STATE OF WISCONSIN PERSONNEL COMMISSION

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STEPHAN J. MORKIN,

Complainant,

v.

Chancellor, UNIVERSITY OF WISCONSIN - MADISON,

Respondent.

Case No. 85-0137-PC-ER

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ORDER

ORDER

The Commission, after considering the arguments of the parties and after consulting with the hearing examiner, adopts the proposed decision and order with the following changes:

1. On page 17, the first paragraph is deleted and the following substituted:

> 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 "disciplinary" in §230.80(2), Stats., and the Commission concludes it was not a disciplinary action. Finally, the essential result of respondent's failure to return complainant to work status after the expiration of the 10-day suspension was in effect an involuntary leave without pay which the Commission concludes was a disciplinary action.

2. On page 20, the following paragraph should be added after the first paragraph:

Finally, the Commission has determined that the leave without pay constituted disciplinary action. The reasons offered above relating to the requirement that complainant undergo a psychiatric evaluation are also legitimate and non-discriminatory reasons for not permitting complainant to return to work status until the results of his psychiatric evaluation were provided to respondent. It should also be noted in this regard that respondent anticipated that the psychiatric evaluation could be completed within the 10-day suspension period, that there was precedent for imposing such a requirement (see Finding

of Fact 23), and that complainant had it within his power to return to work status by agreeing to release the results of his psychiatric evaluation to respondent.[FN]

3. On page 21, the following language is added to the first full paragraph:

> Complainant argues in this regard that the statutory requirement that the Whistleblower Act be liberally construed requires that the complainant be given the benefit of the doubt in resolving questions of credibility. There is simply no authority for this argument. A requirement of liberal construction means that questions regarding the meaning of the words of a statute be resolved in favor of giving the statute its most comprehensive meaning while still giving effect to the intent of the legislature. (Mohasco Corp. v. Silver, 65 L Ed 2d 532, 100 S.Ct. 2486 (1980); Becker Steel Co. v. Cummings, 296 US 74, 80 L Ed 54, 56 S.Ct. 15 (1935); International Mercantile Marine Co. v. Lowe, 93 F. 2d 663, 115 ALR 896; Kansas City v. Federal Pacific Electric Co., 310 F. 2d 271 (8th Cir. Ct. of App., Missouri). The requirement that a statute be liberally construed has no relation to the burdens of proof of parties to litigation under the statute and complainant cites no argument for his assertion that it does.

[FN] There is nothing in the record to support complainant's argument that respondent had access to such evaluation because it was done by a physician employed by respondent or that complainant would have agreed to release the results had respondent not insisted on seeing the entire evaluation, not just the psychiatrist's conclusions regarding complainant's suitability to return to work. Complainant cites no waiver of the confidentiality of medical records requirement by complainant nor any offer by complainant to respondent to furnish the psychiatrist's conclusions.

4. The following language is added to the proposed order:

A copy of this decision and order shall be placed in complainant's personnel file.

Dated: November 23, 1988 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

LRM:rcr
RCR03/2

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

Parties:

Stephan J. Morkin
211 Castille Avenue
Madison, WI 53713

Donna Shalala, Chancellor
UW-Madison
158 Bascom Hall
500 Lincoln Drive
Madison, WI 53706

STATE OF WISCONSIN PERSONNEL COMMISSION

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STEPHAN J. MORKIN, *
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Complainant, *
*
v. * PROPOSED
* DECISION
Chancellor, UNIVERSITY OF * AND
WISCONSIN - MADISON, * ORDER
*
Respondent. *
*
Case No. 85-0137-PC-ER *
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NATURE OF THE CASE

On December 23, 1987, an Initial Determination was issued finding Probable Cause to believe that respondent retaliated against the complainant with respect to the imposition of a ten-day suspension commencing September 12, 1985, and a requirement that complainant undergo a psychiatric evaluation prior to his return to work in violation of Subchapter III, Chapter 230, Stats., which is generally referred to as the Whistleblower law. A hearing on the merits was held on April 25 and 26 and May 19 and 20, 1988, before Laurie R. McCallum, Commissioner. The briefing schedule was completed on July 29, 1988.

FINDINGS OF FACT

1. Complainant began his employment as a Building Maintenance Helper at the University of Wisconsin - Madison Physical Plant in 1982.

2. As a result of a 4-hour unexcused absence from a work shift on November 1, 1982, and appearing at work with alcohol on his breath on that date, and in recognition of letters of reprimand dated April 11, June 4, July 7, and July 8, 1982, and a letter of suspension dated July 13, 1982,

all relating to attendance problems, complainant received a 2-day suspension without pay.

3. A supervisor's report completed on February 11, 1983, by supervisor Diehl, indicated that complainant, since his arrival on the Law School crew, had been uncooperative, hostile, and ineffective in cleaning and had failed completely in cooperating with crew members.

4. As a result of an incident which occurred on May 20, 1983, in which complainant and a co-worker engaged in a physical fight, complainant received a 2-day suspension without pay.

