STATE OF WISCONSIN PERSONNEL COMMISSION

DAVID BRUFLAT,
Complainant,

v.

Secretary, DEPARTMENT OF COMMERCE,
Respondent.

Case Nos. 96-0091, 96-0142, 97-0070-PC-ER

RULING ON MOTIONS TO DISMISS AND MOTION TO COMPEL DISCOVERY

On June 19, 1998, respondent filed nine motions with the Commission. On June 23, 1998, complainant filed a motion to compel discovery with the Commission. On June 29, 1998, the Commission convened a status conference with Laurie R. McCallum, Chairperson and designated hearing examiner in the above-referenced matters, presiding. The hearing examiner indicated at this conference that she would rule on the motions at a conference scheduled to be conducted on July 6, 1998, but requested that the parties brief two legal issues and submit those briefs to her earlier on July 6.

At the conference on July 6, 1998, the hearing examiner ruled on the motions which did not require Commission action. Essentially, this ruling indicated that respondent's motions 2, 3, 4, and 5 (relating to requests that hearing be held on the issue of probable cause rather than on the merits) were denied; that respondent's motions 1, 6, and 7 (motions to dismiss based on failure to satisfy the definition of "disciplinary action" under the whistleblower law; and failure to satisfy the definition of "sexual harassment" under the Fair Employment Act) required Commission action and would be addressed in this ruling; that respondent's motion 8 related to complainant's motion to compel discovery which would be addressed in this ruling; and that respondent's motion 9 (relating to a request for a finding that frivolous

whistleblower complaints had been filed) would more appropriately be addressed after a hearing.

The two legal issues the hearing examiner directed the parties to address are as follows:

> 1. Whether the actions described in the issues stated in the report of the prehearing conference of January 26, 1998, relating to the allegations of whistleblower retaliation, satisfy the definition of "disciplinary action" set forth in §230.80(2), Stats.
>
> 2. Whether Mr. Lippitt's actions of May 15, 1997, if assumed to be as alleged in the complaint in Case No. 97-0070-PC-ER, constitute sexual harassment within the meaning of the Fair Employment Act.

The issues to which the parties agreed at the prehearing conference of January 26, 1998, are reflected in the report of such conference as follows (certain numbering has been added for ease of reference):

Case No. 96-0091-PC-ER:

> Whether respondent retaliated against complainant due to his participation in activities protected under the Whistleblower Law in regard to:
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> 1A. the meeting on July 16, 1996;
>
> 1B. the conversation with Mr. Halverson which occurred on July 16, 1996; or
>
> 1C. the work assignment memo dated July 17, 1996.

Case No. 96-0142-PC-ER:

> Whether respondent retaliated against complainant in violation of the Whistleblower Law with respect to the following actions:
>
> 2A. respondent asking complainant for additional information about his inventory list;
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> 2B. respondent's denial of complainant's renewed request for relocation to Hayward, WI;

2C. respondent's processing of complainant's travel voucher for the month of August/September 1996; and

2D. respondent's decision to change the duties of complainant's position.

Case No. 97-0070-PC-ER:

3A. Whether respondent discriminated against complainant, on the basis of sex, in regard to Mr. Lippitt's actions on May 15, 1997.

3B. Whether respondent retaliated against complainant, in violation of the Whistleblower Law, with respect to Mr. Lippitt's actions of May 15, 1997.

An employee is protected from retaliatory action under the whistleblower law (Ch. 230, Subch. III, Stats.). Section 230.80(8), Stats., defines a "retaliatory action" as a "disciplinary action" taken by an employer because an employee participated in a protected activity. Section 230.80(2), Stats., defines a "disciplinary action" as follows:

> "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 not limited to any of the following:
>
> (a) Dismissal, demotion, transfer, removal of any duty assigned to that 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.

In *Vander Zanden v. DILHR, 84-0069-PC-ER, 8/24/88;* aff'd, *Vander Zanden v. DILHR*, 88CV1223, Outagamie Co. Cir. Ct., 5/25/89; aff'd *Vander Zanden v. DILHR*, 88CV1223, 1/10/90, the reviewing court stated as follows:

> The commission examined the language of the statute and also applied the doctrine of ejusdem generis. This rule of statutory construction applies not only when a general term follows a list of specific things, but also where, as here, a list of specific words follows a more general term, Swanson v. Health and Social Services Dept. 105 Wis. 2d 78, 85, 312 N.W.2d 833 (Ct. App. 1981). The rule provides that the general term applies only to things that are similar to those specifically enumerated. All of the enumerated disciplinary actions or penalties have a substantial or potentially substantial negative impact on an employee. The limitations imposed on Plaintiff's contacts with the Oshkosh Job Service office, while perhaps annoying and perhaps an example of poor management practices bordering on childishness, do not rise to the level of a penalty of a disciplinary action akin to those enumerated in 230.80(2). The common understanding of a penalty in connection with a job related disciplinary action does not stretch to cover every potentially prejudicial effect on job satisfaction or ability to perform one's job efficiently. Plaintiff was not the "victim" of retaliation. His disclosure resulted in no loss of pay, position, upgrade or transfer or other consequences commonly associated with job discipline.

