STATE OF WISCONSIN PERSONNEL COMMISSION

DOUGLAS SMITH,
Complainant,

v.

Chancellor, UNIVERSITY OF WISCONSIN - MADISON,
Respondent.

Case No. 01-0041-PC-ER

RULING ON RESPONDENT'S MOTIONS TO DISMISS

Respondent filed two motions requesting dismissal of the entire case; a motion for summary judgment and a motion for failure to state a claim. Both parties submitted written arguments. A hearing is scheduled on March 18 and 19, 2002.

The parties agreed to the following statement of the issue for hearing:[1]

> Whether respondent's decision to award a Discretionary Compensation Adjustment (DCA) to William Deppen in February 2001, constituted retaliation against complainant for his reporting under the Occupational Safety and Health Act (OSHA), §101.055, Stats.

The facts recited below are made solely to resolve this motion. They are undisputed unless specifically noted to the contrary.

FINDINGS OF FACT

1. Complainant works for respondent's Safety Department as an Environmental Health Specialist (Advanced). His immediate supervisor is Keith Burdick. Burdick's supervisor is David Drummond, Safety Department Director.

2. Complainant participated in activities protected under the Occupational Safety and Health Reporting (OSHR) Act (§101.05(8), Stats.) in 1994, which resulted in a federal

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[1] The hearing issue in the Conference Report dated September 21, 2001, is stated in terms of the probable cause standard of proof. Respondent indicated at the prehearing its preference to go directly to a hearing on the merits. Complainant elected, by document dated October 8, 2001, to proceed directly to a hearing on the merits.

lawsuit in 1998 that was settled for $36,000. Burdick and Drummond were aware of complainant's participation in protected activities and of the resulting lawsuit and settlement.[2]

3. The Discretionary Compensation Adjustment (DCA) award was provided for in the April 8, 2000 through June 30, 2001, collective bargaining agreement for Science Professionals, of which complainant is a member. The agreement gave respondent the sole discretion to grant DCA awards in a non-discriminatory manner according to specified criteria.

4. In February 2001, Burdick supervised three employees in positions classified the same as complainant's position. These individuals were complainant, William Deppen and Rhonda Lenerz. Complainant and Deppen had worked together in the same job title and at the same pay for about 15 years.

5. On February 22, 2001, complainant learned from Deppen that Deppen had just received a DCA. On February 23rd, complainant learned from Burdick that complainant's name was not submitted for a DCA. Complainant did not receive a DCA.

6. Burdick nominated Deppen for a DCA and forwarded the nomination to Drummond on January 11, 2001. Deppen received the maximum four-step pay increase allowed by the DCA. Deppen's resulting raise amounted to about a 10% increase in his base pay. Because the DCA was added to Deppen's base pay, it will have continuing effects with regard to future salary transactions.

7 Respondent had sufficient money to give complainant a DCA award but determined he did not qualify for the award.[3]

8. Complainant was at least as qualified for receipt of a DCA award as was Deppen.[4]

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[2] Complainant provided the information in this paragraph. Respondent, at least for purposes of the present motions, did not dispute the information.

[3] One interpretation of the information provided by is contrary the finding that any decision was made with respect to complainant, as discussed in the Opinion section of this ruling.

[4] Respondent appears to dispute this finding.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction in this case pursuant to §230.45(1)(g), Stats.

2. Respondent has failed to establish entitlement to summary judgment due to the existence of a genuine issue of material fact.

3. Respondent has failed to show entitlement to dismissal on failure to state a claim because complainant has stated an adverse action.

