STATE OF WISCONSIN PERSONNEL COMMISSION

**PAUL H. PROCHNOW,**
***Complainant,***

**v.**

**President, UNIVERSITY OF WISCONSIN SYSTEM (La Crosse),**
***Respondent.***

Case No. 97-0008-PC-ER

RULING ON RESPONDENT'S MOTION TO DISMISS CERTAIN CLAIMS

This case is before the Commission to resolve respondent's motion to dismiss all allegations of retaliation under the Fair Employment Act (FEA) (Subch. II, Ch. 111, Stats.) and under the Whistleblower law (§230.80, Stats., et. seq.). Respondent did not move for dismissal of the disability discrimination claims under the FEA. The parties filed written arguments, with the final argument received by the Commission on August 25, 1998. The facts recited below appear to be undisputed unless specifically noted to the contrary.

FINDINGS OF FACT

1. This complaint was filed on January 15, 1997.

2. A statement of the hearing issues was proposed at a prehearing conference held on May 14, 1998, as noted below. (See, Conference Report dated 5/14/98.)

> Whether respondent discriminated against complainant because of his handicap and/or retaliated against complainant because of his participation in activities protected under the Fair Employment Act (FEA) and/or because of his participation in activities protected under the Whistleblower Law in regard to the following alleged adverse actions:
>
> a. Respondent's request on April 4, 1996, that complainant undergo an evaluation by Dr. Le Page.
> b. Dr. Le Page's comment during the evaluation on April 15, 1996, to the effect that complainant was a loner, a loose canon and an odd duck.
> c. Harassing working environment alleged as being comprised of the following events:

i. Meetings of 3/14/96 and 4/4/96, regarding complainant's work performance.
ii. Alleged verbal reprimand on 3/28/96, regarding the snow-day call taken by complainant;
iii. Disciplinary meeting on 4/17/96, regarding complainant's missed gas meter readings;
iv. 7/10/96, verbal reprimand for the empty boiler;
v. 10/3/96, meeting attended by complainant, his supervisors and his psychologist;
vi. The alleged "gag order" of 10/9/96; and
vii. 12/96, handling of the obesity comment.

## OPINION

FEA Retaliation

Respondent contends all claims of FEA Retaliation should be dismissed because complainant did not engage in an activity protected under the FEA (§111.322(2m) or (3), Stats.). (Resp.'s initial brief, pp. 2-3.) Complainant contends he engaged in an activity protected under the FEA on May 2, 1996. The referenced events were described in the Initial Determination (Finding of Fact 12) as shown below in pertinent part:

> On May 2, 1996, complainant wrote a list of the personal problems he experienced and provided the list to Mr. Goodno. (Respondent's letter 3/20/97, Attachment 3.) According to complainant, he asked Mr. Goodno to stop the "probe" into complainant's mental health at the same time as he provided the list. Mr. Goodno does not recall complainant addressing "mental health concerns" when he tendered the list . . .

Complainant contends the above-noted event is sufficient to find that he participated in an activity protected under the FEA. His argument is shown below in pertinent part (Comp.'s brief, pp. 1-2).

> [A] meeting occurred on May 2, 1996, between Prochnow and his supervisor, Robert Goodno. This meeting . . . had been preceded by a number of meetings between Prochnow and management in his department. One meeting, April 4, 1996, resulted in a request by management that Prochnow take a "test" through EAP. At the May 2nd meeting, Prochnow will testify that he told Goodno to

> stop his probe into Prochnow's mental health. However, this request met with further harassment by management.
>
> This conduct on Prochnow's part constitutes opposition to a discriminatory practice. Prochnow contends that this opposition to a discriminatory practice caused further harassment by management.
>
> As is well established in discrimination law, the opposition does not have to take the form of the filing of a complaint or participation in a proceeding. Rather, to encourage the use of self help by employees in their relationship with the employers, the law recognizes the ability of an employee to express directly to the employer their opposition to a discriminatory practice and receive protection for such an assertion. This is what occurred with Mr. Prochnow.

