STATE OF WISCONSIN PERSONNEL COMMISSION

**GLENN JENKINS,**
***Complainant,***

**v.**

**Attorney General, DEPARTMENT OF JUSTICE,**
***Respondent.***

RULING
ON
MOTION FOR
SUMMARY
JUDGMENT

Case No. 00-0051-PC-ER

*This matter is before the Commission on the respondent's motion for summary judgment.* The parties have previously agreed to the following statement of issue:

> Whether respondent retaliated against complainant for having made a whistleblower disclosure (an e-mail to David Steingraber) when it discharged him on March 8, 2000.

The parties had the opportunity to file briefs.[1] The following findings are based on information provided by the parties, appear to be undisputed, and are made solely for the purpose of deciding this motion.

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[1] A prehearing conference was held on June 23, 2000. At the conference, respondent indicated it might file a motion. The motion was due by July 14th and the Commission gave complainant until July 28th to respond. Also during the June 23rd conference, complainant sought discovery of certain documents. Respondent filed its motion for summary judgment, dated July 14th In a faxed submission dated July 31st, complainant stated he had tried to contact the commission "several times over the last two weeks" and that as agreed to by respondent, complainant would respond to the motion two weeks after respondent supplied information in response to the discovery request. By letter dated August 4th, respondent indicated it had responded to complainant's initial discovery request on July 14th, and that complainant had asked some follow-up questions on July 19th Respondent responded to those questions in the August 4th letter and noted: "I would consent to an extension of time for you to respond to the Department's motion that is equivalent to the time lost between the date of your [July 19th] letter and the date of my response." In a letter dated August 9th, the hearing examiner summarized exchanges he had had with both parties and noted that complainant agreed to "respond to the substance of respondent's motion for summary judgment by August 18 and respondent's reply would be due by August 25, 2000." This schedule was subsequently revised by letter from the examiner dated August 10th That letter stated:

## FINDINGS OF FACT

1. Complainant began working for respondent as an IS(S) Programmer/Analyst-Senior, effective December 6, 1999.

2. Complainant's first-line supervisor was Susanne M. Kufahl, section chief in the Bureau of Computing Services, Division of Management Services, in the Department of Justice.

3. Ms. Kufahl was supervised by Frank J. Ace, Director of the Bureau of Computing Services.

4. Mr. Ace was supervised by Sandra M. Burie, Administrator of the Division of Management Services, until Ms. Burie's retirement on January 28, 2000. Subsequently, Burneatta Bridge, Deputy Attorney General, served as Mr Ace's supervisor on an acting basis.

5. The Division of Management Services (DMS) is one of five divisions within the Department of Justice.

6. One of respondent's other divisions is the Division of Law Enforcement Services (DLES).

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> [Respondent's counsel] called me earlier today and informed me that he would be on vacation from August 19th until August 28th Therefore, I am modifying the due date for respondent's reply brief as shown on yesterday's letter. Respondent's reply brief is now due on September 14, 2000.

Complainant failed to respond to the motion until he hand-delivered materials on September 14th He supplemented that submission with a letter on September 15th stating:

> On September 14, 2000, I filed a reply to the respondent's motion for summary judgment. Technically this motion was late because of a misunderstanding from a letter [from the Commission] dated August 10, 2000. This letter stated that the respondent's attorney . would be out of town and that the reply would be due September 14. I incorrectly interpreted this as being my reply to their original motion.

In light of the explanation offered by the complainant and the absence of any objection from the respondent, the Commission will consider the complainant's late submission. Respondent filed a reply.

7 David O. Steingraber is the Administrator of DLES.

8. Complainant was assigned to work on a project (INTCH) related to providing internet access to the criminal history system. The project was funded by DLES. The programming work for the project had initially been created by outside contractors hired by the Bureau of Computing Services. Complainant's specific assignment was to develop a prototype of web pages that would be used to do batch processing by working with the existing INTCH code.

9. In February of 2000, complainant wrote an e-mail to Mr. Steingraber and indicated the outside contractors who had worked on the project had failed to properly develop code for the computer program according to the guidelines set forth by the Bureau of Computing Services. The e-mail is not part of the record. Mr. Steingraber does not recall that complainant informed him the project had been mismanaged by Ms. Kufahl or by the Bureau of Computing Services.

10. Mr. Steingraber did not direct or assign complainant's work and he did not have the authority to effectively recommend complainant's promotion, transfer, discipline, or discharge.

