

STATE OF WISCONSIN

PERSONNEL COMMISSION

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SHARON L. KING,

Complainant,

v.

Secretary, DEPARTMENT OF  
CORRECTIONS,

Respondent.

Case No. 94-0057-PC-ER

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RULING  
ON  
MOTIONS

On January 22, 1996, respondent filed a motion to compel answers to interrogatories and responses to a request for production of documents. On January 26, 1996, respondent filed a motion to dismiss certain issues related to retaliation and to obtain a ruling as to the presumption of retaliation. A briefing schedule was established in relation to each motion, and the final brief was filed on March 6, 1996. The following findings appear to be undisputed and are made solely for the purpose of deciding these motions.

1. On March 3, 1994, complainant filed a charge alleging that she had been discriminated against on the basis of race, and retaliated against for engaging in protected whistleblower activities.

2. After an Initial Determination (ID) was issued, a prehearing conference was held and the following hearing issues were established based on the conclusions of the ID:

Whether complainant was discriminated against on the basis of race or retaliated against for engaging in protected whistleblower activities in regard to the following:

1. On December 21, 1993, Roberta Otis and Philip Koenig assigned complainant additional job duties after she sent a letter to Secretary Michael Sullivan complaining about her co-worker Meg Stowell.

2. On January 31, 1994, Otis ordered complainant to move to Meg Stowell's former work station.

3. Respondent denied complainant the use of vacation or sick time for her absence on February 2, 1994.

4. Complainant received a letter of reprimand dated February 9, 1994.

3. On December 12, 1995, respondent served on complainant a set of interrogatories and request for production of documents. The interrogatories stated as follows, in pertinent part:

18. Describe, identify and specify, all of your mental and physical conditions that you have or have ever had that constitute a physical or mental impairment for which you have sought or obtained medical treatment.

19. State all facts and each and every factual basis on which you rely to conclude that; you have or have had the mental or physical conditions cited in your answer to interrogatory 18, including but not limited to date of onset of each condition, symptoms experienced, course of illness, and whether or not you had ever had this condition before.

20. Describe, identify and specify every on the job injury you have suffered, if any, during your employment with any administrative agency of the State of Wisconsin.

21. Identify each person who has provided you medical or health care or rehabilitation evaluation or counseling for the mental or physical conditions cited in your answer to interrogatories 18 and 19 and the on the job injuries cited in your answer to interrogatory 20, or whom you have consulted in relation to these conditions or injuries.

22. Identify all of your health care records, or other records relating to rehabilitation evaluation or counseling, including but not limited to your medical records relating to your mental or physical conditions cited in your answer to interrogatories 18 and 19 and relating to any on the job injury cited in your answer to interrogatory 20.

Respondent's request for production of documents stated as follows, in pertinent part:

Pursuant to Rule 804.09, Wisconsin Rules of Procedure and PC 4.03, Wis. Adm. Code, Complainant is requested to produce all documents subject to identification in interrogatories 5 through 25. . . . Complainant's medical or treatment records, identified in Interrogatory 22, must be provided to permit respondent to fully

evaluate complainant's claim that her health would be adversely affected if she was required to move to Meg Stowell's former work station, as she had been ordered to do.

A portion of the "Instructions" section of the interrogatories/request for production of documents states as follows:

4. Unless otherwise specified or indicated, either directly or indirectly, each interrogatory set forth herein calls for information for a period commencing with the date of your employment with the State of Wisconsin and continuing up to and including the date the interrogatories are answered. If any answers cannot apply to this entire time period, such answers for each relevant period during this time period should be set forth together with specific dates setting forth the time frame during which the answers are applicable.

4. Complainant's answers to these interrogatories were as follows:

18. Job related anxiety resulting in depression 1992, 3.

19. First time in complainant's life that I needed psychological treatment was during my employment at the Department of Corrections starting in 1992.

20. Complainant could not function because of personnel problems in cashier unit of Dept. of Corrections Sept. '92.

21. See Attachments. To check for further records.

22. See attachments. To check for further records.

The attachments to which complainant referred in her responses to interrogatories 21 and 22 consisted of copies of billing statements indicating that she had received certain psychotherapy services between September 15, 1992, and March 2, 1993. Complainant also provided copies of two pages of handwritten notes which complainant described as "copy of file notes 2/3 - 2/5/94."

