COURT OF APPEALS
DECISION
DATED AND RELEASED

February 29, 1996

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809 62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports

No. *95-0747*

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

VERNON SEAY,

Petitioner-Appellant,

v.

WISCONSIN PERSONNEL COMMISSION,

Respondent-Respondent.

APPEAL from an order of the circuit court for Dane County: MORIA KRUEGER, Judge. *Affirmed.*

Before Gartzke, P.J., Dykman and Sundby, JJ.

SUNDBY, J. Appellant Vernon Seay appeals from an order of the Dane County Circuit Court entered March 3, 1995, which affirmed a decision of the Wisconsin Personnel Commission. The Commission determined that it lacked

jurisdiction under § 230.44(1)(b), STATS., to review Seay's claim that his employer, the University of Wisconsin-Madison, retaliated against him for seeking a reclassification of his position and further determined that the University did not retaliate against him.

Seay presents two issues: (1) Did the Wisconsin Personnel Commission have jurisdiction[1] under § 230.44(1)(b), STATS., to provide him with relief from the alleged retaliation by a state employer against him because he sought to have his position reclassified? and, (2) Did the Commission err when it concluded that the University rebutted the presumption of retaliation contained in the Whistleblower Law, § 230.85(6), STATS.? We conclude that the Commission had no statutory authority under § 230.44(1)(b) to provide Seay with relief from the alleged retaliatory acts of his supervisors and co-employees. We further conclude that the Commission reasonably determined that the University had rebutted the presumption of retaliation against Seay. We affirm the order.

BACKGROUND

From August 1987 to October 1990, Seay was a Facilities Repair Worker 1 at the University of Wisconsin-Madison College of Agriculture and Life

[1] It would be more accurate to state the issue in terms of the Commission's statutory authority.

Sciences Arlington Research Station. His responsibilities at the Station included various facility maintenance and construction tasks, including painting. According to his job description, painting was to comprise approximately thirty percent of his work. However, from the time he was hired, Seay spent the majority of his time painting and in January 1989 asked the Department of Employment Relations (DER) to reclassify his position from Facilities Repair Worker to Painter. DER denied his request September 13, 1989.

Prior to DER's denial, on March 29, 1989, Seay appealed to the Personnel Commission pursuant to § 230.44(1)(b), STATS., because DER had not yet acted on his reclassification request. He alleged that the University and DER had retaliated against him because he had requested reclassification.[2] On July 12, 1989, Seay filed a Whistleblower complaint under §§ 230.80-230.89, STATS. He claimed that the University and DER retaliated against him through his immediate supervisor, Robert Vetter, who altered his job duties, demoted him, made his work assignments onerous, and refused to intervene when his co-employees harassed him because he had attempted to be reclassified.

[2] Seay appealed DER's denial of his reclassification request to the Commission on September 27, 1989. On January 24, 1991, the Commission concluded that Seay was not entitled to reclassification.

Vetter was unaware of Seay's Whistleblower complaint until months after the alleged retaliatory acts had begun.[3] However, he was aware of animosity between Seay and his co-workers, which began in the summer of 1988. Some of Seay's co-workers harassed and antagonized Seay, and described him as a poor employee and an unsafe worker. The Commission found that the incidents of harassment had occurred before Seay made his Whistleblower complaint and, in any event, the University had successfully rebutted his allegations of retaliation.

STANDARD OF REVIEW

Whether an agency has authority to act presents a legal issue we review *ab initio*. ***Loomis v. Wisconsin Personnel Comm'n***, 179 Wis.2d 25, 30, 505 N.W.2d 462, 464 (Ct. App. 1993) (citing ***Republic Airlines v. DOR***, 159 Wis.2d 247, 257, 464 N.W.2d 62, 66 (Ct. App. 1990)). Decisions of an administrative agency that deal with the scope of its own power are not binding on this court. ***Id.*** In deciding this issue of law, we also owe no deference to the conclusions of the trial court. ***Id.***

The second issue involves the agency's findings of fact. An agency's factual findings must be affirmed if supported by substantial evidence. Section

[3] The facts regarding Vetter's awareness of the Whistleblower complaint will be stated in Part II of the decision.