5. In a letter dated August 8, 1984, complainant received a reprimand for excessive absenteeism.

6. In a letter dated August 21, 1984, complainant was counseled in relation to two unexcused absences on August 16 and 17, 1984. In this letter, John Erickson, Supervisor of Operations for the UW-Madison Physical Plant, stated as follows:

> Until such time when you transfer, you said you will attempt to overcome your stress feelings and will report for work as scheduled and work to the best of your ability.
>
> We also discussed your obligation of loyalty to your employer and avoid creating embarrassing situations for management. An employe has the duty to inform his employer of situations he feels are not in the best interest of the State so they have an opportunity to respond and possibly take corrective action. Legislation has been enacted which prohibits retaliation by the employer against employes who notify them of suspected problem areas.

7. In a letter dated November 7, 1984, Mr. Erickson imposed a 2-day suspension without pay on complainant. The following is a summary of the events which precipitated the imposition of the suspension:

> Complainant's immediate supervisor, Glenn Buss, reported that he counseled complainant about drinking on September 14, 1984. On October 15, 1984, Mr. Buss smelled alcohol on complainant's breath at the first rest break and shortly after that he and Mr. Steinke counseled complainant about drinking. On October 25,

> 1984, Mr. Buss and Mr. Steinke counseled complainant about offensive garlic breath which they felt was to cover up the smell of alcohol. Again on october 31, 1984, Mr. Buss talked to complainant about garlic breath and complainant agreed to stop as long as he were asked nicely. Later that night, complainant came into the break room and told Mr. Buss that no one was going to tell him what not to eat. At 5:05 p.m. at the beginning of the November 1, 1984, work shift, complainant asked Mr. Buss if he could set up a meeting, and he in turn asked if complainant were asking for a Union Steward. Complainant said he wanted a Steward, but also asked if Mr. Buss thought a meeting was necessary. Irked at a continuation of the on again-off again requests and the smell of garlic, which Mr. Buss believed was used to cover up the smell of alcohol, Mr. Buss said he would get a steward for complainant at any time, for any reason, and he didn't care even if complainant went to bed with him. Then complainant became very loud and ran up and down the hallway looking for another employe to verify what complainant perceived as an insult. Mr. Buss told complainant to be quiet because the building occupants could hear him and then complainant began using vulgar language. Mr. Buss reported that complainant was standing over him ranting and raving, intimidating him and making him fearful of a possible physical attack. Complainant then said that he was going to see Jim Steinke, to which Mr. Buss replied that complainant was to go to work and he would arrange to have Mr. Steinke come there. Complainant was warned that if he left the building, he would be off the payroll. Complainant got his coat and left the building as Mr. Buss once again stated that he would then be suspended and off the payroll. Mr. Buss then called Mr. Steinke to notify him that complainant was on his way to see him.
>
> Mr. Steinke said he was still on the telephone with Mr. Buss when complainant arrived at the Service Building front door. Mr. Steinke opened the door for complainant and a conversation was held in the entry way. Complainant was visibly agitated, loud, swore several times, pulled on the stairway handrail bending it out from the wall, and then punched the wall. Other custodial supervisors heard the commotion and one came out to see what was happening. Since complainant's actions indicated that he had been drinking, Mr. Steinke asked complainant about it, to which he responded that he had five Pabsts before coming to work. There was a discussion about complainant's use of garlic to cover up the alcohol smell and also his drinking before work and at lunch break, to which he insisted that he had the right to do both. Mr. Steinke told complainant to go home and a Steward would be present at the next day's meeting.

This suspension was reduced to a one-day suspension as a result of a grievance settlement agreement. Also in such letter of November 7, 1984, Mr. Erickson granted complainant a 30-day medical leave, from November 5

through December 2, 1984, to enable complainant to obtain psychiatric treatment. Complainant agreed that such a leave would be beneficial.

9. While complainant was employed in 1983 on a crew at the Medical School Library under Mr. Braunski's supervisor, Mr. Braunski reported to Ms. Gaulke that complainant continued to have confrontations with co-workers.

10. Many of complainant's performance evaluations during his employment with the Physical Plant indicated his failure to get along with his co-workers.

11. A few months after his return to work from medical leave in December of 1984, complainant was granted another medical leave from which he returned in August of 1985.

12. On September 9, 1985, Gary Bradley, one of complainant's co-workers, came to the Physical Plant office before his shift to discuss complainant's activities on and off the work site. Mr. Bradley was not invited or encouraged by management to do this. Mr. Bradley stated to Sharon Gaulke, a Housekeeping Services Supervisor 3, and Frank Rice, Physical Plant Director, that complainant had called his home and had upset Mr. Bradley's sister by shouting angrily at her and threatening to sue Mr. Bradley; that complainant had reacted violently and irrationally to work situations; that frequently (several times a week) complainant had threatened to "get" the crew supervisor Glenn Buss; and that complainant's actions had disrupted the work and morale of the crew.

