STATE OF WISCONSIN PERSONNEL COMMISSION

ALICE HUGHES,
Complainant,

v.

Chancellor, UNIVERSITY OF WISCONSIN- MILWAUKEE,
Respondent.

Case No. 02-0103-PC-ER

RULING ON MOTION FOR SUMMARY JUDGMENT

This matter is before the Commission to resolve respondent's motion for summary judgment which was filed with the Commission on August 23, 2002. The findings of fact do not appear to be in dispute unless so noted. These findings are for the purposes of this motion only. Complainant alleges that respondent retaliated against her in violation of the Wisconsin Fair Employment Act (WFEA) and the Wisconsin Family Medical Leave Act (FMLA) when an employee of respondent's wrote an email response to a request for information regarding complainant's unemployment compensation claim.

FINDINGS OF FACT

1. Complainant's project appointment with respondent ended on July 31, 2002.

2. Complainant subsequently filed an unemployment insurance compensation claim with the state unemployment insurance office located in Milwaukee.

3. Jennifer Lyons is a Payroll and Benefits Specialist 2 with respondent and is responsible for processing unemployment insurance claims filed by former employees.

4. On August 2, 2002, Adam Mico, an unemployment insurance adjudicator who is employed by the Department of Workforce Development at the Milwaukee unemployment insurance office, emailed Ms. Lyons regarding the unemployment claim that had been filed by complainant. The message read:

> Hello, Jenny. This claimant reported working as an internal auditor and worked through late 7/02. Based on that, it does not appear that she is a school year employee. Do you agree? If not, please provided (sic) information supporting your claim that she is a school year employee with reasonable assurance of returning in a similar capacity. Thanks

5. Ms. Lyons responded on August 2nd by email that complainant was not a school year employee and that her project appointment position ended July 31, 2002. Ms. Lyon's message read:

> She was in a project appointment and her position ended 7/31/02. She is not expected to return. She did file a worker's compensation claim, which was denied. She now has an attorney and is filing an appeal to her denied worker's compensation claim.

6. Mr. Mico[1] replied later on August 2nd via email:

> Ooh, then we have an A&A [able and available to work] issue. I'll take that up instead.

7 Also on August 2, 2002, complainant received a telephone call from Mr. Mico in which he stated that respondent was attempting to deny benefits because com-

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[1] Respondent's reply brief included an affidavit of Adam Mico. In paragraph 10 of the affidavit, Mr. Mico states:

> Ms. Lyon did not indicate in email or other correspondence to me that Ms. Hughes was disabled with work limitation, or otherwise contest Ms. Hughes' eligibility for benefits. Ms. Hughes 's pending worker's compensation claim did not make Ms. Hughes ineligible to receive unemployment insurance benefits. By providing me with information about Ms. Hughes' pending worker's compensation claim, Ms. Lyon was not contesting Ms. Hughes' eligibility to receive unemployment benefits.

Paragraph 11 states:

> Upon receiving Ms. Lyon's August 2 email response, I took administrative notice, as I am required to do, that Ms. Hughes' pending worker's compensation implied some type of injury and could mean that she was not able and available to work. To be eligible to receive unemployment insurance benefits, a claimant must be able and available to work. I indicated in a reply email to Ms. Lyon that there was an "A&A issue" (i.e. an able and available t work issue) that I would take up with Ms. Hughes.

plainant had a worker compensation disability and that complainant had hired an attorney.[2]

8. Complainant advised Mr. Mico she had a medical release to return to work with restrictions, and had been working at her place of employment with respondent at the time of her termination.

9. Mr. Mico requested complainant to fax her medical release from her physician allowing her to return to work. Mr. Mico told complainant he would then approve payment of her unemployment benefits.

10. On August 3, 2002, Mr. Mico mailed a UCB-20 Determination form to complainant notifying her that he was granting unemployment compensation benefits to her. (Exhibit W4 attached to Complainant's brief dated September 2, 2002)

11. On August 6, 2002, Ms. Lyon received the UCB-20 Determination form.

12. Complainant's first unemployment benefits payment was dated August 8, 2002.

13. Complainant is receiving unemployment insurance benefits.

14. Presently, complainant is not employed with respondent.

15. Complainant alleges that Ms. Lyon's email response to the unemployment compensation adjudicator was retaliatory. She contends the response characterized her "as disabled with work limitation."

