STATE OF WISCONSIN PERSONNEL COMMISSION

ARTHUR RADTKE,

Complainant,

v.

Chancellor, UNIVERSITY OF WISCONSIN - Madison,

Respondent.

Case No. 92-0214-PC-ER

DECISION AND ORDER

This matter is before the Commission on a complaint of retaliation by respondent against complainant for making disclosures protected under §101.055, Wis. Stats., or §230.80 et seq., when respondent refused to rescind his resignation. The following is based on an evidentiary hearing on the matter. A post-hearing brief was filed only by respondent.[1] To the extent any of the discussion constitutes a finding of fact, it is adopted as such.

FINDINGS OF FACT

1. Complainant Arthur Radtke began employment with the University of Wisconsin-Madison on September 1, 1991, as a Cook 2 in the university's Division of Housing, Gordon Food Service Pop's Cafe Kitchen. Complainant was placed on a 6-month permissive probation.

2. Gordon Food Service consists of 2 dining rooms, 2 cafeterias, 2 satelite preparation areas, 1 large kitchen and 2 private dining rooms. It serves 43,000 customers per week.

3. Complainant's two-month evaluation report, dated October 21, 1991, showed that he needed improvement in two of the three Performance Expectations categories. The three performance categories were: preparation and production of hot food entree type menu items, maintaining continual food production (grilling, frying) during meal service, and maintaining a high level of food quality, sanitation and safety standards. Complainant was given a "satisfactory" rating for the third category.

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[1] No objections to the proposed decision were filed. However, in the interests of clarity, and to eliminate some unnecessary material, the Commission has edited the opinion to some extent.

4. By the fourth month evaluation, complainant had improved and was rated "satisfactory" in all three Performance Expectations categories.

5. Complainant passed probation on February 13, 1992, but supervisors Julie Luke, Gordon Commons Administrator, and John Whitford, Foods Production Manager, who recommended same, had concerns about complainant and believed him to be a marginally adequate cook.

6. On September 10, 1992, complainant told his supervisor, Julie Luke, he was contemplating resigning because of his concerns about staffing and the delivery of food items.

7. During this conversation, complainant requested Luke to give him a "good" letter of recommendation. When Luke told complainant her concerns about giving such recommendation, complainant stated he intended to have OSHA investigate "the extremely dangerous work environment."

8. Luke inquired about "the extremely dangerous work environment," but complainant identified none and only talked about the stress and pace of the job.

9. On September 15, 1992, complainant refused to sign his Cook 2 position description because the worker activities time percentages differed from those he had computed during the course of the day.

10. On Monday, September 21, 1992, Luke found complainant's letter of resignation, dated September 20, 1992, under her office door. After consulting with the division personnel office, Luke provided complainant a "Notice of Termination" form for signature, which he signed that day.

11. Among other things, complainant's resignation letter to Luke stated:

> I don't want to put you in an awkward spot, but I believe that there should be an investigation by OSHA and also the health and safety committee on the working environment here at Gordon. If U.W.-Stout has 12 cooks for 8,000 students, and U.W.-Madison has 25 for 46,000 students, it becomes apparent that there is something drastically out of line.

12. Complainant's Notice of Employe Termination provided the following for resigning:

> My reason is I feel a lack of trained civil service. Students try their best but experienced staff is needed.

13. On September 22, 1992, complainant made a request to Luke to rescind his letter of termination. Luke told complainant she did not know how his request would be treated because she had no prior experience with such a request.

14. The next day Luke talked with her supervisor, Paula Neese, and Cheryl Mekschun, U.W. Housing, Personnel Manager, informing them her preference was to accept complainant's resignation because the job did not seem to be a good job for complainant, they could not make changes in the operation to satisfy him.

15. Previously, on September 10, 1992, Luke informed her supervisor, Paula Neese, about her conversation with complainant that day regarding resigning and OSHA. Luke and Neese believed complainant's OSHA comment was just extemporaneous and idle talk.

16. On September 24, 1992, complainant asked Luke about his request to rescind his resignation, but she had no information.