227.57(6), STATS.[4] Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." ***Gilbert v. Medical Examining Bd.***, 119 Wis.2d 168, 195, 349 N.W.2d 68, 80 (1984) (quoting ***Bucyrus-Erie Co. v. DILHR***, 90 Wis.2d 408, 418, 280 N.W.2d 142, 147 (1979)).

DECISION

I. *The § 230.44(1), STATS, Appeal.*

Seay requested that the DER secretary reclassify his position pursuant to § 230.09(2)(a), STATS., which provides:

> After consultation with the appointing authorities, the secretary shall allocate each position in the classified service to an appropriate class on the basis of its duties, authority, responsibilities or other factors recognized in the job evaluation process. *The secretary may reclassify or reallocate positions on the same basis.*

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[4] Section 227.57, STATS., Scope of Review, provides in part:

> (6) If the agency's action depends on any fact found by the agency in a contested case proceeding, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. The court shall, however, set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by substantial evidence in the record.

(Emphasis added.) The Commission has authority to hear Seay's appeal from the secretary's denial under § 230.44(1)(b), STATS., which provides:

> **Appeal procedures.** (1) Except as provided in par. (e), the following are actions appealable to the commission under s. 230.45(1)(a):
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> ....
>
> (b) *Decision made or delegated by secretary.* Appeal of a *personnel decision* under s. 230.09(2)(a) or (d) or 230.13(1) made by the secretary or by an appointing authority under authority delegated by the secretary under s. 230.04(1m).

(Emphasis added.)

Seay claims that the Commission could hear his retaliation claim under this statute. However, he has failed to show how the alleged acts of retaliation constitute an appealable "personnel decision."

The legislative intent as to the scope of § 230.44(1)(b), STATS., cannot be determined from its language, to which we must first resort. *See* ***Sturgis v. Neenah Bd. of Canvassers***, 153 Wis.2d 193, 198, 450 N.W.2d 481, 483 (Ct. App. 1989). In ***Marshall-Wis. v. Juneau Square***, 139 Wis.2d 112, 133, 406 N.W.2d 764, 772 (1987), the Wisconsin Supreme Court held, "[i]f the meaning of the statute is plain, we are prohibited from looking beyond the language of the statute to ascertain its meaning." Section 230.44 provides that the Commission may hear an appeal of a § 230.09(2)(a), STATS., personnel decision. Seay argues that employer retaliation

constitutes a personnel decision. We examine case law for guidance in resolving his claim.

"Section 230.44, STATS. ... appears to be designed to deal with appeals by employees from actions affecting their jobs, such as discharge,[5] reassignment,[6] reinstatement[7] or promotion decisions.[8]" *Ass'n of Career Employees v. Klauser*, 195 Wis.2d 602, 614-15, 536 N.W.2d 478, 485 (Ct. App. 1995) (footnotes in original). Section 230.09(2)(a), STATS., directs the DER secretary to allocate each position in the classified service and permits the secretary to reallocate or reclassify positions "on the same basis." Clearly, the secretary's denial of Seay's request that the secretary reclassify his position was a personnel decision. However, the statute required that the secretary base his decision "on the same basis" that he classified Seay's position: "its duties, authority, responsibilities or other factors recognized in the job evaluation process." An appeal under § 230.44(1)(b) from the secretary's denial of a reclassification request examines whether the secretary exercised his or her discretion as to these factors. We conclude that the commission's construction of the

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[5] *See* ***Board of Regents v. Wisconsin Personnel Comm'n***, 103 Wis.2d 545, 309 N.W.2d 366 (Ct. App. 1981) (appeal by probationary employee from decision to discharge him from job).

[6] *See* ***Basinas v. State***, 104 Wis.2d 539, 312 N.W.2d 483 (1981) (employee appeal from reassignment to position with lower maximum pay range).

[7] *See* ***Seep v. State Personnel Comm'n***, 140 Wis.2d 32, 409 N.W.2d 142 (Ct. App. 1987) (employee appeal from decision refusing reinstatement in violation of agreement to do so).