CONCLUSIONS OF LAW

1. This complaint is properly before the Commission pursuant to §103.10 and §230.45(1)(b), Stats.

2. The respondent has the burden to show summary judgment is appropriate.

3. The respondent has met its burden.

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[2] There is a dispute between complainant's and Mr. Mico's versions of the August 2nd telephone conversation. For the purposes of this motion only, the Commission will accept complainant's

4. The respondent did not take an adverse employment action against complainant.

OPINION

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 a 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 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); *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 identified five factors to consider in motions for summary judgments. *Balele*, *id.*, citing *Transportation Ins. Co. v. Huntziger Const. Co.*, 179 Wis. 2d 281, 290-92, 507 N W 2d 136 (Ct. App. 1993):

> (1) *Whether the factual issues raised by the motion are inherently more or less susceptible to evaluation on a disparities motion.* Subjec-

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version as fact.

> tive intent is typically difficult to resolve without a hearing; whereas legal issues based on undisputed or historical facts typically can be resolved without the need for a hearing.
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> (2) *Whether a particular petitioner could be expected to have difficulty responding to a dispositive motion.* An unrepresented petitioner 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;
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> (3) *Whether the complainant could be expected to encounter difficulty obtaining the evidence needed to oppose the motion.* An unrepresented petitioner who either has had no opportunity for discovery or who is not familiar with the discovery process is unable to respond effectively to an assertion by the respondent for which the facts and related documents are solely in respondent's possession;
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> (4) *Whether an investigation has been requested and completed*
>
> (5) *Whether the petitioner has engaged in an extensive pattern of repetitive and/or predominately frivolous litigation.* If this situation exists it suggests that the use of a summary procedure to evaluate his/her claims is warranted before requiring the expenditure of resources required for a hearing.

With respect to the present case, we will address the five factors to be considered when addressing a motion for summary judgment. With respect to the first factor, the material facts necessary to decide the motion in this case are essentially undisputed. The complainant is appearing unrepresented by counsel. Complainant has filed a previous case that is still pending before the Commission, but appears to have limited experience before the Commission and would not be considered familiar with the Commission's procedures. The Commission is unaware that any discovery has been conducted in the present case but complainant has attached additional documents to her response brief and has not brought to the Commission's attention any questions or concerns regarding the withholding of any documents. Furthermore, there does not appear to be any need for any additional documents to decide the present motion beyond what has already been provided to the Commission. The present case was going to be investigated by a member of the Commission's staff but complainant decided to waive the investigation and proceed directly to the hearing stage. Finally, the Commission has no

information that would lead it to believe the complainant has engaged in a pattern of repetitive and/or frivolous litigation. The present case is the second case filed by the complainant and stems from her employment with respondent, as does complainant's first filed case. For these reasons, the Commission will analyze this motion for summary judgment in an essentially conventional manner.

Respondent contends it is entitled to summary judgment regarding complainant's WFEA and FMLA retaliation claims because it is undisputed that respondent did not dispute or challenge complainant's eligibility to receive unemployment compensation benefits, complainant is receiving those benefits, and therefore complainant has not suffered an adverse employment action.

Respondent denies that it attempted to characterize complainant as "disabled with work limitations" and, in the alternative, contends that any such characterization would not constitute an adverse employment action.

Mr. Mico of DWD's unemployment insurance office had questions regarding the possibility of complainant being a school year employee, which would have made her ineligible for unemployment benefits. Respondent argues the email exchange between Mr. Mico and Ms. Lyon was for the purpose of clarifying that complainant was not a school year employee.

In order to prevail on a claim of discrimination or retaliation under the FEA or FMLA, a complainant is required to show that he or she was subject to a cognizable adverse employment action. *Klein v. DATCP*, 95-0014-PC-ER, 5/21/97 In the context of a retaliation claim, §111.322(3), Stats., makes it an act of employment discrimination "[t]o discharge or otherwise discriminate against any individual because he or she has opposed any discriminatory practice under this subchapter or because he or she has made a complaint, testified or assisted in any proceeding under this subchapter." In the context of a discrimination claim, §111.322(1), Stats., makes it an act of employment discrimination to "refuse to hire, employ, admit or license any individual, to bar or terminate from employment . or to discriminate against any individual in promotion, compensation or in terms, conditions or privileges of employment."

