STATE OF WISCONSIN PERSONNEL COMMISSION

PETER D. STACY
Complainant,

v.

Secretary, DEPARTMENT OF CORRECTIONS,
Respondent.

RULING ON MOTIONS

Case Nos. 99-0054, 0072, 0081-PC-ER

These are complaints of whistleblower retaliation. The statement of the issues for hearing to which the parties have agreed is as follows (see report of May 28, 1999, prehearing conference):

Case No. 99-0054-PC-ER:

> Whether respondent retaliated against complainant in violation of the whistleblower law, §§230.80 et seq., with respect to complainant's transfer from Correctional Center Superintendent 2 to an Administrative Policy Advisor III position.

Case No. 99-0072-PC-ER:

> Whether respondent retaliated against complainant in violation of the whistleblower law, §§230.80 et seq., with respect to how complainant's time sheet is to be prepared and establishing a standard that singled him out from other employes.

Case No. 99-0081-PC-ER:

> Whether respondent retaliated against complainant in violation of the whistleblower law, §§230.80 et seq., with respect to e-mail distributed throughout the department, but not sent to complainant.

On September 6, 2001, respondent filed a motion to dismiss and/or for summary judgment. The parties were permitted to brief the motions and the schedule for doing so was completed on November 1, 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 resolving the subject motions.

FINDINGS OF FACT

1. Prior to September of 1997, complainant was employed by respondent as the superintendent (Correctional Center Superintendent 2) of the St. Croix Correctional Center (SCCC). The SCCC housed the Challenge Incarceration Program (CIP), i.e., the youthful offender "boot camp" program.

2. In June of 1997, complainant planned and conducted an exercise for certain CIP offenders which precipitated allegations of inmate abuse. In September of 1997, while these allegations were being investigated, complainant was temporarily removed from his superintendent position and reassigned by respondent to a position in the Hudson Community Corrections Office.

3. As a result of the investigations of these allegations, respondent concluded that complainant's conduct regarding the use of restraints and treatment of an inmate during the exercise was a violation of its policies. Following a predisciplinary hearing, respondent permanently reassigned complainant to an Administrative Policy Advisor 3 (APA 3) position in its Hudson Office in January of 1999. Complainant worked in this APA 3 position until some time later in 1999 when he requested and received a leave of absence to teach in the University of Minnesota system. Complainant returned to work for respondent after teaching two years, and was assigned to a position in Lancaster. Complainant voluntarily retired from state service in June of 2001.

4. In 1997, complainant, who was represented by counsel, filed an appeal with the Commission challenging his temporary removal from the superintendent's position and reassignment to the Hudson Community Corrections Office position. The Commission dismissed this appeal for lack of subject matter jurisdiction. *Stacy v. DOC*, 97-0098-PC, 2/19/98, aff'd Pierce Co. Cir. Ct., *Stacy v. Wis. Pers. Comm.*, 98-CV-0053, 7/9/98.

5. On March 17, 1999, complainant filed a civil service appeal with the Commission challenging his permanent reassignment to the APA 3 position in Hudson. The Commission dismissed this appeal for untimely filing and because it did not involve

subject matter grievable under the noncontractual grievance process. *Stacy v. DOC*, 99-0024-PC, 8/25/99; petition for rehearing denied 10/6/99.

6. On June 18, 1999, complainant, who was represented by counsel, filed an action (*Stacy v. DOC, et al.*, 98-CV-1623) against respondent, and certain of its officials, in Dane County Circuit Court, alleging that his removal from the superintendent position, his temporary 1997 and permanent 1999 reassignments, and respondent's investigations of the CIP exercise, violated state civil service laws and administrative rules, respondent's progressive disciplinary policy, and certain of complainant's federal constitutional rights.

