STATE OF WISCONSIN PERSONNEL COMMISSION

PETER E. KLEIN,

Complainant,

v.

Secretary, DEPARTMENT OF AGRICULTURE, TRADE AND CONSUMER PROTECTION,

Respondent.

Case No. 95-0014-PC-ER

RULING ON MOTION TO DISMISS

This matter is before the Commission on respondent's motion for summary judgment filed October 24, 1995, which has been construed as a motion to dismiss for failure to state a claim (per October 26, 1995, letter to the parties).[1]

This case involves a WFEA complaint of retaliation. The complaint includes the following:

> By letter dated October 14, 1994, I was accused of a work-rule violation which could result in a disciplinary action, and directed to report to the office of my supervisor in Madison. My local office is located in Green Bay. Although no discipline eventually resulted from the complaint of a work-rule violation, I believe that my supervisors failed to follow the policies established with regard to discipline of employees. I believe that my supervisors presented the work-rule violation charge and potential discipline to me for the purpose of retaliating against me and harassing me due to my participation in fair employment activities.

The text of the October 14, 1994, letter is as follows:

> You are directed to report to my office in the Division of Food Safety 801 W. Badger Road Madison at 10:30 a.m. on Wednesday October 19, 1994, to discuss a possible violation of Department Work Rule #10.
>
> All employees of the Department are expected to conduct themselves in a professional and businesslike manner. The following acts are considered as unacceptable and could result in a disciplinary action.

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[1] Complainant's motion to compel discovery filed on October 5, 1995, was stayed pending resolution of the instant motion.

Work Rules:

> 10. Threatening, intimidating, inflicting injury, use of abusive language or otherwise discourteous actions toward fellow employees or the general public.

Specifically, I wish to discuss the abusive language you directed to Ms. Laura Berkner Murphy at a Gender Communications training session on Thursday September 29, 1994.

If you desire, you may choose to have a representative present during this meeting. Discipline may be taken as a result of this meeting.

Respondent contends that this complaint fails to state a WFEA claim because it does not allege that any adverse employment action was taken.

The WFEA prohibits discrimination in employment. §111.321, Stats. Section 111.322(3), Stats., provides that "it is an act of employment discrimination ... to discharge or otherwise discriminate against any individual because he or she has opposed any discriminatory practice under this subchapter or because he or she has made a complaint, testified or assisted in any proceeding under this subchapter." (emphasis added). The WFEA does not define the term "otherwise discriminate" that is used in this subsection.

In the most general sense, employment discrimination is the treatment of some employes "less favorably than others because they belong to a protected class." Racine Unified School Dist. v. LIRC, 164 Wis. 2d 567, 595, 476 N.W. 2d 707 (Ct. App. 1991). However, it has been recognized that an element of a claim of employment discrimination is that the employe have suffered an adverse employment action of some kind. See e.g., Rivers v. Westinghouse Electric Corp., 17 FEP Cases 767, 770 (E.D. Pa. 1978) (second element of prima facie case is "that plaintiff was the object of adverse action." (citations omitted)).

There does not appear to be much precedent on the question of whether merely investigating a co-employe's accusation against another employe could be characterized as an adverse employment action. However, there have been cases where certain kinds of investigatory activities have been treated as adverse employment actions, although without discussion of this legal issue. See Martin v. Citibank, 37 FEP Cases 1580 (2d Cir. 1985) (Title VII claim that employer discriminatorily selected plaintiff for administration of polygraph); Beauford v. Sisters of Mercy, 43 FEP Cases 1286 (6th Cir. 1987) (42 USC 1981

claim that employer discriminatorily "spied" on plaintiff by peering through boiler room window).

The general rule for consideration of a motion to dismiss for failure to state a claim upon which relief can be granted is set forth in Morgan v. Pennsylvania General Ins. Co., 87 Wis. 2d 723, 731-732, 275 N.W. 2d 660 (1979):

> 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.
>
> . . . .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)

In the Commission's opinion, it cannot be concluded on a motion to dismiss that under no set of circumstances could this complaint state a claim upon which relief could be granted.

It is important to note that the allegations in this case involve more than the employer conducting an investigation, or contemplating the imposition of discipline. The letter directing complainant to appear at a meeting to discuss a possible work rule violation can be construed as accusatory or even judgmental: "I wish to discuss the abusive language you directed to Ms. Laura Beckner Murphy." (emphasis added). Complainant alleges that respondent failed to follow established policies for handling potential disciplinary matters.[2] Even though it appears to be undisputed that no formal discipline ensued, it cannot be concluded that there is no way the letter from respondent and the ensuing handling of the matter by management did not and could not have any adverse effect on appellant's conditions of employment. Whether or not it actually did or could have had an adverse effect is a question that will have to await the development of a more complete record.

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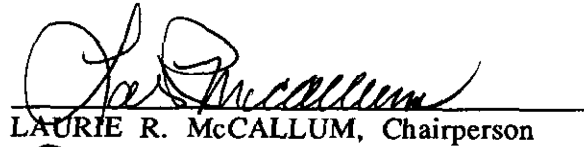
[2] In material submitted as part of the investigation, complainant asserts that respondent began the meeting to which he had been summoned by characterizing it as a predisciplinary hearing, rather than an investigative proceeding.

ORDER

For these reasons, the motion to dismiss is denied. If respondent still has an objection to producing the documents sought to be discovered, it is to file and serve a statement to this effect and its reasons therefore within 10 days of the date of service of this ruling, and a ruling will be rendered on complainant's motion to compel discovery.

Dated: December 20, 1995

STATE PERSONNEL COMMISSION



LAURIE R. McCALLUM, Chairperson

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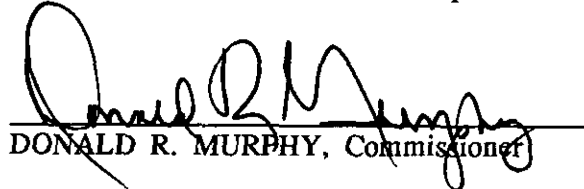

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

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