The applicable standard, if the subject is not one of those specified in these statutory sections, is whether the action had any concrete, tangible effect on the complainant's employment status. *Klein, supra*, at 6; *Thompson v. DOC*, 00-0122-PC-ER, 5/9/00. In determining whether such an effect is present, it is helpful to review case law developed under Title VII, which includes language parallel to the statutory language under consideration here. 42 UCS §2000e-2. In *Smart v. Ball State University*, 89 F. 3d 437, 71 FEP Cases 495 (7th Cir. 1996), the court stated as follows:

> Adverse employment action has been defined quite broadly in this circuit. *McDonnell v. Cisneros*, . 84 F. 3d 256, 70 FEP Cases 1459 (7th Cir. 1996). In some cases, for example, when an employee is fired, or suffers a reduction in benefits or pay, it is clear that an employee has been the victim of an adverse employment action. But an employment action does not have to be so easily quantified to be considered adverse for our purpose. "[A]dverse job action is not limited solely to loss or reduction of pay or monetary benefits. It can encompass other forms of adversity as well." *Collins v. State of Illinois*, 830 F. 2d 692, 703, 44 FEP Cases 1549 (7th Cir. 1987)
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> While adverse employment actions extend beyond readily quantifiable losses, not everything that makes an employee unhappy is an actionable adverse action. Otherwise, minor and even trivial employment actions that "an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit." *Williams v. Bristol-Myers Squibb Co.*, 85 F. 3d 270, 70 FEP Cases 1639 (7th Cir. 1996) . [I]n *Flaherty v. Gas Research Institute*, 31 F. 3d 451, 65 FEP Cases 941 (7th Cir. 1994), we found that a lateral transfer, where the employee's existing title would be changed and the employee would report to a former subordinate, may have caused a "bruised ego," but did not constitute an adverse employment action. Most recently, in *Williams*, we found that the strictly lateral transfer of a salesman from one division of a pharmaceutical company to another was not an adverse employment action .

In *Crady v. Liberty Nat'l Bank & Trust Co*, 993 F. 2d 132, 136 (7th Cir. 1993), the court, in requiring that an actionable employment consequence be "materially adverse," stated:

> A material adverse change in the terms and conditions of employment must be more disruptive than a mere inconvenience or an alteration of job responsibilities. A materially adverse change might be indicated by a

> termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation. *See, Rabinowitz v. Pena*, 89 F. 3d 482 (7th Cir. 1996)

In her response brief, complainant emphasized a portion of Ms. Lyon's email communication, which she believed characterized her as disabled with work limitations. The highlighted portion states:

> She was in a project appointment and her position ended 7/31/02. She is not expected to return. She did file a worker's comp claim, which was denied. She now has an attorney and is filing an appeal to her denied worker's comp. claim

Complainant further notes that Ms. Lyon did not specifically state that "Ms. Hughes was eligible for unemployment benefits."

The Commission disagrees with complainant's contention that the information that she had filed a worker's compensation claim infers that complainant was disabled and had work limitations.[3] Based on the information provided by Ms. Lyon, Mr. Mico's response that there may be an "A&A" issue because complainant would need to be able and available to work and that he would follow up with complainant was reasonable. Complainant provided Mr. Mico with the necessary paperwork and she began receiving her unemployment benefits a week later.

Even if the Commission were to find that complainant's interpretation of Ms. Lyon's statement was correct, that respondent was attempting to characterize complainant as "disabled with work limitations," complainant's unemployment benefits were approved the following day and the comment would not be materially adverse.

Complainant would like us to deny respondent's motion for summary judgment based on possibilities that did not take place. But the Commission cannot rule on mere

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[3] The Commission notes that in respondent's reply brief the affidavits of Ms. Lyon and Mr. Mico were included. Both affidavits stated that respondent is required to inform unemployment personnel if there is an outstanding worker's compensation claim to avoid the possibility of "double dipping." Complainant was not provided an opportunity to dispute this claim, and therefore it was not included in the Findings of Fact.

speculation, without any supporting facts. There is no dispute by either party that the unemployment personnel determined complainant was eligible for unemployment benefits and has been receiving those benefits. The complainant has made no showing of the allegation characterization affecting any material change of complainant's employment or benefits, or respondent's alleged action had any concrete, tangible effect on complainant's employment status. Therefore, there has been no showing of an adverse employment action.

Respondent has raised several additional arguments to support its request for summary judgment and recently filed a second motion for summary judgment based on mootness. In light of the Commission's ruling, there is no need to review respondent's additional arguments or second motion.

ORDER

Respondent's motion for summary judgment is granted and the present case is dismissed.

Dated: 9/27, 2002.

STATE PERSONNEL COMMISSION

KST: 020103Crul1

ANTHONY L. THEODORE, Commissioner

KELLI S. THOMPSON, 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.