11. Complainant met with Ms. Kufahl at 10:15 a.m. on February 23, 2000. Ms. Kufahl's e-mail to complainant scheduling the meeting said it was "[t]ime to have that talk and you can bring up all the issues and concerns you have."

12. Complainant alleges that in the February 23rd meeting with Ms. Kufahl, he told her of his e-mail to Mr. Steingraber. Complainant alleges Ms. Kufahl became quite angry. Complainant told Ms. Kufahl that he believed the contractors on the DLES project had failed to properly develop the computer program, but he did not tell Ms. Kufahl that the project was mismanaged by her or by the Bureau of Computing Services and he never told her that he had told Mr Steingraber that the project was mismanaged by Ms. Kufahl or by the Bureau of Computing Services.

13. After the meeting, complainant wrote the following e-mail message to Ms. Kufahl:

> I wanted to briefly follow up on our meeting yesterday. First of all, thanks for listening to my concerns. I'm not sure anything was settled or will be different in the future but it was helpful to vent these frustrations to the appropriate person. .
>
> It's possible that the strong opinions that I express along with the misperceptions of my attitude could be the basis for some of this friction I sense between us.
>
> Also, I would like some feedback on my concerns about the INTCH code and the object model. If you think my comments are unfounded and I'm being too harsh then I would like to know. After thinking about this, I would say that dealing with this code was probably a large part of my frustration. First, because it appeared everyone around here except me thought this was a great piece of work they put together even though no one looked at their code. Secondly, because anything that comes out of INTCH from this point forward is going to reflect on me. My opinion is that this code will become forever stuck in a maintenance loop and that no other project will be able to benefit from it.

14. Complainant sent another e-mail to Ms. Kufahl on February 29th on this topic. The e-mail stated, in part:

> It seems that my comments over the INTCH code has created quite a mess. While this may be too late, I want to make some things clear First, these are my opinions and my opinions only so take them for what they are worth. Second, I'm not a software architect nor do [I] claim that I have a whole lot of expertise in this area. What I do know is Object Oriented principals [sic] from a developer's point of view. It seems that at times these conflict with an architectural model and with INTCH, there are a few cases where this occurs. However, all of this is subject to interpretation and anyone looking at this would likely have some disagreements. Third, nearly all of my comments are directed at the implementation of INTCH model and how this falls short of what would be considered an industry accepted coding methodology and standard. There are also significant performance issues in the current implementation and there is no doubt in my mind that INTCH would not withstand any sort of heavy load regardless of how much hardware was thrown at it.
>
> Finally and most importantly, the ultimate responsibility for INTCH stops at management. If there was no management [oversight] into the coding/documentation practices during the development of INTCH, then management needs to accept the end product according to what the developer thought was acceptable. Getting upset with everyone will not do

> a whole lot of good at this point. Consider it a lesson learned and move on.

15. By letter dated March 8, 2000, the Deputy Attorney General, Burneatta L. Bridge, terminated the complainant's probationary employment, effective immediately. Ms. Kufahl recommended the action.

16. Complainant alleges that the respondent's decision to terminate his employment was because he sent the e-mail message to Mr. Steingraber and because he told Ms. Kufahl about the e-mail message.

## CONCLUSIONS OF LAW

1. This matter is appropriately before the Commission pursuant to §230.45(1)(gm), Stats.

2. Respondent has the burden to show that summary judgment is appropriate.

3. Respondent has sustained that burden.

## OPINION

The Commission uses the following standard in reviewing motions for summary judgment:

> 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; it decides whether there is a genuine 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.
>
> 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 es-

> tablish 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.

*Grams v. Boss*, 97 Wis.2d 332, 338-339, 294 N.W.2d 473 (1980), citations omitted.

Respondent contends that complainant failed to make a protected disclosure under the Wisconsin Employe Protection Act (or "whistleblower law"), subch. III, ch. 230, Stats. The whistleblower law provides protection to certain employes of the State of Wisconsin who have engaged in one of the various activities specified in §230.80(8), Stats. The various methods for disclosing information that result in protection under the whistleblower law are set forth in §230.81. The typical disclosure is "in writing to the employe's supervisor" as provided in §230.81(1)(a). However, a disclosure need not be made to a first-line supervisor in order to qualify. Qualifying disclosures may be made instead to a second-line supervisor, third-line supervisor, or higher level supervisor in the employe's supervisory chain of command. *Benson v. UW(Whitewater)*, 97-0112-PC-ER, etc., 8/26/98.