Complainant characterized the allegation underlying **issue 1A** in his complaint as follows (see unperfected complaint filed July 24, 1996):

> On July 12th I was directed to be in Ben Burks office Tuesday July 16th 1:00 pm for a meeting, I was told I could have Union Representation by supervisor Sam Solberg. I was not informed what the meeting was about or what to prepare for just that I could have union representation. In the meeting I was questioned about my activities and non-agreement with Program Manager Halversons new audit procedures.

Even if the intent of this meeting had been to investigate complainant's work performance, this decision to investigate and to hold an investigatory meeting would not qualify as a "disciplinary action." *See, Sadlier v. DHSS*, 87-0046, 0055-PC-ER, 3/30/89. If complainant is asserting that the questions asked of him at the meeting constituted verbal harassment within the meaning of §230.80(2)(a), Stats., the

allegation, even when read in a light most favorable to complainant, does not state or imply any language or conduct egregious enough to have a substantial negative impact on complainant's conditions of employment. In order to qualify as harassment or to rise to the level of a penalty comparable to those listed in §230.80(2), Stats., conduct or language, consistent with *Vander Zanden,* must go beyond the simply uncomfortable or inconvenient. The questions asked of complainant in this meeting do not and, as a consequence, do not qualify as verbal harassment within the meaning of §230.80(2)(a), Stats.

Complainant characterized the allegation underlying **issue 1B** in his unperfected complaint as follows:

> Mr. Halverson also questioned me about a request by the Sauk County Chiefs Association to have a speaker at their meeting on the 18th of July. I informed him that their request was to inform them as to what changes are being made to the 2% dues program. He continued to prod me for questions, I informed him and Mr. Burks this is privileged information under protection of the whistleblower act and to contact my attorney. He then continued with "does it have anything to do with your employment here." I asked my union steward Marty Kehrein how do I answer he said; Same Answer.

The conclusion in regard to this allegation is the same as that reached in regard to the allegation underlying issue 1A. Such questions about work-related matters, presented in the manner that complainant has represented they were presented, do not rise to the level of a "disciplinary action."

Complainant characterized the allegation underlying **issue 1C** in his unperfected complaint as follows:

> The following day I received a memo dated July 17, 1996 from Ben Burks directing me to perform certain activities and due dates.

Complainant also attached a copy of the memo which set forth certain work assignments for him and other employees and deadlines for their completion. There is

no contention here that these work assignments were not related to the duties and responsibilities of appellant's position. What complainant does contend is that certain language in this memo essentially removed duties and responsibilities from his position. However, the only actual change in duties or responsibilities which can reasonably be implied from the language of the complaint is that relating to complainant having less independence in setting the schedule for his audits of fires departments. This is not a sufficiently significant change to qualify as a "removal of duties" or "reassignment" within the meaning of §230.80(2), Stats. This allegation does not reasonably implicate any other component of the statutory definition and, as a consequence, it is concluded that this allegation does not qualify as a "disciplinary action."

Complainant characterized the allegation underlying issue **2A** in his complaint as follows:

> The department requested that all employees file inventories as a result of the audit bureaus report. Although he complied with this request Mr. Bruflat was questioned on several occasions and asked for additional information which he did not have available to him.

The conclusion in regard to this allegation is the same as that reached in regard to the allegations underlying issues 1A and 1B. Such questions about work-related matters, presented in the manner that complainant has represented they were presented, do not rise to the level of a "disciplinary action."

Complainant characterized the allegation underlying **issue 2B** in his complaint as follows:

> All employees within Fire Protection had been granted home stations in 1994. Mr. Bruflat was approved for Hayward. Due to personal reason Mr. Bruflat did not make the move to his home area at that time. When he requested to do so now he was denied.

Although such a denial does not have quite as serious an impact on the incidents of employment as the denial of a transfer or the denial of a reassignment, it does have a

substantial negative impact on a condition of employment, i.e., the location from which an employee performs his job. This is sufficiently akin to a transfer or reassignment or to their denial to qualify as a "disciplinary action" within the meaning of §230.80(2), Stats.

