STATE OF WISCONSIN PERSONNEL COMMISSION

PAUL PROCHNOW,
Complainant,

v.

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

Case No. 97-0008-PC-ER

FINAL DECISION AND ORDER

NATURE OF THE CASE[1]

This case involves claims of discrimination on the bases of disability, WFEA (Wisconsin Fair Employment Act; Subchapter II, Chapter 111, Stats.) retaliation, and "Whistleblower" (Subchapter III, Chapter 230, Stats.) retaliation. A September 18, 1998, letter sets forth the following statement of issues for hearing:

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. Whether respondent consulted with Dr. LePage prior to his evaluation of complainant and, if so, whether respondent characterized complainant to Dr. LePage as a loose cannon or 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;

[1] This case is before the Commission following the promulgation of a proposed decision and order pursuant to §227.46(2), Stats. The Commission has considered the objections to the proposed decision and order, and consulted with the examiner, and adopts the proposed decision and order with a few minor changes. Those changes which are substantive in nature are explained by footnotes.

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.

FINDINGS OF FACT

1. Complainant has worked for respondent since October 2, 1986, as a Power Plant Operator 3.

2. In 1993, complainant told his immediate supervisor Al Gerke, Heating Plant Superintendent, that complainant was receiving psychiatric treatment for depression and had admitted himself to a psychiatric unit for observation. Gerke asked complainant when he returned from hospitalization whether complainant needed any accommodation to perform the job. Complainant said he did not.

3. In or about April 1995, complainant took several discarded computer components at the physical plant and planned to disassemble some for personal use and to sell others. When he called a local radio talk show to sell some of the equipment, respondent's administration was informed and an investigation ensued. No discipline was imposed.

4. Complainant made a disclosure protected under the Whistleblower law, by letter dated September 5, 1995, to the La Crosse campus chancellor. (Respondent's Exhibit 8) Complainant reminded the Chancellor that through his own experience with

discarded computer equipment, he learned all materials recycled by staff were to be accounted for and the proceeds of any sale turned over to the University. His letter indicated he felt the policy was not being followed strictly at his workplace and he wanted the Chancellor to know he had never received cash or materials in violation of the policy. As a result of complainant's letter, Vice-Chancellor Lebiecki conducted an investigation of the situation. The Chancellor instructed Mr. Lebieki to conduct this investigation in confidence, and he did so. This investigation resulted in certain changes being made in regard to receipt of payment for scrap metal as noted in a memo dated March 1, 1996, to Mr. Gerke. (Respondent's Exhibit 12) Mr. Gerke was aware of the procedural changes announced in the memo of March 1, 1996, but was unaware such changes had been the result of complainant filing a whistleblower disclosure and, in fact, was unaware of the whistleblower disclosure until the present complaint was filed.

5. During the course of his employment with respondent, complainant received annual performance evaluations. His evaluations were satisfactory; however, recurrent concerns were raised about complainant having problems with communication and the ability to make decisions under pressure. See, for example, the following:

- Probationary report dated January 28, 1987. (Respondent's Exhibit 2) The category "ability to get along with others" is marked "needs improvement." There is an additional comment: "Paul is not the best communicator with people."
- Performance evaluation dated June 22, 1988. (Respondent's Exhibit 3) This evaluation includes the following comments: "Paul has improved on relating to others, but still needs to work on it. . . . he seems a little nervous when making quick decisions."
- Performance evaluation dated June 19, 1991. (Respondent's Exhibit 4) This includes the following: "Would like Paul to work on "keeping his cool" when in a situation that requires snap decision making due operational needs."

- Performance evaluation dated December 18, 1996. (Respondent's Exhibit 7) This includes the following: "One skill you need to work on is communication with other employes."

6. During February and March 1996, some of complainant's coworkers, Stacey Hoege and Thomas Gromacki, advised Mr. Gerke of various concerns they had regarding complainant's performance. Complainant appeared to be unsure of what he should do in an emergency, seemed to have trouble comprehending and understanding verbal instructions, and in general seemed unsure of himself. His co-workers were having problems understanding notes he left them, which were a major means of communications between operators on different shifts. Mr. Gerke received frequent telephone calls at home from complainant regarding matters he felt an experienced power plant operator should be able to perform without assistance.

7. During a March 7, 1996, workplace violence workshop, complainant was critical of coworkers and supervisors in an agitated fashion, to the extent that some participants (including a University police officer) expressed concern about complainant's mental stability.