17. On September 25, 1992, complainant asked Cheryl Mekschun, the Personnel Manager, to rescind his resignation. Mekschun told complainant his request would be considered.

18. Cheryl Mekschun discussed complainant's request with Paula Neese, Nesse's supervisor, Robert Fessenden, Director of Food Services and U. W. Housing Associate Director, and her supervisor, Alice Gustafson, U.W. Housing Assistant Director.

19. As Director of Food Services, Robert Fessenden was ultimately responsible for making the decision regarding complainant's request to rescind his resignation.

20. Fessenden asked Neese her opinion regarding complainant's request and consulted with Mekschun.

21. After being advised by Mekschun regarding applicable personnel procedures, Fessenden directed Mekschun to proceed with the resignation.

22. Neither Fessenden or Mekschun was aware of complainant's letter or comments to Luke regarding OSHA.

CONCLUSIONS OF LAW

1. The Commission has authority to hear these matters pursuant to §§101.55(8) and 230.45(1)(g) and (gm), Stats.

2. Complainant has the burden of proof regarding his claim of retaliation in violation of the public employe safety and health law or the whistleblower law.

3. Complainant has failed to sustain his burden of proof.

4. Respondent did not retaliate against complainant as alleged.

OPINION

The issue in this case is whether respondent retaliated against complainant for making disclosures protected under the Public Employe Heath and Safety Act, §101.055, Wis. Stats., or under the Whistleblower Act, §230.80 et seq., Wis. Stats., when they refused to allow complainant to rescind his September 1992, resignation.

In Sadlier v. DHSS, 87-0046, 0055-PC-ER (3/30/89), the Commission, using the method of analysis employed under the Fair Employment Act in McDonnell-Douglas and Burdine,[2] said the same basic analysis applies for claims of retaliation under the public employe health and safety provisions as under the whistleblower law except in regards to standards of causation. The same approach will be used here.

Turning to the Occupational Safety and Health (OSHA) issue, the first question is whether complainant participated in a protected activity and respondent, the alleged retaliator, was aware of it. Under §101.055(8)(a), Wis. Stats., the particular question to be answered is whether complainant filed a request with the Department of Industry, Labor and Human Relations (DILHR), or instituted or caused to be initiated any action or proceeding related to occupational safety and health matter under same, or exercised any other right protected by OSHA.

In regards to the first question, complainant first mentioned OSHA to respondent on September 11, 1992, when in response to his supervisor's refusal to write a letter highly recommending him as cook, complainant told her "I intend to bring OSHA in here." When questioned by his supervisor about reason for his remark, complainant spoke only about the pace, demands and stress of the position. Complainant next mentions OSHA to respondent in his voluntary resignation letter dated September 20, 1992. There he writes:

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[2] McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 5 FEP Cases 965 (1973). Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 25 FEP Cases 113 (1981).

> I believe that there should be an investigation by OSHA and also the health and safety committee on the working environment here at Gordon.

Also, complainant commented about the cook/student ratio at UW-Stout versus the UW-Madison and stated he believed the situation at Madison was very dangerous. Complainant never contacted DILHR to investigate respondent during his employment with them.

If complainant's threats can constitute a "right" under §101.055(8)(a), Stats., then complainant's actions satisfy that portion of the first question. However, the evidence clearly establishes that Robert Fessenden, who made the decision not to rescind complainant's resignation was not aware of his verbal comments to his supervisor. Conclusion: Complainant failed to establish the first element of a prima facie case.

Since this is a proceeding on the merits, we will proceed with the analysis, and we conclude that respondent's refusal to rescind complainant's resignation within days of his OSHA threats, establishes the last two elements of a prima facie case.