Complainant characterized the allegation underlying **issue 2C** in his complaint, dated November 4, 1996, as follows:

> Mr. Bruflat's August and September travel vouchers have not been processed.

A delay in processing a travel voucher does not have the permanence or the long-term impact of a reduction in base pay or a failure to increase base pay, two penalties cited in §230.80(2), Stats., as constituting "disciplinary actions" within the meaning of the whistleblower law. In addition, such an action is not equivalent to the permanent loss of a day's pay which was concluded by the Commission in *King v. DOC*, 94-0057-PC-ER, 3/22/96, to constitute such a disciplinary action. This allegation is not entitled to protection under the whistleblower law.

Complainant characterized the allegation underlying **issue 2D** in his complaint as follows:

> In the discussions with Mr. Bruflat and his union representative, Marty Kehrein, management is now saying that Mr. Bruflat's position is going to be eliminated and replaced with a position for which he would need to compete.

It appears to be undisputed that a decision has not been made by respondent that complainant would be required to compete for his position. However, it also appears to be undisputed that a decision has been made to change the duties and responsibilities of appellant's position. Such an action could be equivalent to the removal of a duty from a position or to a reassignment, two penalties cited in §230.80(2), Stats., as constituting disciplinary action within the meaning of the whistleblower law. Such a conclusion is consistent with the Commission's decision in *King, supra,* at page 9.

Complainant further argues, in relation to those allegations involving meetings at which complainant was permitted to have a union representative present (presumably those underlying issues **1A and 1B**), that respondent "should be estopped from arguing these meetings did not have the threat for discipline" and that "[a]ll meetings in which the complainant was allowed a union steward are considered to be a predisciplinary or investigatory meeting which can result in discipline," and, as a consequence, should themselves be considered "disciplinary actions" within the meaning of the whistleblower law. (Complainant's brief filed July 6, 1998, at page 4). However, consistent with the Commission's decision in *Sadlier v. DHSS,* 87-0046, 0055-PC-ER, 3/30/89, a decision to investigate an incident or the conduct of a predisciplinary or investigatory meeting, in and of themselves, do not constitute disciplinary action within the meaning of §230.80(2), Stats., since they have no inherent negative impact on an employee. *Sadlier, supra*, at page 46.

The same fact situation serves as the basis for **issues 3A** and **3B**. Complainant characterizes this fact situation in his complaint as follows:

> On Thursday May 15, 1997 at approximately 1:30 pm Program Manager John Lippitt Had called for a meeting for me to explain 2% Fire Program Issues that he did not understand. In the meeting were Luann Robb, Supervisor Solberg, Myself and Program Manager Lippitt. I proceeded to explain procedures to Mr. Lippitt and could see he was frustrated by knowledge of statutory requirements of the Fire Program. As the meeting continued I attempted to use a map tack board I created to assist in explaining the Program issues to Mr. Lippitt. The map was behind the desk resting on the chair back, I was seated in the chair, Mr. Lippitt was seated on the drawer side of the desk. I continued my presentation and answered Mr. Lippits Questions to the best of my ability. Luann had steped to the other side of a partition momentarily when Mr. Lippitt Looked at me and with his legs crossed left foot on right knee and hands crossed in crotch made the statement "How Long Are we going to keep Choking this Chicken Dave. Then he repeated the statement using hand gestures.

It is undisputed that "choking a chicken" is a vulgar reference to masturbation.

In the allegation underlying issue 3A, complainant asserts that the two statements made by Mr. Lippitt constitute sexual harassment. The Fair Employment Act defines sexual harassment as follows:

> **111.32(13)** "Sexual harassment" means unwelcome sexual advances, unwelcome requests for sexual favors, unwelcome physical contact of a sexual nature or unwelcome verbal or physical conduct of a sexual nature. "Sexual harassment" includes conduct directed by a person at another person of the same or opposite gender. "Unwelcome verbal or physical conduct of a sexual nature" includes but is not limited to the deliberate, repeated making of unsolicited gestures or comments of a sexual nature; the deliberate, repeated display of offensive sexually graphic materials which is not necessary for business purposes; or deliberate verbal or physical conduct of a sexual nature, whether or not repeated, that is sufficiently severe to interfere substantially with an employe's work performance or to create an intimidating, hostile or offensive work environment.
>
> **111.36(b)** . . . substantial interference with an employe's work performance or creation of an intimidating, hostile or offensive work environment is established when the conduct is such that a reasonable person under the same circumstances as the employe would consider the conduct sufficiently severe or pervasive to interfere substantially with the person's work performance or to create an intimidating, hostile or offensive work environment.

