STATE OF WISCONSIN PERSONNEL COMMISSION

GARY BENSON,
Complainant,

v.

President, UNIVERSITY OF WISCONSIN SYSTEM (Whitewater)
Respondent.

Case Nos. 97-0112, 0115, 0129, 0132, 0140, 0165, 0185-PC-ER

RULING ON MOTIONS

Complainant, who at all times relevant to these proceedings has been a faculty member at the University of Wisconsin-Whitewater, filed a series of complaints with the Personnel Commission alleging various retaliatory conduct by respondent in violation of the "whistleblower" law, subch. III, ch. 230, Stats., and in violation of the Fair Employment Act, subch. II, ch. 111, Stats. Respondent subsequently filed motions to dismiss complainant's whistleblower claims and the parties have had an opportunity to file written arguments in support of their positions.

These seven cases include more than 40 separate allegations of retaliation by respondent during the period from 1991 until November of 1997. The allegations include removing responsibilities and perquisites from complainant, discouraging students from complainant's areas of interest, puncturing the tires on complainant's car and stealing his cellular phone, denying various work privileges and intercepting incoming communications to complainant. The allegations are set forth more fully below. For the purpose of this ruling, and in addition to the findings made elsewhere in this ruling, the Commission makes the following:

FINDINGS OF FACT

1. Complainant is a tenured faculty member in the Management Department in the College of Business and Economics at the UW-Whitewater.

2. Dr. Chris Clements is Department Chair. Dr. Joseph Domirtz is the Dean of the College. Dr. Gaylon Greenhill is the Chancellor of the UW-Whitewater.

OPINION

I. Overview of the whistleblower law

The whistleblower law provides protection to certain employes of the State of Wisconsin who have engaged in one of the various activities specified in §230.80(8), Stats. In terms of the present case, the relevant provision is §230.80(8)(a), Stats., which protects a lawful disclosure of information under §230.81, Stats. The same provision also protects employes who have filed a complaint of whistleblower retaliation with the Personnel Commission under §230.85(1).

The various methods for disclosing information that result in protection under the whistleblower law are set forth in §230.81. Pursuant to §230.81(1)(a), the typical disclosure is "in writing to the employe's supervisor."

Once an employe engages in, or is perceived as engaging in, an action protected by the whistleblower law, §230.83(1) provides that retaliatory action may not be initiated, threatened or administered. "Retaliatory action" is defined in §230.80(8) as a "disciplinary action taken because of" a protected activity. "Disciplinary action" is defined in §230.80(2) as follows:

> "Disciplinary action" means any action taken with respect to an employe which has the effect, in whole or in part, of a penalty, including but not limited to any of the following:
> (a) Dismissal, demotion, transfer, removal of any duty assigned to the employe'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.

This language was analyzed in *Vander Zanden v. DILHR*, Outagamie County Circuit Court, 88 CV 1223, 5/25/89; affirmed by Court of Appeals, 88 CV 1223, 1/10/90. In *Vander Zanden*, the court reviewed a decision of the Personnel Commission concluding that an action by the state agency was not a disciplinary action under the whistleblower law. The circuit court's decision included the following language:

> The commission examined the language of the statute and also applied the maxim *ejusdem generis*. This rule of statutory construction applies not only when a general term follows a list of specific things, but also where, as here, a list of specific words follows a more general term, *Swanson v. Health and Social Services Dept.*, 105 Wis. 2d 78, 85, 312 N.W.2d 833 (Ct. App. 1981). The rule provides that the general term applies only to things that are similar to those specifically enumerated. All of the enumerated disciplinary actions or penalties have a substantial or potentially substantial negative impact on an employee. The limitations imposed on Plaintiff's contacts with the Oshkosh Job Service office, while perhaps annoying and perhaps an example of poor management practices bordering on childishness, do not rise to the level of a penalty or a disciplinary action akin to those enumerated in §230.80(2). 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 ones' job efficiently. Plaintiff was not the "victim" of retaliation. His disclosure resulted in no loss of pay, position, upgrade or transfer or other consequences commonly associated with job discipline.

The decision to investigate an incident which might lead to the imposition of discipline is not a "disciplinary action." *Sadlier v. DHSS*, 87-0046, 0055-PC-ER, 3/30/89. In *Flannery v. DOC*, 91-0157-PC-ER, 91-0047-PC, 7/25/91, the Commission also ruled that the methods used by the respondent in carrying out an investigation of complainant's work performance was not a "disciplinary action."