8. On March 24, 1996, Mr. Hoege, who was complainant's relief, called complainant to advise him he would be late to work due to poor road conditions. Complainant contacted Mr. Pedretti, and they discussed coverage of the next shift. Mr. Hoege never came in that day and another employe worked his shift in overtime status. Complainant was not disciplined as a result of this incident.

9. Meetings were held on March 14, 1996, and April 4, 1996, to address the concerns raised about complainant's performance and behavior. Complainant, Mr. Goodno (Associate Director of Physical Plant), Mr. Gerke, James Quick (Assistant Director of Human Resources), as well as a union representative, were present at each meeting. It was suggested at the latter meeting that complainant seek assistance through the Employee Assistance Program (EAP). This was suggested to determine whether the workplace issues involving complainant were caused by personal problems, a medical condition, or some other cause. Complainant agreed with this suggestion and

met with a psychologist, Dr. Laury LePage, in respondent's Counseling and Testing Center.

10. Excerpts from Dr. LePage's written evaluation (Respondent's Exhibit 22) are as follows:

> Mr. Prochnow . . . brought along a three-ring binder with various diplomas and certifications pertaining to his education and employment skills. . . . His primary concern appeared to be demonstrating that he has and continues to be competent as an engineer in the power plant.
>
> Mr. Prochnow believes that the reason for being asked to be seen by a counselor and "evaluated," had its origins in two separate but emotionally related incidents. In 1993, he checked himself in to St. Francis Hospital when he felt extremely agitated. He stated that the odor of a pesticide sprayed around the Power Plant caused him to react in a very agitated manner, and recalls thinking about the death of his father some five months before which resulted in feelings of depression. Mr. Prochnow was seen by a psychiatrist and placed on meds to control his anxiety and depression. He stated that some of the meds were changed over the years by his doctor to better help him cope with his anxiety and depression. He stated that in hindsight, he feels that his work environment probably contributed somewhat to this hospitalization.
>
> The second incident that Mr. Prochnow believes has contributed to his being asked to be "evaluated" happened a year ago. He stated that he became the center of attention to the administration when he picked up several discarded computer components at the physical plant and planned to disassemble some for his personal use and sell others for parts. When he called a local radio talk show to sell some of the equipment, the administration was informed, and he was told that he had done something very wrong – apparently this is all well documented and resolved to everyone's concern.
>
> It was this incident and direct communications, written and/or oral, with the Chancellor, Mr. Lebiecki (Assistant Chancellor of the La Crosse campus), his supervisors and union reps that caused him to feel that his job was in jeopardy. He stated that fellow co-workers would say things to him like he was going to lose his job and that he would be going to jail for stealing computer equipment.

> Apparently some of the co-workers that told him he was in serious trouble were also ones that would often taunt and bait LM, a co-worker and good friend. He stated that he does not appreciate foul language and dirty jokes, and when he asks his co-workers not to speak that way in his and L. M.'s presence, they either ignore him or increase this kind of talk. He feels he has little in common with many of his co-workers, but is very willing to work along side them if they would not say and do things that are upsetting to him. He stated that he enjoys his work and takes pride in doing a professional job. He stated that he couldn't understand why his supervisors and most co-workers are "monitoring" him, which threatens him and causes him to fear that his job may be in jeopardy again.
>
> Assessment/Recommendation
>
> Mr. Prochnow . . . was able to discuss past "problems" and his present work situation and coworkers. His thought process was logical and on track most of the time, deviating only when relating emotionally laden events. It would appear that his present agitation and verbosity are related to a perceived negative and threatening work environment.
>
> I suggested that he might contact his psychiatrist and psychologist and ask that they comment on his ability to perform in his present work environment, and also to comment on how the work environment might be improved to lessen the stress on him. He appeared quite willing to contact his doctors to provide this information.

11. The same day complainant met with Dr. LePage (April 15, 1996), and the following day (April 16, 1996), complainant forgot to call the Department of Administration in Madison with gas meter readings. However, he made entries in the log that he had recorded the meter readings in question, although he had not done so. Making the meter readings and calling them in to Madison was important because failure to do so could result in the following day's gas allocation being insufficient, and using gas in excess of the allocations could result in a monetary penalty being assessed against respondent.

