STATE OF WISCONSIN PERSONNEL COMMISSION

RANDY RYKAL,
Complainant,

v.

Secretary, DEPARTMENT OF AGRICULTURE, TRADE AND CONSUMER PROTECTION,
Respondent.

Case No. 01-0052-PC-ER

RULING
ON MOTION
TO DISMISS

This complaint was filed with the Commission on April 5, 2001. Complainant filed an amended complaint on May 10, 2001. Complainant alleges violation of the whistleblower law, subch. III, ch. 230, Stats. Respondent has filed a motion to dismiss the matter for failure to state a claim. The parties have filed written arguments and the following findings are undisputed unless otherwise indicated and are made solely for the purpose of resolving the respondent's motion. The complainant is assisted by a union representative.

FINDINGS OF FACT

1. At all times relevant to this matter, complainant has worked as a Meat Safety Inspector for respondent. His supervisor is Kenneth Larivee, Meat Safety Supervisor.

2. The complainant's position is covered by a Bargaining Agreement between the Wisconsin State Employees Union and the State of Wisconsin.

3. In April of 2000, complainant filed a letter with respondent that complainant identified as a whistleblower disclosure. Respondent informed complainant of the results of its investigation by letter dated June 9, 2000.

4. By letter dated February 16, 2001, Mr. Larivee informed complainant as follows:

> You are directed to report to the Eau Claire Regional Office at 10:30 a.m. on Thursday February 22, 2001. At this meeting we will discuss possible violations of Department Work Rules #3, #4, and #10.
>
> Specifically, we want to discuss your actions and behaviors related to the incident at Pinter Pack on December 28th, 2000.

5. During the predisciplinary hearing on February 22, 2001, respondent threatened to suspend the complainant for 5 days without pay and to place him on 60 days of leave with pay in order to conduct a psychological examination.[1]

6. By letter dated February 23, 2001, respondent: a) directed complainant to submit to a psychological examination on February 28th "to determine to what extent, if any, your current health may be affecting your ability to function in your current work environment"; b) directed complainant to complete a medical release form; c) placed complainant on an indefinite administrative leave with pay, commencing February 27, 2001, to "give the doctor time to conduct a complete assessment and us time to receive the report from the doctor and to review the doctor's recommendations"; and d) directed complainant to, among other things, refrain from visiting any meat plants and from visiting respondent's offices. The letter included the following language:

> As Secretary of the Department, and in accordance with Wis. Stats., section 230.37(2), I am formally directing you to submit to a psychological examination.
>
> Further, you are directed to complete the attached Medical Release Form. This form makes it clear to you and the doctor that the examination is being conducted at our request, and the doctor will be discussing his medical opinions and recommendations with us, to assist us in evaluating your current work situation.
>
> Because I believe it would be in everyone's best interests, I am also placing you on an indefinite administrative leave with pay beginning at the start of your usual work day, Tuesday, February 27, 2001. We believe the administrative leave with pay will be no longer than 60 days. This leave

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[1] It wasn't until complainant replied to respondent's motion to dismiss this matter that he alleged he was threatened with discipline during the February 22nd pre-disciplinary hearing. In its reply brief, respondent noted: "Since the complainant has not attested under oath to the statements in the brief, the department will base its reply solely upon the statements in the Amended Complaint." The respondent has not suggested that complainant's version of the February 22nd predisciplinary hearing was inaccurate. For the purpose of ruling on respondent's motion, the Commission accepts complainant's statement in his brief as uncontested.

> will give the doctor time to conduct a complete assessment and will give us time to receive the report from the doctor and to review the doctor's recommendations. During the administrative leave with pay, you are directed to refrain from visiting any meat plants and the Department offices.
>
> You should contact your supervisor if you have any concerns or questions while on administrative leave. You may use your state assigned vehicle to travel to any appointments you will have with Dr. Hummel, but not for any other purposes. You may not use your state assigned telephone or computer for anything other than communicating with your supervisor, Ken Larivee.
>
> I know you are a very conscientious employee and you are probably reluctant to be gone from your job for so long. However, your health is our primary concern, and we do not want you to worry about your job while you are on this leave with pay.