OPINION

A. Motion for Summary Judgment

The Commission may summarily decide a case when there is no genuine issue as to any material fact and the moving party is entitled to judgment as matter of law. *Balele v. Wis. Pers. Comm.*, 223 Wis.2d 739, 745-748, 589 N.W.2d 418 (Ct. App. 1998). Generally speaking, the following guidelines apply. The moving party has the burden to establish the absence of any material disputed facts based on the following principles: a) disputed facts, which would not affect the final determination, are immaterial and insufficient to defeat the motion; b) 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; and c) doubts as to the existence of a genuine issue of material fact should be resolved against the party moving for summary judgment. *See Grams v. Boss*, 97 Wis.2d 332, 338-9, 294 N.W.2d 473 (1980) and *Balele v. DOT*, 00-0044-PC-ER, 10/23/01. The non-moving party may not rest upon mere allegations, mere denials or speculation to dispute a fact properly supported by the moving party's submissions. Balele, *Id.*, citing *Moulas v. PBC Prod.*, 213 Wis.2d 406, 410-11, 570 N.W.2d 739 (Ct. App. 1997). If the non-moving party has the ultimate burden of proof on the claim in question, that ultimate burden remains with that party in the context of the summary judgment motion. *Balele, Id.*, citing *Transportation Ins. Co. v. Huntziger Const. Co.*, 179 Wis.2d 281, 290-92, 507 N.W.2d 136 (Ct. App. 1993)

The Commission has determined that it is appropriate to apply the above guidelines in a flexible manner, after considering at least the following five factors (*Balele, Id.*, pp. 18-20):

1. *Whether the factual issues raised by the motion are inherently more or less susceptible to evaluation on a dispositive motion.* Subjective intent is typically difficult to resolve without a hearing whereas legal issues based on undisputed or historical facts typically could be resolved without the need for a hearing.
2. *Whether a particular complainant could be expected to have difficulty responding to a dispositive motion.* An unrepresented complainant unfamiliar with the process in this forum should not be expected to know the law and procedures as well as a complainant either represented by counsel or appearing *pro se* but with extensive experience litigating in this forum.
3. *Whether the complainant could be expected to encounter difficulty obtaining the evidence needed to oppose the motion.* An unrepresented complainant who either has had no opportunity for discovery or who could not be expected to use the discovery process, is unable to respond effectively to any assertion by respondent for which the facts and related documents are solely in respondent's possession.
4. *Whether an investigation has been requested and completed.* A complainant's right to an investigation should not be unfairly eroded.
5. *Whether the complainant has engaged in an extensive pattern of repetitive and/or predominately frivolous litigation.* If this situation exists it suggests that use of a summary procedure to evaluate his/her claims is warranted before requiring the expenditure of resources required for hearing.

The Commission now turns to applying the above factors to this case. Resolution of the pending motions involves respondent's assertion of subjective intent; to wit: respondent's contention that complainant's protected activities played no part in respondent's decision to

given Deppen a DCA award. Complainant is unrepresented by counsel. He previously filed a civil service appeal in this forum, which was not resolved in his favor (see *Smith v. DMRS*, 90-0032-PC, 1/15/96).[5] Neither party addressed the degree of his familiarity with the Commission's process including whether he is familiar with discovery rights and procedures. The investigation of complainant's allegations has been completed and resulting in an Initial Determination of no probable cause to believe that discrimination occurred.

The Commission now turns to respondent's arguments. Respondent contends: "Nothing whatsoever happened to the Complainant." (See p. 2, motion.) The crux of respondent's argument is shown below (pp. 2-3, motion):

> William Deppen received a DCA in February 2001 because it was determined that he met the criteria stated in the collective bargaining agreement . It was not a matter of choosing Deppen for the DCA over the Complainant or any other employee in the Safety Department. The Department had sufficient budget to give other DCAs, if any other employees were determined to qualify. The fact that no other employees in the General Safety Division, including the Complainant, received DCAs is not a negative evaluation of their work and is not reflected in their permanent personnel records .

Respondent's own description (above) of what occurred belies its statement that "Nothing whatsoever happened to the Complainant." He may not have been automatically entitled to a DCA award, but neither was Deppen. Both were eligible for the award if respondent determined they both qualified. Respondent concedes that it could have given DCAs to "any other employees (who) were determined to qualify." It logically follows that respondent determined that complainant did not qualify for the award. Further, complainant contends he was at least as qualified for a DCA award as was Deppen. These are genuine issues of material fact sufficient to defeat respondent's motion for summary judgment.

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[5] Paragraph 2 of the Investigative Summary in the Initial Determination states that in 1990 and 1991, complainant filed two civil service appeals and four whistleblower retaliation complaints in this forum and against this respondent. The Commission's database does not support a conclusion that he filed so many cases on in this forum.