The whistleblower law is designed to protect an employe who discloses information the public has an interest in having disclosed. More specifically, the statute protects disclosures of "information," as defined in §230.80(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.

Some of the terms within this definition are defined elsewhere in §230.80:

> (1) "*Abuse of authority*" means an arbitrary or capricious exercise of power.

> (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.

> (9) "*Substantial waste of public funds*" means an unnecessary expenditure of a substantial amount of money or a series of unnecessary expenditures of smaller amounts of money.

Respondent contends that complainant's e-mail message to David Steingraber did not describe "information" as required in §230.80(5), Stats., and that the e-mail did not qualify as a disclosure because it was not directed to complainant's supervisor. The Commission agrees that because Mr Steingraber was not in the supervisory chain above the appellant, the complainant's e-mail message to Mr. Steingraber does not fit within the scope of a disclosure under §230.81(1)(a), Stats., i.e. it was not a disclosure "to the employe's supervisor." Mr Steingraber supervised the Division of Law Enforcement Services. Complainant's position was in the Division of Management Services. Mr. Steingraber's division provided the funding for complainant's project, but Ms. Kufahl, Mr. Ace, Ms. Burie and Ms. Bridge were complainant's supervisors.

Complainant contends that Mr. Steingraber was "an agent of the Attorney General by nature of being appointed" so that a disclosure to Mr. Steingraber was a disclosure to the Attorney General. Because the Attorney General is in the supervisory chain above the complainant, complainant contends the disclosure to Mr Steingraber, as the Attorney General's agent, fell within §230.81(1)(a), Stats. If complainant's theory were adopted, the result would be contrary to the clear intent of the whistleblower law, which specified certain routes for obtaining protection under the law.[2]

While the concept of agency can apply under the whistleblower law, complainant has not made allegations sufficient to infer that an agency relationship existed here.

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[2] Complainant cites *Pierce & Sheldon v. Wis. Lottery & DER*, 91-0136, 0137-PC-ER, 1/21/92, for the proposition that a disclosure to an agent of a qualifying supervisor is protected. In *Pierce & Sheldon*, complainants claimed they made a disclosure of information under §230.81(3), Stats., which protects disclosures by an employee "to his or her legislator or to a legislative service agency." Complainants alleged they made their disclosures to an auditor with the firm Deloitte Touche, which was performing a bi-annual security audit required by statute. The Commission rejected the respondents' argument that a disclosure to an agent of a covered entity would not satisfy the law's requirements, and concluded that "a disclosure to an agent of the legislature would be equivalent to a disclosure to the legislature." While *Pierce & Sheldon* holds that an agency relationship may apply when determining whether a disclosure has been made to a covered entity, it did not address the situation presented in this case.

> Agency is ordinarily a relationship created by agreement of the parties, and, as between principal and agent, an agency is created and authority is actually conferred very much as a contract is made, to the extent that the creation results from the agreement between the principal and agent that such a relationship shall exist. As between the parties to the relationship, there must be a meeting of the minds in establishing the agency, and the consent of both the principal and the agent is necessary to create the agency, although such consent may be implied rather than expressed. The principal must intend that the agent shall act for him, the agent must intend to accept the authority and act on it, and the intention of the parties must find expression either in words or conduct between them.
>
> An agency relationship can arise only at the will and by the act of the principal, and its existence is always a fact to be proved by tracing it to some act of the alleged principal. 3 Am Jur 2d *Agency, §17* (footnotes omitted)

The remaining question is whether the complainant has identified a protected activity under §230.80(8)(c), Stats:

> (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. 230.1 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).

Complainant alleges that after he told Ms. Kufahl about the e-mail message to Mr. Steingraber, Ms. Kufahl became angry and she terminated his employment. If Ms Kufahl believed complainant made a proper disclosure to Mr. Steingraber, complainant could still pursue a claim under §230.80(8)(c), Stats. However, there is no basis on which to conclude that Ms. Kufahl believed complainant made a proper disclosure under §230.81(1)(a), Stats. Ms. Kufahl would have known that Mr. Steingraber was not in the supervisory chain over the complainant.

The Commission notes that the only disclosure alleged by complainant, as set forth in the stipulated issue for hearing, was the e-mail to Mr. Steingraber.

ORDER

Respondent's motion for summary judgment is granted and this complaint is dismissed.

Dated: October 4, 2000 STATE PERSONNEL COMMISSION

Laurie R McCallum/jm
LAURIE R. McCALLUM, Chairperson

KMS:000051Crul1.3

Judy M Rogers
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. 2/3/95