STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

GEORGE RUSSELL, Appellant

v.

BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN, Respondent

Case 57
No. 69722
PA(adv)-183

Decision No. 33845-A

Appearances:

Lisa C. Goldman, Attorney, Lawton & Cates, S.C., 10 E. Doty Street, Ste. 400, P.O. Box 2965, Madison, WI 53701-2965, appearing on behalf of Appellant.

Jennifer Sloan Lattis, Senior System Legal Counsel, University of Wisconsin System Administration, Office of General Counsel, 1808 Van Hise Hall, 1220 Linden Drive, Madison, WI 53706, appearing on behalf of Respondent.

ORDER DENYING APPELLANT'S MOTION FOR SUMMARY JUDGMENT OR TO EXCLUDE EVIDENCE

This matter is before the Wisconsin Employment Relations Commission (the Commission) on Appellant's motion for summary judgment or to exclude evidence as sanctions against Respondent. No hearing has been conducted. The underlying appeal involves the Appellant's discharge from his employment as IS Supervisor 2 with Respondent. The parties filed briefs and reply briefs on the motion, with the final argument being received by August 2, 2011. Having reviewed the record developed to date and considered the parties' positions, the undersigned designated Hearing Examiner issues the following

ORDER

Appellant's motion is denied.

Dated at Madison, Wisconsin, this 29th day of March, 2012.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Matthew Greer /s/
Matthew Greer, Examiner

BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN (Russell)

MEMORANDUM ACCOMPANYING ORDER

This matter is before the Examiner on Appellant's motion for summary judgment or to exclude evidence. Appellant argues that summary judgment in his favor is justified as a sanction against Respondent for Respondent's inadequate preservation, or spoliation, of certain evidence. Alternatively, Appellant argues that if summary judgment in his favor is not granted, then Respondent should be barred from introducing evidence related to the inadequately preserved evidence, also as a spoliation sanction.

Background[1]

Respondent terminated Appellant's employment in a letter dated March 25, 2010 alleging that Appellant engaged in the unauthorized possession or removal of Respondent's property in violation of one of Respondent's work rules. The property at issue was two computers – identified by Respondent as #18 and #19. Respondent alleges that the computers went missing in late 2009 and early 2010 respectively. They were discovered together on Respondent's premises in the same bag on February 23, 2010. A CD with what Respondent alleges contains Appellant's handwriting on it was found in computer #18. All data had been erased from that computer. Computer #19 had not been erased and Respondent made an image of the data on its hard drive. This physical evidence, along with witness statements related to that evidence, formed part of the basis for Respondent's decision to terminate Appellant's employment.

Respondent retained the data image of computer #19, computer #18, and the CD that was found in #18. Computer #19 itself was put back into service and the bag the computers were found in was not retained. Appellant did not have an opportunity to inspect the physical evidence in the state it was in at the time it was found and argues that Respondent should be sanctioned for its failure to preserve the evidence in the manner in which it was found.

Applicability of Common Law Spoliation Rule

To justify awarding sanctions, Appellant argues that the common law spoliation rule regarding failure to preserve evidence should apply in this proceeding. That standard was articulated by the Wisconsin Supreme Court as:

> Every party or potential litigant is duty-bound to preserve evidence essential to a claim that will likely be litigated. SENTRY INS. V. ROYAL INS. CO. OF AM., 196 WIS.2D 907, 918, 539 N.W.2D 911 (CT.APP.1995). Spoliation is the "intentional

[1] This is not a typical summary judgment motion alleging that 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). As will be described below, the motion presents a matter of law and not fact. Therefore, the Examiner declines to make any findings of fact and the information outlined below is provided only for background.

> destruction, mutilation, alteration, or concealment of evidence." BLACK'S LAW DICTIONARY 1409 (7TH ED. 1999). Courts have discretionary authority to sanction parties who destroy or withhold evidence relevant to pending or future litigation. See ESTATE OF NEUMANN v. NEUMANN, 2001 WI APP 61, ¶ 80, 242 WIS.2D 205, 626 N.W.2D 821. These sanctions serve two main purposes: "(1) to uphold the judicial system's truth-seeking function and (2) to deter parties from destroying evidence." INSURANCE CO. OF N. AM. v. CEASE ELEC. INC., 2004 WI APP 15, ¶ 16, 269 WIS.2D 286, 674 N.W.2D 886.

