STATE OF WISCONSIN PERSONNEL COMMISSION

DENNIS J. SHESKEY,
Complainant,

v.

Secretary, DEPARTMENT OF EMPLOYMENT RELATIONS,
Respondent.

Case No. 98-0063-PC-ER

RULING ON RESPONDENT'S MOTION TO DISMISS

This matter is before the Commission to resolve respondent's motion to dismiss. The final brief was received by the Commission on August 18, 1998. The facts recited below appear to be undisputed by the parties unless specifically noted to the contrary.

FINDINGS OF FACT

1. The Commission received complainant's discrimination complaint on March 6, 1998. Complainant alleged therein that respondent discriminated against him due to his participation in activities protected under the Whistleblower Law. The subsequent alleged adverse actions are noted below. (See, Ruona letter dated 3/20/98 and complainant's reply letter dated 4/3/98):

a. Complainant received a sub-standard performance evaluation in July 1995.
b. Complainant volunteered for a lay-off on July 25 or 26, 1995, because of an alleged "hostile work environment" which he believed was retaliation due to his claimed protected Whistleblower disclosure. The specific allegations of hostile work environment were:
   i. within 6 days of volunteering for a lay-off, complainant was escorted off the work premises and effectively denied access to the workplace and fellow employees;
   ii. Complainant believes he was treated differently than others such as Dennis Carol (laid off on 7/14/95) and Kathryn Moore (laid off on 2/16/96) as those individuals were not escorted off the work premises and, accordingly,

had access to the workplace to research job information. Mr. Carol and Ms. Moore also were offered a lay-off plan six months in advance of their respective layoff dates while complainant was not and this difference, complainant alleges, denied him an opportunity to provide information and documentation as to his qualifications for other positions, "as specified in MRS-163 (June 5, 1995)."

c. Complainant believes he was denied "mandatory recall rights" to the following positions:

i. June 9, 1997, to an Information Specialist Professional-Entry-Confidential position for which Peggy Gulan-Parker was hired as an original appointment;

ii. June 30, 1997, to a Management Information Technician 2-Confidential position for which Ellen Lybert was hired as an intra-agency transfer.

iii. October 9, 1995, to complainant's position prior to the layoffs for which Elaine Zimmerman was hired as a transfer.

iv. October 13, 1995, to a Management Information Technician 4 position for which Bill Lorenz was hired..

2. Complainant said his protected activity under the Whistleblower Law is a report entitled: "Veteran Processing Proposed Approach" which he wrote on or about May 15, 1995 and shared with his supervisor, Ms. Jean Hale, on or about May 19, 1995. The text of the claimed protected document is shown below (with same emphasis as appears in the original document).

> **PROBLEM SUMMARY**: There are a number of discrepancies between some AA reports and veteran reports. Even though the time period is the same and the definitions of a "new hire" and current state employe are consistent, the totals for "new hires" and current state employes differ. The possible reasons for these differences are: (1) different calculation methodology, i.e., totals for one report are derived from biweekly reports while totals for other reports are accumulated and reported out as a fiscal year-end total and 2) different procedures, i.e., the information from which these different reports are produced reside on different platforms (Unysis, Info-Tech) and as a result different information and procedures are used to calculate employe totals.

PROPOSED SOLUTION: Our goal is to migrate from the Unisys system. Current Veteran Processing is done at Info-Tech, I suggest retaining Veteran Processing at Info-Tech and producing the Veteran Processing information from the Info-Tech files. Because report discrepancies between different platforms is a common problem, especially during a migration period, I feel there is no feasible solution for making the totals match. We should not attempt to match totals from one report with another report electronically. I suggest the following actions for minimizing the negative impact of the discrepancies.

