

STATE OF WISCONSIN

PERSONNEL COMMISSION

RUVEN GEORGE SEIBERT
Complainant,

v.

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

**RULING ON MOTION
TO DISMISS**

Case No. 01-0035-PC-ER

On March 13, 2001, complainant filed a charge with the Commission alleging that he had been discriminated against on the basis of age, arrest/conviction record, creed, disability, and race, and retaliated against for engaging in protected whistleblower and fair employment activities. On April 23, 2001, respondent filed a motion to dismiss. The parties were permitted to brief the motion and the schedule for doing so was completed on May 16, 2001. 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 involuntarily committed, pursuant to §980.06, Stats., to the Wisconsin Resource Center (WRC). The WRC is a medium security correctional institution administered by the respondent Department of Health and Family Services (DHFS). *See*, §§46.01(1), 46.056, Stats.

2. As a part of this involuntary commitment, complainant was subject to a treatment plan. *See*, §51.61(1)(b)1.a., Stats. Any work tasks assigned to complainant at the WRC were approved as a therapeutic activity within the scope of this treatment plan by a treatment professional. Complainant's qualification for and assignment to these work tasks arose from his confinement at WRC. Complainant was compensated for his performance of some or all of these assigned work tasks.

OPINION

Respondent argues that complainant's relationship with the WRC does not qualify as an employment relationship within the meaning of the Fair Employment Act or the whistleblower law and, as a result, this case should be dismissed.

In *Whaley v. DOC*, 96-0157-PC-ER, 3/12/97; affirmed, Brown Co. Cir. Ct, *Whaley v. Wis. Pers. Comm.*, 97 CV 462, 5/13/97, the Commission concluded that an inmate in a state correctional institution was not an employee of the institution, or the private employer operating within the institution, for purposes of the Fair Employment Act because the work he performed flowed from his confinement and was dependent on his status as an inmate. *See, also, Richards v. DHSS*, 86-0086-PC-ER, 9/4/86; *Dalton v. DHSS*, 87-0186-PC-ER, 9/26/88; *Williams v. Meese*, 55 FEP Cases 390 (10th Cir. 1991); *George v. Badger State Industries*, 827 F. Supp. 584 (W.D.Wis. 1993).

The same situation exists here. The work complainant is assigned at the WRC flows from his confinement and is dependent on his status as an involuntarily committed patient. The fact that complainant's confinement results from application of Chs. 980 and 51, Stats., rather than the statutory provisions governing the incarceration of inmates committed to the state's correctional institutions, is not determinative. It is the fact that complainant qualifies for and is assigned to perform this work as the result of his involuntary commitment that determines whether an employment relationship cognizable under the Fair Employment Act exists here. It is concluded that no such relationship exists.

Complainant also brings this action pursuant to the whistleblower law, Subch. III, Ch. 230, Stats. Protection under the whistleblower law also requires the existence of an employment relationship, and this required relationship is no more extensive than that required under the Fair Employment Act. *See, e.g., Martin v. DOT*, 90-0080-PC-ER, 1/11/91, *Kuri v. UW*, 91-0141-PC-ER, 4/30/93; *Marfilius v. UW*, 96-0047-PC-ER, 5/14/96. As concluded above, there is no employment relationship here.

In view of the conclusions reached above that work tasks performed by complainant at the WRC did not arise from an employment relationship cognizable under either the Fair Employment Act or the whistleblower law, this case must be dismissed.

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §§230.45(1)(b) and (gm), Stats.
2. Complainant has the burden to show the existence of a cognizable employment relationship in regard to his claims of discrimination and retaliation.
3. Complainant has failed to sustain this burden.

ORDER

Respondent's motion is granted and this case is dismissed.

Dated: July 11, 2001

JMR:010035Cru11

STATE PERSONNEL COMMISSION


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.)

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