7. Complainant met with Dr. Hummel on March 5, 2001, instead of on February 28th. By letter dated March 7, 2001, respondent's Secretary wrote complainant, in part:

> I was extremely disappointed to learn that you refused to cooperate with Dr. Eric Hummel when you met with him on Monday, March 5, 2001. Randy, I directed you to meet with Dr. Hummel and I expected you to cooperate with him. My directive to you was a written job instruction and part of your job duties. As you know, refusal to carry out written job instructions is insubordination and violates Department Work Rule #1.
>
> Although the department could discipline you for you insubordinate behavior on Monday, March 5, 2001, I am issuing you this letter in lieu of a disciplinary suspension. I am also repeating the work directive I originally issued you on February 23, 2001, to meet with Dr. Hummel.
>
> I am directing you to meet with Dr. Eric Hummel for a psychological evaluation. I am specifically directing you to cooperate fully with Dr. Hummel, to answer his questions as fully, completely, and honestly as you can, and to cooperate in taking any tests Dr. Hummel administers to you. Your full cooperation is necessary in order for Dr. Hummel to provide a fair and complete evaluation.
>
> You are scheduled to meet with Dr. Hummel on Tuesday, March 13, 2001.
>
> If you fail to attend this meeting or if you fail or refuse to fully cooperate with Dr. Hummel in the evaluation process, you will be subject to discipline up to and including discharge.

> I also want to take this opportunity to inform you that the department has not yet decided what discipline to impose concerning the matters discussed at the pre-disciplinary meeting held on Thursday, February 22, 2001, and continued on Monday, February 26, 2001. The discipline decision in that matter is still being considered.

8. Complainant described the March 5th meeting with Dr. Hummel in a memo dated March 6th The memo reads, in part:

> I proceeded with an examination in Madison with Dr. Hummel as directed by the dept. He and I discussed the two medical release forms prepared by Ms. Kohl. I was concerned that the form didn't indicate that "I" the subject was going to be provided a copy of his report. .
>
> I was concerned that anyone other [than] the Director of Human Resources would review the report prepared by Dr. Hummel. I shared with him that I was concerned that the written tone of the prepared medical release seemed to strongly indicate that there was a medical condition, and "whether my medical condition currently affects my ability to perform." I shared that it concerned me that there seems to have been an implied predetermination, that there was a medical condition. Should not, that determination be assessed by a trained and qualified person I asked. The medical release form was modified by mutual consent and I [signed] the release, which was witnessed by a member of his staff.
>
> I then asked to proceed with the written test. Dr. Hummel asked a question, I shared my concern for issues of my personal privacy.
>
> Dr. Hummel decided that he would not provide the questionnaire to me. I offered that I'm here at the direction [of] the employer to be tested, and that I'm ready to proceed with the written questionnaire.

9. Complainant filed this complaint (01-0052-PC-ER) of whistleblower retaliation with the Personnel Commission on April 5, 2001, stating, in relevant part:

> In December while in work status, a member of the regulated industry assaulted me.
>
> I have been placed on leave, and investigated. The department has not provided me with formal discipline, however to meet the time requirements to file this action, I submit it at this time.

10. On April 16, 2001, respondent filed a motion to dismiss this matter for failure to state a claim.

11. The department received the final evaluation letter from Dr. Hummel regarding complainant around April 26, 2001.

12. Complainant clarified his complaint in an "amendment" signed on May 8, 2001, and filed on May 10th that alleged respondent had engaged in the following retaliation under the whistleblower law:

> I was required to submit to a psychological evaluation, I was ordered to have no contact with fellow employees, I was ordered to speak to no one other than my supervisor Ken Larivee. I was placed on administr[ative] leave for up to sixty days. I was further directed not to use the dept assigned computer or telephone[,] was to have no contact with meat plants and I was not to visit any dept offices. I have been prevented from my union steward activities . I have been denied an opportunity on April 20th 2001 to participate in the labor and management meetings.
>
> On March 3rd, and again on March 13th 2001, I was directed to submit to an evaluation by Dr. Eric Hummel and release of my personal records with my private councilor, under penalty of dismissal and termination of employment. I was directed to reveal my personal medical records, I was required to discuss any and all prior treatments by medical staff.
>
> The results of the testing, examination, and diagnosis, provided on May 7th 2001 revealed no disease or psychosis, I was not found to be any danger to myself or others.
>
> The Medical record release was granted on April 24th 2001 under protest as my personal right to medical privacy has been violated.

