STATE OF WISCONSIN PERSONNEL COMMISSION

DAVID J. LUTZE,
Complainant,

v.

Secretary, DEPARTMENT OF TRANSPORTATION,
Respondent.

Case No. 97-0191-PC-ER

RULING ON MOTION TO DISMISS

This is a complaint alleging disability discrimination and retaliation for engaging in protected fair employment activities. On March 18, 1999, respondent filed a motion to dismiss. The parties were permitted to brief the motion and the schedule for doing so was completed on May 18, 1999. The following findings of fact are derived from information provided by the parties, appear to be undisputed, and are made solely for the purpose of deciding this motion.

1. On October 12, 1998, the Commission's equal rights unit issued an Initial Determination in this case which set forth the following Conclusions section:

> 1. There is Probable Cause to believe that complainant was discriminated against on the basis of disability and retaliated against for engaging in protected fair employment activities when his performance was evaluated as unsatisfactory for the period of August of 1996 to June of 1997.
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> 2. There is No Probable Cause to believe that complainant was discriminated against on the basis of disability or retaliated against for engaging in protected fair employment activities when he was counseled regarding his failure to record personal mileage for April of 1997.
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> 3. There is No Probable Cause to believe that respondent failed to reasonably accommodate complainant's carpal tunnel syndrome disability during 1997.

> 4. There is No Probable Cause to believe that respondent failed to reasonably accommodate complainant's claimed narcolepsy disability in regard to the scheduling of his shifts.

2. Complainant failed to appeal the No Probable Cause determinations.

3. During a prehearing conference conducted on February 18, 1999, the parties agreed to the following statement of issue for hearing:

> Whether respondent discriminated against complainant on the basis of disability and retaliated against him for engaging in protected fair employment activities when his performance was evaluated as unsatisfactory for the period from August of 1996 to June of 1997.

Complainant was represented by counsel at this conference.

4. In his complaint and in his brief on the motion, complainant indicated that his supervisory duties had been removed, and he had received notice of the removal of his supervisory duties, on or before February 3, 1997.

There are several facets of this motion to dismiss. The first relates to respondent's contention that complainant has failed to state a claim for relief since the subject action, i.e., an unsatisfactory performance evaluation, does not qualify as an adverse employment action within the meaning of the Fair Employment Act (FEA).

In order to prevail on a claim of discrimination or retaliation, a complainant is required to show that he or she was subject to a cognizable adverse employment action. *Klein v. DATCP*, 95-0014-PC-ER, 5/21/97. In the context of a retaliation claim, §111.322(3), Stats., makes it an act of employment discrimination "[t]o 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." In the context of a discrimination claim, §111.322(1), Stats., makes it an act of employment discrimination to "refuse to hire, employ, admit or license any individual, to bar or terminate from employment . . . or to discriminate against any individual in promotion, compensation or in terms, conditions or privileges of employment."

The applicable standard, if the subject action is not one of those specified in these statutory sections, is whether the action had any concrete, tangible effect on the complainant's employment status. *Klein, supra,* at 6. In determining whether such an effect is present, it is helpful to review case law developed under Title VII, which includes language parallel to the statutory language under consideration here. 42 USC §2000e-2. In *Smart v. Ball State University*, 89 F.3d 437, 71 FEP Cases 495 (7th Cir. 1996), the court stated as follows:

> Adverse employment action has been defined quite broadly in this circuit. *McDonnell v. Cisneros,* . . . 84 F.3d 256, 70 FEP Cases 1459 (7th Cir. 1996). In some cases, for example, when an employee is fired, or suffers a reduction in benefits or pay, it is clear that an employee has been the victim of an adverse employment action. But an employment action does not have to be so easily quantified to be considered adverse for our purpose. "[A]dverse job action is not limited solely to loss or reduction of pay or monetary benefits. It can encompass other forms of adversity as well." *Collins v. State of Illinois,* 830 F.2d 692, 703, 44 FEP Cases 1549 (7th cir. 1987). . . .
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> While adverse employment actions extend beyond readily quantifiable losses, not everything that makes an employee unhappy is an actionable adverse action. Otherwise, minor and even trivial employment actions that "an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit." *Williams v. Bristol-Myers Squibb Co.,* 85 F.3d 270, 70 FEP Cases 1639 (7th Cir. 1996). In *Crady v. Liberty national Bank & Trust Co. of Indiana*, 993 F.2d 132, 61 FEP Cases 1193 (7th Cir. 1993), we found that a change in title from assistant vice-president and manager of one branch of a bank to a loan officer position at a different branch did not be itself constitute an adverse employment action. . . . Likewise, in *Flaherty v. Gas Research Institute*, 31 F.3d 451, 65 FEP Cases 941 (7th Cir. 1994), we found that a lateral transfer, where the employee's existing title would be changed and the employee would report to a former subordinate, may have caused a "bruised ego," but did not constitute an adverse employment action. Most recently, in *Williams*, we found that the strictly lateral transfer of a salesman from one division of a pharmaceutical company to another was not an adverse employment action.
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> The dispositive question in our case is not whether Vivian's [Smart's] performance evaluations were undeservedly negative, but whether even undeserved poor evaluations can alone constitute the second element of

her prima facie case. . . . We learned at oral argument that she completed the training program on time and is currently working at Ball State as a full-fledged tree surgeon. The attempt to bolster Vivian's case by characterizing a trainee's need for training as "probation" fails.

There is little support for the argument that negative performance evaluations alone can constitute an adverse employment action. There are certainly cases where allegedly undeserved performance evaluations have been presented as evidence of discrimination on the basis of sex or age. But Vivian has not identified, nor have we discovered, a single case where adverse performance ratings alone were found to constitute adverse action. Vivian relies primarily on two cases to support her argument *Vergara v. Bentsen*, 868 F.Supp. 581, 68 FEP Cases 1591 (S.D.N.Y. 1994); and *Mead v. U.S. Fidelity & Guaranty Co.*, 442 F.Supp. 114, 18 FEP Cases 140 (D.Minn. 1977). In neither of these cases were negative reviews the sole basis for a finding of adverse action. In *Vergara*, the court noted that the employer had given Vergara poor evaluations, had failed to notify her of these evaluations in contradiction of company policy and practice, and had removed much of her job responsibilities and perhaps denied her a return to these responsibilities based in part on the poor evaluations. In *Mead*, the plaintiff was overloaded with work, deprived of assistance, and eventually fired after filing a charge of sex discrimination. A supervisor testified that, with the exception of one employee who came in late for five weeks in a row, the only employees she made negative reports on were Mead and two co-workers who had also filed EEOC charges. As if that weren't enough a memo was discovered which in essence said, "Let's paper her file so we can get rid of her."

The closest thing to support for Vivian's claim we were able to find is a 1994 case, not cited by the parties, out of the southern District of Florida. There, the court said, "An allegation that false performance evaluations were prepared in retaliation for the filing of an EEOC claim is a recognized cause of action. . . ." *Boyd v. Brookstone Corp. of New Hampshire, Inc.*, 857 F. Supp 1568, 1571, 71 FEP Cases 3 (S.D.Fla. 1994). Turning to the cases cited by the Florida court in support of that proposition, we see that in one of them the negative evaluations were accompanied by a demotion, *EEOC v. Reichhold Chemicals, Inc.*, 988 F.2d 1564, 61 FEP Cases 1001, (11th Cir. 1993). In another, the retaliatory conduct included not only poor reviews, but a transfer of job responsibilities to the point where the employee's work became the intellectual equivalent of a "dunce cap." *Sowers v. Kemira, Inc.*, 701

> F.Supp. 809, 825, 46 FEP Cases 1825 (S.D.Ga. 1988). In none of them were evaluations alone found sufficient to constitute adverse action.
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> Looking to the facts of the case before us, in the light most favorable to Vivian, we can only conclude that the evaluations alone do not constitute an actionable adverse employment action on the part of Ball State. Vivian was in training, and the evaluations were characteristic of a structured training program. They were facially neutral tools designed to identify strengths and weaknesses in order to further the learning process.

