STATE OF WISCONSIN PERSONNEL COMMISSION

MARILYN WILLIAMS,

Complainant,

v.

Chancellor, UNIVERSITY OF WISCONSIN-MADISON,

Respondent.

Case No. 93-0213-PC-ER

ORDER

The Commission, having reviewed the Proposed Decision and Order and the objections thereto, and having consulted with the hearing examiner, adopts the Proposed Decision and Order with the following modification and clarifications:

MODIFICATION:

Conclusion of Law 4. on page 9 is deleted and Conclusion of Law 3 is modified to read as follows:

> 3. Complainant has not established that a disciplinary action occurred under circumstances which give rise to the presumption, set forth at §230.85(6), Stats., that the disciplinary action was retaliatory.

The reason underlying this modification is as follows:

Section 230.85(6)(b), Stats., requires that, in order for the presumption to attach, the information disclosed must "merit[s] further investigation." In the instant case, the protected disclosure consists of the union grievance relating to the presence of cockroaches in campus buildings. The record shows that respondent processed this grievance as it is required to do under the applicable collective bargaining agreement. The record does not show that respondent concluded that investigation of the health and safety issue presented in the grievance was merited or that such investigation occurred. As a result, complainant has failed to show that the requirement that the information "merit further investigation" was satisfied here. However, as concluded in the Proposed Decision and Order, even

if the presumption were to attach here, the record shows that respondent would have sustained its burden in rebutting it.

CLARIFICATIONS:

The following is a discussion of certain objections raised by complainant in her written objections or oral argument and is included here for clarification purposes:

A. Finding of Fact 2:

Complainant objects to the statement that Ms. Bugge "received numerous complaints about complainant's attitude and behavior as an employee and as a union steward"; and contends in her written objections that "[n]one of the complaints were about Ms. Williams' behavior as an employee." However, in her testimony, Ms. Bugge stated that these complaints related to complainant's work and union activities.

B. Finding of Fact 4:

Complainant contends in her written objections that ". . . the finding that the UW-Environmental Health Program is under the Dean of Students is just plain wrong." However, Richard Johnson, Manager of the Environmental Health Program, testified that, during the relevant time period, the Environmental Health Program was part of University Health Services under the Dean of Students Office.

C. Finding of Fact 5:

Although complainant contends to the contrary in her written objections, Mr. Johnson did testify that the grievance was not properly filed with him.

D. Finding of Fact 10:

There is an inconsistency between Ms. Starr's testimony that she made her calls to Mr. Fueger on November 2 from the phone in her office and the phone records of that day for that phone. However, this inconsistency is not nearly sufficient in its import to counteract the considerations supporting this finding which include, among others, Ms. Starr's status as a disinterested

observer, Ms. Starr's very credible testimony relating to complainant's phone conversation with Mr. Fueger and Mr. Fueger's corroborating testimony, the consistency between Ms. Starr's testimony that she had contacted Mr. Fueger to apologize for complainant's behavior during this conversation and Mr. Fueger's corroborating testimony, and the consistency between the behavior of complainant during this phone conversation reported by Ms. Starr and the behavior reported by Mr. Fueger's office manager. It is certainly more likely given this record that Ms. Starr was mistaken about the location of the phone she used to call Mr. Fueger than it is that she and Mr. Fueger conspired to misrepresent the behavior exhibited by complainant during the subject phone conversation.

E. Findings of Fact 11 and 12.

Although complainant contends in her written objections that there is reason to doubt that Mr. Fueger contacted Mr. Moss first or that such contact occurred prior to the Capital Times article appearing, the sole basis for this contention is a review of the phone records for Mr. Moss's phone. There is no testimony that Mr. Moss used only this phone to conduct his business, or that he recalled from what phone he called Mr. Fueger. The record does show, however, that Mr. Fueger and Mr. Moss met on May 4 and spoke by phone prior to the meeting to schedule it.

F. Finding of Fact 15.

Complainant states in her written objections, "It strains credibility to believe that the newspaper would have contacted Fueger only a day or two before the article was printed, when they had talked to Williams a full week before and had told her at the time they would be also talking to Fueger." Mr. Fueger testified that the Capital Times contacted him after he had talked to Mr. Moss the first time and this testimony was not successfully rebutted by the complainant. Any contention that, because the reporter had talked to complainant a week before the article came out, this necessarily meant that the reporter had talked to Mr. Fueger well in advance of the article as well, is pure conjecture and not reflected in the record.

G. Finding of Fact 18.

Complainant contends in her written objections that Mr. Moss and Mr. Fueger actually did not talk to each other until after the Capital Times newspaper article came out, that they discussed the article during this first

conversation, and that it was Mr. Fueger's unhappiness with the article that led to complainant's discipline. The record shows, however, that Mr. Fueger and Mr. Moss met on November 4, the day before the article was published; and their testimony, as well as a tape recording of their meeting, indicates that the Capital Times article was not discussed.

