

MICHAEL W. PFEFFER
Complainant,

v.

**President, UNIVERSITY OF WISCONSIN
SYSTEM [Parkside]**
Respondent.

**RULING ON MOTION
TO DISMISS**

Case No. 96-0109-PC-ER

On November 22, 1996, respondent filed a motion to dismiss this case. The schedule for filing arguments relating to this motion was completed on February 18, 1997. Any factual findings made below are based on information provided by the parties, appear to be undisputed, and are made solely for the purposes of deciding this motion.

On August 26, 1996, complainant filed this charge of discrimination with the Commission alleging that he had been retaliated against for engaging in protected whistleblower and fair employment activities. In his charge, complainant described the allegedly retaliatory actions which had been taken against him as follows:

Based on discussion with my Supervisor at UW-Parkside, Mr. Pat Wood, the Physical Plant Administration had been planning "for a couple of years" to eliminate a Custodial Supervisor position and replace same with a Custodian 3 position. The "planning" appears to have progressed to the implementation stage, as the State Civil Service Exam was scheduled for June 8, 1996, and same was taken by myself and other custodians from UW-Parkside. Results of the exam were registered 6/19/96, and my score, per enclosed copy of notice, was enough to rank me 20th in the state. On or about July 17, 1996, Supervisor Wood held a custodial meeting at which he announced that the position of Custodian 3 for UW-Parkside was no longer considered viable as the superintendent, Mr. Terry Kilmer, decided "this wasn't the way to go." I believe I was unjustly denied a chance to be considered for this position based on the following: A) Involvement with a letter

(copy enclosed) written to Katharine C. Lyall, President of the University of Wisconsin System, dated June 24, 1996, informing her of perceived economic inequities at UW-Parkside. Her response (copy enclosed) confirms discussion between herself and Dr. William Streeter, Assistant Chancellor for Fiscal Affairs at UW-Parkside, the office which oversees the Physical Plant. My inference is that the discussion included all Physical Plant Administration; B) Also, I believe that Superintendent Kilmer may have it in for me personally for having initiated a Small Claims Court action against his former employer, King Ehrlich Real Estate, of which, I believe, he was "Property Manager" at the time, in the early 1980's. Whatever his title, it was Mr. Kilmer who appeared at the hearing.

My basic argument is: How can so much time be spent in planning the addition of a position, including actually posting an exam notice, taking of an exam, and then allowing even several more weeks after people took the exam.....How can all this time and effort and planning be expended only to reach such an abrupt conclusion that "the position of Custodian 3 isn't the way to go?" I believe it was because my name was on the eligibility list and UW-Parkside Physical Plant Administrators didn't want me to have the position.

The letter to Ms. Lyall to which complainant referred in his charge stated as follows, in pertinent part:

Sometimes in a very large organization, the people on the highest level are not always aware of what is befalling those who occupy the lower echelons. Hence, the purpose of this letter to you from the undersigned custodians at UW-Parkside.

By way of background, a little over a year ago, the UW-Parkside Physical Plant, in conjunction with University administration, unilaterally decided that all third shift custodians would be transferred to the day shift. Only the graciousness of Chancellor Smith can be credited to delaying implementation until this July 1, 1996. Ostensibly, this change in work shifts was for cost savings for the Physical Plant, and our opinion or input on the matter was never given consideration or value!

At that time, a year ago, there were approximately 25 third shift custodians. During discussions and voting among just the custodians, fully 80% were opposed to transfer to days. Less than one-half dozen actually expressed a preference for days.

At this point, it is important to relate the fact that all of these third shift custodians were hired specifically to work that shift. It was a job requirement!

Well, what does all this mean? By being transferred to the day shift, each custodian loses over \$1000 from their paychecks per year. The previous good faith negotiation perquisites of night differential pay and paid one-half hour lunch break are nullified by this transfer. Incidentally, the night differential and paid half-hour lunch are the only perquisites of this third shift position.

Thus, our questions to you, and indirectly to Governor Thompson, are:

1. Why is it that at UW-Parkside, only the third shift custodians actually lose money from their paychecks, and not anyone else on campus?
2. What happened to Governor Thompson's precept of making "cuts at the top" instead of forcing economic hardship on the lowest paid employees?
3. Why couldn't a more progressive, democratic, fair approach (which the State of Wisconsin is known for) been implemented, such as voluntary change or attrition?
4. Finally, what about the most basic of problems, such as custodial efficiency of working in occupied buildings and increasing the potential for disturbing the students and faculty? What about the increased potential for safety problems of wet floors, etc." And what about the 20-25 more vehicles on the road during peak day time driving periods and taking up 20-25 more stalls from student parking?

Please understand, President Lyall, that we custodians, in our economic strata, know about and appreciate "saving money" and "belt tightening." What we do not understand is why we are the only group which will see a net loss in our paychecks and be forced to rearrange our personal lives because of the decision of some much higher paid administrators.

We are looking for your help and Governor Thompson's in this matter. Perhaps we could meet with your personal representative to exchange our thoughts and, most importantly, our ideas. We look

forward to your response and advise, and thank you, in advance, for your time and consideration regarding this matter.

There were twelve signatories to this letter, including complainant.

