



STATE OF WISCONSIN : IN CIRCUIT COURT : DANE COUNTY

#89-CV-0423

STEPHAN J. MORKIN,
Petitioner,

MEMORANDUM

RECEIVED

vs.

DECISION

OCT 3 1989

WISCONSIN PERSONNEL COMMISSION,
Respondent.

Personnel
Commission

This is a Chapter 227, Stats., review of a decision of the Personnel Commission, sec. 230.87(1), Stats., in which it found that Stephan Morkin's suspension from employment at the University of Wisconsin-Madison and the attendant order for a physical examination before returning to work was not retaliatory pursuant to sec. 230.83(1). The issue is whether the commission's determination is supported in law and fact. I conclude that the record supports the commission's decision and affirm.

My review of this matter must be confined to the record. Sec. 227.57(1), Stats. The record reveals that on September 12, 1985, Morkin was suspended from his position with the custodial department of the university's Division of Physical Plant for 10 workdays. The grounds for the suspension were that he had engaged in "intimidating behavior toward other employees." In addition to the suspension, Morkin was required

to undergo a psychiatric examination before he would be allowed to return to work. On September 25, 1985, Morkin filed a complaint with the Personnel Commission alleging that the suspension and ordered psychiatric examination constituted retaliation "following a nepotism complaint [Morkin made] that resulted in negative publicity." After an initial determination that probable cause to believe the suspension and order were retaliatory existed, the commission held a hearing, eventually dismissing the complaint and Morkin now seeks judicial review pursuant to sec. 230.87, Stats.

Section 230.83(1), Stats., provides

No appointing authority, agent of an appointing authority or supervisor may initiate or administer, or threaten to initiate or administer, any retaliatory action against any employe.

This provision is part of the "Whistleblower Law," which protects state employees who lawfully disclose information to outside sources. Here Morkin alleges retaliation as a result of his having disclosed information regarding the Physical Plant's improper hiring practices.

On review of agency decisions, a court "shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed fact." Sec. 227.57(6), Stats. However, the agency's findings of fact must be "supported by substantial evidence in the record." Id. "Substantial evidence" is relevant

evidence that a reasonable person might consider sufficient to support a determination. Gilbert v. Medical Examining Board, 119 Wis.2d 168, 195 (1984). Courts must

uphold the findings of the commission even if, in [their] judgment, they are contrary to the great weight and clear preponderance of the evidence. Any credible evidence is the test to be applied. West Bend Co. v. LIRC, 149 Wis.2d 110, 118 (1989) (citations omitted).

Section 230.80(8)(a), Stats., defines "retaliatory action" as including "action taken because ... [t]he employe lawfully disclosed information under s. 230.81 or filed a complaint under s. 230.85(1)." Applying the statute to the facts of the case results in a legal question which the court may review ab initio. Wis. Power & Light v. Pub. Serv. Comm., 148 Wis.2d 881, 887 (Ct. App. 1989). When, however, an agency has developed expertise in interpreting particular statutes, courts give some deference to its legal conclusion. Id. at 887-88. Generally, if the agency's legal conclusion has a rational basis, courts will defer to it. Id. I conclude that a rational basis exists for the commission's determination that the suspension and order were not retaliatory actions and will defer to it.

The record is replete with illustrations of Morkin's disciplinary problems. He had previously been reprimanded and suspended for unexcused absences from work and for reporting to work "with alcohol on his breath." He had likewise been disciplined for violent outbursts while on duty and several

coworkers reported being somewhat frightened by his attitudes and actions while on the job. Following a series of reports by coworkers that Morkin "frequently reacted violently and irrationally to work situations," the personnel manager called a meeting at which Morkin, a union representative, and several supervisors were present. At the meeting, the Physical Plant Director informed Morkin that he was suspended for 10 days and was required to undergo a psychiatric examination before returning. The commission characterized the disciplinary decision as being

based on the 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 [Morkin'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 [Morkin] were to breach such security, by not removing [him] from the work site and by not having his mental fitness assessed before allowing him to return. (Proposed Decision and Order at 7.)

The commission acknowledged that the department was found to have engaged in improper hiring practices, though it did not conclude that this revelation was a result of Morkin's actions alone. Still, it determined that he had made out, at least in part, a prima facie case for a sec. 230.83, Stats.,

violation, and shifted the burden to the department "to articulate legitimate, nondiscriminatory reasons for the suspension."¹ The commission then found that Morkin's disciplinary history, the numerous complaints from his coworkers, and the disciplinary actions imposed by the department in similar instances all served as adequate reasons for the suspension which were "legitimate and non-discriminatory on their face." The commission then dismissed Morkin's complaint.

Rather than challenging the commission's findings and conclusions directly, Morkin focuses on several extraneous claims, including the hearing examiner's alleged bias and the public policy concerns of the Whistleblower Law. However, on the basis of the record, neither argument is properly before me, for neither claim appears in the record. Further, the fact that an initial determination of probable cause for retaliatory action was made carries no weight, as it is the commission's duty to conduct a hearing, make findings of fact and conclusions of law, and determine the proper disposition. Sec. 230.85, Stats. I review the commission's decision, not that made at the initial stage.

The record adequately supports the commission's determination. I am satisfied that a reasonable person could conclude

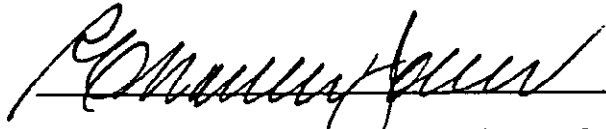
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The commission also concluded that the order for a psychiatric examination was not, itself, a disciplinary action within the meaning of sec. 230.80(2), Stats.

that the department took the action that it did due to Morkin's history and the perceived threat he posed to his coworkers and others. I also conclude that the commission's legal determination that the department did not engage in "retaliatory action" pursuant to sec. 230.80(8), Stats., has a rational basis and defer to it. For these reasons, I affirm the commission's dismissal of Morkin's complaint.²

Dated: September 27, 1989.

BY THE COURT:



P. Charles Jones, Circuit Judge

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Given my conclusion, I will not address Morkin's claim that the discipline imposed was excessive or that the ordered psychiatric examination was improper.