STATE OF WISCONSIN PERSONNEL COMMISSION

DAVID RICHERT,
Complainant,

v.

President, UNIVERSITY OF WISCONSIN SYSTEM (GREEN BAY),
Respondent.

Case No. 99-0074-PC-ER

RULING ON RESPONDENT'S MOTION TO DISMISS

Respondent filed a motion to dismiss the above-noted case by cover letter dated May 14, 1999. Both parties filed written arguments. The Commission received the final argument on July 6, 1999.[1]

The facts recited below are made solely for the purpose of resolving the present motion. They appear to be undisputed by the parties, unless specifically noted to the contrary.

FINDINGS OF FACT

1. Complainant is employed as a Public Safety Officer in the Public Safety Department at the University of Wisconsin's Green Bay campus (UWGB).

2. The Commission received the above-noted discrimination complaint on April 19, 1999. The complainant alleged therein that he was subjected to harassment due to his participation in activities protected under the Whistleblower Law, §§230.80, Stats., et. seq.

3. Complainant's claimed participation in an activity protected under the Whistleblower Law is described in this paragraph (hereafter, referred to as the Whistleblower Disclosure). On or about July 1, 1998, complainant and all staff in his department signed a memo regarding Randy Christopherson, Director of the Public

[1] The final scheduled argument was received on June 3, 1999. Complainant filed an additional unscheduled argument by letter dated June 30, 1999, which was received by the Commission on July 6, 1999.

Safety Department at UWGB. The first issue raised in the memo was a perception that Director Christopherson treated males more favorably than females in regard to training opportunities. The second issue concerned the perception that Director Christopherson engaged in a dangerous practice by placing officers on duty before the officers completed the Field Training Officer (FTO) program. The third issue concerned the perception that Director Christopherson mismanaged the Campus Bike Program. The fourth issue related to the perception that additional policies and procedures should be reduced to writing so Director Christopherson could not change the procedures at his whim and then discipline staff for failing to follow the changes. Examples of the experience alleged by several employees were provided to illustrate the fourth issue. The following excerpt directly relates to complainant:

> An agreement between the Physical Plant, Power Plant and Public Safety officers has been in existence for years. If Public Safety needs anything from the Physical Plant or Power Plant to assist us with our job, we have permission to get it at anytime whether the building is locked or not. Officer Richert entered the Physical Plant to get needed earplugs for a loud concert in the Union on April 30, 1998 at the request of the officers working the concert. The disposable foam earplugs were not available in the Public Safety office. Christopherson heard Richert say he would get the requested earplugs for Officers Boos and DeBauche.
>
> Christopherson accused Richert first of employee theft, then of entering a locked building without authorization citing UW work rules. Entering a locked building is part of our job as public safety officers and we should not be disciplined for doing things we have written permission from the department heads to do. Les Raduenz, Lylas Duquaine and Dennis Bailey all have given written permission for access into the building yet Christopherson uses the situation as a disciplinary action. Christopherson was given a written copy of the authorization by Duquaine yet still chose to ignore it. Christopherson has talked to Raduenz who supports Richert'' actions. Yet on June 8, 1998, Christopherson issued Richert a written reprimand for entering without authorization and using poor judgment. Christopherson told Richert another meeting would be set up to put Richert on a concentrated evaluation program.

> As an added note, Christopherson ordered earplugs which were delivered the week following the accusation by Christopherson. Until then the only earplugs in the Public Safety office were plugs made for speakers to a radio. Four sets are needed to make two usable pairs. They are also kept locked in a storage locker making them inaccessible to the officers. These ear plugs had just arrived the same day.

An allegation was made in regard to the fourth issue raised that Director Christopherson violated UW work rules and state law by using his position as a "means to change legal police documents involving his children." The final topic addressed in the memo was poor staff morale.

4. Complaint cites as harassment, the following actions taken after the Whistleblower Disclosure (described in the prior paragraph) was filed.

a. OWI Report: While the departmental complaint was going on, Director Christopherson again showed that I am treated differently than other employees when he returned an Operating While Intoxicated (OWI) report to me that I had written. On the report he had written several things that he felt were wrong with it. I have enclosed the report. The reason I again feel this was harassment was the fact that Officer Wayne Boos had turned in a OWI report later that week. The parts of my report Director Christopherson felt were wrong were also in Officer Boos' report. The sentences were part of what both of us were taught in training for Standardized Field Sobriety Testing. According to Christopherson actions, for me these nationally taught standards were wrong, yet for another officer in our department they were correct. I again felt this was an attempt to increase the stress from the constant harassment I was already feeling from him.

b. Threat of Concentrated Work Evaluation: A sergeant was recently hired by Director Christopherson . . . It has become very apparent to me, and the other officers, that Sgt. Rosin does not do anything unless he is told by Director Christopherson . . . I feel that new sergeant is a pawn for Director Christopherson to hide behind to continue the harassment of myself and the other people I work with. The other night Sgt. Rosin, after talking to me about some follow up on cases, threatened me with a concentrated work evaluation . . .

c. Narcotics Database: Lately both Sgt. Rosin and Director Christopherson have been harassing me about having still not

created a database for narcotics information. One night the three of us talked about it and found that the database, Microsoft Access, was not in the only computer the police officers are allowed to use. Director Christopherson stated he would look into getting Microsoft Access installed on it. Shortly after the meeting, Sergeant Rosin started harassing me about not having the database done. Yet they had never installed Microsoft Access and I had not heard anything further until being harassed about not having the database done. I was not told until approximately 3 weeks later that they would not install Microsoft Access, that I would have to figure out how to use the programs that were already in the computer. I have no problem creating the database, but would have at least liked to have been informed as to what was going on and not just harassed about not having it done when I did not have the means to do it.

d. Lost File: On April 6, 1999, I was assigned to do follow up (on) case 99-0229. I was unable to locate the case file . . . I spoke with Director Christopherson who told me (he) had searched through all of my paperwork, including my mailbox, and had been unable to find it. I had also looked through my mailbox and case files and was unable to find it. I mentioned to Director Christopherson that Officer Bellantonio had the case file at one time, but I didn't know what he had done with it. After I met with Director Christopherson I went out to the squad car on patrol. Director Christopherson radioed me saying that he just found the case file in mailbox (sic). I had already looked in my box and so had Director Christopherson and Jan Hess yet now the case was there? I feel that Director Christopherson found the case file elsewhere, probably in Officer Bellantonio's paperwork, and claimed he found it in mine. I feel this was done as Officer Bellantonio often receives special treatment from Director Christopherson, as Officer Bellantonio was the only Officer not to sign the complaint against Director Christopherson. We did not include Officer Bellantonio as he was on probation and we figured it would be too easy for him to retaliate against the probationary officer . . .

e. Schedule Change: On 3-16-99, I was given a change of schedule notice by Supervisor Terrien. This notice violated our Union contract as it failed to notify our Union of the change that was to last the rest of the year. I feel it is an arbitrary change of my schedule. Per Union contract I requested a detailed explanation for the change and was only given that it was the operational need of the department. Operational need is Director Christopherson's favorite term. I don't feel this was a very detailed explanation, in

> fact it is not an explanation at all. To me it says that my schedule is being changed because they can, or at least think they can. The schedule I feel was changed so I would work with sergeant Rosin three days a week instead of the two I was scheduled for. A less senior officer Boos had previously had his schedule changed so each of us would be working two days with the sergeant. Boos' schedule was changed so he worked one day with the sergeant, one day with me and two days alone. I normally wouldn't have minded the change, but due to the treatment and threats of discipline from sergeant Rosin I feel this is an attempt to further harass me.

5. Officer Wayne Boos, referenced in the paragraph 3 above (items "a" and "e"), also signed the July 1997 memo of complaint against Director Christopherson.

6. Complainant raised new allegations of retaliation in his letter dated June 30, 1999, as noted below.

> f. Training Duties: In the last few months, Director Christopherson removed complainant's duties as Field Training Officer and as Firearms Instructor.

OPINION

I. Motion to Dismiss

This case is before the Commission pursuant to respondent's motion to dismiss for failure to state a claim. The motion is analyzed pursuant to the guidance set forth in *Morgan v. Pennsylvania General Ins. Co.*, 87 Wis.2d 723, 731-32, 275 N.W. 2d 660 (1979):

> For the purpose of testing whether a claim has been stated pursuant to a motion to dismiss under sec. 802.06(2)(f), Stats., the facts pleaded must be taken as admitted. The purpose of the complaint is to give notice of the nature of the claim; and, therefore, it is not necessary for the plaintiff to set out in the complaint all the facts which must eventually be proved to recover. The purpose of a motion to dismiss for failure to state a claim is the same as the purpose of the old demurrer – to test the legal sufficiency of the claim. Because the pleadings are to be liberally construed, a claim should be dismissed as legally insufficient only if "it is quite clear that under no conditions can the plaintiff recover." The facts pleaded and all reasonable inferences from the pleadings must be

> taken as true, but legal conclusions and unreasonable inferences need not be accepted.

Respondent first contends that this case should include only the alleged retaliatory actions taken after complainant and other staff signed the Whistleblower Disclosure). Specifically, respondent notes that the discipline imposed (as described in ¶2 of the Findings of Fact) could not be considered as taken in retaliation for the Whistleblower Disclosure that had not occurred yet. Complainant does not offer any explanation of how a past event could be motivated by an event that had not yet occurred. Accordingly, the Commission dismisses any portion of this claim involving events that occurred prior to the Whistleblower Disclosure. For example, see *Seay v. DER & UW-Mad.*, 89-0082-PC-ER, 3/31/94; affirmed by Dane County Circuit Court, *Seay v. Wis. Pers. Comm.*, 93-CV-1247, 3/3/95; affirmed by Court of Appeals, 88-CV-1223, 1/10/90.

Remaining for analysis is whether items "a" through "e" as recited in ¶4 of the Findings of Fact are actionable under the Whistleblower Law. The statutory section pertinent to this discussion is shown below (emphasis added):

> §230.80(2), Stats.: "Disciplinary action" means any action taken with respect to an employe which has the effect, in whole or in part, of a penalty, including but not limited to any of the following:
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> a) Dismissal, demotion, transfer, removal of any duty assigned to the employe's position, refusal to restore, suspension, reprimand, verbal or physical harassment or reduction in base pay.
> b) Denial of education or training, if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation or other personnel action.
> c) Reassignment.
> d) Failure to increase base pay, except with respect to the determination of a discretionary performance award.

The introductory clause clearly states that the action(s) complained of must have the effect (at least in part) of a penalty. The examples given of actions having the effect of a penalty are contained in subparagraphs (a) through (d) of the statute, but are not

intended to be an all-inclusive list. The Commission has held that the common understanding of a penalty in connection with a job related disciplinary action does not stretch to cover every potentially prejudicial effect on job satisfaction or ability to perform one's job efficiently. Complainant is not retaliated against where his disclosure results in no loss of pay, position, upgrade or transfer or other consequences commonly associated with job discipline. *Vander Zanden v. DILHR*, 84-0069-PC-ER, 8/24/88; affirmed *Vander Zanden v. DILHR*, Outagamie County Circuit Court, 88 CV 1233, 5/25/89; affirmed by Court of Appeals, 88 CV 1223, 1/10/90.

The alleged retaliatory acts are considered individually in this paragraph. **Item "a"** (OWI report) is akin to an area of complainant's dissatisfaction with an aspect of his working conditions and, accordingly, does not rise to the level of a penalty under the Whistleblower Law. The same is true for **Item "c"** (narcotics database). The same is true for **Item "d"** (lost file). **Item "b"** (threat of concentrated work evaluation) does not rise to the level of a disciplinary action under §230.80(2)(a), Stats. Such conclusion is consistent with the Commission's prior ruling that a decision to investigate the work performance of an employe is not a disciplinary action under the Whistleblower Law. *Flannery v. DOC*, 90-0157-PC-ER, 91-0047-PC, 7/25/91.[2] **Item "e"** (schedule change) according to complainant's own version of events had no effect of a penalty per se, except with respect to the potential of harassment which is discussed later in this ruling.

The complainant also claims that items "a" through "e" when viewed collectively constitute harassment. Section 230.80(2)(a), Stats., prohibits "verbal harassment." The problem with complainant's contention is that the allegations raised in items "a" through "e" involve actions taken by supervisors in the course of

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[2] Such conclusion also is consistent with *Bragg v. Navistar International Transportation Corporation*, 78 FEP Cases 1479 (7th Cir. 1998) ["Moreover, a supervisor's assessment of an employee's skills in not an adverse employment action."] While the *Bragg* decision addressed the question of an adverse action under Title VII of the Civil Rights Act, 42 U.S.C. §2000e et seq., the requirements to establish an adverse action under Title VII are less stringent than under Wisconsin's Whistleblower Law.

performing their supervisory function which cannot be characterized as acts of harassment.

In *Janken v. GM Hughes Electronics*, 53 Cal.Rprt.2d 741, 745-6 (Cal. App 2 Dist. 1996)[3], the court explained the nature of supervisory actions that could be characterized as harassment as opposed to discrimination:

> [H]arassment consists of a type of conduct not necessary for performance of a supervisory job. Instead, harassment consists of conduct outside the scope of necessary job performance, conduct presumably engaged in for personal gratification, because of meanness or bigotry, or for other personal motives. Harassment is not conduct of a type necessary for management of the employer's business or performance of the supervisory employe's job . . .
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> We conclude, therefore, that . . . commonly necessary personnel management actions such as hiring and firing, job or project assignments, office or work station assignments, promotion or demotion, performance evaluations, the provision of support, the assignment or non-assignment of supervisory functions, deciding who will and who will not attend meetings, deciding who will be laid off, and the like, do not come within the meaning of harassment. These are actions of a type necessary to carry out the duties of business and personnel management . . . Harassment, by contrast, consists of actions outside the scope of job duties which are not of a type necessary to business and personnel management.

Respondent's motion to dismiss is granted as to the allegations noted in items "a" through "e." The allegations considered individually do not constitute a disciplinary action within the meaning of §230.80(2), Stats. The allegations considered collectively do not constitute harassment within the meaning of §230.80(2)(a), Stats.

II. Item "f" – Must be Filed as a New Complaint

Complainant raised new allegations in his letter dated June 30, 1999, which was received by the Commission on July 6, 1999. In particular, he indicated that "in the

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[3] The *Janken* case arose under California's Fair Employment and Housing Act (FEHA) which prohibits both harassment and discrimination. The Commission concluded there were sufficient analogies between the FEHA, Wisconsin's Fair Employment Act and the Wisconsin's Whistleblower Law to adopt the *Janken* court's approach to defining the term harassment.

last few months" Director Christenson removed training duties previously assigned to complainant's position. The removal of duties is recognized as a disciplinary action under §230.80(2)(a), Stats. ("removal of any duty assigned to the employe's position"). Complainant did not specifically request to amend his complaint to include the new allegations raised in **Item "f,"** but an amendment or new claim would be necessary to include allegations not raised in the initial complaint. The Commission, accordingly, first turns to the question of whether it would be appropriate to allow complainant to amend his complaint to include the allegations raised in Item "f."

The Commission's administrative code allows amendments only under specific circumstances, pursuant to §PC 2.02(3), Wis. Adm. Code, the text of which is shown below:

> AMENDMENT. A complaint may be amended by the complainant, subject to approval by the commission, to cure technical defects or omissions, or to clarify or amplify allegations made in the complaint or to set forth additional facts or allegations related to the subject matter of the original charge, and those amendments shall relate back to the original filing date.

The allegations raised in Item "f" could not be considered as an attempt to cure a technical defect or omission in the initial complaint because the newly raised allegations occurred after the initial complaint was filed. See *Chelcun v. UW System*, 91-0159-PC-ER, 3/9/94 (discussion of item "V" on p. 12). For similar reason, the allegations raised in Item "f" could not be considered as clarification or amplification of events noted in the initial complaint. Accordingly, the allegations raised in Item "f" would be inappropriate to consider as an amendment to the initial complaint.

Of course, complainant would be entitled to file a new complaint regarding the allegations raised in Item "f" and the new complaint would relate back to July 6, 1999, the date the Commission received complainant's letter dated June 30, 1999. The Commission hereby grants complainant the opportunity to file a new complaint regarding the allegations raised in Item "f." To do so, he must complete a new complaint form and have it notarized as required under §PC 2.02(2), Wis. Adm. Code.

A blank complaint form is included with complainant's copy of this ruling. If he wishes to pursue filing a new complaint, the Commission must receive the same within 15 days of the date this ruling was mailed to the parties. His new complaint form must include relevant dates for the allegations raised in Item "f." The dates are needed to determine whether the new complaint was filed timely (pursuant to §230.85(1), Stats., complaints 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".

ORDER

Respondent's motion is granted and this case is dismissed. Complainant must file a new complaint if he wishes to pursue the allegations raised in item "f".

Dated: July 28, 1999.

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

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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.)