1. OIS and AA staff will explain to interested parties the reasons for the report discrepancies and the problems associated with changing computer platforms.
2. OIS staff will assist AA in identifying an appropriate authority to determine the best method to calculate active and "new hire" employes on the Info-Tech system. This definition and calculation will be used as a standard for future reports.
3. To build customer confidence, OIS and AA will inform interested parties of the mechanisms for counting employes and who determined it.
4. AA will develop their own guidelines for investigating number discrepancies between AA various reports and identify appropriate points where OIS can assist.
5. OIS will implement an appropriate standard to assist its staff in development areas.
6. OIS will incorporate the standard into existing Veteran programs.

ESTIMATED PROJECT DURATION: 4-5 weeks from the begin date. The necessary process changes should be tested and implemented in time for 1994-95 Veteran Processing.

CONTACT PERSON: Dennis Sheskey – 6-1712

***discrepancies between the AAIS reports and the Veteran Reports

1993: The number of permanent on-board classified employees employed by a state agency according to the AAIS reports is 27,845 but as reported in the Veteran Reports the number is 27,689. While this difference is not a very significant difference, it also appears the UW system had no unclassified positions in 1993.

1994: The difference between the permanent on-board classified employee totals for the two reports is almost 1%. Also there is

> disagreement with every employee total between the two reports with the biggest difference between the unclassified totals. There is almost a 2% difference between the permanent classified "new hire" totals.
>
> 1995: The number of on-board and new-hire classified employee totals now match, however, the differences between the other categories remain the same. It is also very coincidental that the first year they match is also when the lines from the veteran reports indicating total non-veteran and total missing form are absent. It is interesting to note that the two totals that match are the ones Jim Lawrence said [were] given the most scrutiny. Given the circumstances, it would appear the matching totals on the veteran report have been manually inserted and are not the result of an internal calculation.
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> 1996: The reports are [the] same as 1995 where the classified new-hire and on-board totals match but the other differences remain. It is interesting to note that the number of unclassified positions according to the AAIS report is less [than] either veteran agency or UW total.

3. The Commission received complainant's amended discrimination complaint on May 1, 1998, wherein he alleged disability discrimination in regard to respondent's failure to rehire him for "recall opportunities." The amended complaint referenced the same recall opportunities as noted in the paragraph 2 above. However, complainant clarified that he was contesting only the Parker and Lybert hires. (See complainant's brief dated 7/30/98, p. 3.)

4. Complainant received Income Continuation Insurance (ICI) from November 27, 1996 to October 27, 1997. During this time period, complainant and his physician represented that complainant was off work and totally disabled from his own or like occupations due to physical or mental impairment. Respondent included a copy of the Income Continuation Insurance booklet as Document 4, attached to arguments dated June 18, 1998. The definition of "totally disabled" applicable here is shown on page 12 of the booklet as noted below (with emphasis as shown in the original document):

> During the first 12 months of disability (called "short term disability"), "totally disabled" means your inability by reason of any medically

> determinable physical or mental impairment, to perform each and all of the material duties pertaining to your occupation or like occupation for which you are reasonably qualified, with due regard to education, training and experience.

5. A physical disability was associated with complainant's receipt of disability payments. This is shown by the doctor's authorization for complainant to return to work on September 15, 1997, with the limitation of sedentary work for 4 hours per day. Further, the doctor's report of September 26, 1997, recommended continued restrictions of working 4 hours a day; plus the additional restriction of a 10 pound lifting requirement, and restricting sitting to 4 hours at a time, and restricting walking and standing to no more than 1 hour at a time. The doctor then released complainant from work from October 8 through October 20, 1997. The doctor later limited complainant to sedentary work and sitting for 1-1/2 hours at a time. (See document #5, attached to respondent's brief dated 6/18/98.)