H. Finding of Fact 21.

Complainant contends in her written objections that "Both the grievance and the newspaper were discussed during the pre-disciplinary meeting." The record does not show, however, that the grievance was discussed. Union representative Habel testified that Mr. Moss was aware at the PDI of the alleged health and safety violations and the publicity, but that she did not recall showing Mr. Moss a copy of the grievance at the PDI. Complainant testified that she laid a copy of the grievance on the table at the PDI and that those present discussed the scope of her jurisdiction as a union steward. However, neither Ms. Habel nor complainant testified that the grievance was specifically discussed at the PDI or that a copy of the grievance was shown to Mr. Moss at the PDI, and complainant's written notes of the PDI do not reflect that the grievance was discussed. In contrast, Mr. Moss testified that he was not aware of the grievance at that time and was not made aware of the grievance at the PDI.

I. Finding of Fact 23.

Complainant contends in her written objections that "None of the conversations were during the complainant's regularly scheduled hours of work." However, the testimonies of Mr. Fueger and Mr. Moss indicate that one of the conversations took place between 9:00 and 9:30 a.m.; and there is testimony by respondent in the record that, even if actions take place outside regularly scheduled work hours, union time equals work time.

In her oral argument before the Commission, complainant raised certain points relating to the Opinion section of the Proposed Decision and Order, including the following:

J. Complainant implies in her argument that, since she followed the advice of Mr. Corcoran of the Classified Personnel Office, an agent of the respondent, the fact that she did not file her initial disclosure, i.e., the grievance, with her supervisor, should not be held against her in applying

§230.81(1), Stats. However, Mr. Corcoran gave her advice relating to where she should file her grievance, not her whistleblower disclosure, and complainant has offered no convincing reason for not holding her to the requirements of §230.81(1), Stats.

K. Complainant also argues that there is no stated requirement in the whistleblower statute that the disciplines be aware of the protected disclosure. However, be that as it may, it is a truism that, in order for a person to retaliate against another person for making a protected disclosure, the retaliator would have had to have been aware of the disclosure. This is a matter of inescapable logic in analyzing a retaliation claim.

L. Complainant seems to imply that general public policy considerations gleaned from a review of the legislative history of the whistleblower statute are not necessarily limited to interpretation aids but can also be used to overcome specific statutory language. Such reasoning flies in the face of certain basic tenets of statutory construction and complainant cites no authority for this argument.

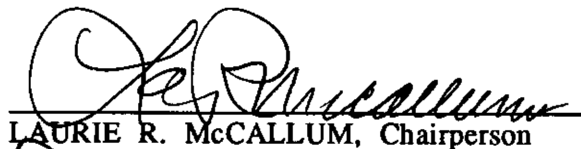
M. Complainant contends that the Capital Times newspaper article could have gained the status of a protected disclosure pursuant to §230.81(1), Stats., if it had been preceded by a parallel disclosure to a supervisor pursuant to §230.81(1)(a), Stats. This interpretation appears to be consistent with the language of §230.81, Stats. Complainant then goes on to argue that, since Mr. Corcoran is in the "chain of command" for purposes of processing grievances originating in the UW-Hospital, he qualifies as a supervisor for purposes of §230.81(1)(a), Stats. Complainant cites the Commission's decision in Morkin v. UW-Madison, 85-0137-PC-ER, 11/23/88, rehearing denied, 12/29/88; aff'd by Dane Co. Cir. Ct., Morkin v. Wis. Pers. Comm., 89-CV-0423, 9/27/89, in support of this argument. What the Commission stated in this regard in Morkin was as follows:

> Respondent further argues that the January 9, 1985, letter . . . did not constitute a protected disclosure because it was not made to complainant's first-line supervisor. . . The Personnel Commission disagrees. The three individuals to whom complainant directed his letter were in the supervisory chain above him and to require that complainant have directed this letter to Mr. Buss in order to qualify for protection would involve too restrictive a reading of §230.83, Stats.

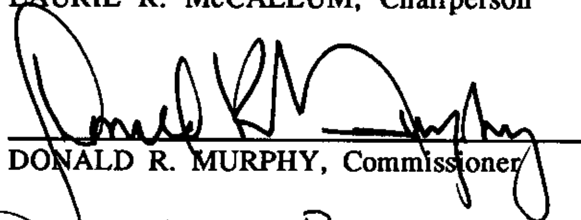
It is clear from the language in this decision that the Commission was stating that the disclosure need not be made to a first-line supervisor but could be made instead to a second-line supervisor, third-line supervisor, or higher level supervisor in the employee's supervisory chain of command in order to qualify as a disclosure to a supervisor within the meaning of §230.81(1)(a), Stats. In the instant case, it is clear from the record that, although Mr. Corcoran has a role in processing grievances which originate in the UW-Hospital, he is not in complainant's supervisory chain of command and has no supervisory authority over any employees of the UW-Hospital. Complainant has failed, therefore, to show that she made a protected disclosure to one of her supervisors within the meaning of §230.81(1)(a), Stats., and, as a result, has failed to show that the Capital Time newspaper article qualified as a protected disclosure. As a consequence, the fact that Mr. Moss and Ms. Bugge were aware of the Capital Times article prior to the imposition of the subject discipline does not lead to a conclusion that the imposition of discipline was in retaliation for a protected whistleblower disclosure.