13. On September 9, 1985, Mr. Buss came to the Physical Plant office after Mr. Bradley had left to discuss complainant's activities on and off the work site. Mr. Buss stated to Ms. Gaulke and Mr. Rice that he had heard from other crew members that complainant had told them he was going

to "get" Mr. Buss; that complainant frequently reacted violently and irrationally to work situations; that complainant continued to use garlic to cover up what Mr. Buss suspected was the smell of alcohol on his breath; that complainant's actions were disrupting the work and morale of the crew and were disturbing and alarming the users of the building; and that complainant spent an inordinate amount of time away from his duties with union stewards and supervisors complaining about matters which Mr. Buss felt were trivial and overblown by complainant. No one in a higher level management position had invited or encouraged Mr. Buss to make this statement. In his 15 years as a supervisor, Mr. Buss could only recall 4 instances not involving complainant where workers on his crew shouted at each other or at him. Three of these involved Jerry Dolphin.

14. On or around September 9, 1985, but subsequent to Mr. Bradley's and Mr. Buss's above-referenced visits to the Physical Plant office, Scott Scullion, another one of complainant's co-workers, went to the Physical Plant office to discuss complainant's activities on and off the work site. Mr. Scullion stated to Ms. Gaulke and Mr. Rice that complainant had frequently reacted violently and irrationally to work situations; that complainant's actions were disrupting the work and morale of the crew; and that complainant spent an inordinate amount of time away from his duties with union stewards and supervisors complaining about trivial and ridiculous matters and imagined slights by other members of the crew. No one in management had invited or encouraged Mr. Scullion to give such statement.

15. On or around September 9, 1985, but subsequent to Mr. Bradley's, Mr. Buss's and Mr. Scullion's above-referenced visits to the Physical Plant office, Jerry Dolphin, another co-worker of complainant's, went to the Physical Plant office to discuss complainant's activities on and off the

work site. Mr. Dolphin stated to Ms. Gaulke and Mr. Rice that complainant seemed fascinated by the lead character in the film "Taxi Driver" who wore Army fatigues, had a Mohawk haircut, and shot a number of people in the movie; that this fascination disturbed Mr. Dolphin after he learned that complainant had worn a Mohawk haircut while he was on medical leave in 1985, after complainant inquired of Mr. Dolphin if he could get complainant a machine gun, what he knew about converting a semiautomatic weapon to an automatic weapon, and what effect certain kinds of bullets had on human flesh, and after he heard that Morkin had said he wanted to dress up like the "Taxi Driver" character and scare some people; that complainant's frequent violent and irrational reactions to work situations were disrupting the work and morale of the crew; and that complainant had a drinking problem that was making his reactions to situations and people bizarre and unpredictable.

16. Mr. Dolphin and Mr. Bradley had reputations for exaggerating about their activities outside of work. Neither Mr. Dolphin nor Mr. Bradley had a reputation as an employee who exaggerated or told untruths about his co-workers.

17. Mr. Dolphin, on a few occasions, i.e., once or twice during a year's time, had shouted angrily at Mr. Buss or others on his work crew. These angry outbursts were of short duration and Mr. Dolphin later apologized.

18. After the above-described statements were made by complainant's supervisor and co-workers, an investigatory meeting was held on September 12, 1985. In attendance were complainant; his union representative; Mr. Rice; Donald Sprang, Personnel Manager for the Physical Plant; and Ms. Gaulke. Mr. Rice generally relayed the information he had received from

complainant's co-workers but refused to identify them. Complainant stated that he knew who they were. Neither complainant nor his union representative requested a postponement or continuation of the meeting to enable them to gather additional information or offer additional argument. At the meeting, Mr. Rice expressed personal concern for complainant which complainant's union representative felt was genuine.

19. Subsequent to the meeting, Mr. Rice decided to suspend complainant without pay for 10 days and to require him to undergo a psychiatric evaluation and to submit the results of such evaluation to the Physical Plant before he would be allowed to return to work. Mr. Rice's decision was based on his feeling that such an action was consistent with discipline previously imposed on other employes; and that, in view of the irrational and violent nature of complainant's actions and his history of problems related to stress and of treatment by a psychiatrist, the University would be ignoring its responsibility for the security of those persons present on the campus and exposing itself to potential liability if complainant were to breach such security, by not removing complainant from the work site and by not having his mental fitness assessed before allowing him to return. Complainant's union representative felt that, in the context of progressive discipline, the 10-day suspension was a "break."

20. Although Ms. Gaulke and Mr. Sprang made recommendations to Mr. Rice, the decision to suspend complainant and require a psychiatric evaluation was Mr. Rice's.

21. On January 9, 1981, Mr. Rice suspended a Physical Plant employe for 10 days without pay for threatening, attempting to intimidate, using abusive language towards, and obstructing the work of a fellow employe after such employe suggested that the disciplined employe wring out his mop

before putting it away. The disciplined employe had previously been sent a warning letter as a result of his failure to adequately complete mopping assignments and clean out the mop and pail and had previously been suspended for 5 days without pay for threatening and intimidating a supervisor.