12. Complainant's failure to have made and called in these meter readings resulted in a disciplinary meeting with management on April 17, 1996. Management decided to impose a verbal reprimand, but after this had been delayed for a number of

days due to scheduling difficulties, management decided not to go ahead with the verbal reprimand, and no discipline was ever imposed with regard to these incidents.

13. On July 10, 1996, a meeting occurred with complainant, management and a union representative regarding a report from coworker Hoege that on July 4, 1996, complainant had left open a continuous blowdown valve on the boiler which resulted in the boiler's water supply becoming dangerously low. Complainant denied that there had been any problem. However, management, Mr. Hoege, and the union representative concurred in the view that complainant had left the valve open and that this had resulted in a potentially dangerous situation. Management imposed a verbal reprimand with regard to this incident, and had a reasonable basis for so doing.

14. On May 2, 1996, complainant prepared a list of the personal problems he had experienced (Complainant's Exhibit 8)[2] and provided the list to Mr. Goodno so that Mr. Goodno would have some idea of his background. At their meeting that date, complainant discussed the ongoing inquiry into his activities and mental status. Complainant's statement to Mr. Goodno is essentially the same as was set forth in his April 26, 1996, letter to Mr. Goodno (see Respondent's Exhibit 39), which includes the following:

> Since you proposed "psych evaluation" in my case I am hoping this letter may clear up some real concerns as well as debatable situations in Heat plant personnel management. As far as I am concerned this entire "psych eval" has been running since 14 March 1996. Since I have seen Dr. LePage as suggested, I hope we can develop a "closure" opinion on you [sic] "psych eval" concerns.

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[2] 1986 motorcycle accident
1987 verbal abuse at work
1988 knee operation
1989 cut (?) on knee
1990 bankruptcy
1991 TB
1992 father and uncle died
1993 bad depression & gallstones
1995 mom suffered a stroke

15. Pursuant to the recommendation of Dr. LePage (see Finding 10, above), complainant agreed to see his own therapist, John Streyle. Mr. Goodno prepared a May 9, 1996, memo (Complainant's Exhibit 9) for Mr. Streyle's consideration, and gave the memo to complainant to bring along to his appointment. This memo includes the following:

> I discussed Dr. LePage's memo with Paul on May 2, 1996. I assured Paul that his job is not in danger because we have not begun the progressive discipline process. I also told Paul that my goal is to provide a positive work environment where he can feel comfortable in performing his duties and, at the same time, his supervisor will feel comfortable that Paul can perform his duties in a work environment that can be stressful when working on a shift alone. . . .
>
> I have counseled Paul on two occasions. The first time was the discarded computer incident . . . I simply told Paul that calling a radio station to sell discarded computers and identifying them as coming from the University, and while he was working, was not a "kosher" thing to do. The incident was not a big deal as far as I was concerned. I thought the incident was over and forgotten about, but it appears to remain a significant issue with Paul. . . .
>
> The second occasion, which happened last month, was when Paul forgot to call in the daily natural gas readings to Madison two days in a row despite checking off that he had done so on the operators duty checklist. This could have resulted in about an $8000.00 penalty . . . Paul said that he just spaced it out those days and forgot to call in. He said that he was preoccupied with his going to the Employee Assistance Counselor that week. Again, he was not disciplined, but the incident was documented because it was a significant operation error that should not have happened. Continued errors of this nature could result in discipline.
>
> Paul said he feels people are out to get him and that he feels very threatened in his job. I have talked to a number of his coworkers and do not get the impression that anyone is out to get him or to ostracize him from the group. The one comment I have heard several times is that "He likes to dish it out, but he can't take it." There appears to be some amount of what starts out to be good natured ribbing, but now it ends in

some type of conflict. What Paul sees as coworkers ignoring him, they see as a way of avoiding conflict.

I have several questions regarding the current situation.

1. Dr. LePage states that, during the interview, Paul's thought process was logical and on track most of the time, deviating only when relating emotionally laden events. Could what appeared to be a forced counseling session have caused Paul enough stress to forget to call in the gas readings?

2. Paul gave me a list of events in his life over the last ten years that have been very stressful on him. It seems there are other things in the work environment that may be causing additional stress in his life. What can we do to reduce the stress at work? Can stress have an impact on Paul's ability to perform his duties?

3. Are there any duties identified on the (enclosed) position description that Paul cannot do or may have difficulty performing?