The two comments made here, although inappropriate in a work setting, are not sufficiently severe or pervasive to satisfy the statutory definition of sexual harassment. This conclusion is consistent with that reached in *Harris v. Forklift Sys.*, 510 U.S. 17 (1993), where the Court held that when determining whether an environment is hostile or abusive, all circumstances must be considered, and these may include: the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating or a mere offensive utterance; and whether it unreasonably interferes with the employee's work performance. The two statements made here were mere offensive utterances which occurred on the same day. This would not come close to meeting the standard set by either the statutory language or the court decisions interpreting this language and similar language. *See, also, Meritor Savings Bank v.*

Vinson, 477 U.S. 57 (1986); *Kannenberg v. LIRC,* 213 Wis.2d 373 (Ct. App. 1997); and *Zabkowicz v. West Bend*, 589 F.Supp 780 (W.D. Wis. 1984).

In contending, in the allegation underlying **issue 3B**, that the two statements made by Mr. Lippitt constitute whistleblower retaliation, complainant represents that the statements were offered as a criticism of complainant's work performance. Even if this were shown to be a reasonable characterization of these statements, the possible connection to a future performance assessment or personnel action is too tenuous and conjectural to support a conclusion that they rise to the level of a penalty on a par with those enumerated in §230.80(2), Stats. In *Sadlier v. DHSS,* 87-0046, 0055-PC-ER, 3/30/89, the Commission held that even though an investigation of a work incident could lead to the imposition of discipline, the investigation itself did not qualify as a disciplinary action within the meaning of the whistleblower law. This situation is parallel. Even though the statements by Mr. Lippitt could have a future impact on complainant's employment, they themselves do not have the type of impact envisioned by the whistleblower law. In addition, these two statements, standing alone, are not sufficiently severe or pervasive to support a conclusion that the conditions of complainant's employment were affected to the extent required for a finding of verbal harassment within the meaning of §230.80(2)(a), Stats.

Finally, in *Seay v. UW & DER*, 89-0082-PC-ER, 3/31/94, the Commission held that, even though an incident of alleged retaliation, standing alone, may not support a finding that disciplinary action within the meaning of the whistleblower law had been taken, the cumulative effect of a series of incidents could be considered in determining whether verbal or physical harassment within the meaning of §230.80(2)(a), Stats., had occurred. The allegation underlying issue **3B** is the only allegation of verbal harassment which possesses some of the attributes of harassing conduct, i.e., a statement with inappropriate content for a work setting which was made more than once and with offensive hand gestures possesses some of the qualities one would expect in conduct

found to be harassing. However, the remaining allegations of verbal harassment, i.e., those underlying issues **1A, 1B, and 2A**, are so weak, when viewed in the context of the requirements for a finding of harassment, that their tendency to lend strength to the allegation underlying issue **3B** is so minimal as to be almost non-existent. The Commission concludes that the cumulative effect of these allegations of verbal harassment is insufficient to support a finding that the requirements of §230.80(2)(a), Stats., have been met.

It should also be noted here that there is precedent for dismissing certain issues prior to hearing on the basis that the supporting allegations fail to meet the requirements of the whistleblower law, *King v. DOC*, 94-0057-PC-ER, 3/22/96; or the requirements of the Fair Employment Act, *Winter (Kaczik) v. DOC*, 97-0149-PC-ER, 5/6/98.

In view of the conclusions reached above, complainant's motion to compel discovery is granted only as to those requests which are reasonably related to the issues which remain, i.e., issues **2B** and **2D.**

Finally, at the status conference convened on July 6, 1998, a question was raised as to the timing of the dismissal of Case Nos. 96-0091-PC-ER and 97-0070-PC-ER. The Commission concludes that these cases should be dismissed as a part of this ruling, and reminds the parties that there is precedent for requesting that a reviewing court hold its proceedings in abeyance until the completion of action before the Commission.

ORDER

Respondent's motions to dismiss are granted as to Case No. 96-0091-PC-ER (issues 1A, 1B, and 1C); as to issues 2A and 2C which are a part of Case No. 96-0142-PC-ER; and as to Case No. 97-0070-PC-ER (issues 3A and 3B), and are otherwise denied. Complainant's motion to compel discovery is granted as to those discovery requests pertaining to the remaining issues, i.e., issues 2B and 2D. Respondent is directed to respond to such discovery requests on or before July 13, 1998.

Dated: July 7, 1998

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

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