22. On October 31, 1986, Mr. Rice terminated a Physical Plant employe for physically assaulting another employe on campus. Mr. Rice noted in the letter of termination that, even though the terminated employe had been off duty, "we consider such an act of physical violence to be extremely serious since it is very disruptive to the normal operations of the University and has a very deleterious effect on employe safety, employe morale, and discipline." Progressive discipline was not followed in this instance.

23. On December 4, 1984, a Physical Plant employe was terminated for threatening and intimidating a student by lunging at him with his fists, although not striking him, and by staring at the student and appearing very agitated while riding on the same elevator with him. The employe had previously received a letter of reprimand for unexcused absences; a one-day suspension for use of threatening and abusive language toward a co-worker; a 3-day suspension for threatening behavior and use of abusive language toward his supervisor; and a 5-day suspension for being absent from work and failing to notify his supervisor of his unanticipated absence. As a condition of his return to work after one of these suspensions, the employe was required to get a psychiatric evaluation.

24. On June 12, 1985, Mr. Erickson suspended a Physical Plant employe for 5 days without pay for excessive absenteeism; using unacceptable language on the job and relating sexual experiences to crew members; bothering a building occupant by requesting a social date; talking to women on the street when traveling from one work site to another; posting a note

on a restroom door with a woman's name and telephone number for anyone who wanted to have a good time; passing around pictures of a scantily clad woman to anyone who would look at them; offering to set others up with a prostitute and providing a telephone number; unacceptable job performance and failure to carry out instructions; and verbally threatening supervisors and a supervisor's wife with physical harm. Mr. Erickson also required that the employe obtain mental health treatment as a condition of his return to work. This employe had not been disciplined prior to this.

25. A Physical Plant employe named Peter Melcher was terminated for putting his fist through a window in anger.

26. Complainant has expressed the opinion that Physical Plant Management has been out to "get" him since 1982 or 1983.

27. Complainant took out an ad which appeared in a Madison newspaper on June 7, 1984, and which stated:

> Anyone interested in discussing the possibility of favoritism or nepotism in the hiring or promotion of employes at the physical plant, UW-Madison, call S. Morkin: 255-9510.

28. In a memo to complainant dated June 12, 1984, Mr. Erickson wrote as follows:

> The classified ad that you have taken out in the local newspaper regarding hiring and promotional practices at the University Physical Plant has been brought to my attention. It seems to me that a more appropriate procedure would be for you to discuss with us any situations that you believe to be irregular so that we can take corrective action or give you an explanation regarding our methods. Please give me a call at 263-3078 during normal office hours to set up a time for you to come in and discuss your concerns.

Complainant responded by phone on June 15, 1984. Mr. Erickson noted that "no disciplinary action taken." Complainant received no responses to his ad.

29. In late 1984, the Department of Employment Relations (DER), as a result of information received from the union, investigated allegations of nepotism in the hiring of LTEs by the Physical Plant. James Stratton, Director of respondent's Classified Personnel Office, conducted the investigation. As a result of such investigation, it was discovered that Ms. Gaulke had hired her niece, Diane Wolpert, as an LTE. As a result of this discovery, Ms. Wolpert was terminated effective December 21, 1984. Complainant was in contact with the union and with DER during this time period regarding his concerns relating to nepotism in Physical Plant hiring practices.

30. In a letter to UW President Robert O'Neil, Chancellor Irving Shain, and Mr. Rice, dated January 9, 1985, complainant alleged that the hiring of the following LTEs involved nepotism:

(a) Kim Moen who complainant stated was a sister-in-law of second-line supervisor (Custodial Supervisor 2) Steve Keller;

(b) Ms. Wolpert, and

(c) Brian Sprang, son of Mr. Donald Sprang.

31. At Mr. Rice's request, Mr. Stratton conducted an investigation of complainant's allegations. In a memo to Vice Chancellor Bernard Cohen dated February 12, 1985, Mr. Stratton reported that:

(a) Kim Moen was hired by Ms. Gaulke and Housekeeping Services Supervisor 3, Robert Bender, neither of whom is related to Ms. Moen;

(b) the situation involving Ms. Wolpert had been investigated and dealt with prior to complainant's letter; and

(c) Brian Sprang was hired by Mr. Bender and Ms. Gaulke, neither of whom is related to him.

Mr. Stratton concluded that neither the Moen nor Sprang hirings violated the Code of Ethics but recommended certain changes in the Physical Plant's hiring procedures nonetheless.

32. In a letter dated February 21, 1985, Vice Chancellor Cohen advised complainant of the results of Mr. Stratton's investigations.

33. Complainant was not satisfied with Vice Chancellor Cohen's response and subsequently relayed his concerns to DER and to State Senator Fred Risser.

34. Ms. Gaulke was not aware that complainant had filed a complaint relating to the hiring of Ms. Wolpert. Ms. Gaulke was aware that the union had filed such a complaint. Mr. Rice and Mr. Sprang were aware of complainant's disclosure in his January 5, 1985, letter.

35. Complainant filed a timely complaint with the Personnel Commission on September 25, 1985, alleging that respondent had retaliated against him in violation of subchapter III, Ch. 230, Stats., as a result of his disclosures relating to the Physical Plant's LTE hiring practices.

36. Complainant did not return to work after the subject 10-day suspension because he refused to release to respondent the results of his psychiatric evaluation. Once such results were released to respondent, complainant was permitted to return to work in October or November of 1986.

37. Mr. Rice's decision to impose the subject discipline on complainant was not based upon complainant's "whistleblower" disclosure. The subject discipline was consistent with respondent's past practice.

CONCLUSIONS OF LAW

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

2. Complainant has the burden of proof.

3. Complainant has established that a disciplinary action occurred under circumstances which give rise to the presumption, set forth at §230.85(6), Stats., that the disciplinary action was retaliatory.

4. Respondent has satisfied its burden under §230.85(6)(a), Stats., of rebutting, by a preponderance of the evidence, the presumption that its disciplinary action was retaliatory.

5. Respondent did not retaliate against respondent in violation of Subchapter III of Chapter 230, Stats., either with respect to the imposition of a 10-day suspension commencing September 12, 1985, or with respect to the requirement that complainant undergo a psychiatric evaluation prior to his return to work.

DECISION

This complaint was filed under §230.83(1), Stats., which prohibits retaliation against state employes who have made a disclosure of improper governmental activities. This provision is part of Subch. III, Ch. 230, Stats., entitled "Employe Protection," which was enacted under the provisions of 1983 Wis. Act 409 with an effective date of May 11, 1984.

The method of analysis applied in prior Whistleblower retaliation cases is similar to that applied in the context of a retaliation claim filed under the Fair Employment Act (FEA). Under the FEA, the initial burden of proof is on the complainant to show a prima facie case of discrimination. If complainant meets this burden, the employer then has the burden of articulating a non-discriminatory reason for the actions taken which the complainant may, in turn, attempt to show was a pretext for discrimination. See McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 5 FEP Cases 965 (1973), and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 25 FEP Cases 113 (1981). This

analysis is modified where the complainant is entitled to a presumption of retaliation pursuant to §230.85(6), Stats.

To establish a prima facie case for a claim of retaliation under the Fair Employment Act, there must be evidence that 1) the complainant participated in a protected activity and the alleged retaliator was aware of that participation, 2) there was an adverse employment action, and 3) there is a causal connection between the first two elements. A "causal connection" is shown if there is evidence that a retaliatory motive played a part in the adverse employment action. See Jacobson v. DILHR, Case No. 79-28-PC, (4/10/81) at pp. 17-18, and Smith v. University of Wisconsin-Madison, Case No. 79-PC-ER-95, (6/25/82) at p. 5. Similar standards apply to a claim of retaliation under the whistleblower law except that the first element is typically comprised of three components: a) whether the complainant disclosed information using a procedure described in s. 230.81, Stats.; b) whether the disclosed information is of the type defined in s. 230.80(5), Stats.; and c) whether the alleged retaliator was aware of the disclosure. As to the second and third elements, the definitions of "disciplinary action" in s. 230.80(2), Stats., replaces the term "adverse employment action" when reviewing a whistleblower complaint.

Respondent argues that the "in part" test articulated above should not apply in cases arising under the Whistleblower law. However, it is not necessary to reach this issue since, as discussed below, the Personnel Commission concludes that unlawful retaliation did not play a part in respondent's decision to discipline complainant.

The first element of a prima facie case requires the complainant to show that he participated in a protected activity and that respondent was

aware of that participation. Section 230.81, Stats., provides, in pertinent part:

> 230.81 Employe disclosure. (1) An employe with knowledge of information the disclosure of which is not expressly prohibited by state or federal law, rule or regulation may disclose that information to any other person. However, to obtain protection under §230.83, before disclosing that information to any person other than his or her attorney, collective bargaining representative or legislator, the employe shall do either of the following:
>
> (a) Disclose the information in writing to the employe's supervisor.
>
> (b) After asking the commission which governmental unit is appropriate to receive the information, disclose the information in writing only to the governmental unit the commission determines is appropriate. The commission may not designate the department of justice, the courts, the legislature or a service agency under subch. IV of ch. 13 as an appropriate governmental unit to receive information. Each appropriate governmental unit shall designate an employe to receive information under this section.

Respondent argues that complainant's June 7, 1984, newspaper ad did not constitute a protected disclosure. The Personnel Commission agrees. Not only did the ad lack the specificity required for it to be regarded as "information" within the meaning of §230.80(5), Stats., but it was also phrased as a solicitation of facts, not a disclosure of facts as required by §230.81, Stats., and it was not directed to any of the entities specified in §230.81, Stats.

