STATE OF WISCONSIN PERSONNEL COMMISSION

DAVID R. MARFILIUS,

Appellant,

v.

Chancellor, UNIVERSITY OF WISCONSIN-MADISON,

Respondent.

Case No. 96-0047-PC-ER

RULING ON MOTION TO DISMISS

This matter is before the Commission on respondent's motion to dismiss for lack of jurisdiction. The parties have been provided an opportunity to file briefs.

The complaint in this matter was filed with the Commission on April 18, 1996. Complainant alleged violation of the Family and Medical Leave Act, §103.10, Stats., and retaliation 1) for having previously filed a complaint of discrimination, 2) for having engaged in union activities, 3) for protected activities under the public employe safety and health provisions, §101.055, Stats., and 4) under the whistleblower law, §230.80, et. seq., Stats.

In his complaint, complainant described his allegations as follows:

> On March 21st 1996 I was mailed information from Julie Walsh UW Madisons legal counsel. This was in respon[s]e to Case No. 96-0026-PC-ER Marfilius vs UW-Madison (Hospital) Some of the documents sent were from my own confidential medical records at Employee Health. This was done without my consent or a court order. I believe this to be an illegal invasion of my privacy. These documents were also sent to Rita Ruona a Equal Rights Officer at the Personnel Commission. As a remedy I am requesting $10,000.00 and termination of employment for whomever was responsible for this [illegal] access of information

Respondent bases its motion to dismiss on the argument that "Complainant's allegations arise *not* from his employment with the University, but from actions taken by the University's counsel in the course of responding to Complainant's previous complaint against the University." Complainant responded by contending his claim involved respondent's "action as an employer

involving access to records employees are required to provide as a condition of employment." Complainant also contends he can provide the names of other employes "whose medical files have also been accessed."

The issue raised in this matter is very similar to the issue considered by the Commission in Larsen v. DOC, 91-0063-PC-ER, 7/11/91. In that case, the complainant sought to amend her complaint of Fair Employment Act discrimination to add an allegation that the employing agency had retaliated against the complainant by asking her irrelevant personal questions during a deposition. Respondent moved to dismiss the amendment for lack of subject matter jurisdiction. The Commission analyzed the Fair Employment Act's prohibition of employment discrimination, and specifically the reference to "terms, conditions or privileges of employment" set forth in §111.322(1), Stats:

> In the Commission's opinion, once the employer and employe become opposing litigants in a statutorily-provided proceeding before a third party agency, this context basically is not that of an employment relationship, and the employer's actions as a litigant in that litigation normally would not implicate any "terms, conditions, or privileges of employment." The proceeding may arise out of the employment, but the relationship between the parties in the conduct of the litigation is not that of employer and employe. This is illustrated by the fact that the employer has no authority to control the employe's conduct of the litigation, and that the basic framework for the parties' conduct in such proceedings is the Administrative Procedure Act (Chapter 227, stats.), §§230.44 and 230.45, stats., and Chs PC, Wis. Adm. Code. An employe's rights with regard to deposition questioning will not be found in the substantive civil service code governing the employment relationship. Rather, it will be found (as relevant here) by reference to §§PC 4.03, Wis. Adm. Code, and 804.01(3)(a), stats., pursuant to which the Commission "May make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Therefore, it is neither a term or condition of employment in the sense of a requirement, nor is it a privilege of employment in the sense of a right or advantage granted to an employe.
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> ....In addition to the rationale discussed in the preceding paragraph, the Commission notes there is a dearth of reported authority holding that litigation tactics are cognizable under the FEA or similar laws. Further, such a holding would have significant negative policy implications. If any allegedly abusive line of questioning or other litigation tactic could be the basis for a charge of FEA retaliation, this could lead to a plethora of new litigation.

In the present case, the complainant's allegation arises from information provided by respondent to the Commission (and complainant) as part of its answer to complainant's previous complaint of discrimination, Case No. 96-0026-PC-ER. The information is part of the Commission's files and its use limited to that of the Commission's investigator in preparing the initial determination in that case. The information was provided as part of the administrative proceeding, rather than as part of the ongoing employe/employer relationship between complainant and respondent. The analysis in Larsen is equally applicable to the present case.[1]

This conclusion is also consistent with the Commission's decision in Martin v. DOC, 94-0103-PC-ER, 12/22/94. In Martin, the Commission dismissed complainant's allegations of discrimination/retaliation arising from the content of an answer filed by complainant's employing agency in a case to which complainant was not a party. In its decision, the Commission noted the following:

> Here, the conduct complained of, i.e. statements made by respondent's counsel in its answers to Ms. Neal's claim, also cannot be said to be part of the employment relationship existing between the respondent and Mr. Martin. The answers did not serve as the basis for imposing discipline against the complainant, nor is there any contention by the complainant that the comments were disseminated by respondent in the workplace setting. Here, the complainant only gained access to the answer by filing an open records request.

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[1]Larsen dealt solely with allegations under the Fair Employment Act. In the instant case, complainants' allegations also seek to invoke the public employe safety and health provisions as well as the whistleblower law. The whistleblower law prohibits any "disciplinary action," defined in §230.80(2), Stats., taken in retaliation for a protected activity. §230.83, Stats. However, to meet the definition of "disciplinary action," the employer's act must be related to the complainant's employment status, Kuri v. UW-Stevens Point, 91-0141-PC-ER, 4/30/93, and must have a substantial or potentially substantial negative impact on the employe. Vander Zanden v. DILHR, Outagamie County Circuit Court, 88 CV 1223, 5/25/89; affirmed by Court of Appeals, 88 CV 1223, 1/10/90. Under the public employe safety and health provisions, §101.055, Stats., the employer may not "discharge or otherwise discriminate." Neither the whistleblower law nor the public employe safety and health provisions is more extensive than the Fair Employment Act with respect to the question raised by the present case.

Here, respondent's conduct of providing the Comission a copy of certain medical records was not the basis for imposing discipline and there has been no contention that the information was disseminated in the workplace setting.

For the reasons set forth in Larsen and Martin, the Commission issues the following

ORDER

Respondent's motion to dismiss for lack of subject matter jurisdiction is granted and this matter is dismissed.

Dated: May 14, 1996 STATE PERSONNEL COMMISSION

LAURIE R. MCCALLUM, Chairperson

KMS:kms
K:D:temp-5/96 Marfilius

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

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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