Dated: September 17, 1996

STATE PERSONNEL COMMISSION



LAURIE R. McCALLUM, Chairperson



DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

LRM:lrm

Parties:

Marilyn Williams
3316 Monroe Street
Madison, WI 53711

David Ward
Chancellor, UW-Madison
361 Bascom Hall
500 Lincoln Drive
Madison, WI 53706-1380

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 (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) 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.) 2/3/95

STATE OF WISCONSIN PERSONNEL COMMISSION

MARILYN WILLIAMS,

Complainant,

v.

Chancellor, UNIVERSITY OF WISCONSIN-MADISON,

Respondent.

Case No. 93-0213-PC-ER

PROPOSED DECISION AND ORDER

Nature of the Case

This is a complaint of whistleblower retaliation. A hearing was held on October 26 and 27, November 7, and December 7, 1995, before Laurie R. McCallum, Chairperson. The parties were permitted to file post-hearing briefs and the briefing schedule was completed on March 26, 1996.

Findings of Fact

1. At all times relevant to this matter, complainant has been employed as a Food Service Worker 2 in the Food and Nutritional Services unit of the University of Wisconsin Hospital and Clinics (UWHC), Center for Health Sciences (CHS); and has served as a union steward and secretary of AFSCME Local 171. Complainant's assigned jurisdiction as a union steward is the CHS.

2. Prior to July of 1993 and thereafter, Renae Bugge, Director of Employment Relations and Training, Human Resources Department, UWHC, received numerous complaints about complainant's attitude and behavior as an employee and as a union steward. Since most of these related to complainant's activities as a union steward, Ms. Bugge requested a meeting with Patrick Wilkinson, chief steward, and Jack DeYoung, president of Local 171. This meeting took place in July of 1993. During the course of this meeting, Ms. Bugge presented to Mr. Wilkinson and Mr. DeYoung copies of several written

complaints prepared by UWHC supervisors based on their observations and on observations reported to them by non-supervisory staff relating to complainant's conduct while engaged in union business. These complaints indicated that, in the opinion of the observers, complainant had been hostile, confrontational, uncooperative, loud, rude, unprofessional, demanding, insistent, and/or abrasive. Ms. Bugge requested that Mr. Wilkinson and Mr. DeYoung investigate the matter of complainant's conduct while engaged in union business at UWHC. Ms. Bugge's purpose in requesting this investigation was to allow the union an opportunity to address the situation before UWHC considered or imposed discipline. After a period of time had passed and Ms. Bugge had heard nothing further in relation to her request, she contacted Mr. Wilkinson who told her that the matter had been taken care of internally. Mr. Wilkinson solicited information solely from complainant in his investigation of the complaints provided by Ms. Bugge. On January 5, 1994, after the subject discipline had been imposed against complainant, Mr. DeYoung provided a written response to the complaints provided by Ms. Bugge. This written response was based on the information solicited by Mr. Wilkinson from complainant and concluded that complainant had acted appropriately in each situation.

3. In a letter to complainant dated September 23, 1993, Phil Moss, Employment Relations Specialist, Human Resources Department, UWHC, stated as follows, in pertinent part:

> On September 21, 1993 I conducted a pre-disciplinary investigatory (PDI) meeting with you. Present was your union steward, Craig Venzke. I held this meeting after receiving the following report from supervisor Betty Powers and Neal Spranger.
>
> On September 13, 1993, a PDI was held at which you were the employee's representative. The meeting ended and you and the employee left the meeting room. You then came back into the room and made statements regarding Supervisor Powers who present at that PDI and another employee who was not present. You stated to the supervisor that she is "the worst damn supervisor I've ever seen." You then referred to the other employee by saying "she's just a kiss ass."
>
> In your defense, you stated to me that you did not say the word "damn" but did call the supervisor "despicable" during the PDI. You did admit to calling the employee a "kiss ass" because you believe that to be true. You then claimed that all of your comments were made in your official capacity as a union official

and, as such you are not at those moments a State employee. You claimed that I cannot hold a PDI or discipline someone while they are not a State employee.

First of all, I find the reports made to me by Powers and Spranger to be credible regarding what was said and when it was said. Second, I believe that when those comments were made, you were a State employee and subject to discipline.

Because of the above, this is an official letter of reprimand for violation of University of Wisconsin work rule IVj: Failure to exercise good judgment, or being discourteous, in dealing with fellow employes, students or the general public.