7 In arguments filed as a part of the proceedings in Dane County Circuit Court, complainant contended that respondent and its officials had taken the subject actions at least in part because they were aware that complainant was an outspoken advocate of CIP, and its concept of earned release, and an opponent of the truth-in-sentencing legislation which respondent supported; and because he had expressed concerns and filed a whistleblower complaint about the release of AODA (Alcohol and Other Drug Abuse) treatment records by respondent.

8. On August 13, 2001, Dane County Circuit Judge Richard Callaway granted the defendants' motion for summary judgment and motion to dismiss for failure to state a claim in Case No. 98-CV-1623, and dismissed the entire case with prejudice.

9. On March 29, 1999, complainant filed a charge of discrimination with the Commission (Case No. 99-0054-PC-ER), alleging that he had been retaliated against for engaging in protected whistleblower activities in regard to his removal from the superintendent position and permanent reassignment to the APA 3 position in January of 1999. In this charge, complainant identified as his protected whistleblower activities three whistleblower claims he had filed against respondent "during the past 18 months," and his advocacy for certain legislation not supported by respondent.

10. On April 26, 1999, complainant filed a charge of discrimination with the Commission (Case No. 99-0072-PC-ER), alleging that he had been retaliated against for engaging in protected whistleblower activities in regard to the requirement that he

secure his supervisor's approval if he would be working more than, or less than, 40 hours per week. In this charge, complainant identified as his protected whistleblower activities the three whistleblower claims he had filed against respondent and had relied upon in Case No. 99-0054-PC-ER, as well as his filing of Case No. 99-0054-PC-ER.

11. On May 10, 1999, complainant filed a charge of discrimination with the Commission (Case No. 99-0081-PC-ER), alleging that he had been retaliated against for engaging in protected whistleblower activities in regard to his alleged exclusion from an email distribution list. In this charge, complainant identified as his protected whistleblower activities the three whistleblower claims he had referenced in his earlier complaints, his filing of Case Nos. 99-0054-PC-ER and 99-0072-PC-ER, and certain "legislative contacts." Attached to this charge were copies of emails authored by Mary Keyes which respondent has represented relate to the death and funeral of a former DOC employee. Complainant has not challenged this representation. These were the only emails specifically offered by complainant in support of his charge.

12. Complainant retained his level of pay and benefits upon reassignment.

13. Complainant has not been represented by counsel in Case Nos. 99-0054, 0072, 0081-PC-ER.

OPINION

Case No. 99-0054-PC-ER—permanent reassignment

Respondent contends here that this case should be dismissed on the basis of *res judicata* (claim preclusion), citing the decision of the Dane County Circuit Court in Case No. 98-CV-1623 (See Findings 5, 6, and 7, above).

However, it is appropriate in whistleblower cases to first review the specific requirements set forth in §230.88(2)(c), Stats., which provides, *inter alia*:

> [A]n employe shall notify the commission if he or she has commenced an action in a court of record alleging matters prohibited under s. 230.83(1). . Upon commencement of such an action in a court of record, the commission has no jurisdiction to process a complaint filed under s. 230.85 except to dismiss the complaint.

Although the complainant here did not explicitly specify a whistleblower cause of action in his circuit court case, he averred in that case that he had been retaliated against in regard to his permanent reassignment based on his advocacy of CIP and his opposition to truth-in-sentencing legislation and based on concerns he had expressed about, and his filing of a whistleblower complaint concerning, the release of AODA treatment records (see Findings 5 and 6, above). In this case before the Commission, complainant charges that he was retaliated against in regard to his permanent reassignment because of three whistleblower claims he had filed against respondent "during the past 18 months" and because of his advocacy for certain legislation. Complainant provides no further specifics.

It is concluded that the circuit court action covers, for purposes of §230.88(2)(c), Stats., essentially the same subject matter as the complaint before this Commission in Case No. 99-0054-PC-ER, and that, as a result, the Commission is required to dismiss this case. *See, Dahm v. Wis. Lottery*, 92-0053-PC-ER, 8/26/92; *Nichols v. UW-Madison*, 96-0084-PC-ER, 3/12/97.