13. Complainant filed a written response to complainant's motion to dismiss for failure to state a claim. The response, dated May 11, 2001, included the following statements regarding respondent's contention that it had not taken any "disciplinary action" against the complainant:

> In *Vander Zanden v. DILHR*, 84-0069-PC-ER, 8/24/88, the Commission interpreted the introductory language of [§230.80(2), Stats.,] when it decided a series of incidents met the "standard of substantial or potentially substantial negative impact on the employee." In this case there are six incidents that meet this standard:
>
> 1. The predisciplinary hearing of Febuary 22, 01 with James Larsen and Ken Larivee (the respondent) at which Mr. Rykal was threatened with a 5 day suspension and 60 days leave, with pay, for psychological examination by an independent medical examiner not of his choosing. This "threat" is action prohibited under ss. 230.83(1): "No appointing authority,

agent of an appointing authority, or supervisor may initiate or threaten to initiate any retaliatory action against an employee " There was (and remains to this day) a very real threat of discharge. As of this date, May 10, 2001, the department still has not decided on what discipline it will pursue, and Mr. Rykal remains on administrative leave, in limbo, *with no end in sight*, having no contact with fellow employees or supervision. He has missed staff meetings, been overlooked for training opportunities, and prevented from performing all his former job duties. This is clearly a removal of duty, as prohibited in ss. 230.80. It has the effect of severely damaging his reputation and his credibility both as a meat inspector and as an advocate for his fellow employees as a union steward. This is clearly an act of retaliation, not only for his past whistleblowing activities, but for his long advocacy for the safety of his fellow employees.

2. The "psychological evaluation" consisted of a one and a half hour interview, followed by a three hour written personality inventory, followed by a sixty day period *when nothing at all was done.* This long period of "house arrest" or "solitary confinement was clearly unnecessary and punitive and has the effect of a removal of a duty, and is therefore retaliatory. I cannot overemphasize the damage that has been done to Mr. Rykal's reputation and to his psyche. It has also created a "chilling effect" where no other employee dare come out and report any wrongdoing they might witness on the job, for fear of the same treatment. It has also served to discredit and discourage any fellow employee from union activity.

3. The letter of Secretary Brancel, of February 23 in which he instructs Mr. Rykal to refrain from visiting any meat plants or the Department offices while a "complete assessment" is made. In this letter the secretary makes a number of assumptions and accusations based on facts *which are still in dispute.* This had the effect of precluding him from any union activities he would or could be doing. It should be noted that Mr. Rykal is the chief steward for WSEU Local 333 and has certain legal duties to represent his members and to advise fellow union stewards. He was excluded from at least one labor management meeting in which he represents his membership. This affair, of placing an active leader in the union, under "house arrest" for *entirely specious* reasons, will have great effect on the willingness of any member to come forward and attempt to enforce his rights under the contract. I believe this is a violation of ss. 111.82 and 111.84.

4. The letter, dated March 7 from Secretary Brancel instructing Mr. Rykal to meet and cooperate with Dr. Hummel. This letter was issued "in lieu of a disciplinary suspension" is a disciplinary action [sic] it is clearly a warning letter, and it clearly threatens the employee with discipline up to and including discharge. It should be noted that this letter was

> issued after Mr. Rykal had met with the medical examiner, Dr. Eric Hummel, for two hours and cooperated fully with him at that time The only areas of disagreement were an understanding of the medical record release form he was asked to sign and the disclosure of past medical records. *He never refused to cooperate.* He had been told previously on Feb. 26 that Dr. Hummel would answer these questions. Yet in an unprecedented move, the Secretary of the Department threatens him with discipline for insubordination in his March 7 letter. .
>
> 5. The department of agriculture, trade and consumer protection has chosen a new weapon against "whistleblower' the psychiatric reprisal. They are using this as a "fitness for duty exam", and only giving it to those who question management.
>
> 6. Mr. Rykal was asked to release his entire medical history to department administrators (exhibit 9), a request he found to be intimidating and threatening. With his career on the line, he had every right to be apprehensive about a hostile administrator looking at his entire medical history. How does he know that some statement in his file that may be 20 or 30 years old will not come back to haunt him? Yet, when he had valid questions and concerns about this, he was threatened with discharge [sic] and not by his supervisor, not by a division head but by the *Secretary of the Department.* (exhibit 7).
>
> When these elements are considered together as a whole, a level of harassment exists that rises to the level of discipline against Mr. Rykal. (Emphasis in original.)