Further violations of this work rule may result in discipline up to and including discharge. This letter is appealable through the collective bargaining agreement.

4. During the fall of 1993, complainant and certain other union stewards decided to publicize and seek redress for their concerns relating to the presence of cockroaches in certain UW-Madison campus buildings. It was decided during a meeting of the executive board of Local 171 that a union grievance would be filed in relation to this issue, and complainant, as the secretary of Local 171, and Dirk Bakken, as the treasurer of Local 171, were assigned to file this grievance. Mr. Bakken is an employee of the Memorial Union at the UW-Madison. The Memorial Union is not part of CHS. A "union grievance" is a different type of grievance than that filed on behalf of an individual employee; requests an interpretation of certain provisions of a collective bargaining agreement; may be filed by any two union stewards; and generally applies to a bargaining unit as a whole. Complainant consulted Ed Corcoran of the UW-Madison Classified Personnel Office (CPO) regarding where this grievance should be filed at the first step. Mr. Corcoran suggested that the grievance be filed with him. Complainant objected to this based on her feeling that it would result in too long a delay in getting the cockroach problem addressed and decided instead to file the grievance with the UW-Madison's Environmental Health Program (EHP). The Environmental Health Program is not part of the Center for Health Sciences, but instead is part of the University Health Services under the Dean of Students Office.

5. Richard Johnson, Manager of the Environmental Health Program, conducted a first-step grievance meeting with complainant on October 27, 1993. Complainant had also filed an open records request with EHP prior to October 27, 1993, and this request was also discussed at the meeting. Mr.

Johnson advised complainant at the meeting that the union grievance was not properly filed with the EHP. Mr. Johnson did not discuss the union grievance with or show it to anyone at UWHC other than complainant.

6. The union grievance was waived to the third step and the third step grievance was filed with Mr. Corcoran on October 28, 1993. The record does not show that Mr. Corcoran discussed the union grievance with or showed it to anyone at UWHC other than complainant.

7. On October 11, 1993, complainant had filed certain open records requests. One of these requests had been filed with Mr. Moss and asked for copies of all contracts for pest control, schedules for application of pest control chemicals, and policies and procedures for Food Service having to do with insect contamination. Another open records request was filed with Bruce Fueger, President of Fueger Pest Control. Fueger Pest Control has a contract with the UW-Madison to provide certain pest control services.

8. When complainant did not receive from Mr. Fueger a response to the open records request she had filed with him, she contacted his office by phone on Friday, October 29, 1993. Complainant was told by Deanna Allen, office manager for Fueger Pest Control, that Mr. Fueger was out of town. In a statement she gave on November 4, 1993, Ms. Allen characterized her conversation with complainant as follows:

> Marilyn Williams called last Friday afternoon and asked for Bruce. I said that he was out of town. She said her name and then said that she needed to speak with him concerning the paperwork right-a-way. I don't remember the exact words; it happened so fast and she was very demanding. She said that she sent a letter and it should have been responded to. She kept going on about some chapter in the law. She said "I've given him 13 days to respond to this and that's enough." I said that Bruce is at convention right now and that he's been really busy this summer. She said "I don't care about that. I need this information NOW." I was trying to be nice and said I would leave a message. I asked Marilyn where she was from - if she was from the University or what. She said that she was from the union. I asked what union and she said the University union and rattled off some local and AFSCME. She was just really awful, very demanding. I was trying to be nice to her by saying that I recalled her letter but that he doesn't know who you are or why you want to look at records. Marilyn said that she gave sufficient amount of notice and if he doesn't respond - that's when she began talking about the law and attorneys - she said that the law says that we have to let her in or she could come after us.

9. Complainant and Mr. Fueger had a phone conversation on the morning of Tuesday, November 2, 1993. Complainant placed this phone call from a phone in the Patient Meal Service Area of the UWHC Food and Nutritional Services unit. Anne Starr, a Program Assistant 1, was present in this area approximately 10 to 12 feet away from complainant during at least part of this conversation. In Ms. Starr's opinion, complainant's tone during the conversation was accusatory, demeaning, caustic, belligerent, and relentless. During this conversation, complainant criticized the way Mr. Fueger handled his business at the UW-Madison.

10. After the conversation ended, Ms. Starr called Mr. Fueger to apologize for complainant's conduct during the conversation. Ms. Starr subsequently ascertained that Mr. Moss would be an appropriate person to whom to refer a complaint about complainant's conduct and she so advised Mr. Fueger.

11. On or before November 4, 1993, Mr. Moss and Mr. Fueger had a telephone conversation in which they discussed complainant's telephone contacts with Mr. Fueger. Mr. Moss arranged to take Mr. Fueger's statement at Mr. Fueger's office and did so on November 4, 1993. This statement was tape recorded by Mr. Moss and subsequently transcribed. A copy of this transcribed statement was provided to Mr. Fueger.