Respondent disagreed with complainant's legal analysis, providing the following reply, in pertinent part (reply brief, pp. 1-2):

> Complainant argues that by opposing an evaluation of his ability to undertake the job-related responsibilities of his employment he opposed a discriminatory practice. As a matter of law, respondent's actions with respect to the evaluation of the complainant cannot constitute employment discrimination.. Materials submitted in this case . . . clearly established that complainant was aware of respondent's concerns with his ability to adequately undertake job related responsibilities. The FEA in absolutely unequivocal terms states that it is not employment discrimination to evaluate an individual's ability to "adequately undertake the job-related responsibilities of a particular job." §111.34(2)(b), Stats. Therefore, complainant's "opposition" to this evaluation, if it in fact actually occurred, cannot, as a matter of law, constitute what complainant refers to as "opposition to a discriminatory practice."
> Complainant has neither identified a protected fair employment activity nor can one be fairly implied. Nothing establishes the required causal connection between the protected activity and an adverse employment decision. *Acharya v. Carroll*, 152 Wis.2d 330, 340, 448 N.W.2d 275, 280 (Ct. App. 1989). As a result, complainant fair employment retaliation charge must be dismissed.

The Commission agrees with complainant that his (alleged) request on May 2, 1996, for respondent to stop the "probe" into his mental health potentially could be characterized as opposing a "discriminatory practice" within the meaning of §111.322(3), Stats. Respondent's assertion that a review of complainant's mental health status was necessary due to work performance issues is a core dispute in this case. Complainant felt such "probe" was

unwarranted, unnecessary and motivated by discrimination or retaliation. It would be improper to resolve a dispute of this nature in the context of the present motion.

The alleged date of complainant's participation in an activity protected under the FEA was May 2, 1996. It cannot be said that a causal connection exists between complainant's participation in a protected activity and events prior to May 2, 1996. Accordingly, respondent's motion to dismiss the FEA Retaliation claims is granted with respect to events alleged to have occurred prior to May 2, 1996, and is denied as to events occurring on or after May 2, 1996.

Whistleblower Retaliation

Complainant's disclosure protected under the Whistleblower law is claimed to have occurred on September 5, 1995. Complainant contends (and respondent disputes) that complainant's supervisor became aware of the complainant's participation in the protected activity on or after March 1, 1996, when certain procedural changes were brought to the supervisor's attention by memo dated March 1, 1996. All alleged adverse actions occurred after March 1, 1996.

Section 230.85(1), Stats., provides that a whistleblower complaint must be filed "within 60 days after the retaliatory action allegedly occurred or was threatened or after the employe learned of the retaliatory action or threat thereof, whichever occurs last." The complaint in this case was filed on January 15, 1997. The applicable sixty-day period commenced on November 16, 1996 and ended on January 15, 1997. The only allegation occurring within this 60-day period is respondent's handling of the obesity comment in December 1996. According to complainant, on or about December 18, 1996, he heard a coworker make an unkind comment about an overweight female coworker in front of a group of people. He reported the comment to his supervisor who then "turned this around" on complainant with a reprimand for reporting the incident. (Respondent disputes that a reprimand was given.)

Complainant contends all alleged adverse actions survive the 60-day time period for filing a Whistleblower complaint because he is alleging a continuing violation. The Commission addressed the continuing violation theory in *Tafelski v. UW (Superior)*, 95-0127-

PC-ER, 3/22/96, wherein the seventh circuit's guidance in *Selan v. Kiley*, 59 FEP Cases 775, 778 (7th Cir., 1992) was adopted. Quoting from *Selan*, the Commission stated in *Trafelski* (starting on p. 19) as follows (bold emphasis added):