The Commission has also held that when determining whether a series of incidents constitutes "verbal or physical harassment' within paragraph (a) of the definition of disciplinary action, it may be appropriate to consider the possible cumulative impact of the incidents on the employe. *Seay v. DER & UW-Madison*, 89-0082-PC-ER, 3/31/94; affirmed by Dane County Circuit Court, *Seay v. Wis. Pers. Comm.*, 93-CV-1247, 3/3/95; affirmed by Court of Appeals, 95-0747, 2/29/96. However, "verbal or

physical harassment" does not include most any public criticism by an employer of an employe's or a group of employes' approach to a controversial issue. *Kuri v. UW (Stevens Point)*, 91-0141-PC-ER, 4/30/93.

There is a 60 day time limit for filing a complaint under the whistleblower law. Pursuant to §230.85(1):

> An employe . . . may file a written complaint . . . within 60 days after the retaliatory action allegedly occurred or was threatened or after the employe learned of the retaliatory action or threat thereof, whichever occurs last.

II. Standard to be applied by the Commission in ruling on the motions

The method of analysis followed by the Commission in ruling on respondent's motions is consistent with the general rules for consideration of a motion to dismiss for failure to state a claim as discussed in *Morgan v. Pennsylvania General Ins. Co.*, 87 Wis. 2d 723, 731-32, 275 N.W. 2d 660 (1979):

> For the purpose of testing whether a claim has been stated pusuant to a motion to dismiss under sec. 802.06(2)(f), Stats., the facts pleaded must be taken as admitted. The purpose of the complaint is to give notice of the nature of the claim; and, therefore, it is not necessary for the plaintiff to set out in the complaint all the facts which must eventually be proved to recover. The purpose of a motion to dismiss for failure to state a claim is the same as the purpose of the old demurrer – to test the legal sufficiency of the claim. Because the pleadings are to be liberally construed, a claim should be dismissed as legally insufficient only if "it is quite clear that under no conditions can the plaintiff recover." The facts pleaded and all reasonable inferences from the pleadings must be taken as true, but legal conclusions and unreasonable inferences need not be accepted.
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> Sec. 802.06(2)(f), Stats., on which the motions to dismiss were based, is similar to Rule 12(b)(6) of the Federal Rules of Civil Procedure. A claim should not be dismissed under the Wisconsin rule or the federal rule unless it appears to a certainty that no relief can be granted under any set of facts that plaintiff can prove in support of his allegations. (citations omitted)

The Commission notes that complainant appears *pro se* in these matters. The Commission has previously held that, in evaluating a preliminary motion, particular care should be taken not to erode a complainant's right to be heard where the complainant is not represented by counsel. *Balele v. UW-Madison*, 91-0002-PC-ER, 6/11/92

III. Theories relied upon by respondent in its motions to dismiss

Respondent has raised a variety of theories to support its motions to dismiss complainant's whistleblower claims. Respondent's motions relate solely to complainant's claims under the whistleblower law. The motions do not address complainant's parallel allegations of retaliation under the Fair Employment Act[1] in Case Nos. 97-0112, 0115, 0129, and 0140-PC-ER. The remaining three case cases addressed by this ruling, Case Nos. 97-0132, 0165, and 0185-PC-ER, do not include FEA retaliation claims, but are based solely on claims under the whistleblower law.

A. Failure to specify disclosure

Respondent's first general contention is that complainant's whistleblower claims should be dismissed because complainant has not specified the information he disclosed for which he was subjected to retaliation or a threat of retaliation. Complainant filed his first complaint, Case No. 97-0112-PC-ER, with the Commission on July 21, 1997. Filing a complaint of whistleblower retaliation is itself a protected activity under the whistleblower law pursuant to §230.80(8)(a). Therefore a "disciplinary action" threatened or imposed after respondent learned of complainant's July 21st charge could constitute illegal retaliation under the whistleblower law.

In a submission that was received on September 15, 1997, complainant also offered the following description of the protected activities that serve as a basis for his initial complaints (Case Nos. 97-0112, 0115-PC-ER):

> I disclosed, in 1991-93, to the Dean of the [UW-Whitewater] College of Business that extensive misuse of State resources was taking place in ar-

[1] The Fair Employment Act prohibits retaliation for engaging in various protected activities. See §111.322(2m) and (3), Stats.

> eas of the University such as the Music Department and the Athletic Department (he has copies of those letters or memos . . . I am sure) - I disclosed ["a bogus scholarship program funded by a very wealthy benefactor of the University - David Kachel - because Mr. Kachel insisted that some of the scholarship should go to some of the UWW students who also happened to work for him but who were not scholarship caliber students - a scholarship program that the Dean of the College of Business did not want to put an end to because one of his children was getting the scholarships, as well"] in 1991-92 to the Dean - three times (he has copies of those memos or letters - which he will refuse to give you - I am sure) - I disclosed, again in 1996, the extensive misuse of State Resources around the campus . . . (again he has copies of that letter)
>
> It was that letter in 1996 that prompted the University to do a whitewash, cover-up internal audit and it was the results of that audit that were accompanied by a cover letter, or memo, from the Chancellor . . . . I also complained, or blew the whistle, if you will on things like the amount of money wasted here at UWW on capital construction projects, bogus faculty recruiting efforts and so on - that complaint was made during the Spring of 1996 - again the Dean has that (those) letters, memos, in his Personnel file on me - which he will, again, undoubtedly refuse to give you copies of.

Complainant clearly contends that, as to Case Nos. 97-0112 and 0115-PC-ER, he made whistleblower disclosures starting in 1991. Complainant has not, as yet, submitted copies of the written disclosures described in his September 15, 1997, letter. However, he has described the disclosures in a manner that is sufficiently specific so as to withstand respondent's motion to dismiss for failure to specify the "information" he disclosed that resulted in the alleged retaliation. Complainant's subsequent complaints (97-0129, 0132, 0141, 0165, 0185-PC-ER) may rely on the same disclosures as his first two complaints, or they may rely on the filing of a prior complaint as the protected activity/disclosure. In either event, respondent's motion to dismiss fails in this regard.

B. Failure to make disclosures in writing and to his supervisor

Respondent's second general contention is that complainant "did not make his disclosures in writing to his supervisor" as required by §230.91(1)(a), Stats. Complainant's statement in his September 15th letter clearly indicates that the disclosures

were in writing and, at least in several instances, were made to the Dean of the College of Business at the UW-Whitewater.

The Personnel Commission has previously held that a disclosure need not be made to a first-line supervisor in order to qualify as a disclosure to a supervisor within the meaning of §230.81(1)(a). *Williams v. UW-Madison, 93-0213-PC-ER, 9/17/96* Qualifying disclosures may be made instead to a second-line supervisor, third-line supervisor, or higher level supervisor in the employe's supervisory chain of command. In *Morkin v. UW-Madison*, 85-0137-PC-ER, 11/23/88, the Commission held that a letter from a Building Maintenance Helper at the UW-Madison Physical Plant directed to the president of the UW System, the chancellor of UW-Madison and the director of the Physical Plant was a whistleblower "disclosure" even though it was not sent to complainant's immediate supervisor. The whistleblower law does not include a definition of the term "supervisor." When a faculty member is the "employe" making a whistleblower disclosure, it is reasonable to interpret "supervisor" to include the campus chancellor, the college dean and the department chair of the department containing the employe's position. This result is consistent with the rule of liberal construction that applies to the interpretation of the whistleblower provisions pursuant to §§230.01 and .02, Stats. *Hollinger & Gertsch v. UW-Milwaukee*, 84-0061, 0063-PC-ER, 8/15/85. Here it is undisputed that complainant made at least some of his disclosures to the department chair, the college dean or the campus chancellor. Those disclosures are, therefore, protected under the whistleblower law, assuming they meet the other requirements of the statute.

C. Timeliness and "disciplinary action"

Respondent contends that the allegations raised by complainant were, at least in part, untimely filed. It is complainant's burden of proof to demonstrate that the allegations raised in his complaint were timely filed. When analyzing this question it is appropriate to construe the allegations raised in the complaint in a light most favorable to complainant. *Reinhold v. Office of the Columbia County District Attorney & Bennett*, 95-0086-PC-ER, 9/16/97.

As noted above, there is a 60 day filing period under the whistleblower law. The complaints were filed at various times during a five-month period in 1997. Complainant's individual allegations, which are set forth below, relate to various actions taken beginning in 1991 and ending in November of 1997. Complainant responded to respondent's timeliness arguments by stating that his complaints were timely because

> the vast majority of the retaliation and harassment etc., has occurred in the past 6 – 9 months and in the vast majority of those cases I have filed complaints within days of those events or incidents. . . . And, almost without exception, each complaint was filed within the statutory time period required of each event or incident of retaliation etc.

Respondent also contends that certain alleged conduct by respondent does not amount to "disciplinary action" as specified in the statute.

The Commission's analysis as to whether each claim was timely filed[2] and whether the alleged conduct constituted a "disciplinary action" is set forth below.

Case No. 97-0112-PC-ER, filed on July 21, 1997, alleges "whistleblower" retaliation and Fair Employment Act retaliation. In order for complainant's allegations to be timely, the earliest possible date for the retaliatory action under the whistleblower law would be May 20, 1997. Complainant alleges the following conduct was retaliatory:[3]

> *a) In early July 1997, Dean Joseph Domitrz removed Gary Benson's secretary and photocopy machine.* This whistleblower allegation is timely filed because the conduct occurred within the 60 day actionable period. Neither action is enumerated in the definition of "disciplinary

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[2] Respondent raised timeliness objections in Case Nos. 97-0112-PC-ER and 97-0115-PC-ER. Therefore, in the analysis set forth below, there is no reference to the timeliness of complainant's other allegations.

[3] The complaints and amendments filed by the complainant are written in such a way that it is often difficult to determine the specifics of his allegations. A member of the Commission's staff drafted a four-page summary of the allegations and complainant was asked to notify the Commission if the summary was inaccurate in any way. The complainant failed to identify any inaccuracies in the summary, which is referred to in correspondence as Appendix A. This ruling reproduces the content of the summary as accepted by complainant. Any additional information, apparent from other materials in the case files and relevant to this ruling, is also referenced in the Commission's discussion.

action" in §230.80(2). The next question is whether, under the standard established in *Vander Zanden v. DILHR*, Outagamie County Circuit Court, 88 CV 1223, 5/25/89, the actions have a "substantial or potentially substantial negative impact" on complainant. Complainant has not provided any information clarifying this allegation although the case file does contain a July 7, 1997, memo from Dean Domitrz directing Prof. Clements to "have the copy machine in Dr. Benson's office removed and sent to surplus for disposal. Dr. Benson should route all future copying requests through Ruth Ann." The Commission assumes complainant is alleging that UW-Whitewater's administration denied him all secretarial services, that this action had a drastic effect on complainant's ability to perform his responsibilities, and that the action was taken in response to complainant's protected activities. At least at this point in the proceedings and with the limited information available, the Commission concludes that the removal of complainant's secretary qualifies as a "disciplinary action." However, the allegation regarding the removal of the photocopy machine must be viewed in the context of that complainant could "route all future copying requests through Ruth Ann." Obviously, the complainant continued to have photocopying options, even though a particular machine had allegedly been removed. Because of the alternative available to complainant, the removal of the copying machine will not be considered a "disciplinary action."

b) In early July 1997, Domitrz removed SIFE from Benson's leadership. This action is also timely. "SIFE" refers to Students in Free Enterprise, a student organization with faculty advisors. The case file includes a July 7, 1997, memo from Dean Domitrz to complainant which indicates the Dean had asked Dr. Bhargava to "assume a leadership role in all future UW-Whitewater [SIFE] team competitions." The Commission assumes that complainant was removed from a role as a faculty advisor to the organization. Because the claim relates to the "removal of any duty," it falls within the scope of a "disciplinary action" under §230.80(2).

c) In spring 1996 and spring 1997, Benson was moved to a smaller office. Complainant has failed to show that this conduct occurred within the actionable period. The allegation is untimely.

d) In fall 1995 and spring 1996, Domitrz removed the Entrepreneurship Program from Benson's leadership. The allegation is untimely.

e) In June 1997 (and thereafter), Domitrz refused to pay Benson for his summer work with Dr. Afonja. Elsewhere in his materials, complainant states that he "took care of" Professor Afonja, who was apparently

visiting UW-Whitewater as "our Senior Fulbright Scholar/Fellow."[4] Complainant's allegation that he was not paid for this responsibility, in response to complainant's protected activities, is comparable to an allegation that his pay had been reduced. This claim is timely and has the "effect . . . of a penalty," thereby falling within the scope of a "disciplinary action" under §230.80(2).

f) In fall 1995 and at other times, Domitrz and other COBE faculty members spread rumors about Benson. The allegation is untimely.

g) In spring 1991 and 1996 and fall 1996, Domitrz accused Benson of doing illegal and/or unethical things. The allegation is untimely.