[8] *See* ***Cozzens-Ellis v. Wisconsin Personnel Comm'n***, 155 Wis.2d 271, 455 N.W.2d 246 (Ct. App. 1990) (employee appeal from denial of promotion).

statute is a reasonable one and we adopt it. *See* ***Plumbers Local No. 75 v. Coughlin***, 166 Wis.2d 971, 976-77, 481 N.W.2d 297, 299 (Ct. App. 1992). Section 230.44(1)(b) does not give the Commission authority to review decisions of the secretary or failures to make decisions as to administration of the state service having nothing to do with classification or reclassification of positions.

Seay argues, however, that the Commission's authority to prevent retaliation as a result of an appeal is necessarily implied. He points to ***Popp v. DER***, No. 88-0002-PC (WPC Mar. 8, 1989), in which the Commission concluded that it had jurisdiction to set the effective date of a reallocation decision because "the issue of effective date is part of the reclassification decision under § 230.09(2)(a), STATS., and is appealable under § 230.44(1)(b), STATS." ***Id.*** at 5. However, we do not see how retaliation *after* a reclassification decision is part of that decision. The legislature has provided a specific remedy for relief from employer retaliation in §§ 230.80-230.89, STATS. When the legislature provides an express remedy to correct a wrong, that remedy is exclusive. *See* ***County of La Crosse v. WERC***, 170 Wis.2d 155, 175, 488 N.W.2d 94, 102 (Ct. App. 1992), *rev'd on other grounds*, 180 Wis.2d 100, 508 N.W.2d 9 (1993).

II. *The § 230.85(6), STATS., Presumption.*

Seay claims that the Commission erred when it concluded that the University successfully rebutted the presumption of retaliation contained in §

230.85(6), STATS.[9] A rebuttable presumption of retaliation arises when an employer takes disciplinary action against an employee if the employee has made a protected disclosure. *Id.*

The Commission concluded that Seay's March 29, 1989 letter and July 12, 1989 complaint were protected disclosures. Seay argues that Vetter, according to his testimony, was aware of the disclosure in early 1989 so any disciplinary action occurring thereafter would be retaliatory.

It is the function of the fact-finder, not the reviewing court, to determine the credibility of witnesses. ***Wehr Steel Co. v. DILHR***, 102 Wis.2d 480, 487, 307 N.W.2d 302, 306 (Ct. App. 1981), *modified on other grounds*, 106 Wis.2d 111, 315 N.W.2d 357 (1982). The Commission noted that Vetter's testimony, while confused, established that the alleged retaliators could not have learned of Seay's

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[9] Section 230.85(6), STATS., provides:

> . . . . .
>
> (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.
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> (b) Paragraph (a) applies to a disciplinary action under § 230.80(2)(a) which occurs or is threatened within 2 years, or to a disciplinary action under § 230.80(2)(b), (c) or (d) which occurs or is threatened within one year, after an employe discloses information under § 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.

complaints before November 15, 1989. Therefore, Seay did not establish a *prima facie* case of retaliation as to any incidents which occurred before November 15, 1989. We cannot conclude that the Commission's findings are clearly erroneous. *See* § 805.17(2), STATS.

The Commission attributed the incidents which occurred after November 15, 1989, to a poor relationship between Seay and his co-workers which led to inappropriate behavior by both Seay and his colleagues. Although Seay claims that he never had a poor relationship with his colleagues, there is substantial evidence in the record which shows that Seay elicited negative responses from his co-workers because of his unfriendly attitude and pessimistic demeanor. Additionally, the Commission noted that Seay's poor relationship with his co-workers did not begin abruptly after he made his complaints, but gradually worsened during his tenure at the Arlington Research Station. We conclude that the Commission's findings are supported by substantial evidence.

. . . .

III. *Summary.*

We conclude that the secretary's denial of Seay's request that his position be reclassified was a decision appealable to the Commission pursuant to § 230.44(1)(b), STATS. The issues appealable were whether the secretary properly exercised his discretion based on Seay's duties, authority, responsibilities and other factors "recognized in the job evaluation process." Seay's claim of retaliation is not a factor recognized in the job evaluation process.

We further conclude that if Seay had a retaliation claim, his exclusive remedy was contained in § 230.85, STATS., the Whistleblower Law. However, Seay's employer rebutted the statutory presumption of retaliation, § 230.85(6), by showing that its acts or threats to act were not retaliatory or a threat to retaliate against Seay for requesting reclassification.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.