> The continuing violation doctrine allows a plaintiff to get relief for a time-barred act by linking it with an act that is within the limitations period. For purposes of the limitations period, courts treat such a combination as one continuous act that ends within the limitations period. This court most fully addressed the continuing violation doctrine in *Steward v. CPC International, Inc.*, 679 F.2d 117 [33 FEP Cases 1680] (7th Cir. 1982). In *Stewart*, we discussed three viable continuing violation theories . . . **the first theory** stems from "cases, usually involving hiring or promotion practices, where the employer's decision making process takes place over a period of time, making it difficult to pinpoint the exact day the 'violation' occurred." *Id.*, at 120 . . . **The second theory** stems from cases in which the employer has an express, openly espoused policy that is alleged to be discriminatory. *Id.* at 121. . . . **The third continuing violation theory** stems from cases in which "the plaintiff charges that the employer has, for a period of time, followed a practice of discrimination, but has done so covertly, rather than by way of an open notorious policy . . . In such cases the challenged practice is evidenced only by a series of discrete, allegedly discriminatory, acts." *Id.* . . .

Complainant conceded that the first and second theories noted above are inapplicable to his case. (Complainant's initial brief, p. 2.) Accordingly, the focus is on the third theory, which the Selan court described as shown below. This approach was adopted by the Commission in *Trafelski*.

> Under the third theory, the question is whether, in response to the defendants' motion for summary judgment, [the employee] produced sufficient evidence to establish that there existed a genuine issue of fact whether the defendants' acts were "related closely enough to constitute a continuing violation" or were "merely discrete, isolated, and completed acts which must be regarded as individual violations" *Berry v. Board of Supervisors of L.S.U.*, 715 F.2d 971, 981 [32 FEP Cases 1567] (5th Cir. 1983). The Fifth Circuit has suggested three factors to consider in making this determination:
>
> > The first is subject matter. Do the alleged acts involve the same type of discrimination, tending to connect them in a continuing violation? The second is frequency. Are the alleged acts recurring (e.g., a biweekly paycheck) or more in the nature of an isolated work assignment or

> employment decision? The third factor, perhaps of most importance, is degree of permanence. Does the act have the degree of permanence which should trigger an employee's awareness of and duty to assert his or her rights, or which should indicate to the employee that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate?

*Id.* This court and others have stressed the significance of the third factor:

> What justifies treating a series of separate violations as a continuing violation? Only that it would have been unreasonable to require the plaintiff to sue separately on each one. In a setting of alleged discrimination, ordinarily this will be because the [employee] had no reason to believe he was a victim of discrimination until a series of adverse actions established a visible pattern of discriminatory treatment.

*Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1310 [50 FEP Cases 1474] (7th Cir. 1989).

The first consideration (as noted above) is subject matter which complainant describes as "verbal discipline for what can only be characterized as minor infractions." (Complainant's brief, p. 2.) The second consideration is frequency. Complainant contends that after March 1996 when his supervisor became aware of his participation in an activity protected under the Whistleblower law that over the following "nine months there were approximately nine incidents" of Whistleblower retaliation in the form of verbal reprimands. Complainant further contends that such frequency was unusual in his ten years working for respondent. The gist of complainant's argument is that it was all incidents taken together which alerted him to the fact that he was a victim of a pattern of retaliation. (See complainant's initial brief, p. 3.)

Respondent asserted that such argument is in direct conflict with information contained in an attachment to complainant's letter appealing the initial determination. Specifically, it was noted therein as shown below:

> 10 July 96 – we have the 4th Management Union Meeting since 14 March 1996, it's about a supposed "empty" boiler. I say I shut the valve and the management claims are unproven and not even backed on the DOA log. Union finds offense in certain log entries about "new personnel." Management talks to S. Hoegge. I get verbal reprimand. I claim I see a "pattern" with the three

> Hoegge claims about my operating the plant. I tell management that I feel I am being harassed through their misuse of the disciplinary system.

