STATE OF WISCONSIN PERSONNEL COMMISSION

NICHOLAS H. PIERCE,

Appellant,

v.

Executive Director, WISCONSIN LOTTERY [GAMING COMMISSION] and Secretary, DEPARTMENT OF EMPLOYMENT RELATIONS,

Respondents.

Case No. 91-0136-PC-ER

RULING ON MOTIONS

This matter is before the Commission on the joint motion of respondents to dismiss for failure to state a claim for which relief can be granted, and the separate motion by respondent Department of Employment Relation to dismiss it as a party. The motions were filed on April 16, 1993. The parties have filed briefs.

The Commission has previously issued a ruling dated February 21, 1992, on what was described as DER's "alternative motions filed December 6, 1991 to dismiss DER as a party, to dismiss the complaints[1] for failure to state a claim and because the Commission lacks the authority to grant the relief requested, and to require complainants to amend their complaints to state more specifically their allegations against DER." Also, in a ruling dated October 19, 1992, the Commission addressed motions by Wisconsin Lottery "to dismiss for lack of subject matter jurisdiction or, in the alternative, for failure to state a claim."

In their joint motion, respondents now contend that because the complainant contends merely that he assisted someone else in making a disclosure rather than making a disclosure himself, he is not entitled to protection against retaliation under the whistleblower law. Respondents rely on §230.81:

> (1) An employe with knowledge of information... may disclose that information to any other person. However, to obtain protection under s. 230.83, before disclosing that information to

[1]The respondent DER's motions were addressed to both the instant complaint as well as the matter of Sheldon v. Wis. Lottery & DER, 91-0137-PC-ER.

> any person other than his or her attorney, collective bargaining representative or legislator, the employe shall do either of the following:
>
> (a) Disclose the information in writing to the employe's supervisor.
>
> (b) [D]isclose the information in writing only to the governmental unit the commission determines is appropriate.

In his complaint of whistleblower retaliation filed with the Commission on September 12, 1991, complainant made the following statements:

> (2) Complainant assisted with a lawful disclosure in that on or about February 5, 1991, Lottery co-worker Gary Cravillion disclosed to the Joint Committee on Audit of the Legislature, information he received from Complainant as follows:
>
> "[Lottery Executive Director] Flynn complained to [Complainant] about 'people making waves around here' [Flynn] told [Complainant] that one way to cure that was to fire [Cravillion]. [Flynn] further told [Complainant] that [Cravillion] 'may get his job back in a year, but his guts would churn all the while.' [Complainant] believed that the comments were made about [Cravillion]." [brackets in complaint]
>
> In providing this information to Cravillion, who then disclosed it to the legislature, Complainant was lawfully assisting with a lawful disclosure within the meaning of section 230.80(8)(b), Stats.
>
> RETALIATION;
>
> Respondent engaged in retaliation as follows: On July 17, 1991, Flynn asked Complainant to sign a "settlement agreement" wherein Complainant would waive certain legal rights. Flynn threatened that if Complainant did not accept the "settlement offer," Flynn would cause the Department of Employment Relations to take steps to remove Complainant from protective occupation status.... On information and belief, the threat to terminate Complainant's protective occupation status was, in whole or in substantial part, retaliation for Complainant's disclosure described above, and constitutes retaliation prohibited under section 230.85, Stats.
>
> RELIEF REQUESTED:
>
> Order prohibiting Respondent or the Department of Employment Relations from terminating Complainant's protective occupation status.

In its October 16th ruling, the Commission made the following observations regarding the allegation of protected conduct:

> While Mr. Pierce has made no allegation that, prior to his conversation with Mr. Cravillion, he complied with either §230.81(1)(a) or (b), making a protected disclosure is not the only basis for protection under the whistleblower law. The prohibition against retaliation set forth in §230.83(1) is based on the definition of "retaliatory action" found in §230.80(8):
>
> > (8) "Retaliatory action" means a disciplinary action taken because of any of the following:
> > (a) The employe lawfully disclosed information under s. 230.81 or filed a complaint under s. 230.85(1).
> > (b) The employe testified or assisted or will testify or assist in any action or proceeding relating to the lawful disclosure of information under s. 230.81 by another employe.
> > (c) The appointing authority, agent of an appointing authority or supervisor believes the employe engaged in any activity described in par. (a) or (b).
>
> Mr. Pierce contends that his contact with Mr. Cravillion falls within the scope of §230.80(8)(b) in that he assisted Mr. Cravillion in making his disclosure to the legislative committee. For purposes of ruling on the Lottery's motion to dismiss, the Commission must accept the complainant's description of his contact with Mr. Cravillion, and, on that basis, the Commission will deny the respondent's motion, without prejudice.

