STATE OF WISCONSIN PERSONNEL COMMISSION

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STEPHEN C. ELMER,

Complainant,

v.

Secretary, DEPT. OF AGRICULTURE, TRADE and CONSUMER PROTECTION,

Respondent.

Case No. 94-0062-PC-ER

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RULING ON RESPONDENT'S MOTION TO DISMISS

This matter is before the commission on respondent's motion to dismiss for failure to state a claim. Both parties have filed briefs and supporting documents. The essential facts relating to the legal issue of whether complainant states a claim under the whistleblower law (Subchapter III, Chapter 230, Stats.) do not appear to be in dispute.

The general rules for consideration of a motion to dismiss for failure to state a claim are set forth in Phillips v. DHSS & DETF, No. 87-0128-PC-ER (3/15/89); affirmed other grounds, Phillips v. Wis. Pers. Commission, 167 Wis. 2d 205, 482 N.W.2d 121 (Ct. App. 1992):

> For the purpose of testing whether a claim has been stated . . . the facts pleaded must be taken as admitted. The purpose of the complaint is to give notice of the nature of the claim; and, therefore, it is not necessary for the plaintiff to set out in the complaint all the facts which must eventually be proved to recover. The purpose of a motion to dismiss for failure to state a claim is the same as the purpose of the old demurrer – to test the legal sufficiency of the claim. Because the pleadings are to be liberally construed, a claim should be dismissed only if "it is quite clear that under no circumstances can the plaintiff recover." The facts pleaded and all reasonable inferences from the pleadings must be taken as true, but legal conclusions and unreasonable inferences need not be accepted.
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> . . . A claim should not be dismissed . . . unless it appears to a certainty that no relief can be granted under any set of facts that plaintiff can prove in support of his allegations. (Citations omitted.)

Accordingly, the Commission accepts as true for purposes of deciding this motion all the facts alleged in the complaint, as well as the facts alleged in opposition to the motion to dismiss.

In order to fall under the protection of the whistleblower law, an employe must make a protected disclosure as set forth in s. 230.81, Stats. While there are several means of disclosure set forth in this section, the only type of disclosure which complainant alleges in this case is under s. 230.81(1)(a), Stats.: "Disclose the information in writing to the employe's supervisor."

Complainant was employed as Southwestern Area Regional Meat Safety Supervisor under the supervision of a Gary Bauer. Complainant was a coworker of an Arthur Ness. Complainant believed that Ness was not performing his job satisfactorily and expressed his concerns to upper level management on a number of occasions. Eventually, complainant's work responsibilities were reassigned from the Southwestern Area to the Southeastern Area, allegedly because of his complaints about Mr. Ness.

There were four written communications from complainant to his supervisor that arguably could be considered related to complainant's concerns with respect to Mr. Ness.[1] However, in responding to the motion, complainant relies solely on a note confirming a meeting between complainant and his supervisors: "I would like to meet with the two of you on Monday, Jan. 31, 1994 around 2:45 or 3 p.m. to discuss some issues." Complainant characterizes this memo in his brief in opposition to respondent's motion to dismiss (pp. 4-5) as follows:

> This [January 28, 1994] memo was written by Elmer in an attempt to set up a meeting with Ness and Loerke to confront the issue of Ness' poor work performance. Prior to writing this memo, Elmer had discussed the situation with Bauer. Bauer then gave Elmer permission to plan the meeting. The January 28, 1994 memo was a confirmation of the scheduled meeting, the purpose of which was to address errors by Ness and essentially "blow the whistle". (Affidavit of Stephen C. Elmer). Clearly, this memo is more than a mere scheduling document, and easily satisfies the statutory requirements of Wis. Stats. S. 230.80(5), as it is information which Elmer reasonably believes demonstrates:
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> 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 the public health and safety.
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> Bauer, the retaliator, was aware of Elmer's concerns with Ness' job performance and Elmer's intent to reveal these problems. Elmer had discussed Ness' poor job performance on numerous prior occasions with

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[1] E g , an August 10, 1993, note states.

> Sample Reports from Kickapoo Locker #97
> Teeny Wild called - he sampled
> Bologna & Ground Beef on 5-10-93
> He has not received results yet
> Can you check this out?

> Bauer. In fact, on January 28, 1994, Elmer specifically requested permission from Bauer to conduct a meeting on January 31, 1994 to discuss these issues and essentially "blow the whistle". The January 28, 1994 memo was the direct result of this conversation with Bauer. (Affidavit of Stephen C Elmer). Therefore, Bauer had full knowledge of Elmer's intent and purpose in requesting such a meeting and what the contents of that meeting were to be.

The Commission cannot agree with complainant's contention. The law (as relevant here) requires that in order to gain protection, the employe must: "Disclose the information in writing to the employe's supervisor." S. 230.81(1)(a), Stats. (Emphasis added.). Section 230.80(5), Stats., provides that "information" must have a specific, substantive content:

> (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 January 28, 1994, memo, has no substantive content, but is a scheduling document. That the meeting it was scheduling was to serve as a forum to address substantive issues does not transform a scheduling document into a covered disclosure under the whistleblower law. Another way of looking at this is that the meeting scheduled for January 31, 1994, to "discuss some issues" could not be protected under the whistleblower law if it involved only a verbal discussion, as the January 28, 1994, memo suggested. A nonsubstantive note scheduling such a meeting cannot somehow utilize its connection to that meeting to become a protected disclosure under the law.

The January 28, 1994, scheduling memo is distinguishable from documents which convey substantive information, but do so in a relatively opaque manner, and which may not appear to be disclosures of "information" when viewed in isolation. For example, in Canter v. UW-Madison, 86-0054-PC-Er (6/8/88), the complainant arguably had disclosed information covering improper handling of travel-related expenses. One example of this kind of activity is set forth in Finding #4 on page 2 as follows:

> 4. On February 3, 1986, Complainant wrote a memo to Dr. Brooks, a department faculty member, which read:
>
> > As you can see from the attached statement you have several outstanding invoices with Burkhalter Travel. The total amount due Burkhalter is $2,233.14.

She also wrote a memo to Dr. Schutta on February 3, 1986, which read as follows:

> See memo & attachment please. Kim has informed me that Abbott was supposed to reimburse for some of these and in fact they reimbursed Dr. Brooks directly. Dr. Brooks has not paid Burkhalter. Kim does not know quite how to deal with Ben on this. I wrote him this memo in response to the situation.

The statement from the Burkhalter agency, dated January 26, 1986, indicated Dr. Brooks still owed $2,322.14 for tickets billed.

While this communication was not on its face an overt accusation of illegal activity, it certainly could amount to this depending on the surrounding circumstances. In contrast, Mr. Elmer's January 28, 1994, scheduling memo has no substantive content, but is a request for a meeting to discuss complainant's unspecified concerns.

In conclusion, the whistleblower law covers only certain specific kinds of disclosures made in specific ways. The legislature obviously did not intend to provide blanket protection for any kinds of employe utterances which might result in retaliation by the employing agency. The law simply does not extend to the kind of communication involved here.

ORDER

This complaint is dismissed for failure to state a claim.

Dated November 14, 1996.

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

AJT/jmr

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

**Petition for Rehearing.** Any person aggrieved by a final order (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