4. During my four recent meetings with Paul, I have noticed a tendency for him to change subjects in the middle of a conversation. He explained that sometimes his mind races ahead of the conversation which causes him to change topics. I believe this is the reason why some of his coworkers have said they don't know where he's coming from many times. Several months ago, the campus had a Violence in the Workplace Seminar . . . The ensuing conversations left many attendees wondering where Paul was coming from . . . Paul later told me that he was only trying to get answers to questions and relate work incidents and had no intention of coming across that way. Can anything be done to help this situation?

5. Paul said he was on medication. Could his medication have a negative effect on his ability to perform his duties effectively and safely?

I realize that I am not privileged to medical information, but asking for your opinions such that we can try and resolve our current situation and have a work environment in which everyone feels comfortable. We also want to be fair when dealing with Paul if there are any additional work problems that may result in discipline.

16. On October 3, 1996, another meeting was held with Mr. Goodno, Mr. Gerke, complainant and Mr. Streyle. Mr. Streyle provided the opinion that there was no risk of workplace violence with respect to complainant.

17. On October 9, 1996, Mr. Gerke and Mr. Pedretti cleaned a softener with an acid solution. Complainant noticed a "bad smell" and called Mr. Sweetman in respondent's Environmental Health department about possible physiological harm or symptoms associated with the solution. Mr. Sweetman visited the site and found the solution "too hot" to dump in the sewer. On October 10, 1996, Mr. Sweetman met with management to discuss alternative methods to neutralize the solution in the softener tank. On October 14, 1996, Mr. Gerke told him he should take such concerns through the chain of command.[3]

18. On or about December 18, 1996, complainant heard a coworker make what complainant perceived as an unkind comment about an overweight female coworker in front of a group of people. Complainant reported this to the coworker in question and Mr. Gerke. Mr. Gerke checked with the program assistant who told him she did not appreciate that complainant had brought the comment to her attention. Mr. Gerke relayed the message to complainant. There was no reprimand or discipline of complainant.

19. Allan Lesky, one of complainant's union representatives wrote a letter to complainant dated February 1, 1997 (Respondent's Exhibit 38), which includes the following:

> You have been asked to go to the employee assistance counselors because you stated during investigatory meetings, and to your coworkers and supervisors that you felt "stressed out," "a little depressed," and during one meeting said you were having chest pains. (When I asked if you wanted to see a Doctor, you declined.) Your supervisor stated that you were having trouble making decisions and that "something" was bothering you. . . . All this happened after you failed to call in the gas readings to Madison two days in a row; admitted that you checked off all the duties on the duty sheet . . . You have also said that your supervisor is out to get you and that he treated you like "his retarded brother." When they point to a failure on your part, such as your failure to call in the gas readings, or your failure to close the Blow-By Valve . . . you start pointing fingers at others. The Employer sent you to EAP

[3] See issue #1.c.vi.: "The alleged 'gag order' of 10/9/96."

> Counseling in lieu of discipline because you told him that you felt threatened in your job and ostracized from the group. . . .
>
> Going to the Employee Assistance Program at the employer's expense and while on duty is a hard won contractual option to address your concerns about stress and pressure in the performance of your duties and your interaction with your coworkers and management. . . .
>
> In conclusion, the employers insistence on EAP counseling was meant to help you deal with stress and problems that you told them that you were feeling on the job, so that you could return to feeling relaxed and confident on the job. . . .

DISCUSSION

Under the Wisconsin Fair Employment Act (FEA), the initial burden of proof is on the complainant to show a prima facie case of discrimination. If complainant meets this burden, the employer then has the burden of articulating a non-discriminatory reason for the actions taken which the complainant may, in turn, attempt to show was a pretext for discrimination. *McDonnell-Douglas v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 5 FEP Cases 965 (1973), *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 25 FEP Cases 113 (1981).

The allegations raised in the complaint are that respondent took certain adverse actions against complainant because respondent perceived him as disabled and because of WFEA and whistleblower retaliation. The alleged adverse actions are incorporated in the hearing issues, which are reiterated below:

3. Whether respondent discriminated against complainant because of his disability 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. Whether respondent consulted with Dr. LePage prior to his evaluation of complainant and, if so, whether respondent characterized complainant to Dr. LePage as a loose cannon or 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.