14. Attached to complainant's submission dated May 11, 2001, were two unsigned documents marked as Exhibit 9, entitled "Authorization for Release of Medical Information." The first document would have authorized Dr. Eric Hummel to release certain records relating to the complainant to Ms. Georgia Pedracine, Director of respondent's Bureau of Human Resources, and Ms. Elizabeth Kohl, Deputy Administrator of respondent's Division of Food Safety. The document stated, in part:

> Records Authorized to be released:
>
> Records related to [complainant's] medical condition, including the results of any medical examination, findings from the examination and tests, medical observations, diagnosis, and prognosis of my medical condition and copies of relevant documents or records pertaining to my medical condition.
>
> Purpose for Release of Information:
>
> To provide my employer with information about my medical condition;

> To determine whether my medical condition currently affects my ability to perform the essential duties of my job;
> To determine whether accommodation is necessary to permit me to successfully perform my job duties, and if so, to identify what accommodations are necessary.
>
> I hereby authorize disclosure of the records identified above to the person or agency specified above. This authorization does not allow any WDATCP employee to talk to my physicians.
>
> This release shall be effective for six months from the date of signing.

The second release would have permitted Ms. Pedracine and Ms. Kohl to release certain information to Dr. Hummel and included the following language:

> Records Authorized to be released:
> Records related to the medical condition of [complainant], including the results of any medical examination, findings from the examination and tests, medical observations, diagnosis, and prognosis of my medical condition and copies of relevant documents or records pertaining to my medical condition.
>
> Purpose for Release of Information:
> To provide Dr. Eric Hummel and his staff with information about my medical condition; including but not limited to, written statements from my doctors and written information from myself;
> To determine whether my medical condition currently affects my ability to perform the essential duties of my job;
> To determine whether accommodation is necessary to permit me to successfully perform my job duties, and if so, to identify what accommodations are necessary.
>
> I hereby authorize disclosure of the records identified above to the person or agency specified above. This authorization does not allow any WDATCP employee to talk to [my] physicians.

15. Complainant remained on paid administrative leave until September 19, 2001.

16. Respondent suspended the complainant on September 19, 20 and 21, 2001, for his actions at Pinter's Packing Plant on December 28, 2000.

17. Respondent returned the complainant to paid administrative leave from September 24 through 28, 2001.

18. Effective Monday, October 1, 2001, respondent temporarily reassigned complainant to work in the Eau Claire Regional Office of the Division of Food Safety. Complainant has been in paid status at his regular salary since that time.

CONCLUSIONS OF LAW

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

2. Complainant's charge states a claim of whistleblower retaliation in regard to his allegations arising from the February 22nd pre-disciplinary hearing, the March 7th letter, the requirement that he undergo a psychological examination, the medical release requirement and the action of placing him on an indefinite leave with pay.

OPINION

This case is before the Commission pursuant to respondent's motion to dismiss for failure to state a claim. The Commission analyzes such a motion according to the procedure set forth in *Morgan v. Pennsylvania General Ins. Co.*, 87 Wis.2d 723, 731-32, 275 N.W 2d 660 (1979):[2]

> 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 the same as the purpose of the old demurrer – 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.

[2] This analysis was adopted by the Commission in *Phillips v. DHSS & DETF*, 87-0128-PC-ER, 3/15/89; affirmed, *Phillips v. Wis. Pers. Comm.*, 167 Wis. 2d 205, 482 N.W.2d 121 (Ct. App. 1992).

When evaluating a preliminary motion, particular care should be taken not to erode a complainant's right to be heard where complainant is not represented by counsel. *Balele v. UW-Madison*, 91-0002-PC-ER, 6/11/92.

The focus of the respondent's motion is on the question of whether the complainant has alleged that he was subjected to "disciplinary action" as prohibited by the whistleblower law. In *Benson v. UW (Whitewater)*, 97-0112-PC-ER, 8/26/98, the Commission offered the following overview of this aspect of the law.