In a letter dated July 23, 1996, Ms. Lyall responded to the June 26 letter as follows, in pertinent part:

I appreciate the concerns you have expressed in your correspondence to me of June 24, 1996. I also understand your dismay at sacrificing the night differential pay adjustment for working the third shift. It is my understanding from information provided by Assistant Chancellor William Streeter that the yearly loss of income per custodian due to this change is in the \$350 to \$500 range. Dr. Streeter further indicated that to ease the transition, the fee for parking was eliminated for the summer and reduced to half for the year 1996-97. Further, a year's notice was provided to affected individuals to allow time for making any living adjustments as necessary. It is my understanding that he, the Director and Assistant Director of Physical Plant, and the custodial supervisor held a number of meetings throughout 1995-96 to prepare the crew for the switch, as well as to listen to concerns and suggestions from the custodial staff.

I believe that in reducing the UW-Parkside budget, some positions were eliminated entirely, while others were reduced in time. The University followed a consultative process whereby each governance group was represented on a campuswide committee to identify potential savings while strengthening the core mission of UW-Parkside. In the custodial area, the night differential savings was \$11,600 while the elimination of a full-time supervisory position amounted to \$34,330. Since it is difficult for a small campus to provide supervision for more than one shift, the decision was made to move the evening crew to first shift to save on supervisory costs and improve supervision. Unfortunately, all required budget cutting affects people directly in a people organization like the University. In fact, UW-Parkside did meet the guidelines for cutting administrative expenses in the budget reductions reported for the biennium 1995-97. It is my hope that it will not be necessary to further reduce budgets in the 1997-98 biennium.

I know Chancellor Smith and Dr. Streeter are concerned about the disruption to your lives and loss of the night time differential. I hope you will work with them to work through issues of mutual concern during this transition period.

FEA Retaliation

Respondent contends that complainant has failed to state a cognizable fair employment retaliation claim pursuant to §111.322, Stats., since he has failed to identify a protected fair employment activity in which he has engaged. Although the Commission recognizes that the pleading requirements for a complaint of discrimination/retaliation are extremely minimal (*See, e.g., Goodhue v. UWSP*, 82-PC-ER-24, 11,9,83), the issue currently before the Commission is not limited to a consideration solely of the language of the pleadings. Respondent has filed a motion and complainant has been given an opportunity to respond to the motion. In its motion, respondent has specifically cited complainant's failure to identify a protected fair employment activity as the basis for its argument that this aspect of complainant's charge should be dismissed. Despite this, complainant did not identify in his written response to the motion any protected fair employment activity, and none can be fairly implied from any of the information complainant has provided to the Commission to date. As a result, complainant's fair employment retaliation charge should be dismissed.

Whistleblower retaliation

Respondent contends that complainant's whistleblower retaliation charge should be dismissed due to the failure of both the alleged disclosure and the alleged retaliatory action to satisfy statutory requirements.

Section 230.83, Stats., provides protection against retaliation to an employee who discloses certain information. Section 230.80, Stats., provides the following relevant definitions:

(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. . . .

(7) “Mismanagement” means a pattern of incompetent management actions which are wrongful, negligent or arbitrary and capricious and which adversely affect the efficient accomplishment of an agency function. “Mismanagement” does not mean the mere failure to act in accordance with a particular opinion regarding management techniques. . . .

(9) “Substantial waste of public funds” means an unnecessary expenditure of a substantial amount of money or a series of unnecessary expenditures of smaller amounts of money.

Complainant is apparently relying upon the June 26 letter to Ms. Lyall as his protected disclosure. In his response to the motion, complainant states that this letter did not allege violation of a law, rule or regulation, but was intended as a request for a meeting with Ms. Lyall or her representative at which possible violations of law, rules or regulations such as those relating to the employment of limited term employees would be disclosed. In his response, complainant also states that, “. . . while our letters to President Lyall may not be considered ‘whistleblowing’ as such. . . .”

It is clear that the June 26 letter to Ms. Lyall did not relate to a violation of a state or federal law, rule or regulation; a substantial waste of public funds; or a danger to public health and safety within the meaning of §230.80(5), Stats. It is also apparent that the letter does not allege a “pattern” of “incompetent management actions,” but instead relates to a disagreement by certain UW-Parkside custodians with a decision by management to transfer all third shift custodians to the day shift. This disagreement involves a “failure to act in accordance with a particular opinion regarding management techniques” within the meaning of §230.80(7), Stats., and does not, therefore, satisfy the disclosure requirements of the whistleblower law.

Complainant also appears to argue that, even though the June 26 letter did not itself constitute a whistleblower disclosure, it involved in part a request for a meeting

with Ms. Lyall to discuss a pattern of mismanagement at UW-Parkside and, therefore, constituted a protected disclosure. However, as the Commission articulated in *Elmer v. DATCP*, 94-0062-PC-ER, 11/14/96, a written request for a meeting to discuss employee concerns not specifically articulated in the writing does not constitute a protected disclosure.

For these reasons, complainant's whistleblower claim must be dismissed.

Small claims action

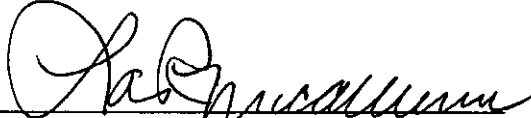
Complainant also charges that he was retaliated against because of a small claims action he filed against a private business during the early 1980's. This action, as described by complainant, clearly does not satisfy the statutory requirements of a protected fair employment activity or a protected whistleblower activity and is not cognizable here.

ORDER

Respondent's motion to dismiss is granted and this complaint is dismissed.


Dated: March 14, 1997

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

LRM
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DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

Parties:

Michael W. Pfeffer
2214 Loraine Avenue
Racine WI 53404

Katharine Lyall
President, UW System
1720 Van Hise Hall
1220 Linden Drive
Madison, WI 53706

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