Respondent further argues that the January 9, 1985, letter (see Finding of Fact 30, above) did not constitute a protected disclosure because it was not made to complainant's first-line supervisor and because it was not complainant's first disclosure of his suspicions relating to nepotism in hiring at the Physical Plant. The Personnel Commission disagrees. The three individuals to whom complainant directed his letter were in the supervisory chain above him and to require that complainant have

directed this letter to Mr. Buss in order to qualify for protection would involve too restrictive a reading of §230.83, Stats. Furthermore, respondent has not shown that complainant made a previous written disclosure of such information. Respondent alleges that complainant made previous disclosures by "talking about his belief that there was nepotism in the hiring process" and the fact of these previous disclosures renders the January 9, 1985, letter unprotected. However, it would be contrary to the policy behind the protections of the Whistleblower law for information exchanged in informal discussions to render subsequent formal written disclosures unprotected and the Personnel Commission so holds.

Respondent argues very convincingly, however, that the Gaulke/Wolpert situation had already been resolved by the time complainant wrote his January 9, 1985, letter and the other allegations made in such letter were subsequently determined to be of no merit. It is possible and perhaps even likely that complainant, as a result of his contacts during the relevant time period with the union and with DER regarding the nepotism issue, knew of the resolution of the Gaulke/Wolpert situation, and that it did not merit further investigation. For complainant to nevertheless offer information regarding this situation as a part of his Whistleblower disclosure lends credence to respondent's contention that the purpose of complainant's January 9, 1985, letter was to shield himself from further discipline for the problems he was continuing to experience as a member of Physical Plant crews. This is further reinforced by complainant's continuing contention that he has been unfairly targeted for discipline by the Physical Plant prior to the January 9, 1985, disclosure and the subject discipline was further evidence of this unfair targeting. The issue of complainant's sincerity in advancing his allegations regarding the other

situations specified in his letter is more difficult to resolve on this record. However, this issue as to complainant's intent in writing his January 9, 1985, letter is more relevant to other stages of our analysis. For purposes of this stage, the Personnel Commission concludes that complainant's January 9, 1985, letter constituted a protected disclosure within the meaning of §230.81, Stats., in view of the above as well as the fact that complainant's disclosure involved conduct on the part of respondent which violated an administrative rule (§ER-Pers 24.04(2)(e), Wis. Adm. Code) and involved, therefore, the disclosure of "information" within the meaning of §230.80, Stats.

Finally, in relation to the first element of a prima facie case, there is no question that two of the alleged retaliators, Mr. Rice and Mr. Sprang, knew of the protected disclosure, i.e., complainant's January 9, 1985 letter. It is less clear that Ms. Gaulke was aware. It is clear from the record that Ms. Gaulke was under the impression at the time her niece was terminated that the union had initiated the complaint leading to such termination. Naturally, she did not have the impression that complainant had initiated such complaint since it predated his January 9, 1985, disclosure. Since the situation was resolved prior to such disclosure, since Ms. Gaulke has testified she was not aware of such disclosure until some time after the subject suspension/psychiatric evaluation requirement, and since there is no evidence from which to conclude there should be any reason for Ms. Gaulke to have been aware of such disclosure or to have participated in the investigation of such disclosure, the Personnel Commission concludes that Ms. Gaulke was not aware of such disclosure at the time the decision was made to suspend complainant and require that he undergo a psychiatric evaluation.

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. It is clear from the record that Mr. Rice had a sincere concern regarding complainant's mental fitness. His intent in requiring complainant to undergo a psychiatric evaluation was not to penalize complainant but to protect the University of Wisconsin and its employes and the complainant himself. It did not interfere with complainant's employment in any significant way since complainant could have returned to work any time after the expiration of his 10-day suspension if he would have submitted the results of his psychiatric evaluation to respondent. Respondent's requirement of complainant that he undergo a psychiatric evaluation is not equivalent to those actions designated as "disciplinary" in §230.80(2), Stats. It would have no significant or lasting effect on complainant's employment per se as those listed actions would have.

The final element of a prima facie case requires the establishment of a causal connection between the protected disclosure and the disciplinary action. Section 230.85(6), Stats., provides:

> (6)(a) If a disciplinary action occurs or is threatened within the time prescribed under par. (b), that disciplinary action or threat is presumed to be a retaliatory action or threat thereof. The respondent may rebut that presumption by a preponderance of the evidence that the disciplinary action or threat was not a retaliatory action or threat thereof.
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> (b) Paragraph (a) applies to a disciplinary action under §230.80(2)(a) which occurs or is threatened within 2 years, or to a disciplinary action under §230.80(2)(b),(c)or(d) which occurs or is threatened within one year, after an employe discloses information under §230.81 which merits further investigation or after the employe's appointing authority, agent of an appointing authority or supervisor learns of that disclosure, whichever is later.