12. During their meeting in Mr. Fueger's office, Mr. Fueger reported to Mr. Moss that complainant had called him, identified herself as a union representative for UW employees, and demanded that she be allowed to come to his office and inspect certain records; that, when he suggested that she inspect such records at the UW, she repeated numerous times her demand to inspect the records at his office and her right to do so under the open records law; that complainant made these demands in a very loud voice and by continually interrupting Mr. Fueger; that complainant stated that, if Mr. Fueger did not allow her to inspect these records at his office, he would be sorry, she would find other means to come into his building and inspect the records, and she would invoke the authority of the Attorney General's office; that, in Mr. Fueger's opinion, complainant's tone during the conversation was rude, hostile, belligerent, intimidating, and threatening; that Mr. Fueger ended the conversation by indicating that he intended to check with the UW and with the Attorney General's office and he would contact complainant once he did so; and that complainant gave him two phone numbers where she could

be reached (one of these phone numbers was for her work unit at UWHC and one for the Local 171 office); that, after the conversation with complainant, Mr. Fueger contacted the UW-Madison Purchasing unit and Assistant Attorney General Alan Lee; that the advice he received from both was that he had no obligation under the open records law to open his records to inspection by complainant; that Mr. Fueger then left a message for complainant to call him; that, when complainant returned the call, Mr. Fueger advised her what he had learned from these contacts with the UW and the Attorney General's office; and that complainant continued in this subsequent conversation the same conduct she had exhibited in the first conversation.

13. Mr. Fueger has extensive contact with the public in the conduct of his business and typically participates in hundreds of telephone conversations each day. Part of his responsibilities includes talking with dissatisfied customers. Fueger Pest Control has been in business 51 years and Mr. Fueger has been involved in managing the business many years. In Mr. Fueger's opinion, complainant was the rudest, most audacious person with whom he had ever dealt. Mr. Fueger reported this opinion to Mr. Moss.

14. The tone and content of the subject conversations between complainant and Mr. Fueger were as represented by Mr. Fueger and Ms. Starr.

15. Some time after Mr. Fueger's initial telephone conversation with Mr. Moss, Mr. Fueger was contacted by a reporter from the Capital Times newspaper regarding the presence of cockroaches in UW-Madison campus buildings. An article quoting Mr. Fueger appeared in the Capital Times on November 5, 1993. Mr. Fueger did not bring the contact by the reporter to Mr. Moss's attention.

16. Complainant was contacted by the same Capital Times newspaper reporter on October 29, 1993.

17. The article that appeared on November 5, 1993, in the Capital Times newspaper described a cockroach contest initiated by UW kitchen workers; attributed the idea for the contest to complainant; described kitchen conditions at the Memorial Union; included reaction statements from Memorial Union spokespersons and Mr. Johnson; quoted complainant as stating that she had told management and Fueger Pest Control about an approved paste insecticide product for months; quoted Mr. Fueger as saying that his company had stepped up spraying and that the roach problems had been greatly exaggerated; quoted Mr. Fueger as saying that complainant was the rudest, most audacious person

with whom he had ever dealt; and quoted complainant and Mr. Bakken as stating that they would "continue to file grievances until the roaches are eliminated."

18. Mr. Moss and Ms. Bugge became aware of this Capital Times newspaper article no later than Monday, November 8, 1993.

19. Some time in October of 1993, Ms. Bugge had brought to the attention of Glen Blahnik, Administrator of the Division of Collective Bargaining of the Department of Employment Relations, her concerns relating to the relationship between UWHC management and Local 171. It was decided that a meeting would be set up with Marty Biel, president of the Wisconsin State Employees Union, and this meeting was scheduled to be held on November 9, 1993. Mr. Biel did not attend the meeting but Ms. Bugge and Mr. Blahnik did. One of the concerns expressed by Ms. Bugge related to complainant's conduct while engaged in union activities and Ms. Bugge summarized for Mr. Blahnik the reports she had received describing such conduct. Mr. Blahnik recommended to Ms. Bugge that termination of complainant be considered.

20. On November 5, 1993, Mr. Moss discussed with his supervisor Ms. Bugge what he had learned from Mr. Fueger about his contacts with complainant. Mr. Moss and Ms. Bugge decided that a pre-disciplinary investigative (PDI) meeting should be held. This PDI was scheduled for November 11, 1993, but had to be postponed because complainant had a scheduled dental appointment that day. The PDI was conducted on November 18, 1993.

21. Anne Habel served as complainant's union representative during the PDI. Complainant did not speak during the PDI but relied on Ms. Habel to provide information to Mr. Moss. Mr. Moss indicated that Mr. Fueger had complained to him about complainant's conduct during their telephone contacts. Ms. Habel disputed Mr. Fueger's characterization of complainant's conduct and stated that, regardless of the nature of complainant's conduct during these conversations, it was in her role as a union official investigating a sanitation issue and not as a UWHC employee, and, as a result, not subject to employee discipline procedures. Mr. Moss mentioned during the PDI that the Memorial Union was not part of complainant's jurisdiction as a union steward.