The final question in this analysis is whether respondent's explanation for not rescinding complainant's resignation was pretextual. Complainant's supervisor testified that complainant passed probation as a marginally acceptable employe, but subsequently his performance and attitude had been disappointing. Luke testified that when complainant told her he was contemplating resigning and requested a good recommendation, she told complainant she could not "in good conscience" recommend him "highly" for a Cook 2 position. This, she testified, occurred before complainant made any references about OSHA. Robert Fessenden testified that after consulting with Cheryl Mekschun and determining the University had no legal obligation to rescind, he based his decision on the recommendation not to retain for reasons of work performance problems and his cardinal rule not to rescind resignations on the theory an employe who voluntarily resigns is unhappy and is unlikely to be productive upon re-employment. Clearly the evidence presented supports a conclusion that respondent had a legitimate nonpretextual reason for the action taken.

We now address complainant's claim under the whistleblower law, §§230.80 et seq.

As applicable to the facts of this case, written disclosure is required in order for complainant to be protected from retaliation under the whistleblower law, §230.81(1), Stats. The particular written disclosure required of complainant is expressed in §230.80(5), Stats., as:

> "information" means information gained by the employe which the employe reasonably believes demonstrates:
> (a) a violation of any state or federal law, rule or regulation.
> (b) mismanagement or abuse of authority in state or local government, a substantial waste of public funds or a danger to public health and safety.

Complainant's hand-written resignation letter is the only document in evidence as the source of written disclosure of information referred to in §230.80(5), Stats. In this letter complainant writes that he believes OSHA should investigate, the cook/student ratio at UW-Madison is out of line and very dangerous, and the rush, rush atmosphere might cause injuries.

Respondent argues that complainant's letter provides no information, merely unsupported belief, and that complainant's comments regarding staffing indicate no violation of any state or federal occupational health or safety standard. Further, respondent argues that complainant's opinions regarding management techniques cannot be considered a disclosure of information concerning mismanagement within the meaning of §230.80(7), Stats., and his letter provides no information putting respondent on notice of some safety or health violation.

While a strong argument can be made that complainant's generalized conclusory criticisms of the working situation in Gordon Food Service do not constitute "information" as defined in §230.80(5), Stats., the Commission will proceed with its analysis as if this element were present.

If it can be concluded complainant made a protected disclosure, the next question is whether the alleged retaliators were aware of this disclosure. As noted in the OSHA claim, Fessenden and Mekschun testified they had not seen complainant's letter of resignation nor had discussions of its contents prior to November 1992.

Continuing with the analysis, the next question is whether respondent took disciplinary action against complainant. Respondent argues it took no disciplinary action. The evidence establishes that complainant was not fired, and that respondent did not suggest to complainant that he would be fired or disciplined. Complainant voluntarily quit. While it might be argued

respondent's decision not rescinding the resignation was a penalty and qualified as a disciplinary action, the evidence presented in any event fails to establish complainant was treated differently than others in like circumstances, or otherwise establish that respondent's explanation for its decision was pretextual, as will be discussed below.

Moving on the final element needed to establish a prima facie case is a casual connection between complainant's whistleblower allegations and respondent's disciplinary action. If we can conclude complainant has satisfied the first two elements, then the short span of time between the disclosure and the discipline provides evidence of a causal connection between the two events.

Finally, we come to the question of pretext. Respondent argues that if one accepts all the testimony presented by complainant, it would not support a conclusion that respondent's action was retaliatory. The Commission agrees. Fessenden's and Mekschun's reasons for the decision appear unambiguous and are supported by the record. Fessenden testified he had never been involved in considering rescission of a resignation. He testified his policy was not to rescind resignations. When Fessenden was in Physical Facilities, a couple resigned, went to Florida, and then were reinstated, but Fessenden testified he had no input in that decision. Fessenden testified that had his staff followed his cardinal rule, he would have been consulted and he would have accepted the couple's resignations as final. Cheryl Mekschun testified she was not involved in that decision. Mekschun did testify to another incident where a transferee was reinstated to his former position. She testified the personnel transaction in that instance was reinstatement. Clearly these personnel transactions offered by complainant do not establish dissimilar treatment, and it is doubtful that respondent's action can be viewed as a penalty.

ORDER

Respondent's action is sustained, and this complaint is dismissed.

Dated: November 22, 1994 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

DRM:rcr

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NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the

Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.