In addition, *see, Bragg v. Navistar International*, 78 FEP Cases 1479 (7th Cir. 1998), where the court stated that, ". . . a supervisor's assessment of an employee's skills is not an adverse employment action."

Here, unlike the situation in *Smart* and *Bragg*, *supra,* the performance evaluation, according to complainant, does not stand alone, i.e., complainant represents that it was part of an evaluation/compensation process which linked a satisfactory performance evaluation to eligibility for merit pay. Complainant has alleged that, as the direct result of the unsatisfactory performance evaluation he received on June 17, 1997, he was denied a merit pay increase. This concrete, tangible impact on complainant's pay results in a conclusion that the unsatisfactory performance evaluation was an adverse employment action within the meaning of the FEA, and the motion to dismiss should be denied in this regard.

In his brief on the motion, complainant appears to assert that the removal of supervisory duties from his position and the conduct of investigatory interviews relating to his personal use of a state vehicle remain a part of this action. It should first be noted in this regard that complainant, who appeared by counsel, agreed to the statement of issue for hearing (See finding #3, above) which does not refer to either of these actions. Aside from this, however, there are additional reasons not to consider these allegations further in this proceeding. It is apparent from the Initial Determination that the investigator did not interpret complainant's mention of the removal of supervisory duties in his complaint as a separate allegation of discrimination. Both in his complaint and in his brief on the motion, complainant indicates that this removal took place on or

before February 3, 1997, and he was notified of the removal on or before February 3, 1997. The FEA requires that a complaint be filed within 300 days of the date that the discrimination allegedly occurred. Section 111.39(1), Stats. Since it is acknowledged by complainant that the discrimination took place on or before February 3, 1997, which is more than 300 days prior to December 1, 1997, the date this complaint was filed, this allegation was untimely filed. It should also be noted that the removal of supervisory duties is a discrete employment action and not subject to application of a continuing violation theory. The investigatory interview and resulting counseling were the subject of Conclusion #2 in the Initial Determination (See finding #1, above). The investigator found No Probable Cause in this Conclusion and complainant failed to appeal this determination. It is concluded that the motion to dismiss for untimely filing of the allegation relating to the removal of supervisory duties should be granted; and that it would be inappropriate to consider the allegation relating to the investigatory interview and resulting counseling further in these proceedings.

Finally, respondent argues in this motion that the only protected fair employment activity cited by complainant is his support of a worker's compensation claim filed by another employee, and that this is not one of the protected activities cited in §111.322, Stats. This statutory section contains a lengthy list of protected fair employment activities and support of a worker's compensation claim or the filing of a worker's compensation claim is not on this list. Moreover, complainant has cited no other protected fair employment activity in which the complainant engaged, nor any authority for regarding support of another employee's worker's compensation claim or filing of such a claim as a protected fair employment activity. It is concluded as a result that the motion to dismiss for failure to state a claim should be granted as to this issue.

CONCLUSIONS OF LAW

1. Respondent has the burden to show that complainant failed to state a claim for relief under the FEA.

2. Respondent has sustained this burden in part and has failed to sustain this burden in part.

3. Complainant has the burden to show that the allegation relating to the removal of supervisory duties was timely filed.

4. Complainant has failed to sustain this burden.

ORDER

Respondent's motion to dismiss for failing to state a claim for relief is granted in part and denied in part consistent with the above ruling. Respondent's motion to dismiss complainant's allegation relating to the removal of supervisory duties for untimely filing is granted. The statement of issue for hearing is revised, as a result, to read as follows:

> Whether respondent discriminated against complainant on the basis of disability when his performance was evaluated as unsatisfactory for the period from August of 1996 to June of 1997.

Dated: July 28, 1999

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

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