

STATE OF WISCONSIN

PERSONNEL COMMISSION

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SANDRA DURAN, *

Complainant, *

v. *

Secretary, DEPARTMENT OF *

CORRECTIONS, *

Respondent. *

Case No. 94-0005-PC-ER *

* * * * *

RULING
ON
MOTION TO
DISMISS

This case arises from complainant's claim under the whistleblower law, subch. III, ch. 230, Wis. Stats. On July 20, 1994, respondent filed a motion to dismiss the complaint for failure to state a cause of action and for untimely filing. A briefing schedule was established. Complainant declined to file a brief.

According to the materials in the case file, the complainant was promoted to the position of Program Assistant Supervisor 1 with respondent's Division of Probation and Parole, effective November 15, 1992. Because she was a new supervisor, she was placed on a one year probation. Complainant's immediate supervisor in her position at the Grafton work site was David Wagner, but she also worked in West Bend which required her to interact with Jan Shorts.

According to complainant, her difficulties began when she completed a work assignment in January of 1993 in the West Bend office. Complainant contends that thereafter, she was not given any work assignments by Ms. Shorts "for weeks on end." Complainant subsequently raised her concerns about the lack of work assignments with a representative of respondents' Bureau of Personnel and Human Resources in Madison. On February 22, 1993, complainant also wrote a memo to Roger Miller, the Assistant Regional Chief, in which she stated that the computer equipment in both the Grafton and West Bend offices was not covered by a maintenance agreement and suggested it

"might be a wise investment" to enter into such an agreement.¹ Mr. Miller said that it would have to wait to the next fiscal year.

Complainant contends that she was subsequently blamed for the lack of a maintenance agreement when there was a problem with the computer in the West Bend office, that her work was intentionally sabotaged and that her probationary evaluations suffered. Early in August of 1993, while she was still on probation, complainant accepted a promotion to a Program Assistant Supervisor 2 position. In a memo dated August 17th, her supervisor, Mr. Wagner, requested that the remaining 2 1/2 months of her probation be waived so that the complainant could receive the 3-step pay increase upon the promotion.

On September 17, 1993, complainant began working in her new position.

On January 10, 1994, complainant filed a letter and supporting documentation claiming harassment and retaliation by respondent. She subsequently perfected a complaint of discrimination by filing a notarized complaint form with the Commission on February 14, 1994, in which she claimed discrimination based on handicap, race and sex and retaliation under the whistleblower

¹The memo reads as follows:

Two weeks ago we were having a problem with the computer here in the Grafton office. I contacted you for assistance, in turn you gave me the name of Elia Basurto, in Madison. After a week and a half of working with her on fixing the problem we finally did it.

While working with her on this problem it was brought to my attention that the computers and printers in the Grafton and West Bend offices do not have maintenance agreements and are not under warranty any longer. I think this might be a wise investment.

Elia said maintenance programs on computers run about \$20/month. Printer agreements run about \$8/month. Both of these prices are estimates. It depends on the type of computer and printer each office has.

I was advised by Chris Blumm that you were the person to contact for authorization of a maintenance agreement.

Please advise. The phone number in the Grafton office is 375-7940.

law. She subsequently withdrew her claims of handicap, race and sex discrimination.

Motion for Failure to State a Cause of Action

Respondent's motion requires the Commission to analyze the complainant's allegations liberally in favor of the complainant and to grant the motion only if it appears with certainty that no relief can be granted.

In order to be entitled to protection under the whistleblower law, an employe must engage in one or more of the protected activities identified in §230.81, Stats. Typically, the protected activity will be a written disclosure to complainant's supervisor as provided in §230.81(1)(a). An employe can also engage in a protected activity by making a written disclosure after having contacted the Personnel Commission, making a disclosure to a law enforcement agency or in a court proceeding, or making a disclosure to an attorney, union representative or legislator. §§230.81(1)(b), (2) and (3). Here, the complainant contends that her protected activities consisted of raising her concerns about Ms. Shorts in a conversation with a representative of respondent's Bureau of Personnel and Human Resources in Madison and submitting a memo to Mr. Miller suggesting entering into a maintenance agreement. The conversation does not fall within the scope of any of the methods of a protected disclosure under §230.81, Stats. Iwanski v. DHSS, 88-0124-PC, etc., 6/21/89.

Assuming Mr. Miller could be considered complainant's supervisor² for a written disclosure under §230.81(1)(a), the memo still has to meet the definition of "information" as described in §230.80(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.