AMERICAN FAMILY MUT. INS. CO. v. GOLKE, 319 WIS.2D 397, 768 N.W.2D 729 (2009).

Appellant cites no case where the Commission or its predecessors applied the spoliation rule, let alone sanctioned a party for spoliation. This is not surprising in light of the distinct and relatively lenient evidentiary standards applicable in administrative proceedings. In relevant part, Sec. 227.45(1), Stats., provides:

> . . . an agency or hearing examiner shall not be bound by common law or statutory rules of evidence. The agency or hearing examiner shall admit all testimony having reasonable probative value, but shall exclude immaterial, irrelevant or unduly repetitious testimony or evidence that is inadmissible under s. 901.05.

The Commission's rules reiterate this lenient standard in Sec. PC 5.03(5), Wis. Adm. Code:

> (5) Evidence. As specified in s. 227.45, Stats., the commission is not bound by common law or statutory rules of evidence. All testimony having reasonable probative value shall be admitted, and immaterial, irrelevant or unduly repetitious testimony shall be excluded. The hearing examiner and the commission shall give effect to the rules of privilege recognized by law. Hearsay evidence may be admitted into the record at the discretion of the hearing examiner or commission and accorded such weight as the hearing examiner or commission deems warranted by the circumstances.

Respondent cites the Court of Appeals' analysis in YAO v. BOARD OF REGENTS OF UNIVERSITY OF WISCONSIN SYSTEM, 649 N.W.2d 356, 256 WIS.2D 941 (WI CT. APP. 2002). In that case, an assistant professor was terminated following an administrative proceeding where a videotape was admitted into evidence against the professor even though it had portions erased or taped over by the University and the professor alleged that those erased portions contained evidence that would have exonerated him. The professor argued to the Court of Appeals that the spoliation rule should have prevented the admission of the videotape in the administrative proceeding and that by allowing it, the University benefited from its own failure to preserve evidence. The Court addressed this argument by citing the Sec. 227.45(1), Stats., evidentiary standard and noting that "a 'spoliation rule' developed and applied in case law

involving civil litigation does not necessarily govern the outcome here." ID. The Court further observed that even if the spoliation rule was applied in an administrative proceeding, sanctions were discretionary and Sec. 227.45 Stats., provides that "an administrative body enjoys even wider latitude than a court in admitting and considering proffered evidence." ID. Thus, the Court concluded that the videotape was not admitted improperly.

The reasoning in YAO is persuasive in this case. Because there is no requirement that the spoliation rule be applied in an administrative proceeding and, as noted above, there is also no Commission precedent for doing so, to apply such a rule on these facts would be contrary to the lenient evidentiary standard applicable in Commission proceedings, as established by Sec. 227.45(1), Stats. and Sec. PC 5.03, Wis. Adm. Code. Therefore, the requested sanctions are not appropriate in this case. The evidence that Appellant wishes to exclude has "reasonable probative value" and there is no argument in the record at this point that such evidence would be "immaterial, irrelevant or unduly repetitious." Therefore, excluding such evidence would go beyond the mandates of the statute and administrative rules governing admissibility of evidence in this proceeding.

It is also important to note that Respondent has the burden to "show by a preponderance of credible evidence that there was just cause for the discipline." DOC (DEL FRATE), DEC. NO. 30795 (WERC, 2/04). Appellant remains free to argue and show how Respondent may have failed to reliably preserve the credible evidence supporting its decision to terminate Appellant's employment.

To the extent that Appellant argues for discovery sanctions, they are also inappropriate at this point in this case. Section 804.12(2) Stats., provides that sanctions may be appropriate for "failure to comply with order." No order has been issued in this case. As such, a motion for discovery sanctions is premature. *See* LANG V. SPD, CASE NO. 98-0197-PC-ER (PERS. COMM., 8/23/00). Further, Commission precedent requires parties to "make a serious and good faith effort to resolve, informally, all aspects of the discovery dispute" prior to seeking formal action from the Commission. ORIEDO V. DOC, CASE NO. 98-0124-PC-ER (PERS. COMM., 4/21/99). The record does not establish that such efforts have been made in this case.

For the foregoing reasons, the sanctions requested in the motion are not appropriate. Appellant's motion is denied.

Dated at Madison, Wisconsin, this 29th day of March, 2012.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Matthew Greer /s/

Matthew Greer, Examiner

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No. 33845-A