22. Mr. Moss discussed the PDI with Ms. Bugge. Ms. Bugge also consulted with Mr. Blahnik again who indicated that he didn't feel that a suspension would be severe enough discipline to correct complainant's conduct. Mr. Moss

and Ms. Bugge decided that a five-day suspension would be imposed and so informed complainant in a letter dated November 25, 1993. The letter stated as follows, in pertinent part:

> After long and careful consideration, I find that you did make a phone call during your regularly scheduled hours of work. Even if you were not expected, at the time of the call, to be performing your regular duties, you were not where you were scheduled to be. I do not find that you were performing, in any legally contractual way, your duties as a steward. The contract does not allow "grievance processing" outside of your own official jurisdiction. As I understand it, the subject matter of the phone call had nothing to do with the Hospital. You were not, on November 2, exercising any contractual right that you have. I also find, after talking with three individuals who had conversations with you or who had witnessed a conversation, that you were rude, threatening, intimidating and discourteous. Mr. Fueger did know that you are a Hospital and State employee and complained to me after he found out that fact.
>
> You have been warned about such behavior in the past. You were given a letter of reprimand on September 23, 1993 for violation of work rule IV-J.
>
> The Hospital looks upon this as a very serious matter. Actions such as yours on the part of any Hospital employee reflect in a very negative way on the Hospital, the University and the State. Such actions cannot and will not be tolerated. Because of the above, you are suspended from work without pay on the following dates: December 3, 6, 8, 9, and 10, 1993.

23. Complainant was suspended for her conduct during her phone conversations with Mr. Fueger. The conversation overheard by Ms. Starr occurred after complainant's scheduled work hours. At least one of the conversations occurred during complainant's scheduled work hours.

24. No one involved in the decision to discipline complainant was aware, prior to the imposition of discipline, of the union grievance she had filed relating to her cockroach concerns.

25. "Grievance processing" is a term used to describe the union activities performed by a steward.

26. In an article she authored for a Local 171 newsletter published some time after November 5, 1993, complainant's identified herself as "Roach Queen" in the byline and stated as follows, in part:

> Bruce Fueger, according to the *The Capital Times*, called me "the most rude and audacious person" he has ever encountered. I

> am guilty. Rude people don't ignore cockroaches in their work place (polite people shouldn't either).
>
> Rude people confront pesticide-company owners about their failure to do a job for which they are contracted at an annual fee of more than $30,000.
>
> I am guilty of being rude. Mr. Fueger is guilty of ripping off the university for the fees (billed and received) of services inadequately provided, guilty of forcing thousands of workers to endure unsafe, unhealthy and unpleasant work conditions, guilty of forcing thousands of students and their families to live in roach-infested living quarters. (I wonder what words these people would use to describe Fueger.
>
> But I digress. The issue here is one of personalities. The issue is roaches, and there are plenty of them. The university finally has begun to address the problem. Operation Broomstick was not a Halloween prank.

27. It is unusual for a state employee to be disciplined for activities carried out while performing duties as a union steward.

Conclusions of Law

1. This matter is properly before the Commission pursuant to §230.45(1)(gm), Stats.

2. Complainant has the burden to show that she was retaliated against for engaging in protected whistleblower activities when she was suspended in November of 1993.

3. Complainant has established that a disciplinary action occurred under circumstances which give rise to the presumption, set forth at §230.85(6), Stats., that the disciplinary action was retaliatory.

4. Respondent has satisfied its burden under §230.85(6)(a), Stats., of rebutting, by a preponderance of the evidence, the presumption that its disciplinary action was retaliatory.

5. Respondent did not retaliate against complainant in violation of Subchapter III of Chapter 230, Stats., with respect to the imposition of a suspension in November of 1993.

Opinion

The whistleblower law prohibits retaliation against state employes who have made a protected disclosure of improper governmental activities. The method of analysis is described in Morkin v. UW-Madison, 85-0137-PC-ER 11/23/88, rehearing denied, 12/29/88; aff'd by Dane Co. Cir. Ct., Morkin v. Wis. Pers. Comm., 89-CV-0423, 9/27/89:

/

> The method of analysis applied in prior Whistleblower retaliation cases is similar to that applied in the context of a retaliation claim filed under the Fair Employment Act (FEA). Under the FEA, the initial burden of proof is on the complainant to show a prima facie case of discrimination. If complainant meets this burden, the employer then has the burden of articulating a non-discriminatory reason for the actions taken which the complainant may, in turn, attempt to show was a pretext for discrimination. See McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 5 FEP Cases 965 (1973); and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 25 FEP Cases 113 (1981). This analysis is modified where the complainant is entitled to a presumption of retaliation pursuant to §230.85(6), Stats.
>
> To establish a prima facie case for a claim of retaliation under the Fair Employment Act, there must be evidence that (1) the complainant participated in a protected activity and the alleged retaliator was aware of that participation, (2) there is a causal connection between the first two elements. A "causal connection" is shown if there is evidence that a retaliatory motive played a part in the adverse employment action. See Jacobson v. DILHR, 79-28-PC, 4/10/81 at pp. 17-18, and Smith v. University of Wisconsin-Madison, 79-PC-ER-95, 6/25/82 at p. 5. Similar standards apply to a claim of retaliation under the whistleblower law except that the first element is typically comprised of three components: a) whether the complainant disclosed information using a procedure described in §230.81, Stats.; b) whether the disclosed information is of the type defined in §230.85(5), Stats.; and c) whether the alleged retaliator was aware of the disclosure. As to the second and third elements, the definitions of "disciplinary action" in §230.80(2), Stats., replaces the term "adverse employment action" when reviewing a whistleblower complaint.
>
> Section 230.80(5), Stats., defines the term "information" as follows:
>
> (5) "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.

The "information" relevant here relates to the presence of cockroaches in campus buildings, including those where food is prepared and served. The record shows that it was reasonable for complainant to believe that this could

pose a danger to public health and safety. As a result, it is concluded that the definition of "information" has been satisfied.

Section 230.81, Stats., states as follows:

> **Employe disclosure. (1)** An employe with knowledge of information the disclosure of which is not expressly prohibited by state or federal law, rule or regulation may disclose that information to any other person. However, to obtain protection under s. 230.83, before disclosing that information to 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) After asking the commission which governmental unit is appropriate to receive the information, disclose the information in writing only to the governmental unit the commission determines is appropriate. The commission may not designate the department of justice, the courts,the legislature or a service agency under such. IV of ch. 13 as an appropriate governmental unit to receive information. Each appropriate governmental unit shall designate an employe to receive information under this section.
>
> **(2)** Nothing in this section prohibits an employe from disclosing information to an appropriate law enforcement agency, a state or federal district attorney in whose jurisdiction the crime is alleged to have occurred, a state or federal grand jury or a judge in a proceeding commenced under s. 968.26, or disclosing information pursuant to any subpoena issued by a person authorized to issue subpoenas under s. 885.01. Any such disclosure of information is a lawful disclosure under this section and is protected under s. 230.83.
>
> **(3)** Any disclosure of information by an employe to his or her attorney, collective bargaining representative or legislator or to a legislative committee or legislative service agency is a lawful disclosure under this section and is protected under s. 230.83.

Complainant argues that her protected disclosure satisfies the requirements of both 230.81(1)(a) and 230.81(3), Stats. Section 230.81(1)(a), however, requires that the information be disclosed in writing to the employe's supervisor. In its decision in Morkin, the Commission interpreted this provision to extend to those in the employe's chain of command as well as to the employe's immediate supervisor. In the instant case, however, the record does not show that complainant provided to her immediate supervisor or anyone else in her supervisory chain of command a copy of her written disclosure, i.e., the union grievance relating to the presence of cockroaches in

campus buildings. Complainant argues, however, that the Capital Times newspaper article provided those in her supervisory chain of command notice of the existence and content of such written disclosure and, as a result, satisfies the requirements of §230.81(1)(a), Stats. Two factors militate against concurrence with complainant's argument. First, §230.81(1)(a), Stats., states that ". . . to obtain protection, . . . the employee shall . . . [d]isclose the information in writing to the employe's supervisor." The clear language requires more from an employee than publicizing the existence and content of such a writing in a newspaper, i.e., requires the employee to provide the written disclosure to one of his or her supervisors. Second, the general description in the newspaper article of the cockroach problem at the UW-Madison and the Memorial Union in particular, and the quotation attributed to complainant and Mr. Bakken that "they will continue to file grievances until the roaches are eliminated." are not sufficient alone to place complainant's supervisors on notice that she had actually filed a grievance relating to the cockroach problem. It is concluded that complainant has failed to show that she filed a protected disclosure within the meaning of §230.81(1)(a) Stats.

Section 230.81(3), Stats. provides that a disclosure to an "attorney, collective bargaining representative or legislator or to a legislative committee or legislative service agency" qualifies as a protected whistleblower disclosure. Complainant contends that her filing of the union grievance qualifies as a disclosure to a "collective bargaining representative" within the meaning of this provision. Complainant's collective bargaining representative would be AFSCME Council 24, Wisconsin State Employees Union, i.e., the entity empowered to engage in collective bargaining on behalf of complainant as a Food Service Worker 2 at the UW-Madison. Complainant contends that Council 24 received a copy of the subject grievance at least by October 28, 1993, the date that the grievance was processed at the third step, and this contention has not been rebutted by respondent. The Commission concludes that, as of October 28, 1993, the union grievance filed by complainant qualified as a protected whistleblower disclosure within the meaning of 230.81(3), Stats.