B. Motion to Dismiss for Failure to State a Claim

Respondent also moves to dismiss for failure to state a claim. The Commission's analysis of this motion is based on *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 . 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 contends complainant suffered no adverse action and, accordingly, cannot establish a prima facie case of OSHR retaliation. The crux of this argument is shown below (motion, p. 3):

> In this case, the issue involves the question of whether there was any adverse employment action against the Complainant. Complainant argues that Respondent retaliated against him by refusing to award him a DCA in February 2001. However, as stated above, in the attached affidavits and in the agreed issue for hearing, that is simply not what happened in this case. The only thing that happened is that the Complainant's colleague, William Deppen, received a DCA. The Complainant was not refused a DCA. He never had any entitlement to one. Complainant cannot make out a *prima facie* case of retaliation under these circumstances.

The Commission rejects respondent's claim that complainant was not refused a DCA. As discussed previously, it is a logical conclusion from information provided by respondent that respondent determined complainant did not qualify for the award. Furthermore, the agreed-upon hearing issue was stated in terms suggested by respondent for the stated purpose of

relating to the present motion. The wording of the hearing issue was not intended and does not foreclose any decision respondent made regarding complainant's eligibility for the award.

Respondent supports its argument that no adverse action occurred by citing to case decisions, as noted below (motion, p. 4):

> For purposes of a retaliation claim under Title VII, loss of a bonus is not an adverse employment action where the employee is not automatically entitled to the bonus. *Rabinovitz v. Pena*, 89 F.2d 482, 488-489 (7th Cir. 1996). In *Rabinovitz*, the plaintiff received a lower performance rating that denied him a monetary bonus. *See id.* The court held that neither the lower performance rating nor the loss of a bonus is an adverse employment action where the employee is not automatically entitled to the bonus. *See, id.*
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> The court went further in *Hunt v. City of Markham*, to identify why denial of a bonus must not be regarded as an adverse employment action:
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> > Bonuses generally are sporadic, irregular, unpredictable and wholly discretionary on the part of the employer . A bonus, too, is an incident of the employment relation, rather than something unrelated to it, something only adventitiously connected with the workplace. But the denial of a bonus is inherently ambiguous, as well as less damaging to the employee [than a raise] because he didn't count on it. *See Hunt*, 219 F.3d 649, 654 (7th Cir. 2000).
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> An employee not entitled to a bonus does not have an action for retaliation under Title VII. Likewise, in this case, the Complainant had no entitlement to a DCA, and no reasonable expectation of receiving one. It was clearly within the discretion of the employer to nominate deserving employees. Then complainant was simply not so nominated. Without entitlement, the Complainant has no adverse action and, therefore, no cause of action for retaliation under the Occupational Safety and Health Act.

The above argument is inapplicable because it is based on case law relating to bonuses rather than an increase in an employee's base salary. The bonus considered in the *Rabinovitz* case amounted to $600, and there was no indication that the sum was added to the employee's base pay; a distinction found noteworthy in *Power v. Summers*, 226 F.3d 815, 821 (7th Cir., 2000):

> The raise at issue here unlike a bonus [had] continuing effects, because it was added to the recipients' base salary. We decline to hold as a matter of law that the denial of such a raise cannot be an adverse employment action.

Merit raises in the civil service system also are added to an employee's base salary. The Commission has held that an unsatisfactory performance evaluation, which resulted in a decision not to grant a merit raise, is a cognizable adverse action. *Lutze v. DOT*, 97-0101-PC-ER, 7/28/99. Merit raises and DCA's involve the employer's exercise of discretion. The pleadings are insufficient to conclude that DCA's do not constitute a cognizable adverse action while merit raises do.

The Commission wishes to note that this ruling does *not* stand as precedent for the proposition that only salary decisions affecting base pay are cognizable adverse actions. This case does not involve a one-time cash disbursement unrelated to base pay (a bonus) and, accordingly, resolution of that question is reserved if and when it is raised in a future decision.

ORDER

Respondent's motions for summary judgment and for failure to state a claim are denied.

Dated: January 24, 2002.

STATE PERSONNEL COMMISSION

JMR:010041Crul1

JUDY M. ROGERS, Commissioner

ANTHONY L. THEODORE, Commissioner

Chairperson McCallum did not participate in the consideration of this case.