5. As relevant to the issues established for hearing, complainant's health status is referred to in the ID in the following paragraphs:

20. (page 5) According to complainant, after finishing her conversation with Otis, she called Hamdy Ezalarab (respondent's Personnel Director). She told him that it was a problem for her to move in Stowell's work station and that problems in the Cashier's Unit had made her sick the year before and she did not want this repeated. . . .

24. (page 6) On February 2, 1994, complainant met with Otis, Koenig, Campbell, and Rutter. Respondent responded to each of complainant's concerns. . . According to Otis' meeting notes, "Sharon flatly refused to move to this [Stowell's] workstation stating it makes her ill and she cannot bear the thought of being at that workstation." . . .

26. (page 6) On February 3 and 5, 1994, complainant provided documentation from a health care provider supporting her request not to be moved.

28. (page 6) According to respondent, after receiving complainant's health care provider documentation, it decided that complainant would not move to Stowell's old work station.

6. Complainant has been employed by respondent as a Fiscal Clerk 1 in the Cashier Unit since December 1, 1991.

#### Motion to Compel

In its brief, respondent described as follows the basis for its position that the requested medical information is discoverable in this matter:

Evidence at hearing will show that in February of 1994, Complainant represented that it was a problem for her to move into Stowell's work station and that problems in the Cashier's Unit had made her sick the year before and she did not want this repeated; Complainant provided documentation from a health care provider supporting her request not to be moved. As a result of receiving the health care provider documentation, Respondent decided that Complainant would not move to Stowell's old work station.

Clearly Complainant has placed her medical condition in issue because she has alleged that her medical condition prevented her from moving to Stowell's work station, as she was ordered to do. Complainant has also placed her medical condition in issue because she has alleged that problems in the Cashier's Unit had made her sick the year before.

Respondent has every right to obtain information concerning all relevant facts in this matter, including but not limited to all facts bearing upon the existence of Complainant's alleged medical condition and the impact of this condition on her ability to follow the directions given to her by her supervisor in regard to her work station and in regard to her leaving the work site without permission.

All parties to a case before the Commission may obtain discovery and preserve testimony as provided by Ch. 804, Stats. §PC 4.03, Wis. Adm. Code. Section 804.01(2)(a), Stats., states as follows:

*In general.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Section 905.04(4)(c), in limiting the scope of the privilege of physician-patient, psychologist-patient, social worker-patient, and professional therapist/counselor patient, states as follows, in pertinent part:

There is no privilege under this section as to communications relevant to or within the scope of discovery examination of an issue of the physical, mental or emotional condition of a patient in any proceedings in which the patient relies upon the condition as an element of the patient's claim or defense . . .

#### Interrogatory 18

The interrogatory asks complainant to describe, identify, and specify any mental or physical condition she has or has ever had that constituted an impairment for which she sought or obtained medical treatment. Complainant's response is that she had "job related anxiety resulting in depression" in 1992 and 1993. Although complainant has relied upon her medical condition in prosecuting her charge of discrimination/retaliation, this reliance consists solely of her representations that problems in the unit had made her sick the year before and that her medical condition prevented her from moving to the Stowell work station. As a result, although the interrogatory is phrased broadly to include an unlimited time period, only complainant's medical condition "the year before" and at the time the move to the Stowell work station was under consideration would be considered relevant here for discovery purposes. Although complainant's answer appears to identify the physical or mental impairments she had in 1992 and 1993 for which she sought medical treatment, it does not identify any physical or

mental impairments she had during the time period in 1994 when the issue of her move to the Stowell work station was under consideration (apparently between January 5, 1994, and February 7, 1994), and complainant is required to provide that information.

Interrogatory 19

The interrogatory asks complainant to provide additional information relating to the physical or mental conditions she identified in Interrogatory 18, including date of onset, symptoms, course of illness, and whether or not she had ever had this condition before. Complainant's response was that the first time in her life that she had needed psychological treatment was during her employment with respondent and that her treatment started in 1992. In her response, complainant failed to describe the symptoms of her mental condition, or the duration of this condition and how it changed during its duration (it is presumed this is what is meant by "course of illness"). This information is discoverable and is required to be provided by complainant. It is not possible to tell, in view of her response to Interrogatory 18, whether complainant's response to Interrogatory 19 includes the time period in 1994 when her move to the Stowell work station was under consideration. If it does not, the information requested in Interrogatory 19 relating to her condition during this time period is required to be provided as well.