OPINION

Respondent's motion to dismiss the Whistleblower and Disability claims is a motion for summary judgment. Summary judgment should be granted only in clear cases. See *Grams v. Boss*, 97 Wis. 2d 332, 338-39, 294 N.W.2d 473 (1980) (citations omitted):

> On summary judgment the moving party has the burden to establish the absence of a genuine, that is, disputed, issue as to any material fact. On summary judgment the court does not decide the issue of fact. A summary judgment should not be granted unless the moving party demonstrates a right to a judgment with such clarity as to leave no room for controversy; some courts have said that summary judgment must be denied unless the moving party demonstrates his entitlement to it beyond a reasonable doubt. Doubts as to the existence of a genuine issue of material fact should be resolved against the party moving for summary judgment.
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> The papers filed by the moving party are carefully scrutinized. The inferences to be drawn from the underlying facts contained in the moving party's material should be viewed in the light most favorable to the party

> opposing the motion. If the movant's papers before the court fail to establish clearly that there is no genuine issue as to any material fact, the motion will be denied. If the material presented on the motion is subject to conflicting interpretations or reasonable people might differ as to its significance, it would be improper to grant summary judgment.

Motion to Dismiss the Whistleblower Claims

Respondent asserts two grounds for dismissal of the whistleblower claims. First, respondent contends the claimed disclosure does not meet the requirements of §230.80(7), Stats. Second, respondent contends the complaint was untimely filed.

Section 230.81, Stats., provides that an employe with knowledge of "information" may disclose the same and, if the disclosure meets the statutory requirements, then the protection against Whistleblower Retaliation applies. The term "information" is defined in §230.80(5), Stats., as shown below:

> "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.

The term "mismanagement" is defined by §230.80(7), Stats., is shown below:

> "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.

Respondent's argument as to why the alleged disclosure is insufficient to trigger the protections under the Whistleblower Law is shown below in pertinent part (from p. 3, brief dated 6/18/98):

> The alleged disclosure does not relate to a violation of 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. Nor does it allege a "pattern" of "incompetent management actions." . . .

Complainant's reply argument is shown below in pertinent part (from pp. 1-2, brief dated 7/30/98):

> As to [respondent's] contention that DER actions were not a violation of either Federal or State Statute, I contend the actions violated numerous state statutes . . . Clearly DER cannot monitor the state's employment practices if the two Governor's reports [AAIS & Veteran] have major differences on the total count of state employees. From 1994 thru 1996, report differences for "total onboard employees" were 15,293; 10,236; and 15,072 respectively. Also while the Veteran report showed a 2,811 decrease of state employees between 1994 and 1995, the AAIS report showed an increase of 2,156. Obviously, DER cannot fulfill its statutory obligations, if it cannot determine if state employment figures are rising or falling or the total number of state employees. §§230.49(c), (e), (em), (9r), (9m), (10b), (10c), 230.06 and 111.38, Stats., further clarify the role of DER and the importance of accurate employment figures.
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> As for [respondent's] assertion that these errors don't constitute mismanagement and a substantial waste of public funds (§230.80(7) & (9),Stats., respectively) the evidence indicates otherwise. It is impossible for DER to perform its statutory obligations if it knowingly uses and disseminates false employment figures. Clearly DER is not accurately reporting state employment practices [and] therefore DER is being mismanaged and is wasting a substantial amount of money. . . .
>
> Clearly the report figures are not in dispute. Equally clear is the fact DER cannot perform its function of monitoring and evaluating the state's employment practices when its own reports consistently show "onboard employee" differences in excess of 15% and is unsure whether employment levels are rising or falling. If DER cannot perform its statutorily mandated functions, it must be mismanaged and is therefore wasting money.

Complainant stated in his argument (recited above) that DER's ability to monitor state employment practices clearly could not be done if "major differences" existed between the two reports. The claimed protected disclosure (see ¶2 of the Findings of Fact), however, did not mention any "major differences." Rather, the

recited discrepancies of "almost 1%" and "almost 2%", were reported which cannot be characterized as "major differences."

It is desirable for employes to assist management in identifying potential problem areas. The problem which complainant brought to management's attention may have been valid but (as discussed above) does not meet the requirements of §230.80(5), Stats. Accordingly, complainant's "disclosure" is not protected under the Whistleblower Law and respondent's motion to dismiss the Whistleblower Retaliation claims is granted. Since the claimed disclosure does not meet the statutory requirements for protection against retaliation, there is no need for the Commission to address respondent's second assertion that the complaint was filed untimely.

Motion to Dismiss the Disability Claims

In order to establish that complainant was discriminated against on the basis of disability, the facts must show that: 1) the complainant is a disabled individual within the meaning of the Fair Employment Act (FEA), §111.32(8), Stats.; 2) the employer rejected the complainant because of his/her disability; and 3) the employer's action was not legitimate under the FEA. *Samens v. LIRC*, 117 Wis. 2d 646, 657-58 (1984), citing *Boynton Cab Co. v. ILHR Dept.*, 96 Wis. 2d 396, 406 (1980).

The facts show that complainant was a disabled individual during the time when he was eligible and received disability benefits. Ms. Hale, the individual responsible for making the decisions to hire Zimmerman and Lorenz, was unaware of complainant's disability when she made the hiring decisions. However, it is unknown at this juncture who it was at DER who excluded complainant from the recall process. Accordingly, Ms. Hale's lack of knowledge about complainant's disability does not resolve the question of why complainant was excluded from the recall process, which is the crux of the present dispute. It could be that the individual(s) who excluded complainant from the recall process knew of his disability. Accordingly, the facts are insufficient to show whether the employer rejected complainant because of his disability.

Respondent also argued that the employer's action was legitimate under the FEA. Respondent asserted as shown below in relevant part (emphasis shown appears in the original document):

> Even if DER intended to recall Mr. Sheskey for the Parker [and] Lybert . . . positions, DER has an absolute defense for not doing so. It turns out that Mr. Sheskey was unable, by reason of a medically determinable physical or mental impairment, to perform each and all of the material duties pertaining to his occupation or like occupation. Mr. Sheskey cannot now claim that DER should have recalled him to work when he, at the time, was representing to DER and the Department of Employment Trust Funds that he was totally disabled and therefore eligible to receive ICI payments. Either he was disabled or he was not. If not, then he should not have represented he was disabled and he should not have accepted and cashed any ICI payments. Mr. Sheskey's conduct in accepting ICI payments is an admission against interest and it is an obvious inconsistent position he now takes. Mr. Sheskey cannot have it both ways.
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> During the investigation of Mr. Sheskey's grievances and complaints, respondent's Chief Legal Counsel, Mr. David Vergeront, discussed with Respondent's Payroll & Benefits Specialist, Mr. Brian Schroeder, complainant's allegations that Respondent failed to recall him. Mr. Schroeder informed Mr. Vergeront that Mr. Sheskey had been receiving Income Continuation Insurance (ICI) while some of the jobs to which Mr. Sheskey is claiming he should have been recalled were being filled by others. That is, Mr. Sheskey began receiving ICI payments on 11/27/96 and continued to receive those payments until 10/27/97, and between these dates, the positions of Peggy Gulan-Parker (6/23/97) [and] Ellen Lybert (7/6/97) . . . were filled . . .
>
> In order to be eligible to receive ICI payments, "[y]ou must remain completely off work and must be totally disabled from your own or a like occupation because of physical or mental impairment for a minimum of 22 consecutive workdays for most state employes . . ." . . . The ICI rules state that "[d]uring the first 12 months of disability (called "short term disability"), "totally disabled" means your inability by reason of any medically determinable physical or mental impairment, to perform each and all of the material duties pertaining to your occupation or like occupation for which you are reasonably qualified, with due regard to education, training and experience." . . .

> Even if we assume that the positions were perfectly suited for Mr. Sheskey, his doctor had informed DER, on at least a monthly basis, that he recommended Mr. Sheskey remain off work . . . Moreover, Mr. Sheskey indicated to DER in an October 21, 1997, memo that he was "unable to perform [his] job duties and . . . unable to work" and that "the combination of the limitations and [his] qualifications severely limit [his] chances of finding employment" . . . He also indicated that he would contact DER with further information on whether he qualified for any Vocational Rehabilitation programs . . .
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> In sum, the fact that Mr. Sheskey was receiving ICI payments establishes that he could not perform the material duties of his occupation or a like occupation, and for that reason, it operates as an absolute defense to Mr. Sheskey's allegations that DER failed to recall him for the positions of Peggy Gulan-Parker (6/23/97) [and] Ellen Lybert (7/6/97) . . .). For these above reasons, Mr. Sheskey's disability discrimination complaint should be dismissed.