Since the parties argued the issue of claim preclusion, the Commission includes the following analysis as dicta here.

The doctrine of claim preclusion holds that a final judgment is conclusive in all subsequent actions between the same parties as to all matters which were litigated or which might have been litigated in the former proceedings. *A.B.C.G. Enterprises v. First Bank* Southeast, 184 Wis.2d 465, 515 N W.2d 904 (1994); *DePratt v. West Bend Mut. Ins. Co.*, 113 Wis.2d 306, 334 N.W.2d 883 (1983). In order for earlier proceedings to act as a claim preclusive bar in relation to the present suit, three criteria must be satisfied: 1) an identity between the parties or their privies in the prior and present suits; 2) an identity between the causes of action in the two suits; 3) a final judgment on the merits in a court of competent jurisdiction. *Schaeffer v. State Personnel Comm.*, 150 Wis.2d 132, 441 N.W.2d 292 (1989). Wisconsin courts apply the transactional rule in determining whether the claims or causes of action in the two cases are sufficiently identical: a basic factual situation generally gives rise to only one

cause of action, no matter how many different theories of relief may apply. *Schaeffer*, 150 Wis.2d at 140, *citing DePratt*, 113 Wis.2d at 311-12; *Marshall-Wisconsin v. Juneau Square*, 130 Wis.2d 247, 387 N.W.2d 106 (Ct. App. 1986), *aff'd in part, reversed in part*, 139 Wis.2d 112, 406 N.W.2d 764 (1987); *Oriedo v. DER & DOT*, 90-0067-PC-ER, 9/5/91. The cause of action is the fact situation on which the first claim was based. If the present claim arose out of the same transaction as that involved in the former action, the present claim is barred even though the plaintiff is prepared in the second action to present evidence or grounds or theories of the case not presented in the former action, or to seek remedies or forms of relief not demanded in the first action. *DePratt, supra; Parks v. City of Madison,* 171 Wis.2d 730, 492 N.W.2d 365 (Ct. App. 1992); *Weatherall v. DHSS*, 84-0047-PC-ER, 10/7/87, aff'd Ozaukee Co. Cir. Ct., *Weatherall v. Personnel Commission*, 87-CV-481-B1, 9/15/88. In sum, the purpose of the claim preclusion doctrine is to prevent multiple litigation of the same claim, and it is based on the assumption that fairness to the defendant requires that at some point litigation involving the particular controversy must come to an end. *Balele v. Wis. Pers. Comm. et al.*, Dane County Circuit Court, 98-CV-0257, 8/10/98; affirmed Court of Appeals, 98-2658, 5/20/99.

Here, the parties in the circuit court action (complainant as the plaintiff, and the Department of Corrections and its secretary and certain other officials as defendants) are identical to or privies of the parties in this case before the Commission (complainant, and the Department of Corrections as the respondent). The transactional event, i.e., complainant's permanent reassignment to the APA 3 position, is the same. Complainant had full and fair opportunity to litigate his whistleblower retaliation claim in regard to this permanent reassignment in his circuit court action. The whistleblower law contemplates that an original action may be commenced in circuit court,[1] but complainant failed to explicitly include a whistleblower retaliation cause of action as a

[1] See, §§230.88(2)(c) and 895.65, Stats.

part of his circuit court case.[2] All the elements for a finding of claim preclusion are present.

Complainant appears to be arguing that the fact that his circuit court case was dismissed on the basis of pretrial motions (motion for summary judgment and motion to dismiss for failure to state a claim) should militate against a finding of claim preclusion here. However, such a resolution qualifies as a final disposition on the merits for purposes of the application of the doctrine of claim preclusion. *Schaeffer v.* DMA, 82-PC-ER-30, 6/24/87, aff'd Dane Co. Cir. Ct., *Schaeffer v. State Pers. Comm. & DMA,* 87-CV-7413, 6/22/88, aff'd, *Schaeffer v. State Pers. Comm. & DMA*, 150 Wis.2d 132 (Ct. App. 1989); *Balele v. DOA*, 94-0090-PC-ER, 2/20/95.