Interrogatory 20

This interrogatory asks complainant to describe, identify and specify every on-the-job injury she has suffered during her employment with the State of Wisconsin. Complainant's response was that she "could not function because of personnel problems in cashier unit of Dept. of Corrections Sept. '92." This response does not specify the reason for complainant not being able to function, i.e., the nature of the injury she suffered and a description of the manifestations of the injury; and does not specify with any particularity how the injury was suffered, i.e., what occurred in the cashier unit that led to the injury. This information is discoverable and complainant is required to provide it. It is assumed from complainant's response that the only on-the-job injury she suffered in state service occurred during September of 1992 while she was employed by respondent in the Cashier's Unit.

Interrogatory 21

The interrogatory asks complainant to provide information relating to the providers of treatment for the conditions identified in Interrogatories 18, 19, or 20. In response complainant provided a copy of billing records for outpatient services rendered to her by an individual named McAweeney on September 8 and 9, 1992; a copy of a letter from Psychological Consultants of Green Bay referencing an appointment she had recently had with a Dr. Bertrand; and copies of billing statement for psychotherapy services complainant received from Nicholas J. Bisenius, Ph.D., on September 15, September 24, October 6, October 20, November 5, December 8, 1992, and January 12, February 9, and March 2, 1993. It is presumed from this response that these are all of the individuals whom she consulted or from whom she received treatment for the condition complainant identified in her response to Interrogatory 18, i.e., "job-related anxiety resulting in depression 1992, 3." This response does not, however, identify any individual whom she consulted or from whom she received treatment during the time period (presumably January 5 through February 7, 1994) when her move to the Stowell work station was under consideration. This information is discoverable and complainant is required to provide it.

Interrogatory 22

The interrogatory asks complainant to identify the evaluation, consultation, and treatment records relating to the conditions identified in Interrogatories 18, 19, and 20. Complainant offers the same response as that offered to Interrogatory 21. It will be presumed that the individuals identified as providing services in the documents offered in response to Interrogatory 21 are the individuals in whose custody the records relating to the rendering of such services to complainant are maintained. As with Interrogatory 21, it is concluded that complainant's response is sufficient as it relates to the condition she has described she was suffering from in 1992 and 1993. However, complainant's has not provided a response relating to any condition from which she was suffering during the time period the move to the Stowell work station was under consideration and she is required to do so.

Request for Production of Documents

The request asks complainant to produce all document subject to identification in Interrogatories 5 through 25, and refers specifically to medical or treatment records identified in Interrogatory 22. Three of the four issues established for hearing (2, 3, and 4) require an examination of complainant's reason for resisting the assigned move to the Stowell work station. Complainant has offered as the primary reason the impact the move would have on her health. Although, unlike a handicap discrimination case or a case filed under the Family and Medical Leave Act, complainant's health condition is not the pivotal issue here, it is an issue and the state of her health is being advanced by complainant as a part of her claim. As a result, such records are discoverable and complainant is required to provide them. This requirement extends to those records relating to the treatment provided complainant in 1992 and 1993 as well as during the relevant time period in 1994.

As part of this motion to compel, respondent has requested an award of expenses, including attorney's fees and costs, pursuant to §804.12(1)(c), Stats. However, in view of the fact that the motion was granted only in part; that respondent's interrogatories were, in some instances, overly broad; and that complainant is unrepresented by counsel in these proceedings, the Commission declines to award expenses here.

Motion to Dismiss Issues; Request for Ruling on Presumption

Wisconsin's "whistleblower law" is Chapter 230, Subchapter III, §§230.80 et seq., Stats. Relevant provisions are as follows:

**230.83 Retaliatory action prohibited. (1)** No appointing authority, agent of an appointing authority or supervisor may initiate or administer, or threaten to initiate or administer, any retaliatory action against an employee.

**230.85 Enforcement. (1)** An employee who believes that a supervisor or appointing authority has initiated or administered, or threatened to initiate or administer, a retaliatory action against that employee in violation of s. 230.83 may file a written complaint with the commission, . . .



**230.80 Definitions**

(8) "Retaliatory action" means a disciplinary action taken . . .

(2) "Disciplinary action" means any action taken with respect to an employe which has the effect, in whole or in part, of a penalty, including but limited to any of the following:

(a) Dismissal, demotion, transfer, removal of any duty assigned to the employe's position, refusal to restore, suspension, reprimand, verbal or physical harassment or reduction in base pay.

(b) Denial of education or training, if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation or other personnel action.

(c) Reassignment.