The contention being raised by the respondents is that the complainant's interaction with Mr. Cravillion, prior to Mr. Cravillion's disclosure to the legislative committee, amounted to a verbal disclosure by complainant to "any other person" which is conduct specifically left unprotected by §230.81(1), Stats. For example, if complainant had left the alleged meeting with Mr. Flynn and had disclosed Mr. Flynn's statement to a reporter, this would not be covered under the whistleblower law, because it would constitute a disclosure "to any [other] person' under §230.81(1), without having been preceded by a disclosure under either §230.81(1)(a) (in writing to the supervisor) or §230.81(1)(b) (in writing to a governmental unit designated by the Commission). In deciding this motion, the Commission must construe the complaint liberally and dismiss it "only if 'it is quite clear that under no circumstances can the plaintiff recover.'" Phillips v. DHSS & DETF, 87-0128-PC-ER (3/15/89), p. 7, citing Morgan v. Pennsylvania General Ins. Co., 87 Wis. 2d 723,

731-32, 275 N.W. 2d 660 (1979). It cannot be concluded on this motion to dismiss for failure to state a claim upon which relief can be granted that complainant's alleged conversation with Mr. Cravillion falls into the category of the kind of disclosure "to any [other] person," §230.81(1), referred to above, as opposed to being a part of complainant's act of assisting "in any action or proceeding relating to the lawful disclosure of information under §230.81 by another employe." §230.80(8)(b). The determination of whether the conversation with Cravillion was covered by the statute must await the development of a factual record at the hearing on the merits.

Respondents also point out that complainant has not alleged a prima facie case of retaliation under the elements identified in Vander Zanden v. DILHR, 84-0069-PC-ER, 8/24/88; affirmed by Outagamie County Circuit Court, 88 CV 1223, 5/25/89; affirmed by Court of Appeals, 88 CV 1223, 1/10/90. However, the Vander Zanden case was premised on a written disclosure to the department secretary. It is logical that the prima facie elements enunciated in that decision[2] would be worded to reflect that particular type of protected activity. Here, a different type of protected activity is being alleged. It would clearly be incorrect to require a complainant who alleges he was retaliated against because he assisted in a proceeding related to another employe's §230.81 disclosure, to establish that he actually made such a disclosure. This would be analogous to requiring a complainant who alleged he was retaliated against because his employer incorrectly believed he had made a whistleblower disclosure, to establish that he actually made such a disclosure. The prima facie elements set forth in Vander Zanden are inapplicable to the present case.

The second motion before the Commission is DER's motion that it be dismissed as a party. This motion is based upon two theories. The first is that the complainant has failed to allege that DER was aware of the protected activ-

---

[2]Those elements were listed in Vander Zanden as follows:

> A prima facie case of retaliation consists of a showing that: (1) the complainant disclosed information as provided in §230.81, Stats.; (2) the disclosed information is of the type defined in §230.80(5), Stats.; (3) the alleged retaliator was aware of the disclosure; and (4) the complainant suffered a retaliatory action as defined by §230.80(8), Stats.; i.e., the complainant suffered a "disciplinary action" as a result of the lawful disclosure of information.

ity. Complainant argues that the Commission had previously addressed an identical motion in its February 21, 1992 ruling in this matter. In that ruling, the Commission concluded that DER should be kept in the case for remedial purposes and that it had not been established to a certainty that no relief could be granted under any set of circumstances which complainant could prove in support of his allegations.

In terms of the question of whether DER should be a party to the case for remedial purposes, DER contends in its brief that any order by the Commission directed to DER would have no effect because "the issue of the complainant's protective occupation status now is currently and exclusively pending before the Department of the Employe Trust Fund ("ETF") pursuant to Chapter 40 of the Wisconsin Statutes." Motion, p. 3. Respondent further asserts: "DER has been advised by ETF that it will not give effect to any order by DER regarding the complainant's protective occupation status." Motion, p. 4.

Section 40.06(1), Stats., provides, *inter alia*:

> (d) Each participating employer and, subject to par. (dm), each state agency shall notify the department... of the names of all participating employes classified as protective occupation participants....
>
> (dm) Each determination by a department head regarding the classification of a state employe as a protective occupation participant shall be reviewed by the department of employment relations. A state employe's name may not be certified to the fund as a protective occupation participant under par. (d) until the department of employment relations approves the determination.
>
> (e)1. An employe may appeal a determination under par. (d)... to the board by filing a written appeal with the board.

In deciding this motion, the Commission must consider the possibility that complainant would prevail in this matter, and that as a remedy the Commission would order the Gaming Commission to notify DETF of its determination of complainant's protective occupation status pursuant to §40.06(1)(d), and would order DER to approve that determination pursuant to §40.06(1)(dm). The Commission cannot conclude that DER is not a proper party for remedial purposes on the basis of DER's assertion in its motion that it has been advised by the Department of Employe Trust Funds that it will not give effect to any order by DER regarding the complainant's protective status. This contention, without more, is an insufficient basis for the Commission to conclude that an order

directed to DER could have no possible effect on whether complainant maintains a protective occupation status.

The second basis for retaining DER as a party is complainant's allegation that DER violated the whistleblower law. In its February 21, 1992 decision, the Commission declined to dismiss the complaint for failure to state a claim relating to DER. DER now cites the Commission's decision in Martin v. DOC/UW, Case Nos. 90-0080, etc.-PC-ER, 1/11/91, in support of its position. The relevant portion of Martin reads:

> The conspicuous deletion of the term "agent of an appointing authority" from §230.85(1), stats., compels the conclusion that this Commission's authority does not extend to an individual outside the employing agency who may have played some precipitating role in a disciplinary action but who has no legally-recognized role as an appointing authority or employer. This case neither involves a situation where an agency is properly a party because it has authority over a condition of employment of an employe of another agency, Phillips v. DHSS & DETF, Wis. Pers. Comm. No 87-0128-PC-ER (3/15/89), nor a situation where an agency is properly a party in order to grant effective relief, Prill v. DETF & DHSS, Wis. Pers. Comm. No. 85-0001-PC-ER (1/23/89).

The exception represented by the Phillips decision is noteworthy, because in its February 21, 1992 interim decision in the instant case, the Commission specifically cited Phillips when it rejected the respondent's argument that the Commission lacks authority to grant the relief requested:

> The Commission rejected a similar contention in Phillips v. DHSS & DETF, 87-0128-PC-ER (3/15/89), which involved a complaint of sex, sexual orientation, and marital status discrimination with respect to insurance coverage administered by DETF. Respondent argued that the operation of §40.03(1)(j), Stats., which specifically provides for appeals of DETF eligibility decisions to the Employe Trust Funds Board, precluded any Personnel Commission jurisdiction under the FEA.... The Commission has jurisdiction pursuant to §230.85, Stats., over the subject matter of these complaints, and this jurisdiction is not ousted by DETF's concurrent administrative jurisdiction.

Finally, respondent contends that it was not aware of the complainant's alleged protected activity. In support of its contention, DER has submitted an affidavit from its Deputy Secretary, Joseph Pellitteri, which provides, in part:

> 3. As Deputy Secretary, and at my instruction, I had the proposed settlement agreement, at issue in this case, drafted and delivered to the Wisconsin Lottery.
>
> 4. Neither before or during the drafting and delivery of the settlement agreement to the Wisconsin Lottery was I aware of the alleged conversation between the Complainant and then Executive Director Flynn....
>
> 5. Neither before or during the drafting and delivery of the settlement agreement to the Wisconsin Lottery was I aware of the Complainant's alleged disclosure of this conversation to Gary Cravillion.
>
> 6. Neither before or during the drafting and delivery of the settlement agreement to the Wisconsin Lottery was I aware that Gary Cravillion testified before the Legislative Audit Bureau.

This affidavit only references Mr. Pellitteri's knowledge, and does not preclude the possibility that someone in DER, who had knowledge of protected conduct by complainant, was able to influence the drafting of the settlement agreement.

For the above reasons, the respondents' motions are denied.

In his response to the respondents' motions, the complainant requested attorneys fees and costs in the amount of $525 "for the necessity of responding to these stale and previously-decided motions." The Commission's authority, referenced in §230.85(3)(a)4., to award attorney fees in a whistleblower case specifically requires a finding that the "respondent engaged in or threatened a retaliatory action." There has been no such finding in this case. The Commission is unaware of any other statute or rule which would provide it with the authority to award attorney fees after ruling on motions such as those that are the subject of this ruling.

ORDER

Respondents' motions are denied. Complainant's request for attorney fees is denied.

Dated: 9/17/93, 1993 STATE PERSONNEL COMMISSION

LAURIE R. MCCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

KMS/AJT:kms
K:D:temp-10/93 Pierce2