²The file indicates that Mr. Miller, as Assistant Regional Chief, was Ms. Shorts' supervisor. It does not specify that he also served as the supervisor for Mr. Wagner, who was complainant's supervisor. However, it is reasonable to assume for the purpose of ruling on this motion, that Mr. Miller was in the direct supervisory chain above the complainant. In Morkin v. UW-Madison, 85-0137-PC-ER, 11/23/88; rehearing denied, 12/29/88; affirmed by Dane County Circuit Court, Morkin v. Wis. Pers. Comm., 89-CV-0423, 9/27/89, the Commission concluded that a disclosure made to three individuals, all of whom were in the supervisory chain above the complainant, constituted a protected disclosure even though it was not made to the complainant's first-line supervisor.

(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 term "mismanagement" is further defined in §230.80(7) as:

"Mismanagement" means a pattern of incompetent management actions which are wrongful, negligent or arbitrary and capricious and which adversely affect the efficient accomplishment of an agency function. "Mismanagement" does not mean the mere failure to act in accordance with a particular opinion regarding management techniques.

The memo only refers to one condition, the absence of a maintenance agreement for the equipment in the two offices. Giving the memo the liberal construction which is required when ruling on respondent's motion, the memo may be read to indicate complainant's view that the lack of a maintenance agreement was "wrongful, negligent or arbitrary and capricious."³ The second issue related to disclosure is whether the memo meets the requirement that it describe "a *pattern* of incompetent management actions." The Commission has previously held that a grievance which related to only one action did not relate to a "pattern" of conduct. Sadlier v. DHSS, 87-0046, 0055-PC-ER, 3/30/89. Here, however, the condition of not having maintenance agreements does not relate solely to one piece of equipment. It relates to computers and printers located in two separate offices. Again, giving the memo a liberal reading, it can be said to satisfy the requirements for a written disclosure of "mismanagement" under the whistleblower law.

Timeliness

The respondent also contends that the complaint was untimely filed. Pursuant to §230.85(1), Stats., an employe alleging a violation under the whistleblower law may file their complaint with the Commission "within 60 days after the retaliatory action allegedly occurred or was threatened or after

³In Canter-Kihlstrom v. UW-Madison, 86-0054-PC, 6/8/88, the memos which served as the written disclosures were neutral on their face. In that case, the Commission held that their were circumstances where such memos, "though neutral on their face, would act to inform the reader that the writer wished to identify improper governmental activities." The Commission denied the motion to dismiss, but permitted respondent to reassert, at the hearing on probable cause, its contention that the complainant had made no lawful disclosure. In the present case, the respondent will also be permitted to reassert at hearing that there was no lawful disclosure by the complainant.

the employe learned of the retaliatory action or threat thereof, whichever occurs last."⁴

At first reading, the period for filing would appear to commence no later than the date the complainant left her position as Program Supervisor 1 and promoted to the Program Supervisor 2 position. That occurred on September 7, 1993. However, the documents submitted by complainant along with her complaint of discrimination reflect the following:

1. In a memo dated October 9, 1991, division administrators and institution wardens were informed that the authority "to waive a portion of a lengthened probationary period being served by an employee in a supervisory or managerial position" was being delegated. The memo recommended that each employing unit retain certain items for the waiver file and for audit purposes:

1. A copy of the supervisor's letter or memorandum requesting the waiver of an employees remaining probationary period.

2. A copy of the waiver letter *signed by the appointing authority* and delivered to the employee. (emphasis added)

2. As noted above, Mr. Wagner requested waiver of the final 2 and 1/2 months of complainant's probationary term in a memo dated August 17, 1993, to Mr. Miller.

⁴This language is in the nature of a statute of limitations rather than a statute conferring subject matter jurisdiction. There is no comparable reference as is found in §230.44(3) which provides: "Any appeal filed under this section [i.e., §230.44] *may not be heard* unless the appeal is filed within 30 days...." It is the phrase "may not be heard" that the Commission has relied upon in concluding that §230.44(3) confers subject matter jurisdiction. Richter v. DP, 78-261-PC, 1/30/79. In contrast, in Milwaukee County v. LIRC, 113 Wis 2d 199, 335 N.W. 2d 412 (Ct. App., 1983), the court held that the 300 day filing period provided by the Fair Employment Act was a statute of limitations rather than a statute concerning subject matter jurisdiction. The FEA provision in question, now found in §111.39(1), reads: "The department may receive and investigate a complaint charging discrimination... in a particular case if the complaint is filed with the department no more than 300 days after the alleged discrimination... occurred." The 60 day period for filing a whistleblower complaint is comparable to the FEA statute of limitations in that the provisions have similar language and neither suggests that the Commission lacks the authority to proceed in the absence of a timely complaint.