(d) Failure to increase base pay, except with respect to the determination of a discretionary performance award.

Respondent questions here whether the actions taken which are the subject of issues 1, 2, and 3 meet the requirements of a "disciplinary action" within the meaning of §230.80(2), Stats. Issue 1 involves the assignment of additional duties to complainant's position. At this stage of these proceedings and viewing the available information in the light most favorable to the complainant, this action by respondent would appear to be akin to the "removal of any duty" or to a "reassignment" within the meaning of §230.80(2), Stats, and, as a result, would appear to satisfy the statutory definition of "disciplinary action."

Issue 2 relates to respondent's directive for complainant to move to the Stowell work station. It is undisputed here that this work station was adjacent to the work station that complainant had been occupying; that a move of only five feet would be required; and that, in all other significant respects (with the exception of the more subjective factor discussed below), the two work stations were equivalent. In Vander Zanden v. DILHR, 84-0069-PC-ER, 8/24/88, the Commission concluded that certain limitations placed on complainant's contacts with an office in a different division did not rise to the level of a "disciplinary action" within the meaning of the whistleblower law and, applying the doctrine of ejusdem generis, stated:

The general term "penalty" must be interpreted in the context of the specific terms used within the definition, each of which has a substantial or potentially substantial negative impact on an employe.

Viewed in isolation, a move of five feet to a work station that is equivalent in all significant respects to complainant's current work station would not appear to have such a substantial or potentially substantial negative effect on complainant. However, if the available information is viewed in the light most favorable to complainant, it shows that complainant felt and communicated to respondent that the association of this work station with an employee to whom she had developed an aversion could significantly affect her health and her ability to function in her job. At this point in these proceedings and based on the available information, it is concluded that this is sufficient to satisfy the statutory definition of "disciplinary action."

Issue 3 involves an action by respondent to deny complainant the use of leave time for her absence on February 2, 1994. The result of this action was that complainant received no pay for February 2. The loss of a day's pay would be considered a substantial penalty by most standards and it is so concluded here.

Respondent's motion to dismiss Issues 1, 2, and 3 is denied.

Respondent also requests a ruling on whether the statutory presumption stated in §230.85(6), Stats. would apply here. The basis for respondent's contention that it would not is that the information disclosed by complainant in her protected disclosure, i.e., her written disclosure to Secretary Sullivan, did not "merit further investigation" as required for the application of the presumption by §230.85(6)(b), Stats.<sup>1</sup> Available information indicates that the disclosure consisted of two components, that relating to Ms. Stowell's violation of respondent's fraternization policy and that relating to the use of work phones for personal calls by Ms. Stowell. This information also indicates, and complainant does not dispute, that complainant had raised the fraternization issue before; it had been investigated and resolved by Secretary Sullivan's predecessor; and, as a result, respondent did not feel this part of

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<sup>1</sup> It is not the Commission's role here to independently determine whether the disclosure merited further investigation but instead to determine whether respondent regarded it as meriting further investigation. See, §230.82(1), Stats.; Sadlier v. DHSS, 87-0046, 0055-PC-ER (3/30/89).

complainant's disclosure merited further investigation. However, respondent apparently concedes (See ¶15 of ID, page 4), that the use of Cashier Unit phones for personal calls was the subject of individual meetings with Cashier Unit employees after the date of the disclosure. Presumably, one of these employees was Ms. Stowell. At this point in these proceedings and based on available information, it is concluded that it appears as though respondent felt that this part of the disclosure merited further investigation, and, as a result, the statutory presumption would apply.

Order

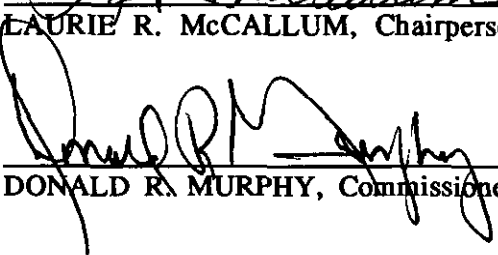
The motion to compel is granted in part and denied in part. Complainant is ordered to answer the interrogatories and produce the documents in accord with this ruling on or before April 19, 1996. Any medical/psychological treatment records so produced will be subject to the Protective Order issued on January 17, 1996.

The motion to dismiss is denied without prejudice.

Dated: March 22, 1996 STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

LRM:lrn

  
DONALD R. MURPHY, Commissioner

  
JUDY M. ROGERS, Commissioner