> Once an employee engages in, or is perceived as engaging in, an action protected by the whistleblower law, §230.83(1) provides that retaliatory action may not be initiated, threatened or administered. "Retaliatory action" is defined in §230.80(8) as a "disciplinary action taken because of" a protected activity. "Disciplinary action" is defined in §230.80(2) 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 any of 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.
>
> This language was analyzed in *Vander Zanden v. DILHR*, Outagamie County Circuit Court, 88 CV 1223, 5/25/89; affirmed by Court of Appeals, 89-1355, 1/10/90. In *Vander Zanden*, the court reviewed a decision of the Personnel Commission concluding that an action by the state agency was not a disciplinary action under the whistleblower law. The circuit court's decision included the following language:
>
> > The commission examined the language of the statute and also applied the maxim *ejusdem generis*. This rule of statutory construction applies not only when a general term follows a list of specific things, but also where, as here, a list of specific words follows a more general term, *Swanson v. Health and Social Services Dept.*, 105 Wis. 2d 78, 85, 312 N.W.2d 833 (Ct. App. 1981). The rule provides that the general term applies only to things that are similar to those specifically enumerated. All of the enumerated disciplinary actions or penalties have a substantial or potentially sub-

> stantial negative impact on an employee. The limitations imposed on Plaintiff's contacts with the Oshkosh Job Service office, while perhaps annoying and perhaps an example of poor management practices bordering on childishness, do not rise to the level of a penalty or a disciplinary action akin to those enumerated in §230.80(2). The common understanding of a penalty in connection with a job related disciplinary action does not stretch to cover every potentially prejudicial effect on job satisfaction or ability to perform ones' job efficiently. Plaintiff was not the "victim" of retaliation. His disclosure resulted in no loss of pay, position, upgrade or transfer or other consequences commonly associated with job discipline.

The decision to investigate an incident which might lead to the imposition of discipline is not a "disciplinary action." *Sadlier v. DHSS*, 87-0046, 0055-PC-ER, 3/30/89. In *Flannery v. DOC*, 91-0157-PC-ER, 91-0047-PC, 7/25/91, the Commission also ruled that the methods used by the respondent in carrying out an investigation of complainant's work performance was not a "disciplinary action."

The Commission has also held that when determining whether a series of incidents constitutes "verbal or physical harassment' within paragraph (a) of the definition of disciplinary action, it may be appropriate to consider the possible cumulative impact of the incidents on the employe. *Seay v. DER & UW-Madison*, 89-0082-PC-ER, 3/31/94; affirmed by Dane County Circuit Court, *Seay v. Wis. Pers. Comm.*, 93-CV-1247, 3/3/95; affirmed by Court of Appeals, 95-0747, 2/29/96. However, "verbal or physical harassment" does not include most any public criticism by an employer of an employee's or a group of employees' approach to a controversial issue. *Kuri v. UW (Stevens Point)*, 91-0141-PC-ER, 4/30/93.

The question before the Commission in the present case is whether the actions complained of by the complainant constitute disciplinary actions, i.e. whether they resulted in a "loss of pay, position, upgrade or transfer or other consequences commonly associated with job discipline." *Vander Zanden v. DILHR*, Outagamie County Circuit Court, 88 CV 1223, 5/25/89; affirmed by Court of Appeals, 89-1355, 1/10/90.

Complainant's allegations are considered separately, below.

I. <u>February 22, 2001, pre-disciplinary hearing</u>

Complainant claims that he was retaliated against during the pre-disciplinary hearing on February 22nd, when respondent allegedly threatened to suspend him for 5

days. This allegation clearly falls within the scope of a *threat* of a "disciplinary action," prohibited under §230.83(1), Stats.[3]

II. March 7, 2001, letter

Complainant has articulated a claim that he was retaliated against when respondent issued the March 7th letter threatening complainant with discipline "up to and including discharge." (Finding 7). Again, this allegation is within the scope of a threat of "disciplinary action."

III. Psychological exam

Complainant alleges that the respondent's requirement that he undergo a psychological examination falls within the scope of a "disciplinary action." In *Morkin v. UW-Madison*, 85-0137-PC-ER, 11/23/88, affirmed by Dane County Circuit Court, *Morkin v. Wis. Pers. Comm.*, 89-CV-0423, 9/27/89, the Commission held:

> To establish the second element, complainant must show that there was a disciplinary action taken against him. It is clear that the 10-day suspension was such an action. It is less clear that the requirement that complainant undergo a psychiatric evaluation was a disciplinary action within the meaning of §230.80(2), Stats. Respondent's intent in imposing the requirement is offered as an argument in this regard and, although the Commission agrees that respondent did not intend to penalize the complainant but to protect the UW when it imposed the requirement, this argument relates to later steps in the analysis, not to the question of whether the imposition of the requirement was a disciplinary action. The Commission does conclude in this regard, however, that the imposition of the requirement did not interfere with complainant's employment in any significant way for the following reasons:
>
> > (1) complainant could have had the evaluation completed before the end of his 10-day suspension; and
> > (2) it did not create a stigma for complainant because it is a matter of record that complainant had previously been given a leave of absence to enable him to undergo psychiatric treatment.
>
> As a result, respondent's requirement of complainant that he undergo a psychiatric evaluation is not equivalent to those actions designated as

[3] "No appointing authority may *threaten* to initiate or administer, any retaliatory action against an employee." (Emphasis added.)