FEA Retaliation

To establish a prima facie case in the context of an FEA Retaliation claim, there must be evidence that: 1) the complainant participated in an activity protected under the FEA, 2) the alleged retaliator was aware of that participation, 3) there was an adverse employment action, and 4) there is a causal connection between the alleged retaliator's knowledge of the protected activity and the ensuing adverse action. A "causal connection" is shown if there is evidence that a retaliatory motive played a part in the adverse employment action. *See, e. g., McCartney v. UWHCA,* 96-0165-PC-ER, 3/24/99.

Complainant has not established the first element of a prima facie case. He has not shown that he engaged in an activity protected under the FEA. Pursuant to §111.322(3), Stats., it is illegal to "discharge or otherwise discriminate against any individual because he or she has opposed any discriminatory practice under this

subchapter or because he or she has made a complaint, testified or assisted in any proceeding under this subchapter." The only action complainant cites under this heading is that he claims he attempted to get management to halt the inquiry into his mental status. However, complainant's testimony as to what he communicated to management was somewhat unclear. He indicated that it tracked what he said in an April 26, 1996, letter to Mr. Goodno (see Respondent's Exhibit 39), which includes the following:

> Since you proposed "psych evaluation" in my case I am hoping this letter may clear up some real concerns as well as debatable situations in Heat plant personnel management. As far as I am concerned this entire "psych eval" has been running since 14 March 1996. Since I have seen Dr. LePage as suggested, I hope we can develop a "closure" opinion on you [sic] "psych eval" concerns.

In the Commission's opinion, this communication was part of an ongoing dialogue between complainant and management concerning the problems he had in the workplace and his mental status. Even using a liberal construction of §111.322(3), Stats., *see* §111.31(3), Stats., complainant's request can not be equated with opposing a discriminatory practice, *see Booker v. Brown & Williamson,* 879 F. 2d 1304, 50 FEP Cases 365, 371-72 (6th Cir. 1989):

> Booker was not contesting any unlawful employment practice; he was contesting the correctness of a decision made by his employer. Booker generally attempts to dispute the employer's position with regard to his management style, and he suggests that the focus of the company's inquiry should be on his supervisor, Pavona.
>
> There are only two possible allegations in the letter that suggest Booker may have been contesting an unlawful employment practice. Booker suggests that Pavona may be a racist due to a statement Pavona allegedly made. However, the allegation is not that Brown & Williamson is engaging in [an] unlawful employment practice, but that one of his employes has a racial intolerance.
>
> The only other possible suggestion of opposition is when Booker alleges that the charges against him are a result of "ethnocism." Assuming that Booker intended discrimination, we hold that a vague charge discrimination in an internal letter or memorandum is insufficient to

> constitute opposition to an unlawful employment practice. An employe may not invoke the protection of the Act by making a vague charge of discrimination. Otherwise, every adverse employment decision by an employer would be subject to challenge under either state or federal civil rights legislation simply by an employe inserting a charge of discrimination. In our view, such would constitute an intolerable intrusion into the workplace. (footnote omitted)

See also McCartney v. UWHCA, 96-0165-PC-ER, 3/24/99 (complainant who allegedly objected to harassment by becoming "short" with her supervisor and arguing with him did not oppose a discriminatory practice in accordance with §111.322(3), Stats.).

Even assuming that complainant had established a prima facie case, he did not establish that respondent's rationale for its actions constituted a pretext for retaliation against complainant. With respect to the verbal reprimand for having left a valve open on July 10, 1996, there was a difference of opinion as to what happened. Management certainly had at least a rational basis for having imposed the reprimand, as Mr. Gerke, coworker Hoegge, and complainant's union representative concurred in the view that complainant had created a potentially dangerous situation. With regard to the October 3, 1996, meeting of management, complainant and his therapist, this was part of an ongoing process of management responding to concerns about complainant. The record supports a conclusion that this meeting was precipitated by management's legitimate concerns about complainant, and not by a desire to retaliate against complainant. There is also no evidence that Mr. Gerke's instructions to complainant on October 14, 1996, to take up his safety concerns with management before going outside the chain of command was motivated by a retaliatory motive.[4] Finally, respondent's handling of the obesity comment, which was simply to relay to complainant the desire of the coworker in question that complainant not convey such remarks to her, did not constitute a disciplinary action, and there is no evidence to suggest that management was motivated by any discriminatory reason in so doing.