Complainant would next have to show that the alleged retaliators, i.e., Mr. Moss and Ms. Bugge, were aware of her protected disclosure. As concluded above, the protected disclosure here is the union grievance relating to the presence of cockroaches in campus buildings. The record does not show that

either Mr. Moss or Ms. Bugge was specifically aware of this grievance or had reason to be specifically aware of it. Complainant points to the Capital Times newspaper article as imparting this awareness to both Mr. Moss and Ms. Bugge. However, although the article would render Mr. Moss and Ms. Bugge aware of complainant's concern with the cockroach issue and her efforts to publicize this concern, the reference to her and to Mr. Bakken "continuing to file grievances until the roaches are eliminated" is too vague a reference to impute knowledge of the specific grievance filed by complainant to readers of the article. Complainant also represents that Ms. Habel testified that the grievance was specifically discussed at the PDI with Mr. Moss. However, Ms. Habel's testimony is not as clear in this regard as complainant represents it to be, and the Commission declines to conclude based solely on testimony from complainant's union representative that indicated that "grievance processing," steward jurisdictions, and the Capital Times article were discussed during the PDI that this somehow put Mr. Moss on notice that the subject grievance had been filed by complainant. It is concluded that complainant has failed to show that either of the two alleged retaliators was aware of her protected disclosure. However, if complainant had successfully made such a showing, the analysis would continue as follows.

Section 230.85(6), Stats., provides as follows:

> **(6)** (a), If a disciplinary action occurs or is threatened within the time prescribed under par. (b), that disciplinary action or threat is presumed to be a retaliatory action or threat thereof. The respondent may rebut that presumption by a preponderance of the evidence that the disciplinary action or threat was not a retaliatory action or threat thereof.
>
> (b) Paragraph (a) applies to a disciplinary action under s. 230.80(2)(a) which occurs or is threatened within 2 years, or to a disciplinary action under s. 230.80(2)(b), (c) or (d) which occurs or is threatened within one year, after an employe discloses information under s. 230.81 which merits further investigation or after the employe's appointing authority, agent of an appointing authority or supervisor learns of that disclosure, whichever is later.

A suspension is one of the disciplinary actions listed in §230.80(2)(a), Stats., and, as a result, the two-year time period would apply. Since the five-day suspension of complainant was imposed within two years of her protected disclosure, it is presumed to be retaliatory and the burden shifts to respondent to rebut this presumption. See Morkin v. UW-Madison, 85-0137-PC-ER

11/23/88, rehearing denied, 12/29/88; aff'd by Dane Co. Cir. Ct., Morkin v. Wis. Pers. Comm., 89-CV-0423, 9/27/89; Sadlier v. DHSS, 87-0046, 0057-PC-ER, 3/30/89.

Complainant argues that the fact that respondent had received numerous complaints about complainant's behavior but took no action until after the disclosure was made is evidence of retaliation. However, the record shows in this regard that Ms. Bugge had requested, prior to the disclosure, a meeting with officials of Local 171 to bring these numerous complaints to their attention and to request their assistance in correcting complainant's behavior; and that, when such assistance was not forthcoming and the behavior continued, respondent, effective September 23, 1993, issued to complainant an official letter of reprimand. This demonstrates that complainant's behavior had been a matter of concern for a period of time prior to the disclosure and that respondent had taken action to correct it prior to the disclosure.

Complainant also argues that the severity of discipline and the failure of respondent to follow typical levels of progressive discipline demonstrates retaliation. The record does not show that there were any "typical" levels of progressive discipline followed by respondent. In addition, the fact that complainant's behavior in this instance was so egregious that it prompted a disinterested office worker to call and apologize to Mr. Fueger, that concerns relating to complainant's behavior had now extended beyond the UWHC and involved a member of the public, and that complainant had already been disciplined and warned, lead to the conclusion that the discipline was not unreasonably severe in view of the underlying behavior and complainant's conduct history.

Complainant further contends that the fact that only rarely has an employee been disciplined for behavior exhibited in the role of union steward demonstrates retaliation. However, the record does not show that this had never occurred prior to complainant's suspension nor, more importantly, that the behavior of any other union steward was comparable to that demonstrated by complainant and for which she was disciplined.

Respondent has successfully rebutted the presumption of retaliation. The record shows that complainant was suspended for the behavior she exhibited in her telephone conversations with Mr. Fueger and not in retaliation for filing a whistleblower disclosure.

Order

This complaint is dismissed.

Dated:________________________, 1996 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

LRM:lrm

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

Parties:

Marilyn Williams
3316 Monroe Street
Madison, WI 53711

David Ward
Chancellor, UW-Madison
361 Bascom Hall
500 Lincoln Drive
Madison, WI 53706-1380

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 (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) 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.) 2/3/95