> "disciplinary" in §230.80(2), Stats., and the Commission concludes it was not a disciplinary action.[4]

In comparing the facts of the present case to those in *Morkin*, it is undisputed that there was also no loss in pay associated with respondent's requirement that complainant undergo a psychiatric examination. However, there is no basis for the Commission to conclude, on the limited record before us, that respondent's requirement that complainant undergo a psychiatric evaluation did not have a negative effect sufficient to rise to the level of a disciplinary action. At this stage of the proceedings, the Commission cannot conclude it is clear that under no conditions can the plaintiff recover. Therefore, the Commission denies respondent's motion to dismiss complainant's allegation that the psychological exam requirement was a disciplinary action.

IV Medical release requirement

Complainant's allegations regarding the medical releases are somewhat unclear. Respondent's February 23, 2001, letter directed complainant "to complete the attached Medical Release Form" that makes it "clear [Dr. Hummel] will be discussing his medical opinions and recommendations with [respondent], to assist [respondent] in evaluating your current work situation." In his March 5th memo (Finding 8), complainant states that he discussed the "two medical release forms prepared by Ms. Kohl" when he met with Dr. Hummel on March 5th, the "medical release form was modified by mutual consent" and he signed the release at that meeting. Complainant later (Finding 13, §4) stated the "only areas of disagreement [at the March 5th meeting with Dr. Hummel] were an understanding of the medical release form [complainant] was asked to sign and the disclosure of past medical records." However, in his amendment to the complaint, complainant states the "Medical record release was granted on April 24, 2001 under protest." Complainant submitted unsigned copies of two releases, described in Finding 13, as an attachment (Exhibit 9) to his arguments on respondent's motion to dismiss. His description of these documents fails to clarify if he signed one or both of the them as written, or whether they represent the release forms attached to respondent's February 23rd letter, the

[4] The Commission also concluded in its November 23, 1988, order, that complainant had failed to

forms modified by "mutual consent" and signed at the March 5th meeting with Dr. Hummel or subject to "disagreement" at that meeting, or the release "granted on April 24, 2001, under protest." Complainant does contend that he found the medical release requirement "to be intimidating and threatening":

> With his career on the line, he had every right to be apprehensive about a hostile administrator looking at his entire medical history. How does he know that some statement in his file that may be 20 or 30 years old will not come back to haunt him? Yet, when he had valid questions and concerns about this, he was threatened with discharge [sic] and not by his supervisor, not by a division head but by the *Secretary of the Department.* (Finding 13, §6, emphasis in original.)

Based on the stage of these proceedings, the fact that complainant is not represented by counsel and on the limited information before it, the Commission cannot conclude it is clear complainant could not prevail as to his medical release allegation under any circumstances. The terms and consequences of the release requirement are insufficiently clear for granting respondent's motion to dismiss for failure to state a claim.

V Leave with pay

Complainant also seeks review of the respondent's action of placing him on leave from his workplace with pay and subject to various related restrictions. In his written arguments on respondent's motion, complainant notes:

> As of this date, May 10, 2001, the department still has not decided on what discipline it will pursue, and [complainant] remains on administrative leave, in limbo, *with no end in sight,* having no contact with fellow employees or supervision. He has missed staff meetings, been overlooked for training opportunities, and prevented from performing all his former job duties. This is clearly a removal of duty, as prohibited in ss. 230.80. It has the effect of severely damaging his reputation and his credibility both as a meat inspector and as an advocate for his fellow employees as a union steward.
>
> This long period of "house arrest" or "solitary confinement" was clearly unnecessary and punitive and has the effect of a removal of a duty, and is therefore retaliatory. I cannot overemphasize the damage that has

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sustain his burden of establishing that his 10-day suspension was retaliatory.

> been done to [complainant's] reputation and to his psyche. It has also created a "chilling effect" where no other employee dare come out and report any wrongdoing they might witness on the job, for fear of the same treatment. It has also served to discredit and discourage any fellow employee from union activity.
>
> This had the effect of precluding him from any union activities he would or could be doing. He was excluded from at least one labor management meeting in which he represents his membership.