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[4] This case does not involve a claim under the state OSHA law (§101.055 Stats.), and no opinion is expressed with respect to any actions that might have been covered by that law.

Whistleblower Retaliation

To establish a prima facie case in the whistleblower retaliation context, there must be evidence: 1) that complainant participated in a protected activity and the alleged retaliator was aware of that participation, 2) that there was a disciplinary action, and 3) that there is a causal connection between the first two elements. *Sadlier v. DHSS*, 87-0046, 0055-PC-ER, 3/30/89. It is undisputed that complainant made a disclosure of information under the whistleblower law, §§230.80(5), 230.81, Stats., when he wrote to the chancellor about the disposition of scrap funds on September 5, 1995. However, complainant has not shown the retaliators were aware of his whistleblower disclosure prior to the alleged adverse action in connection with the obesity comment in December 1996. At the time the chancellor assigned the investigation to vice-chancellor Lebiecki, she specifically instructed him to handle the matter in strict confidence. (Respondent's Exhibit 9) There is no evidence in this record that either Mr. Goodno or Mr. Gerke knew that complainant's communication had precipitated the inquiry. Even if complainant had established respondent knew about the disclosure, management's action of relaying a coworker's request that she not be told about certain comments was not a "disciplinary action" under §230.80(2), Stats., and there was no evidence that management's action was precipitated by complainant's disclosure.

Disability Discrimination

The first question in a disability discrimination case is whether the complainant is a disabled individual as defined by the WFEA, §111.32(8), Stats.:

> "Individual with a disability" means an individual who:
> (a) Has a physical or mental impairment which makes achievement unusually difficult or limits the capacity to work;
> (b) Has a record of such impairment; or
> (c) Is perceived as having such an impairment.

In this case, the complainant did not establish and does not assert that he has a mental or physical impairment as defined in §111.32(8)(a). However, he contends that management perceived him as disabled. In the commission's opinion, the record

supports the conclusion that while the employer never had a belief that complainant was disabled as that term is statutorily defined, there was a suspicion that he had a mental illness of some kind. This frames the question of whether a suspicion of this nature constitutes a perception under §111.32(8)(c), Stats.

In *LaCrosse Police Comm. v. LIRC,* 139 Wis. 2d 740, 759-60, 407 N.W.2d 740 (1987), the Supreme Court held that "the element of 'impairment' is satisfied by showing either an actual lessening, deterioration, or damage to a normal bodily function or bodily condition, including the absence of such function or condition, or by showing that *the condition perceived by the employer would constitute an actual impairment if it in fact did exist."* (emphasis added) *See also, Racine Unified School Dist. v. LIRC,* 164 Wis.2d 567,598, 476 N.W.2d 707 (Ct.App. 1991): "A perceived impairment is a belief by the employer that an employee has a condition which, if it in fact did exist, would constitute an actual impairment." This definition is not satisfied by a suspicion that the complainant, Mr. Prochnow, might have had some kind of mental illness of an unknown nature.

Assuming that complainant had established that he was a person with a disability, he did not establish that respondent discriminated against him. Management had legitimate bases to have been concerned about complainant's performance. Two of his coworkers testified that they had problems with various aspects of his performance and his behavior. It is undisputed that he omitted the gas meter readings on two days, notwithstanding that he signed off on these duties on his checklist, and that his omission could have been costly to respondent. The record supports a conclusion that complainant's remarks at the workplace violence workshop alarmed a number of people and respondent had a basis for its actions with regard to its referral of complainant to Dr. LePage, and its subsequent meetings with regard to complainant's situation, including the performance issues. There is no evidence that anyone characterized complainant to Dr. LePage as a loose cannon or an odd duck, and this was conceded by complainant at oral argument.

CONCLUSIONS OF LAW

1. This case is properly before the commission pursuant to §§230.45(1)(b), and 230.45(1)(gm), Stats.

2. Complainant has the burden of proof and must establish by a preponderance of the evidence that respondent discriminated against him in the manner framed by the issues for hearing in this case.

3. Complainant has not sustained his burden.

4. Respondent did not discriminate against complainant in the manner framed by the statement of issues.

ORDER

This complaint of discrimination is dismissed.

Dated: February 18 2000

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

AJT:970008Cdec1.1

Parties:

Paul Prochnow
109 Lee St.
Holmen, WI 54636

Katherine 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.

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