In the instant case, the subject suspension was imposed within 2 years of the protected disclosure. As discussed above, only part of such disclosure, i.e., that part not involving the Gaulke/Wolpert situation, merited further investigation. As a result, the statutory presumption is created only to that part of the disclosure not involving the Gaulke/Wolpert situation.[1] The Personnel Commission fails to find a causal connection between the subject suspension and complainant's disclosure of the Gaulke/Wolpert situation in view of the fact that complainant's disclosure of information relating to such situation occurred after the situation had been resolved and Ms. Gaulke counselled and Ms. Wolpert terminated; Ms. Gaulke, the only alleged retaliator personally affected by the situation, not only had little influence on the suspension decision, but was also unaware that complainant had made a disclosure regarding the situation; and complainant's disclosure regarding the situation did little to further embarrass Ms. Gaulke, Mr. Rice or Mr. Sprang because, despite the fact that complainant directed his disclosure to their superiors at the UW-Madison and shared his disclosure and the results of the investigation of it with officials at DER and with State Senator Risser, the union had previously

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[1]The practical effect of the conclusion that the presumption applies only to part of this disclosure is nil. There was only one disclosure and, in effect, only one disciplinary transaction. Therefore, if the presumption is created by any part of the disclosure, the burden shifts to respondent to "rebut that presumption by a preponderance of the evidence that the disciplinary action... was not a retaliatory action...." §230.85(6)(a).

involved such UW-Madison superiors and officials at DER, among others, when it originally brought its nepotism complaint late in 1984.[2]

Complainant has, therefore, established a prima facie case as to at least part[3] of his disclosure as embodied in his January 9, 1985, letter and as to his 10-day suspension.

The burden then shifts to respondent to articulate legitimate, non-discriminatory reasons for the suspension. Respondent cites previous disciplinary actions taken against complainant, the violent nature of some of complainant's actions for which he was disciplined, complainant's history of problems working with others on different crews, the unprecedented disruptive influence complainant's actions were having on the Sterling Hall crew, the fact of and the content of the unsolicited complaints made by fellow Sterling Hall crew members and their first-line supervisor, and the history of discipline imposed on other employes. Certainly, these reasons are legitimate and non-discriminatory on their face.

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[2]The §230.85(6) presumption operates to shift the burden to the respondent to rebut the presumption that the disciplinary action was retaliatory by a preponderance of the evidence. This appears to short-circuit part of the McDonnell-Douglas-type analysis. Once the presumption is present, it supplies not only what is in effect a prima facie case, but also a presumption that the disciplinary action was retaliatory -- i.e., the analysis moves directly to what is in effect the pretext stage. At this point, the respondent is required to rebut the presumption by a preponderance of the evidence. In considering whether the presumption has been rebutted, the Commission looks to all the evidence, including any evidence of pretext or retaliatory intent adduced by the complainant. While the Commission believes on this record that respondent has rebutted the presumption by a preponderance of the evidence, and has established that the disciplinary action was not retaliatory, for the reasons set forth below, it also includes in the alternative an analysis under a more conventional McDonnel-Douglas framework which is set forth below.

[3]Again, the fact that there is only a prima facie case as to part of the disclosure is of little or no significance. See note 1, above.

Even though the requirement that complainant undergo a psychiatric evaluation was determined not to be a disciplinary action, if it were, respondent offers as its reasons for imposing such requirement Mr. Rice's concern for the safety of those who came in contact with complainant on the work site in view of the violent nature of some of the actions for which complainant was disciplined and the content of the complaints made by fellow Sterling Hall crew members and their first-line supervisor, complainant's history of problems related to stress and of psychiatric treatment, Mr. Rice's concern for the UW's liability if complainant engaged in further violence, and Mr. Rice's feeling that he was incapable of assessing complainant's stability and predictability. These reasons, too, are legitimate and non-discriminatory on their face.

The burden then shifts to complainant to show that respondent's articulated reasons are pretextual.

Complainant first contends in this regard that complainant did not engage in the conduct alleged by the employer. Complainant isolates certain responses in the statements made by complainant's co-workers and supervisor to Mr. Rice in support of this contention. However, the fact clearly remains that such statements, viewed as a whole, paint a picture of an employe who had disrupted the work and morale of the crew with his frequent violent and irrational reactions to work situations; such statements were unsolicited by management and were consistent with each other; such a situation was unique in Mr. Rice's and Mr. Buss's experience; complainant had a long history of problems with co-workers; and complainant had been disciplined several times before, most recently for violent and threatening behavior toward 2 superiors. None of the four individuals who gave statements to Mr. Rice had any reason to retaliate against complainant

for his protected disclosure about nepotism. It was clear from the record that their motivation was to try to get him removed from their crew because he had made working conditions unpleasant for them. Each of them confirmed that the easy banter among crew members had stopped because complainant would take offense at seemingly innocuous comments or actions and begin shouting or exhibiting some other inappropriate behavior. Even though complainant tries to portray Jerry Dolphin as an equally disruptive, volatile employe, the record shows that Jerry Dolphin lost his temper and shouted once or twice a year whereas complainant did so sometimes as often as once or twice a night. Mr. Buss, who again had no reason to retaliate against complainant for his protected disclosure, had had no similar relationship or problems with an employe on such a continuing basis in his 15 years as a supervisor as he had with complainant. Complainant challenges the veracity of Mr. Dolphin and Mr. Bradley. Although the record shows that they have a tendency to exaggerate their exploits outside of work, there is no evidence from which to conclude that Mr. Dolphin or Mr. Bradley ever made misrepresentations regarding the activities of their co-workers. In addition, there is no evidence from which to conclude that Mr. Buss or Mr. Scullion were not truthful. It should also be emphasized that these statements from co-workers should not be viewed in isolation but in the context of the other disciplinary actions taken against complainant. In fact, very little on-the-job time had elapsed since complainant was last disciplined, that time for violent and threatening behavior toward 2 superiors.