It is concluded that claim preclusion would apply here to prevent relitigation of the permanent assignment issue.

In view of the above conclusions, the other bases for respondent's motion to dismiss/motion for summary judgment in this case need not be analyzed here.

Case No. 99-0072-PC-ER time reporting

Respondent argues in regard to this charge that it should be dismissed for failure to state a claim since the action of respondent requiring that complainant report his work time to his supervisor in a particular way does not qualify as a "disciplinary action" within the meaning of §230.80(2), Stats., and, due to complainant's retirement in June of 2001, that this charge should be dismissed because it is moot.

The whistleblower law (§230.80 et seq., Stats.) protects certain qualifying employees from "retaliatory action." Section 230.80(8), Stats., states that a "retaliatory action," is a "disciplinary action" taken against an employee because he or she engaged in certain protected activities or was regarded as having engaged in such activities. Section 230.80(2), defines a "disciplinary action," as follows:

> **(2)** "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:

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[2] As noted above, *A.B.C.G. Enterprises, supra; DePratt, supra.*

> (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.

Only those personnel actions which have a substantial or potentially substantial negative impact on an employee fall within the definition of "disciplinary action" found in §230.80(2), Stats. *Vander Zanden v. DILHR,* 84-0069-PC-ER, 8/24/88; aff'd Outagamie Co. Cir. Ct., 88 CV 1223, 5/25/89; aff'd Ct. of App., 89-1355, 1/10/90. 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 one's job efficiently. *Id.* The requirement that complainant report to his supervisor whether he was going to work more than or less than 40 hours in a particular work week does not come close to rising to the level of a disciplinary action within the meaning of the whistleblower law. It is not comparable in scope or impact to any of the "disciplinary actions" listed in §230.80(2), Stats. It is concluded as a result that complainant's charge fails to satisfy one of the requirements for prosecuting a claim of whistleblower retaliation and should be dismissed for failure to state a claim.

In view of this conclusion, it is not necessary to address the other bases for respondent's motion to dismiss/motion for summary judgment in this case.

Case No. 99-0081-PC-ER failure to include complainant on certain email distribution lists

Complainant specifically alleges in this case that he was excluded from certain email distribution lists on which he should have been included given the nature and level of his job responsibilities. It is conceivable that, under certain circumstances, exclusion from an email distribution list could significantly impair an employee's ability

to successfully perform the duties and responsibilities of his job. *See, Benson v. UW (Whitewater)*, 97-0112-PC-ER, etc., 8/26/98 (respondent's action of completely barring complainant from using the university's mail system rose to the level of a disciplinary action if it had a drastic effect on his ability to perform his responsibilities as a member of the faculty) Here, the only specifics complainant has offered in support of his charge are emails relating to the death and funeral of a former DOC employee. Although complainant, in his brief, makes a general reference to respondent sending "him virtually no correspondence that is being sent to all others in his employment range," he does not identify or specifically describe any such emails, or relate them to his ability to perform the duties and responsibilities of his position. Complainant's general reference is insufficient to sustain a finding that respondent's alleged action constituted a disciplinary action within the meaning of §230.80(2), Stats., and complainant has failed to state a claim in regard to this case.

Respondent also argues, among other things, that this case is moot.

Respondent has the burden to show that a controversy is moot. *Wongkit v. UW-Madison*, 97-0026-PC-ER, 10/21/98. An issue is moot when a determination is sought which can have no practical effect on a controversy. *Id.* When a complainant is no longer employed by the respondent, the question of whether the controversy is moot involves reviewing the available remedies to determine if the separation precludes granting effective relief. *Burns v. UW-Madison*, 96-0038-PC-ER, 4/8/98.

