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STATE OF WISCONSIN

PERSONNEL COMMISSION

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 MARIE IDA IWANSKI,
 Appellant/
 Complainant,
 v.
 Secretary, DEPARTMENT OF
 HEALTH AND SOCIAL SERVICES,
 Respondent.
 Case Nos. 88-0124-PC
 88-0127-PC
 88-0143-PC-ER
 * * * * *

RULING
 ON
 MOTIONS TO DISMISS
 AND
 PROTECTIVE ORDER

These matters are before the Commission on respondent's motions to dismiss and for protective order filed on April 17, 1989, with supporting briefs. Complainant submitted an amended complaint in response on May 4, 1989. Respondent filed a reply brief on May 12, 1989. The Commission will first address the motion to dismiss as to each case.

88-0124-PC

This case was filed as a fourth step of a noncontractual grievance. Appellant alleges that management reassigned her level of supervision from a bureau director to a section chief and indicated that this would probably cause a change in her classification which she characterized as a constructive demotion. Section ER 46.03(2)(j), Wis. Adm. Code, provides that an employe may not grieve a management right. Section ER 46.04(2) includes the following items in the definition of management rights:

- "(c) Managing and directing the employes of the agency.
- (d) Hiring, promoting, transferring, assigning or retaining employes."

Appellant's concern about the change in her supervision clearly falls within management rights and is not grievable. The fact that the change could lead to a change in classification or what complainant contends would be a "constructive demotion" does not alter this conclusion.¹ Therefore, this appeal must be dismissed. See Helm v. UW, Wis. Pers. Commn. 81-65-PC, (10/21/81).

88-0127-PC

This case is also a fourth step noncontractual grievance. The subject matter is a written reprimand. Section ER 46.07(1)(a) prohibits fourth step grievances of written reprimands. Therefore, this appeal must be dismissed.

88-0143-PC-ER

The original complaint, filed September 12, 1988, alleged whistleblower retaliation with respect to the following actions:

"Reassignment of supervision from Bureau Director to Section Chief which serves as constructive demotion; accusation that I exhibit behavior that lacks interpersonal skills required of my position and is disruptive; and issuance of written reprimand."

Respondent argues in support of its motion that this complaint did not allege complainant had made a disclosure of information under §230.81(1), Stats., or that she had filed a complaint under §230.85(1), Stats. -- i.e., the complaint did not specify the act by complainant which allegedly triggered the retaliation, and respondent raised this point in its brief.

In her proposed amended complaint filed by counsel in response to respondent's motion, complainant first alleges as follows:

¹ A change in classification could be directly appealed to this Commission pursuant to §230.44(1)(b), Stats. A "constructive demotion" presumably could be appealed pursuant to §230.44(1)(c), Stats., Cohen v. DHSS, 84-0072-PC, 85-0214-PC, 86-0031-PC (2/5/87).

1. On or about June 20, 1988, complainant was reassigned to a different supervisor in retaliation for criticizing the Bureau Director about her lack of knowledge regarding departmental rules affecting the public. That the respondents have fabricated allegations of misconduct against complainant with the intent to discipline her for her outspokenness on issues of public concern. (emphasis added)

Given the nature of respondent's argument in support of its motion, it could be inferred that if complainant had made a disclosure of the nature protected by the law, primarily as provided in §§230.81(1)(a) (in writing to her supervisor) or (b) (in writing to a governmental unit after being referred by the Commission), as opposed to a verbal disclosure, her attorney would have alleged this in her amendment. Therefore, it can be concluded that a necessary element (a covered disclosure) is absent from complainant's case. Accordingly, the Commission will grant this part of respondent's motion.

The second count of the amended complaint is as follows:

2. On or about September 12, 1988, Complainant filed a complaint against the Department of Health and Social Services and the Respondents cited in the caption of this Amended Complaint and that as a result of having filed such complaint the Respondents have retaliated against complainant and that such retaliatory conduct has been in the form of constant harassment towards Complainant and that such harassment includes but is not limited to the following:

A. Issuing work assignments that are unreasonable for the sole purpose of building a case against her for failing to complete assignments which are unreasonable and for the sole purpose of harassing her.

B. Selectively surveilling complainant's conduct for purposes of building a case against her.

C. Demanding and subjecting the complainant to psychological evaluations for the sole purpose of justifying the retaliatory conduct of the Respondents.

D. Issuing an unjustified disciplinary action on or about April 10, 1989 which was specifically issued for purposes of intimidating her and also in retaliation for having filed the above-cited complaint with the Wisconsin State Personnel Commission.

The allegation that respondent retaliated against complainant for having filed the original complaint, which was denominated a whistleblower complaint, facially states a claim upon which relief can be granted under

§230.83(1), Stats. The definition of retaliatory action under §230.80(8)(a), Stats., includes a disciplinary action taken because the employe "filed a complaint under §230.85(1)." The latter subsection provides that an employe who believes retaliatory action has occurred can file a complaint with the Commission. The fact that it may ultimately be determined that the employe was unable to allege a necessary element in her case does not mean she loses the law's protection against retaliation for having filed the complaint.

However, the material set forth in the second count of the proposed amended complaint is not properly an amendment, but should be treated as a new complaint. Section PC 3.02(2), Wis. Adm. Code, provides:

"An appeal may be amended, subject to approval by the commission, to clarify or amplify allegations or to set forth additional facts or allegations related to the subject matter of the original charge, and those amendments shall relate back to the original filing date of the appeal." (emphasis added)


Here, the second count of the proposed amended complaint alleges that respondent retaliated against complainant because she filed the first complaint. Thus, these allegations do not relate to the subject matter of the original charge, but rather to the filing of the original charge. Therefore, the material set forth in the second count of the proposed amended complaint will be processed as a new complaint rather than as an amendment to the original complaint.

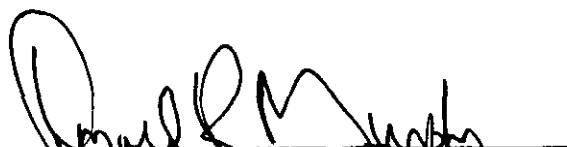
Given the disposition of respondent's motion to dismiss, the motion for protective order appears to be moot since the underlying cases in which discovery may occur are being dismissed.

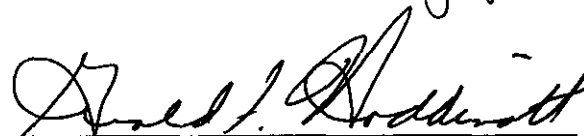
ORDER

Respondent's motion to dismiss filed April 17, 1989, is granted, and these cases are dismissed. The Commission denies complainant leave to amend as set forth in her proposed amended complaint filed May 4, 1989. The second count of said proposed amended complaint will be processed as a new complaint of discrimination under §230.85(1), Stats. Respondent's motion for protective order filed April 17, 1989, is denied as moot.

Dated: June 21, 1989 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner

AJT:rcr
RCR01/2

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