3. In separate memos dated September 3, 1993, to both Sandy Powers and Jo Winston, respondent's Affirmative Action/Civil Rights Compliance Officer, complainant wrote:

On 8-17-93 I requested that the remainder of my current probationary period be waived. I spoke with my current supervisor of record, Dave Wagner, as to my performance level. He felt that it warranted a waiver of my probationary period. I had contacted Roger Miller prior to informing my supervisor to see if it was something that would be approved by the regional office. He said that he was not the one that could give final approval; however, he would have to talk to [Regional Chief] Jan Cummings and let me know. It is my understanding that there was a discussion and *the decision was made by Roger and Jan not to approve such a request* based upon the fact that my performance level did not warrant a waiver. Roger never notified me of this; *a message was related to me by my supervisor.*

* * *

I am not certain all the facts were brought to the attention of the Appointing Authority. He has the right to deny a waiver; however, I am not sure my request ever made it to Mr. Jordan. Therefore, I am formally requesting Mr. Jordan consider my request and that I be present to discuss my documentation as to why I feel my request should be approved. (emphasis added)

The memo to Ms. Winston was entitled "Unfair Treatment from Supervisor/Management" and the memo to Mr. Powers was entitled "Waiver of My Probationary Period." The memo to Ms. Winston also raised an allegation that her work had been sabotaged and made suggestions about the organizational structure of various Probation and Parole offices.

4. In a letter dated November 29, 1993, Ms. Winston wrote complainant as follows:

The Department of Corrections, Affirmative Action Office *has forwarded your Probationary Request for Waiver to Eurial Jordan, Administrator, Department of Probation and Parole.* As agreed to by you on November 15, 1993, this action constitutes the culmination and dismissal of your complaint alleging Unfair Treatment from Supervisor/Management.

With regard to your program assistant staffing concerns, this is an issue that this office does not have any involvement in.... (emphasis added)

5. In correspondence to the Commission received on January 10, 1994, the complainant submitted a cover letter and various documents in which she claimed "harassment/retaliatory action" by respondent. The cover letter included the following statements:

I have enclosed documentation in reference to my complaint of Harassment and Retaliatory Action on the part of Region 2 Probation & Parole Management, in particular Janice Cummings, Roger Miller, and Jan Shorts.

I would appreciate a review and an investigation of the documented facts. I have been waiting for a response from Mr. Eural Jordan since 11-16-93 when the information was forwarded to him by Jo Winston. I have yet to hear anything.

* * *

I have requested that my probationary period with Probation & Parole be waived based on the quality of my work in order to allow me the financial benefits of the promotion that I obtained and began on September 7, 1993.

6. Complainant perfected her charge by filing a notarized complaint form with the Commission on February 14, 1994. Complainant made the following notation on the form in response to the request to list the "most recent date you believe the respondent acted illegally against you": "12-93 yet to get Response from Eural Jordan."


In light of the statement in the letter dated November 29, 1993, from Ms. Winston that the complainant's request for waiver of the remainder of her probation was still pending before Mr. Jordan, and complainant's statement in her complaint that she never received a decision from Mr. Jordan, the complaint filed on January 10, 1994 and perfected on February 14, 1994, must be considered timely with respect to the the failure to waive the final portion of complainant's probationary period as a Program Assistant Supervisor 1. The complainant's statements indicate that her supervisor, Mr. Wagner, had informed her that her performance level did not warrant a waiver. However, based upon both the existing policy as described in the October 9, 1991, memorandum and upon the letter from Ms. Winston indicating the matter was still under consideration, the Commission must conclude that the decision relayed by Mr. Wagner was not a final one and the complainant had taken the steps

necessary to place the waiver question before Eural Jordan, Administrator of the Division of Probation and Parole. Mr. Jordan has not responded to the request, so the complainant filed her complaint, effectively contending that it had been constructively denied. Complainant filed her complaint within 60 days of Ms. Winston's letter which advised the complainant that her request had been forwarded to Mr. Jordan. Therefore, it is considered to be timely.

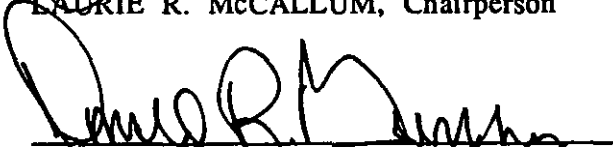
ORDER

Respondent's motion to dismiss is denied. The respondent may reassert, at any hearing in this matter, its contention that the complainant made no lawful disclosure of information.

Dated: October 4, 1994 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

K:D:temp-10/94 Duran


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner