

STATE OF WISCONSIN  
**JUDY KAY OCHRYMOWYCZ,**  
*Complainant,*

v.

**President, UNIVERSITY OF WISCONSIN  
SYSTEM (EAU CLAIRE),**  
*Respondent.*

Case No. 99-0161-PC-ER

PERSONNEL COMMISSION

RULING ON MOTIONS  
TO DISMISS

This is a complaint of whistleblower retaliation. Respondent filed motions to dismiss based on untimely filing and failure to state a claim for relief on December 23 and 30, 1999, and January 10, 2000. Both parties provided written argument on the motions. In addition, the Commission issued a Proposed Ruling and provided both parties an opportunity to file written objections to it. The following findings of fact are based on information provided by the parties, appear to be undisputed unless otherwise noted, and are made solely for the purpose of deciding these motions.

In the objections she filed on April 21, 2000, to the Proposed Ruling, complainant claimed for the first time that the following, in addition to the disclosure she claimed in her complaint, constituted protected whistleblower disclosures for purposes of this case:

A. Complainant's Document 4. This is an April 2, 1998, email from complainant to Dean Haywood confirming her receipt of his confidential letter of April 1, 1998, which directed complainant to provide Chemical Stockroom services to additional Arts & Sciences departments effective April 6, 1998. Dean Haywood was aware at this time that complainant did not feel that such additional services should be provided until certain administrative policies and procedures had been developed. In her email, complainant stated that she had contacted the Department of Commerce and a lawyer to get input from them as to Dean Haywood's directive.

B. Complainant's Document 6. This is a January 12, 1999, email from complainant to Leigh Leonard and Pat Kandziora in which complainant requests assistance in interpreting employee rights and

responsibilities for health. In this email, complainant cites alleged restrictions imposed on contacts she was allowed to make and two examples of non-compliance with Laboratory Standards. Leonard and Kandziora were employed in the University of Wisconsin System Office of Safety and Loss Prevention, which is not in complainant's supervisory chain of command. This email may have been copied to Assistant Dean Smethells of the UWEC College of Arts and Sciences.

C. Complainant's Document 11. This is an April 19, 1999, letter from complainant to UWEC Chancellor Mash objecting to the appointment of Dr. Muller as supervisor of the Chemical Stockroom and its staff. In this letter, complainant raises the point that UWEC had not met the standards promulgated by local, state, or federal codes as evidenced by its failure to pass inspections during the last fiscal year; and stated her concerns regarding the Phillips Hall purchasing plan, various environmental health and safety matters, and UWEC's failure to respond to her concerns relating to regulatory issues. Chancellor Mash responded by advising complainant that Provost/Vice Chancellor for Academic Affairs Satz would be following up. Complainant alleges that Provost Satz did not follow up.

D. Complainant's Document 14. This is a June 14, 1999, letter from complainant to the Department of Natural Resources which was copied to Assistant Dean Smethells and Vice Chancellor Satz. In this letter, complainant discusses the failure to include Chemical Stockroom staff in initial hazardous waste training, and her concern that the card access system, centralized purchasing, chemical inventory procedures, and failure to record dates on chemical containers violated applicable health and safety requirements.

E. Complainant's Document 20, Part 1. This document was written by Brian Mahoney, a member of the UWEC Geology Department faculty.

F. Complainant's Document 20, Part 2. This document was written by Dean Haywood to Dr. Mahoney.

G. Complainant's Document 20, Part 3. This is a February 22, 1997, document written by complainant to Don Campbell in which she provides advice as to preparation of a response to Dr. Mahoney.

H. Complainant's Document 20, Part 4. This is a January 12, 1998, memo from complainant to Dr. Lewis in which complainant

expresses her opinion regarding a request from Dr. Mahoney to obtain hydrofluoric acid through the Chemical Stockroom, and proposes an alternative procedure.

I. Complainant's Document 20, Part 5. This is a March 31, 1998, memo from complainant to Dean Haywood. In this memo, complainant points out that she did not have the authority to provide chemicals to departments other than the Chemistry Department because the relevant administrative policies and procedures had not yet been put in place.

J. Complainant's Document 20, Part 6. This is an April 2, 1998, email from complainant to three University of Wisconsin System attorneys in which she inquires about certain liability issues.

K. Complainant's Document 20, Part 7. This is an April 3, 1998, email from complainant to the members of the Chemistry Department faculty advising that Dean Haywood had directed her to begin providing Chemical Stockroom services to additional departments effective April 6, 1998; that, because current Chemical Stockroom services and staff were inadequate to assume these additional responsibilities and because proper policies and procedures had not yet been developed, Chemistry Department faculty should be concerned; and that she would appreciate their patience while this change was being implemented.

L. Complainant's Document 20, Part 8. This is a memo to complainant from Dean Haywood in which he expresses his appreciation for her cautious approach to matters which could have a health or safety ramification, suggests steps she could take, and solicits her input.

M. Complainant's Document 20, Part 9. This is an April 14, 1998, memo from complainant to Dean Haywood requesting assistance in implementing the directive to provide Chemical Stockroom services to additional departments in the areas of cost sharing and broader purchasing authority, suggesting the creation of an assistant stockroom manager position, and requesting a meeting to discuss chemical inventory management and storage policy.

N. Complainant's Document 20, Part 10. This is a July 1, 1998, memo from Dean Haywood to complainant thanking her for her cooperation.

O. Complainant's Document 20, Part 11. This is an April 16, 1998, memo from complainant to Susan Harrison, Chair of the UWEC Faculty Senate, in which complainant cites examples of the failure of UWEC to satisfy certain health and safety requirements. Ms. Harrison was not in complainant's supervisory chain of command.

P. Complainant's Document 20, Part 12. This is a November 4, 1997, memo to complainant from Ms. Harrison.

Q. Complainant's Document 20, Part 13. This is an October 31, 1997, memo from complainant to Ms. Harrison in which she requests language be added to the UWEC Faculty and Academic Staff Handbook in the area of environmental health and safety.

#### FINDINGS OF FACT

1. This complaint was filed with the Commission on October 8, 1999. The actionable period created by the 60-day filing requirement of §230.85(1), Stats., is August 9, 1999, through October 8, 1999.

2. At all times relevant to this matter, complainant has been employed in a Laboratory Manager 1 position at the University of Wisconsin-Eau Claire (UWEC), assigned to the Chemical Stockroom within the College of Arts and Sciences.

3. Complainant held this Laboratory Manager position as a classified employee from 1971 to 1990 and through an academic staff appointment from 1990 through November 17, 1999.

4. In her charge of discrimination, complainant claimed as her only protected whistleblower disclosure a letter of April 16, 1998, relating to various chemical health and safety concerns, which she wrote and signed, and which she directed to Scott Amacher of the Wisconsin Department of Commerce. Complainant sent an anonymous copy of this letter to the UWEC Safety and Buildings Division on or around April 16, 1998. Complainant has not indicated that she disclosed the contents of this letter during the relevant time period to anyone in her supervisory chain, to any agency to which she was referred by the Personnel Commission, or to any other individual or entity specified in §230.81, Stats.

5. Through June 30, 1998, the Chemical Stockroom was a part of the UWEC Chemistry Department. As of July 1, 1998, the Chemical Stockroom was assigned to the College of Arts and Sciences, the "Chemistry Department Stockroom" was renamed the "Phillips Hall Chemical Stockroom," and the Chemical Stockroom became a centralized operation serving all of the departments of the College of Arts and Sciences rather than just the Chemistry Department. Complainant was notified of these changes at or before the time they were effected. As a result of these changes, the Chemical Stockroom no longer was entitled to automatic representation on the Chemistry Department Safety Committee or other Chemistry Department committees or working groups. At all times relevant to this matter, both before and after the centralization effective July 1, 1998, the Chemistry Department was the primary user of the services offered by the Chemical Stockroom.

6. Shortly after July 1, 1998, complainant's supervision was transferred from the Chair of the Chemistry Department (David Lewis) to the Dean of the College of Arts and Sciences (Carl Haywood) as a part of the centralization of the Chemical Stockroom. Assistant Dean William Smethells was assigned by Dean Haywood to be his point of contact with the Chemical Stockroom.

7. Beginning in July of 1998, complainant participated in the recruitment and hire of an Assistant Stockroom Manager. Jason Kuehl was appointed to this position in October of 1998, and complainant was assigned to serve as his first-line supervisor.

8. In January of 1999, Cheryl Muller, Associate Professor of Chemistry, was designated as the Chemistry Department's Chemical Hygiene Officer.

9. On February 3, 1999, UWEC Chancellor Mash toured the Chemical Stockroom.

10. In the spring of 1999, Dean Haywood announced his retirement and was replaced by Interim Dean David Lund. Effective May 18, 1999, Interim Dean Lund appointed Dr. Muller as the Assistant to the Dean in charge of the Chemical Stockroom. In her complaint, complainant represented on page 2 that, in a meeting to announce this appointment which occurred in April or May of 1999, complainant and

the others present were told by Interim Dean Lund that “Dr. Muller would have complete control of the stockroom, all decisions would be made by her and that all communications to anyone must proceed through her.” Complainant also stated in her complaint that this action resulted in the demotion of the complainant “from the responsibilities which she had executed for 28 years.”

11. As a result of this appointment, Dr. Muller assumed some duties previously performed by complainant, including supervision of the assistant Chemical Stockroom manager; providing authorization for access to the Chemical Stockroom; and working with department chairs to review and revise certain Chemical Stockroom procedures. These had been some of the higher level duties of complainant’s position. Most of these duties had been established or expanded as the result of the centralization of the Chemical Stockroom operation in 1998.

12. In an effort to clarify complainant’s allegations, one of the Commission’s equal rights investigators prepared a summary chart listing and briefly describing each of the allegations she understood complainant to be making here. Complainant was provided an opportunity to suggest changes to this list and the investigator incorporated the changes suggested by complainant. The following represents the list of these allegations (as revised on December 22, 1999):

1. Dean Carl Haywood, Assistant Dean Smethells, and Dean David Lund directed other offices to cease all communications, such as announcements of campus-wide computer, electrical, water, other utilities shut-downs; Y2K discussions; campus-wide alerts and announcements; discussions of the upcoming Phillips Science Hall remodeling project; etc.

- 1.a.(1) campus announcements via campus mail
- 1.a.(2) campus announcements via e-mail
- 1.b. Y2K discussions
- 1.c. Phillips Hall remodeling project
- 1.d. Chemical Hygiene Plan and environmental health and safety issues
- 1.e. card access system
- 1.f. Phillips Hall purchasing plan

2. Chair David Lewis eliminated Stockroom representation on the Chemistry Dept Safety Committee and the Stockroom was excluded from planning for the waste minimization plan and not included in safety inspections and other requirements of the Chemical Hygiene Plan.
  - 2.a. Chemistry Dept Safety Comm
  - 2.b. Chemical Hygiene Plan and environmental health and safety issues
  - 2.c. Other denials of Stockroom representation
3. John Baltes excluded Stockroom personnel from the initial hazardous waste training sessions for Phillips Hall personnel and [complainant] had to appeal for training even though the Stockroom is the interim storage area for hazardous waste for the 4<sup>th</sup> floor of Phillips Science Hall.
4. Dean Carl Haywood and Dean David Lund removed some of complainant's job duties; staff tried to reassign work responsibilities to complainant.
5. Dean Carl Haywood and Asst. Dean William Smethells denied complainant's freedom of speech by directing the Stockroom not to communicate with any environmental health or safety agency.
6. Chancellor David Mash appeared to have a hostile attitude and allocated a short time when he visited the Stockroom [on February 3, 1999].
7. Dean Carl Haywood, Dean David Lund, and Asst. Dean William Smethells failed to respond to requests for action on regulatory issues.
8. Dean David Lund reallocated the Stockroom space to the Chemistry Dept and relocated the Stockroom office(s) to the chemical wing (North wing) of Phillips Science Hall.
9. Dean David Lund reverted the newly created centralized Stockroom servicing all science departments back to a Chemistry Dept Stockroom.
13. The delivery of some of complainant's mail through the campus mail distribution system was disrupted from July or August of 1998 through February of 1999.

14. Complainant did not receive the campus e-mail messages she felt she should receive as the result of her position because, after the centralization of the Chemical Stockroom in 1998 and after Dr. Muller's appointment as the supervisor of the Chemical Stockroom in 1999, these messages were sent directly to Assistant Dean Smethells or to Dr. Muller and they decided which should be forwarded to complainant. Most of the e-mail messages complainant cites as the basis of her allegation in this regard date from the summer of 1998 through early 1999. Complainant cites as the latest of the e-mail messages she did not receive an April 5, 1999, memo which had been posted on the University of Wisconsin System Environmental Health and Safety web page relating to Y2K information.

15. Complainant contends that, on September 28, 1998, Dean Haywood refused to allow the complainant to be involved in the Phillips Hall Renovation Project and instead appointed Assistant Dean Smethells as the point person. Complainant did share her opinions and concerns regarding these renovation plans with her superiors and others up to the date of her retirement. The Chemical Stockroom was involved in the renovation project through Assistant Dean Smethells and Dr. Muller during the relevant time period.

16. On July 9, 1999, complainant, in response at least in part to the alleged failure of Chancellor Mash or Provost Satz to respond to her memo of April 19, 1999, (see Finding 4.c., above) requested a meeting with her superiors to discuss the Phillips Hall renovation project, the Chemical Stockroom card access system, the Phillips Hall purchasing plan, various environmental health and safety issues, and UWEC's alleged failure to respond to her concerns relating to regulatory issues. This request was granted but complainant declined to attend the August 13, 1999, meeting held in response to her request.

17. Complainant was given permission by Assistant Dean Smethells, Dr. Muller, and Dean Haywood, prior to July 1, 1999, to prepare a Chemical Hygiene Plan for the Chemical Stockroom. Complainant completed this plan.



18. In regard to the “environmental health and safety issues” aspect of allegation 2.b., above, complainant cites four examples which fit within the scope of allegation 2.: she was not notified of upcoming verification of flow rates of lab fume hoods on December 9, 1998; she was not notified that Dr. Muller was the new Chemical Hygiene Officer on January 6, 1999; she was not notified of upcoming safety inspections on February 19, 1999; and she was not included in discussions of the Waste Minimization Plan on March 31, 1999. Complainant was aware of these notifications/discussions at or around the dates that they were issued/occurred.

19. A schedule was established for the initial hazardous waste training sessions for faculty and staff in Phillips Science Hall. Chemical Stockroom staff was not part of the first group participating in the training and complainant learned this on or around August 27, 1998. Chemical Stockroom staff, including complainant, did receive this training in February of 1999.

20. Complainant bases her contention that Dean Haywood and Assistant Dean Smethells denied her freedom of speech by directing the Chemical Stockroom not to communicate with any environmental health or safety agency (allegation 5.) on an August 31, 1998, e-mail from Dean Haywood and a January 1999 e-mail from Assistant Dean Smethells which complainant became aware of on or around their dates of issue.

21. The Phillips Hall Renovation Project is a \$12 million remodeling plan. As a part of this project, room 444, which was Mr. Kuehl’s office in the Chemical Stockroom, was reallocated to the Chemistry Department in a memo from Dr. Lewis dated April 7, 1999. Also as a part of this project, Jack Pladziewicz, Chair of the Chemistry Department, in a memo dated July 22, 1999, recommended that Chemical Stockroom space revert to the Chemistry Department. Complainant apparently became aware of the subject matter of these memos on or around the dates they were issued. These are the decisions or actions upon which complainant relies in regard to allegation 8. (See Finding 12, above).

22. In a memo dated June 29, 1999, complainant stated that, in a memo received by Chemical Stockroom staff on June 28, 1999, Dr. Muller outlined a new policy which effectively placed control of the Chemical Stockroom back in the Chemistry Department with budgeting through the Chemistry Department. Dr. Muller's memo of June 28, 1999, outlined her proposal for a charge-back system for chemicals used by departments other than the Chemistry Department. Dr. Muller's memo of June 28, 1999, was the basis for complainant's allegation 9., (See Finding 12, above), and complainant specifies July 1, 1999, as the date she became aware of the facts underlying this allegation.

23. On or around August 31, 1999, complainant notified respondent of her intent to retire effective November 17, 1999. Complainant's last day at the work site was August 31, 1999.

## OPINION

### WHISTLEBLOWER LAW

Section 230.81, Stats., states as follows, in relevant part:

(1) An employe with knowledge of information the disclosure of which is not expressly prohibited by state or federal law, rule or regulation may disclose that information to any other person. However, to obtain protection under s. 230.83, before disclosing that information to any person other than his or her attorney, collective bargaining representative or legislator, the employe shall do either of the following:

(a) Disclose the information in writing to the employe's supervisor.

(b) After asking the commission which governmental unit is appropriate to receive the information, disclose the information in writing only to the governmental unit the commission determines is appropriate. The commission may not designate the department of justice, the courts, the legislature or a service agency under subch. IV of ch. 13 as an appropriate governmental unit to receive information. Each appropriate governmental unit shall designate an employe to receive information under this section.

**Section 230.83**, Stats., states as follows, in relevant part:

(1) No appointing authority, agent of an appointing authority or supervisor may initiate or administer, or threaten to initiate or administer, any retaliatory action against an employe.

**Section 230.85**, Stats., states as follows, in relevant part:

(1) An employe who believes that a supervisor or appointing authority has initiated or administered, or threatened to initiate or administer, a retaliatory action against that employe in violation of s. 230.83 may file a written complaint with the commission, specifying the nature of the retaliatory action or threat thereof and requesting relief, 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.

**Section 230.80**, Stats., states as follows, in relevant part:

(2) "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:

(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.

(3) "Employe" means any person employed by any governmental unit except:

(a) A person employed by the office of the governor, the courts, the legislature or a service agency under subch. IV of ch. 13.

(b) A person who is, or whose immediate supervisor is, assigned to an executive salary group or university senior executive salary group under s. 20.923.

(5) "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.

(7) "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.

(8) "Retaliatory action" means a disciplinary action taken because of any of the following:

(a) The employe lawfully disclosed information under s. 230.81 or filed a complaint under s. 230.85 (1).

(b) The employe testified or assisted or will testify or assist in any action or proceeding relating to the lawful disclosure of information under s. 230.81 by another employe.

(c) The appointing authority, agent of an appointing authority or supervisor believes the employe engaged in any activity described in par. (a) or (b).

## WHISTLEBLOWER DISCLOSURES

In *Getsinger v. UW*, 91-0140-PC-ER, 4/30/93, the Commission set forth the general rule for deciding a motion for failure to state a claim for relief as follows:

The pleadings are to be liberally construed, and a claim should be dismissed only if "it is quite clear that under no circumstances 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. A claim should not be dismissed unless it appears to a certainty that no relief can be granted under any set of facts that plaintiff can prove in support of his allegations. *Phillips v. DHSS & DETF*, 87-0128-PC-ER, 3/15/89 (quoting *Morgan v. Pa. Gen. Ins. Co.*, 87 Wis. 2d 723, 731-32, 275 N.W. 2d 660 (1979); aff'd *Phillips v. Wis. Pers. Comm.*, 167 Wis. 2d 205, 482 N.W. 2d 121 (Ct. App. 1992).

Section 230.81, Stats., requires, as relevant here, that an employee disclose the subject information to his or her supervisor, which the Commission has interpreted to

include any supervisor in the employee's chain of command (*Williams v. UW-Madison*, 93-0213-PC-ER, 9/17/96; aff'd Dane Co. Cir. Ct., *Williams v. Wis. Pers. Comm.*, 96-CV-2353, 11/19/97) prior to disclosing that information to any other person, in order to obtain protection as a whistleblower. The claimed disclosures identified as E, F, L, N, and P, above, were not even authored by complainant and, as a result, could not entitle complainant to protection as a whistleblower. The disclosure identified in Finding 3. as the April 16, 1998, letter to the Department of Commerce, and disclosures J, O, and Q were not made to supervisors in complainant's chain of command. Disclosures B and D, although copied to supervisors in complainant's chain of command, were not provided to them prior to their disclosure to other persons and, as a result, do not satisfy the requirements of §230.81, Stats. As a result, complainant has failed to state a claim for relief under the whistleblower law as to any allegedly retaliatory actions taken as a result of the disclosure described in Finding 3., i.e., the April 16, 1998, letter to the Department of Commerce, and disclosures B, D, E, F, J, L, N, O, P, and Q.

Section 230.80(5), Stats., requires that, in order to invoke the protections of the whistleblower law, the employee must reasonably believe that the information disclosed demonstrates a violation of a state or federal law, rule or regulation; or mismanagement or abuse of authority in state or local government, a substantial waste of public funds or a danger to public health or safety. "Mismanagement" is defined in §230.80(7), Stats., as 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, and should not be interpreted to include the mere failure to act in accordance with a particular opinion regarding management techniques. Disclosures A, G, H, I, K, and M set forth complainant's opinions about a variety of issues relating to the management of the Chemical Stockroom, but do not, even considered in the context of the situation in the Chemical Stockroom at the time, reference a violation of law or mismanagement or abuse of authority within the meaning of §230.80, Stats. In regard to disclosure A, complainant does indicate that she had contacted the Department of Commerce and a lawyer about the extension of Chemical Stockroom services to

additional departments, but, even taking into consideration complainant's previous expressions of concern about this extension of services, the disclosure amounts at most to a difference of opinion on complainant's part regarding management techniques. Although Dean Haywood references "abuses" in previous correspondence relating to this matter, this reference is not to complainant's disclosure of current abuses but instead to complainant's disclosure of previous concerns relating to UWEC's failure to meet safety and health requirements. None of these previous disclosures is under consideration as a part of this matter. Complainant has filed to state a claim for relief under the whistleblower law as to any allegedly retaliatory actions taken as a result of disclosures A, G, H, I, K, and M.

The only claimed disclosure which qualifies complainant for whistleblower protection is disclosure C. However, it should be noted that the date of this disclosure was April 19, 1999, and that most of the actions which complainant alleges to be retaliatory here occurred prior to that date, i.e., the only actions which occurred subsequent to April 19, 1999, are embodied in allegations **8.** and **9.**

#### **ALLEGED RETALIATION (8. AND 9.) AFTER QUALIFYING DISCLOSURE**

Allegation **8.** relates to the impact on the Chemical Stockroom's space and location of decisions made by UWEC administration and Chemistry Department leadership in regard to the Phillips Hall Renovation Project. Complainant has failed to show how the action which was taken would constitute a "disciplinary action" within the meaning of §230.80(2), Stats. (*See, King v. DOC*, 94-0057-PC-ER, 3/22/96). In addition, complainant apparently received notice of the decisions made in this regard prior to the 60-day actionable period (*See Finding 21, above, and §230.85, Stats., quoted above*). It is concluded as a result that the complaint should be dismissed as to this allegation for untimely filing and failing to state a claim for relief.

Allegation **9.** is based on complainant's disagreement with Dr. Muller's decisions relating to Chemical Stockroom budgeting and charge-back issues. The

available information indicates that, although, during the time period relevant to this matter, a symbiotic relationship existed between the Phillips Hall Chemical Stockroom and the UWEC Chemistry Department, the Chemical Stockroom did not again become a part of the Chemistry Department in 1999 or thereafter but remained a separate entity under the auspices of the College of Arts and Sciences. However, even if the Chemical Stockroom had again become a part of the Chemistry Department, complainant has failed to demonstrate how this would constitute a “disciplinary action” within the meaning of §230.80(2), Stats.. Moreover, complainant states that she formed a belief that this had occurred on or around July 1, 1999, which is outside the 60-day actionable period. It is concluded as a result that the complaint should be dismissed for untimely filing and for failure to state a claim in regard to this allegation.

#### **ALTERNATIVE ANALYSIS**

If any of complainant’s earlier disclosures had entitled her to whistleblower protection, the following analysis of respondent’s motions would apply.

#### **Allegations 1.a(2), 1.b., 1.c., 1.d., 1.e., 1.f., 2.a., 2.b., 2.c., 4., and 7.**

In her complaint and subsequent filings, complainant’s central theme here relates to the alleged reduction in her authority over the operation of the Chemical Stockroom and reduction in her input into UWEC decisions affecting the operation of the Chemical Stockroom. In essence, these are the underpinnings of allegations 1.a(2), 1.b., 1.c., 1.d., 1.e., 1.f., 2.a., 2.b., 2.c., 4., and 7., as stated in Finding of Fact 12, above. Although the complainant has filed hundreds of pages detailing the factual bases for each of these individual allegations, these details all center around the fact that the Chemical Stockroom was centralized in 1998 with Assistant Dean Smethells becoming the point person for this centralized operation at that time and Dr. Muller assuming overall responsibility in 1999; and that, as a result, all communications relating to the Chemical Stockroom went through Assistant Dean Smethells and Dr. Muller instead of through complainant, and Assistant Dean Smethells and Dr. Muller, not complainant,

had input into the UWEC decisions affecting the Chemical Stockroom. It is undisputed that complainant became aware of the centralization around July 1, 1998. Complainant stated on page 2 of the complaint she filed with the Commission on October 8, 1999, that, “[A]t the meeting announcing Dr. Muller’s appointment, the complainant was told (in the presence of Jason Kuehl, Carl Haywood, Janice Morse) by Interim Dean of Arts and Sciences, David Lund, that Dr. Muller would have complete control of the stockroom, all decisions would be made by her and that all communications to anyone must proceed through her.” It is undisputed that this meeting took place in April of 1999. Although complainant argues that she didn’t really have notice of the extent of Dr. Muller’s authority in regard to the Chemical Stockroom until October 6, 1999, when she had the opportunity to review a description of Dr. Muller’s duties and responsibilities in this regard, this argument is not persuasive in view of the sweeping statement in the complaint quoted above; complainant’s acknowledgement of, and strong objection to, Dr. Muller’s new authority over the Chemical Stockroom in her memo to Chancellor Mash of April 19, 1999 (See Finding 4.c., above); and statements which complainant made about actions taken by Dr. Muller between June 25 and July 1, 1999 (See Complainant’s Document 34) acknowledging that Dr. Muller was unilaterally deciding policy for the Chemical Stockroom, controlling its inventory and budget, and managing it in all respects. The above-referenced meeting in April of 1999 and complainant’s statements about the extent of Dr. Muller’s authority did not take place within the actionable 60-day period specified in §230.85, Stats., and it is concluded as a result that the complaint was untimely filed as to the allegations listed above in this paragraph, i.e., 1.a(2), 1.b., 1.c., 1.d., 1.e., 1.f., 2.a., 2.b., 2.c., 4., and 7., as stated in Finding of Fact 12, above.

**Allegations 1.a(1), 3., 5., and 6.**

Allegation 1.a. relates to complainant’s failure to receive correspondence through the campus mail system between July or August of 1998 and February of 1999. This allegation stems from a different set of circumstances than the other allegations,



i.e., it does not involve a decision to communicate through Assistant Dean Smethells or Dr. Muller instead of complainant. Since complainant acknowledges that the practice stopped in February of 1999, it would have to be concluded that the complaint was untimely filed as to this allegation.

Allegation 3. relates to the denial or, more accurately, the delay in providing, training to Chemical Stockroom staff, including complainant. Since complainant acknowledges that she was aware in August of 1998 that she and her staff were not included in the first round of training, and that this training was provided to them in February of 1999, it would have to be concluded that the complaint was untimely filed as to this allegation.

Allegation 5. relates to complainant being denied the opportunity to communicate with others. The actions relevant here which complainant cites as the basis for this allegation are emails directed to her on August 31, 1998, and January 11 or 13, 1999. Although complainant also cites a statement made to Mr. Kuehl at the meeting of August 13, 1999 (See Finding 16, above) regarding his contacts outside the Chemical Stockroom, complainant did not attend this meeting and has not represented that this statement to Mr. Kuehl included a reference to her or that a similar statement was directed to her at this time. In addition, complainant does not argue that it was not until this August 13, 1999, meeting that she formed a belief that she was being retaliated against in regard to limitations on her communications outside the Chemical Stockroom, but instead acknowledges that this belief was formed in August of 1998 and January of 1999. Since the August 1998 and January 1999 communications were not made during the actionable 60-day period, it is concluded that the complaint was untimely filed as to this allegation.

Allegation 6. does not involve an action which would be considered a "disciplinary action" within the meaning of §230.80(2), Stats., and occurred on February 3, 1999, outside the actionable 60-day period. It is concluded as a result that the complaint was untimely filed as to this allegation, and that complainant has failed to state a claim for relief in regard to this allegation.

It should finally be noted that, even if any of the allegations under consideration here were susceptible to the application of a continuing violation theory, complainant has failed to specify any qualifying action within the actionable 60-day period, a necessary component of a continuing violation. Even when provided an opportunity to respond to the Proposed Ruling issued in regard to the motions under consideration here, complainant continued to refer the Commission to a collection of scores of documents without specifically identifying a qualifying action within the actionable period. In addition, complainant does not dispute that she formed a belief that she was being retaliated against in regard to each allegation prior to the beginning of the 60-day actionable period, and this would make the application of a continuing violation theory inappropriate.

#### CONCLUSIONS OF LAW

1. Complainant has the burden to show that her complaint was timely filed.
2. Complainant has failed to sustain this burden in regard to any of the subject allegations.
3. Complainant has the burden to show that her complaint stated a claim for relief.
4. Complainant has failed to sustain this burden in regard to any of the subject allegations.

ORDER

This complaint is dismissed.

Dated: June 7, 2000

STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

LRM.990161Crull

  
JUDY M. ROGERS, Commissioner

Parties:

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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.) 2/3/95