

STATE OF WISCONSIN

PERSONNEL COMMISSION

RANDALL MEYER,
Complainant,

v.

**Secretary, DEPARTMENT OF HEALTH
AND FAMILY SERVICES,**
Respondent.

**FINAL DECISION
AND ORDER**

Case No. 98-0162-PC-ER

NATURE OF THE CASE

This case involves a complaint of discrimination on the basis of WFEA (Wisconsin Fair Employment Act) (Subchapter II, Chapter 111, Stats.) retaliation. The issue is "Whether respondent retaliated against complainant in violation of the Fair Employment Act when complainant's request for reinstatement was denied in August, 1998, by Northern Wisconsin Center." (Conference report dated October 26, 1998.)

FINDINGS OF FACT

1. Complainant had been employed at NWC (Northern Wisconsin Center for the Developmentally Disabled) as an RCT 2 (Resident Care Technician 2) prior to his discharge on or about September 28, 1990.
2. Following his discharge, complainant filed a charge of discrimination alleging that his termination had been in violation of the FMLA (Family and Medical Leave Act).
3. Complainant was successful with his FMLA claim and this resulted in his restoration at NWC in 1992.
4. During his employment at NWC after his restoration, complainant's annual performance evaluations (PPD's) were above average and reflected a good rapport with staff, supervisors, and patients.

5. After about four years, complainant transferred to WRC (Wisconsin Resource Center). After several months at WRC he returned to NWC. In July, 1997, he transferred to WMHI (Winnebago Mental Health Institute). He resigned his employment effective March 19, 1998.

6. Complainant's PPD's at WRC and WMHI reflected above average performance.

7. Complainant subsequently applied for reinstatement at NWC.

8. Pursuant to the civil service code, complainant had the right to reinstatement at NWC. This meant that he could be re-employed at NWC without having to undergo competition. The decision whether to re-employ him was discretionary with NWC. *See* §230.31(1)(a), Stats.; §§ER-MRS 16.01, 16.035(1), Wis. Adm. Code.

9. Complainant's request for reinstatement at NWC was denied on August 12, 1998, by a letter signed by Personnel Director Metsala.

10. The NWC management personnel who were primarily involved in the decision to deny complainant's reinstatement request were Personnel Director Metsala, Personnel Assistant Hedrington, and Resident Care Specialists (RCS's) Salling and Ramsier.

11. After receiving complainant's request for reinstatement, the personnel department contacted several former supervisors about their previous experience with complainant. Two (RCS Ramsey and Nursing Director Nelson) said they weren't interested in having complainant reinstated.

12. RCS Ramsier also was consulted. She had supervised complainant from 1994-1996. She believed complainant's overall performance had been satisfactory, but she had observed some erratic behavior by him toward the end of his tenure at NWC, and she felt personal issues were affecting his work, and that he sometimes was too "strong armed" in dealing with patients. She had observed one outburst by complainant when he stated that someone had better tell his (complainant's) "God damn" wife to stop spreading lies about him. She was not in favor of rehiring complainant for these reasons.

13. RCS Salling also had been consulted. She recounted to the personnel department an incident she had observed where she felt complainant was angry with a patient and was using excessive force with a patient. She felt that this was a relatively significant incident, albeit not one that was written up. As a result of the incident she engaged in a job instruction session involving her, complainant, the NWC behavior management instructor, and complainant's union representative. Ms. Salling wanted the union representative present to demonstrate to complainant that the incident was a serious situation.

14. When complainant called Ms. Hedrington to inquire about the status of his reinstatement request, she told him he was not being reinstated because of his "past experience" at NWC.

15. At the time of the denial of complainant's reinstatement request, none of the aforesaid members of management (Ramsey, Nelson, Ramsier, Salling, Hedrington, and Metsala) were aware of complainant's earlier (after his termination in 1990) charge of FMLA discrimination or that he had used FMLA leave. Neither Hedrington nor Metsala had been employed at NWC either during the period when this previous charge was being processed nor when complainant was restored in 1992.

16. Neither complainant's prior FMLA discrimination charge nor his use of FMLA leave played any part in his reinstatement denial.

CONCLUSIONS OF LAW

1. This case is appropriately before this commission pursuant to §230.45(1)(b), Stats.

2. Complainant has the burden of proof to establish that he was retaliated against in violation of the WFEA when he was denied reinstatement to NWC in August 1998.

3. Complainant has not sustained his burden of proof.

4. Respondent did not retaliate against complainant in connection with the denial of his request for reinstatement in August 1998.

OPINION

A prima facie case of employment retaliation requires a showing that the complainant engaged in a protected activity, that the employer was aware of that protected activity, and that the complainant suffered an adverse employment action under circumstances which give rise to an inference that the employer was motivated by that protected activity. *Marfilius v. UW-Madison*, 96-0026-PC-ER, 4/24/97. In the instant case, the complainant has not established a prima facie case. There is no question that he engaged in a protected activity, and that he suffered an adverse employment action, but there is no evidence that any of the supervisors and personnel staff had any awareness of complainant's protected activities that occurred. All of them disavowed such knowledge. While in some circumstances it can be inferred that certain members of the employer's staff had notice of a particular legal proceeding—e. g., the staff member directly named in a complaint—such circumstances do not exist in this case. The employees of the personnel staff who were involved in the decision to deny complainant's request for reinstatement were not even employed at NWC during the time the earlier charge was being processed. It can not be inferred that the other members of management were aware of complainant's activities because it appears that they were members of middle management, and there is no apparent reason that they would necessarily have been aware of complainant's activities.

Even if complainant had established a prima facie case, he did not establish that the reasons articulated by respondent for the denial of reinstatement were a pretext for retaliation. Complainant produced significant evidence of pretext by presenting favorable PPD's that did not reflect the concerns voiced by management about his performance. It might well be the case that the PPD's would have prevented respondent from establishing just cause for a disciplinary action, where respondent would have the burden of proof. However, in this case complainant has the burden of proof to establish an unlawful motivation for respondent's action. As against the PPD's, respondent established that there were several supervisors who independently had voiced the same or

similar concerns about complainant in response to Ms. Hedrington's inquiries. While the supervisors' concerns had never been documented, it was undisputed with respect to the most serious matter, an incident involving what Ms. Seeley perceived as excessive use of force with a patient, that she felt it was serious enough to have immediately convened a job instruction session involving her, the institution behavior management instructor, and complainant and his union representative.

Another piece of evidence on which complainant relied was Ms. Hedrington's statement to complainant when he inquired about his reinstatement request, that he was not being reinstated because of his "past experience" at the institution. Complainant contends that this was a reference to complainant's prior discrimination complaint. However, the reference was to the complainant's experience at the institution about which the supervisors had expressed concern.

ORDER

This complaint is dismissed.

Dated: May 5, 1999.

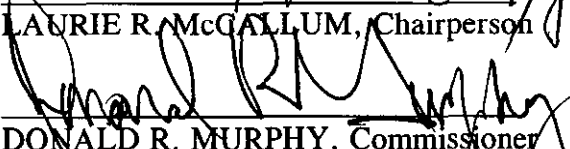
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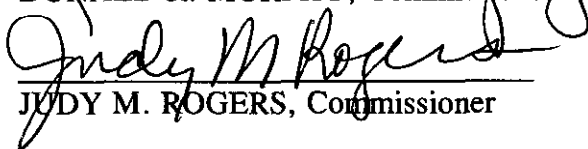
Parties:

Randall Meyer
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STATE PERSONNEL COMMISSION


LAURIE R. MCGALLUM, Chairperson


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

Jon E. Litscher, Secretary
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OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.)

2/3/95