The list of remedies available to a prevailing complainant in a whistleblower case is set forth in §230.85(3)(a), Stats., as follows:

> ... If the commission finds the respondent engaged in or threatened a retaliatory action, it shall order the employee's appointing authority to insert a copy of the findings and orders into the employee's personnel file In addition, the commission may take any other appropriate action, including but not limited to the following:
>
> 1. Order reinstatement or restoration of the employee to his or her previous position with or without back pay
>
> 2. Order transfer of the employee to an available position for which the

employee is qualified within the same governmental unit.

3. Order expungement of adverse material relating to the retaliatory action or threat from the employee's personnel file.

4. Order payment of the employee's reasonable attorney fees by a governmental unit respondent, or by a governmental unit employing a respondent who is a natural person if that governmental unit received notice and an opportunity to participate in proceedings before the commission.

5. Recommend to the appointing authority of a respondent who is a natural person that disciplinary or other action be taken regarding the respondent, including but not limited to any of the following:

a. Placement of information describing the respondent's violation of s. 230.83 in the respondent's personnel file.

b. Issuance of a letter reprimanding the respondent.

c. Suspension.

d. Termination.

It should first be noted that complainant is no longer employed by respondent and, given the fact that he is now retired, there is no reason to expect that complainant would be employed by respondent in the foreseeable future.

Potential remedy 1. would be meaningful only in a situation where the complainant was involuntarily removed from a position in retaliation for engaging in protected whistleblower activities and sought return to a position with respondent. That is not the situation in this case where we are dealing solely with the allegedly retaliatory action of removing complainant from certain email distribution lists.

Potential remedy 2., above, which deals with transfer, would only be applicable if the prevailing complainant were still employed by respondent which, due to his retirement, he is not.

Potential remedy 3., above, would only be applicable if materials relating to the allegedly retaliatory action were included in the complainant's personnel file. Not only

would a retired employee like the complainant here not have an active personnel file, but materials relating to an employee's presence or absence from an email distribution list are not the types of materials typically maintained in a personnel file.

In regard to potential remedy 4., above, although complainant asserts that he should also be entitled to attorneys fees and costs, these fees and costs were incurred in relation to his earlier civil service appeal (97-0098-PC) and his circuit court action (98-CV-1623). Complainant has not been represented by counsel at any stage of the three cases under consideration here. *See, Duello v. UW-Madison*, 87-0044-PC-ER (Commission lacks authority to order reimbursement for fees generated in proceedings in another forum)

Potential remedy 5. is applicable only where the respondent is a natural person. In this case, the respondent is a state agency, and complainant has not asserted that any natural person would be a proper party respondent in this matter.

In regard to the general language of §230.85 (3), Stats., which authorizes the commission to take any other appropriate action, given the conclusion above that the only emails which were not distributed to complainant related to non-work matters, the Commission cannot identify any other potentially appropriate remedy here.

It is concluded that complainant has failed to state a claim for relief, and this controversy is moot. In view of this conclusion, it is not necessary to address the other bases for respondent's motion to dismiss/motion for summary judgment in this case.

CONCLUSIONS OF LAW

1. These matters are appropriately before the Commission pursuant to §230.45(1)(gm), Stats.

2. Respondent has the burden to show that these cases should be dismissed.

3. Respondent has sustained this burden.

ORDER

Case No. 99-0054-PC-ER is dismissed for lack of subject matter jurisdiction.

Respondent's motion to dismiss Case No. 99-0072-PC-ER based on failure to state a claim is granted and the case is dismissed.

Respondent's motion to dismiss Case No. 99-0081-PC-ER based on mootness is granted and the case is dismissed.

Dated: December 21, 2001

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

LRM:990054C+rul1

JUDY M. ROGERS, Commissioner

ANTHONY J. THEODORE, 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.) 2/3/95