Respondent imposed an indefinite leave with pay commencing February 27th, 2001, for a specified purpose: "This leave will give the doctor time to conduct a complete assessment and will give us time to receive the report from the doctor and to review the doctor's recommendations." The letter expressed a belief that the "leave with pay will be no longer than 60 days." Respondent received the final evaluation letter from Dr. Hummel regarding complainant around April 26, 2001. However, the indefinite leave remained in effect another 5 months, until the end of September of 2001. It is undisputed that throughout the leave period of approximately 7 months, complainant was prohibited from visiting respondent's offices and all meat plants and from using his state-assigned computer and telephone for any purpose other than communicating with his supervisor.

At some point, maintaining an employee on a leave of absence, even a leave with pay, may reach the level of a disciplinary action, i.e. it may result in a "loss of. position or other consequences commonly associated with job discipline" within the meaning of *Vander Zanden*, supra. Respondent kept complainant on leave for approximately 5 months after it received Dr. Hummel's medical evaluation.[7] The statutory definition of "disciplinary action" includes "removal of any duty assigned to the employee's position." While an argument can be made that the employer should be given a reasonable opportunity to review a medical or physical examination obtained under §230.37(2), Stats., respondent has provided no basis on which the Commission could conclude that respondent has acted promptly in reviewing Dr. Hummel's evaluation. At this stage of

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[7] In its brief dated May 23, 2001, respondent states: "At this time Complainant has agreed to work with the department to review his employment situation. Information relating to respondent's course of conduct upon receiving Dr. Hummel's report, including its actions to work with complainant in "reviewing his employment situation" could be relevant in determining whether the leave constituted a "disciplinary action."

the proceeding, where the Commission is ruling on respondent's motion to dismiss for failure to state a claim, the Commission cannot conclude it is clear that under no conditions can the complainant recover.

VI. Verbal or physical harassment claim

In his brief on respondent's motion, complainant alleges that the various actions taken by respondent constitute "verbal or physical harassment" under §230.80(2). He contends that the series of actions taken by respondent, when viewed together, satisfy the standard in *Vander Zanden* of "a substantial or potentially substantial negative impact on an employee." The Commission has already denied respondent's motion to dismiss for failure to state a claim as to all of complainant's allegations, when viewed as discrete events. Because, for purposes of ruling on this motion to dismiss for failure to state a claim, complainant's allegations relating to the February 22nd pre-disciplinary hearing, the March 7th letter, the psychological exam requirement, the medical release requirement and the leave with pay have all been found to fall within the scope of a "disciplinary action" or threat thereof, it is unnecessary to review the same actions, cumulatively, in the context of a more general allegation of harassment.

VII. Additional matter

On page 2 of his written arguments filed on May 14, 2001, complainant made the following request:

> It should be noted that the complainant is not represented by counsel, but by his own union steward, a fellow meat inspector, who has been instructed by the department to only use personal time for the preparation of this case. In the interest of fairness, I would respectfully ask that [counsel for respondent] be given the same instruction. The Commission has previously held that, in evaluating a preliminary motion, particular care should be taken not to erode a complainant's right to be heard where the

[8] The following hypothetical complaint supports this result. If a complainant alleges that whistleblower retaliation took the form of a suspension as well as a later series of 5 lesser actions that together constituted harassment, the Commission would analyze whether the 5 lesser actions, in aggregate, met the standard for "verbal or physical harassment" rather than determining whether the 6 actions, considered together, met the standard for "verbal or physical harassment."

complainant is not represented by counsel. *Balele v. UW-Madison*, 91-0002-PC-ER, 6/11/92.

In *Cleary v. UW-Madison*, 84-0048-PC-ER, 11/21/85, the Commission held it was not authorized to appoint counsel for a complainant. Complainant has failed to cite any authority for his suggestion that he should be able to dictate that counsel for respondent not use work time to represent the interests of the respondent. There is no basis for complainant's request and it is denied.

ORDER

Respondent's motion to dismiss for failure to state a claim is denied.

Dated: December 20, 2001

STATE PERSONNEL COMMISSION

JUDY M. ROGERS, Commissioner

KMS:010052Crul1.2

ANTHONY J. THEODORE, Commissioner

Commissioner McCallum did not participate in this matter.