

STATE OF WISCONSIN

PERSONNEL COMMISSION

**JO A. REED,**  
*Complainant,*

v.

**Secretary, DEPARTMENT OF  
CORRECTIONS,**  
*Respondent.*

**RULING ON MOTION  
TO DISMISS**

Case No. 00-0098-PC-ER

This is a complaint of whistleblower retaliation. On September 21, 2000, respondent filed a motion to dismiss based on lack of standing and failure to state a claim for relief. The parties were permitted to file briefs, and the schedule for doing so was completed on November 10, 2000. The following findings of fact are based on information provided by the parties, appear to be undisputed, and are made solely for the purpose of deciding this motion.

#### FINDINGS OF FACT

1. At all times relevant to this matter, complainant has been employed as a Probation and Parole Agent (Intake Agent) in respondent's probation and parole office in Beloit.

2. In this charge filed on July 27, 2000, complainant alleges that she was retaliated against for engaging in protected whistleblower activities when respondent established a policy requiring that personal guests of employees of the Beloit probation and parole office were required to remain in the reception area until they were escorted into the office by the employee; when co-worker Joan Payton was disciplined for violating this policy when she permitted complainant's husband to access the office without an escort; and when Program Assistants in the office presented flowers to

certain Probation and Parole Agents in celebration of "Agent Week" but did not present any flowers to complainant.

#### OPINION

In order to advance a cause of action, a petitioner must have the requisite standing. In *Barry v. Maple Bluff Country Club, et al.*, 221 Wis. 2d 707, 586 N.W. 2d 182 (Ct. App. 1998), the Court of Appeals stated as follows in this regard:

In order to have standing to bring a claim, a plaintiff must have "a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy." To satisfy the standing requirement, [a petitioner] must allege she has suffered "a distinct and palpable injury traceable to the challenged conduct." (citations omitted)

Here, complainant has no standing in regard to the disciplinary action taken against co-worker Payton, i.e., complainant suffered no "distinct and palpable" injury as a result of this disciplinary action taken against another employee, and this allegation, as a result, must be dismissed for lack of standing. See, *Duvnjak & Studenak v. DHSS*, 88-0164, 168-PC-ER, 9/8/89.

In order to state a claim for relief in a whistleblower retaliation action, a complainant must show that she suffered a "disciplinary action," which is defined in §230.80(2), Stats., as follows:

"Disciplinary action" means any action taken with respect to an employee which has the effect, in whole or in part, of a penalty, including but not limited to the following:

(a) Dismissal, demotion, transfer, removal of any duty assigned to the employee'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.

In *Vander Zanden v. DILHR*, 84-0069-PC-ER (8/24/88), this term was interpreted to require that an action have a substantial or potentially substantial negative impact on an employee. This term has been interpreted not to include limitations on contacts with a different work unit when the duties and responsibilities of the complainant's position do not necessitate frequent contact with such unit (*Vander Zanden, supra*); denying complainant's entry into his work unit while an investigation of an allegation that he engaged in misconduct implicating unit security was being conducted (*Holubowicz v. DHSS [DOC]*, 88-0097-PC-ER, 9/5/91); reminding complainant, a faculty member, that, according to the policy applicable to all faculty members, guest editorials must be coordinated through campus management (*Benson v. UW-Whitewater*, 97-0112-PC-ER, 8/26/98); and requesting that complainant clarify whether certain of his work was as a private citizen or as a representative of respondent in order to determine whether respondent's policy relating to official contact with Cuba should apply to such work (*Benson, supra*).

The policy at issue here relating to escorting personal guests into the office from the reception area is significantly less restrictive and less directly related to complainant's ability to carry out the duties and responsibilities of her position than the limitations on contact with work units held in *Vander Zanden* and *Holubowicz, supra*, not to constitute disciplinary actions. In addition, it was recognized in *Benson, supra*, that, typically, policies of general application, such as the one here, do not constitute disciplinary actions within the meaning of §230.80(2), Stats.

Finally, the failure to receive flowers from co-workers does not come close to satisfying the criteria for recognition as a penalty or disciplinary action having a substantial or potentially substantial negative impact on complainant as an employee. As a result, the escort policy and the failure to receive flowers from co-workers do not constitute disciplinary actions within the meaning of the whistleblower retaliation statute, and complainant has failed to state a claim for relief in regard to these two allegations.

CONCLUSIONS OF LAW

1. This matter is appropriately before the Commission pursuant to §230.45(1)(g), Stats.
2. Complainant lacks standing to advance the allegation relating to the discipline of a co-worker.
3. Complainant has failed to state a claim for relief in regard to the allegations relating to the escort policy and the failure to receive flowers from co-workers.

ORDER

Respondent's motion to dismiss is granted and this complaint is dismissed.

Dated: November 15, 2000

STATE PERSONNEL COMMISSION

Laurie R. McCallum  
LAURIE R. McCALLUM, Chairperson

LRM:000098Cru11

Judy M. Rogers  
JUDY M. ROGERS, Commissioner

Parties:

Jo A. Reed  
1611 Yates Avenue  
Beloit WI 53511

Jon Litscher  
Secretary, DOC  
P.O. Box 7925  
Madison, WI 53707-7925

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