In this context, the Personnel Commission concludes that the complaints of complainant's co-workers are credible, i.e., that complainant did engage in the conduct complained of.

Complainant next contends that respondent's lack of progressivity in imposing discipline against complainant demonstrates pretext. There is no rigid formula for imposing progressive discipline. The record clearly shows that complainant had been disciplined several times before, including at least 5 written reprimands, two 2-day suspensions and one one-day suspension. Mr. Sprang testified that the normal course of progressive discipline is written reprimand, one-day suspension, three-day suspension, ten-day suspension, termination. A review of complainant's history of discipline seems to indicate leniency and tolerance on the part of respondent, not excessive harshness as complainant contends. Even complainant's union representative testified that complainant had gotten a "break" when respondent imposed the 10-day suspension.

A review of discipline imposed on other employes (Findings of Fact 21-25, above) reveals a range and frequency of behavior which respondent considered unacceptable and subject to higher levels of discipline and it is clear from the record that complainant's behavior falls within this range.

Complainant further contends that respondent's failure to interview all the members of the crew and to divulge to complainant the names of the crew members who had complained about him demonstrates pretext. However, it was not unreasonable for Mr. Rice to rely upon unsolicited and independent statements from 4 of complainant's co-workers, including his supervisor, none of whose veracity or motivations he had any reason to question, or to refuse to divulge the names of the complaining crew members in view of his sincere concerns regarding complainant's stability and mental fitness. In any event, complainant indicated to Mr. Rice that he knew who they were, anyway.

The McDonnell-Douglas framework can be a useful tool but in a case such as the instant one can obscure the essence of the case. What we have before us is an employe who has alarmed and disrupted his co-workers by his irrational behavior. The only motivation of these co-workers is to get this complainant off their crew. They report their observations and feelings to Mr. Rice. Although two of the four have reputations as braggarts regarding their activities off the job, Mr. Rice has no reason to question their veracity or motivations regarding complainant. Eight months earlier, complainant had disclosed in writing to Mr. Rice and his superiors that he felt certain specified Physical Plant hiring transactions had involved nepotism. Complaint was possibly or even likely aware that the one involving Ms. Gaulke had already been investigated and resolved. The investigation of the others revealed no wrongdoing. None of these hiring transactions involved any of the four complaining co-workers who had no reason to retaliate against complainant for his disclosure. Ms. Gaulke was unaware of complainant's disclosure and had little input into the subject decision to discipline complainant, in any event. Mr. Sprang was aware of complainant's disclosure but had little input into the subject decision to discipline complainant and little motivation to retaliate since complainant's allegations regarding the hiring of Mr. Sprang's son had already been investigated and no wrongdoing found. Mr. Rice actually made the decision to suspend complainant for 10 days. Mr. Rice was not personally affected by complainant's disclosure and had little motivation to retaliate against complainant for such disclosure because the only incident complainant pointed to which involved wrongdoing had been resolved before complainant made his January 9, 1985, disclosure. Furthermore, Mr. Rice had to decide how to handle an employe with a long history of problems with co-workers,

some involving violence on his part; who had been disciplined many times, including three suspensions, the most recent for violent and threatening behavior against two superiors; who had continued to alienate and alarm his co-workers and disrupt his work crew; and who he knew had suffered psychological problems related to stress and who he suspected had an alcohol problem. It was not unreasonable for Mr. Rice to consider this situation serious and to impose a serious penalty, i.e., a 10-day suspension. Respondent had been tolerant of complainant's unacceptable behavior and had actually protracted the usual progressive discipline stages, i.e., had given him a "break." Moreover, complainant continues to contend that respondent had it out for him as early as 1982 or 1983. This predates the protected disclosure by several years. On this record, the Personnel Commission concludes that it is likely that complainant made his disclosure to protect himself from further discipline. In any event, there is a preponderance of the evidence that respondent did not retaliate against complainant for his disclosure.

ORDER

The Commission having determined that no discrimination in violation of Subchapter III, Chapter 230, Stats., has occurred, this complaint is dismissed.

Dated: _____,1988 STATE PERSONNEL COMMISSION

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DONALD R. MURPHY, Commissioner

LRM:jmf
JMF11/2

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LAURIE R. McCALLUM, Commissioner

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GERALD F. HODDINOTT, Commissioner

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