Complainant's attorney responded to the above argument as shown below (from letter dated 8/24/98):

> The statement is not contrary to our continuing-violation claim.
>
> First, the entry references a pattern with the **three Hoegge claims**. This makes the statement ambiguous as to whether Paul Prochnow is simply referring to the Hoegge claims and a belief that Hoegge is harassing him or UW-L.
>
> Second, while the entry refers to harassment, it does not make any reference to the cause of such harassment. There is nothing in the statement linking the harassment to the Whistleblower allegations. (Emphasis in original.)

In any event, it is clear that by July 10, 1996, complainant was of the opinion that he was being harassed through misuse of the disciplinary system. This knowledge triggered complainant's duty to file a complaint whether he knew the harassment was due to FEA or to Whistleblower Retaliation. As quoted previously in this ruling (emphasis added):

> What justifies treating a series of separate violations as a continuing violation? Only that it would have been unreasonable to require the plaintiff to sue separately on each one. <u>In a setting of alleged discrimination, ordinarily this will be because the [employe] had no reason to believe he was a victim of discrimination until a series of adverse actions established a visible pattern of discriminatory treatment.</u>

According to complainant's own statement, he had reason to believe as of July 10, 1996, that a pattern of what he viewed as an abuse of the disciplinary process had occurred which was sufficient to make him suspect he was the victim of some form of discrimination. Since complainant knew or suspected as of July 10, 1996, that he was the victim of harassment, the complaint filed on January 15, 1997, was filed more than 60 days after he formed such belief.

Based on the foregoing, the adverse actions alleged in the complaint which occurred prior to the applicable 60-day filing period were untimely filed. Accordingly, respondent's

motion to dismiss the Whistleblower Retaliation claims is granted with respect to events alleged to have occurred prior to November 16, 1996.

Revised Statement of Proposed Hearing Issues

This ruling results in a revision of the proposed statement of hearing issues, as shown below.

1. Whether respondent discriminated against complainant because of his handicap in regard to the following alleged adverse actions:
   a. Respondent's request on April 4, 1996, that complainant undergo an evaluation by Dr. Le Page.
   b. Dr. LePage's comment during the evaluation on April 15, 1996, to the effect that complainant was a loner, a loose canon and an odd duck.
   c. Harassing working environment alleged as being comprised of the following events:
      i. Meetings of 3/14/96 and 4/4/96, regarding complainant's work performance.
      ii. Alleged verbal reprimand on 3/28/96, regarding the snow-day call taken by complainant;
      iii. Disciplinary meeting on 4/17/96, regarding complainant's missed gas meter readings;
      iv. 7/10/96, verbal reprimand for the empty boiler;
      v. 10/3/96, meeting attended by complainant, his supervisors and his psychologist;
      vi. The alleged "gag order" of 10/9/96; and
      vii. 12/96, respondent's handling of the obesity comment.

2. Whether respondent retaliated against complainant for his participation in activities protected under the FEA in regard to the following alleged adverse actions:
   a. 7/10/96, verbal reprimand for the empty boiler;
   b. 10/3/96, meeting attended by complainant, his supervisors and his psychologist;
   c. The alleged "gag order" of 10/9/96; and
   d. 12/96, respondent's handling of the obesity comment.

3. Whether respondent retaliated against complainant for his participation in activities protected under the Whistleblower Law in regard to respondent's handling of the obesity comment in December 1996.

Respondent also contended that the surviving claim of Whistleblower Retaliation is insufficient because no reprimand occurred. (See 230.80(8), Stats.) Complainant contends a formal verbal reprimand occurred. This is a factual dispute, which cannot be resolved in the context of the present motion.

The next step in this proceeding will be to finalize the statement of the hearing issues. The parties will receive a scheduling letter for that purpose shortly after this ruling is mailed.

ORDER

Respondent's motion is granted in part and denied in part as detailed in this ruling.

Dated: August 26, 1998.

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

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JUDY M. ROGERS, Commissioner