Complainant's response to the above-quoted argument is shown below (p. 4, letter dated 7/30/98):

> DER has not offered any other explanation for my recall denials except for its "absolute defense". Since DER allegedly didn't know of my disability during recall decisions, [DER's] "absolute defense" offers no explanation why the decision was made not to notify me of recall opportunities. [DER's] "absolute defense" is clearly an attempt to introduce prejudicial and discriminatory information which does not disprove any accusations of discrimination, on the contrary, [DER's] "absolute defense" reinforces my allegation that I was denied restoration rights because DER perceived me as disabled at the time I applied for ICI benefits.

Respondent's reference to an "absolute defense" is an apparent reference to a form of judicial estoppel which has been described by courts as shown below (some citations omitted):

> [J]udicial estoppel is especially appropriate where a party has taken inconsistent positions in separate proceedings. . . .
>
> "The policies underlying preclusion of inconsistent positions are general consideration[s] of the orderly administration of justice and regard for

> the dignity of judicial proceedings . . . Judicial estoppel is intended to protect against a litigant playing fast and loose with the courts." (*Russell v. Rolfs* (9th Cir. 1990) 893 F.2d 1033, 1037, internal quotation marks omitted.) "It seems patently wrong to allow a person to abuse the judicial process by first [advocating] one position, and later, if it becomes beneficial, to assert the opposite." (Comment, *The Judiciary Says, You Can't Have It Both Ways: Judicial Estoppel—A doctrine Precluding Inconsistent Positions* (1996) 30 Loyola L.A. L. Rev. 323, 327 . . .)

Jackson v. County of Los Angeles, 7 AD Cases 1256, 1260-61 (Calf Ct. App 1997).

The Equal Employment Opportunity Commission (EEOC) has guidelines describing the relationship between receipt of disability benefits under various sources (such as under the Social Security Act, different Workers' Compensation Acts and employer benefit plans). (See EEOC Notice Number 915.002, dated 2/12/97.) The EEOC cautions that receipt of disability benefits does not act as an absolute bar to a disability discrimination claim. Of particular interest here, many definitions of total disability used in employer benefit plans do not rely on whether an individual can work with accommodations which is the crux of a disability discrimination case. The EEOC guidelines include the following pertinent discussion:

> Another important consideration is whether the contract's definition of "disability" takes into account whether an individual can work with reasonable accommodation. Frequently, the definition makes no allowance for an individual's ability to work with reasonable accommodation . . . For example, one disability plan defined a "totally disabled" individual as an employee "who is unable to perform the material duties of his/her job for the entire regularly scheduled work week as the result of illness or injury . . ." Under such a plan, an individual with a disability who is able to work only part time may be both "totally disabled" under the plan and [able to work with accommodations]. Accordingly, an individual receiving disability insurance benefits still may be entitled to protection under [discrimination laws.]

The EEOC guidelines State that representations on a disability benefit application may be relevant to the question of accommodation. The parties have not

provided the Commission with any detailed reports filed by complainant or his physician in connection with his disability benefit claim. What we have is respondent's assertion that complainant's receipt of disability benefits based on a representation of total disability should operate as an automatic bar to the present disability discrimination claims. The disability benefit plan's definition of "total disability", however, does not take into account whether complainant could work with accommodations. Accordingly, respondent cannot rely solely on the disability plan's definition of total disability to prevail on the present motion. Issues of fact remain regarding the accommodation issue, which defeat the present motion.

ORDER

Respondent's motion to dismiss the Whistleblower claims is granted. Respondent's motion to dismiss the disability claims is denied.

Dated: August 26, 1998.

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

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