h) In nearly every year, Domitrz froze Benson's budget. Complainant has failed to show that this conduct occurred within the actionable period. The allegation is untimely.

i) In fall 1995, Domitrz called Benson's doctor, Mary Ann Benavediz. The allegation is untimely.

j) In fall 1996, spring 1997, and fall 1997, Domitrz threatened to remove Benson's endowed chair. The allegations relating to the fall of 1996 and the spring of 1997 are untimely. Any threat to remove a faculty member from an endowed chair would have a "potential substantial negative impact" on that person and fits within the scope of a "disciplinary action." Therefore, complainant may pursue his claim regarding the alleged threat in the fall of 1997.[5]

k) On several occasions, Domitrz and Chancellor Gaylon Greenhill have tried to engineer Benson's failure by sabotaging and sandbagging Benson's work, for instance:

- Both Greenhill and Domitrz essentially have broadcast Benson's name as the source of complaints about misuse of State funds on

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[4] This information is found in an attachment to the complaint filed in Case No. 97-0132-PC-ER.

[5] While the reference to "fall 1997" is not specific, it presumably relates to an event after July 21, 1997, the date Case No. 97-0112-PC-ER was filed. The Commission notes that the number of claims filed by complainant and the lack of specificity in those complaints caused Commission staff to organize complainant's allegations into the italicized claims [*a)* through *oo)*] that are set forth in this ruling. In many instances, the complainant submitted "additional information" regarding an existing claim when he filed a new complaint. Complainant supplied such information regarding allegation *j)* when he filed Case No. 97-0140-PC-ER on September 15, 1997. This accounts for including the "fall 1997" reference in a case filed on July 21, 1997.

campus. Complainant has failed to show that this conduct occurred within the actionable period. The allegation is untimely.
- *UWW refused to add Entrepreneurship to its MBA program.* Complainant has failed to show that this conduct occurred within the actionable period. The allegation is untimely.
- *Domitrz removed leadership of the Entrepreneurship Program from Benson.* Complainant has failed to show that this conduct occurred within the actionable period. The allegation is untimely.
-*Where Greenhill used to congratulate Benson on his work, he now criticizes him.* With the exception of that conduct described in allegation *oo)*, which is discussed as part of Case No. 97-0132-PC-ER, complainant has failed to show that this conduct occurred within the actionable period. The allegation is untimely.
- *Benson's work in Cuba.* Complainant has failed to show that this conduct occurred within the actionable period. The allegation is untimely.
- *Benson's work in Mexico, including the visit of Mexican artist McLean and the University of Guadalajara exchange agreement.* Complainant contended that respondent did not promptly respond to complainant's proposal that artist Guillermo MacLean serve as "artist in residence for a few days" after participating in an art exposition in Chicago during October of 1997. Complainant also contended there was inadequate response to his efforts to have several students from the University of Guadalajara attend the UW-Whitewater in the fall of 1997. These two specific allegations appear to arise from events after May 20, 1997, and they will be considered timely. However, they do not rise to the level of a "disciplinary action" because they resulted in "no loss of pay, position, upgrade or transfer or other consequences commonly associated with job discipline." *Vander Zanden.* Any other unspecified allegations regarding complainant's "work in Mexico" are untimely.
- *Domitrz told Benson that he was having trouble reorganizing the Advisory Committee because old members told Domitrz they did not want to participate if Benson was involved when in fact Domitrz had not contacted former Committee members.* Complainant has failed to show that this conduct occurred within the actionable period. The allegation is untimely.

l) Domitrz and/or his office staff frequently intercept Benson's incoming faxes and other communications. With one exception, complainant has failed to show that this conduct occurred within the actionable

period. The exception relates to complainant's contention, set forth in the materials attached to Case No. 97-0129-PC-ER, that someone had stolen a fax because the father of a University of Guadalajara student said he had sent a fax to complainant several days earlier but complainant never received it. This contention appears in a message to the Chancellor dated August 19, 1997, so it appears to be timely.[6] The allegation of stealing a fax may be considered a form of "physical harassment." When this allegation is viewed in conjunction with allegations *u)* and *w)*, the "cumulative impact" on the complainant satisfies the requirement of a "disciplinary action." *Seay v. DER & UW-Madison*, 89-0082-PC-ER, 3/31/94; affirmed by Dane County Circuit Court, *Seay v. Wis. Pers. Comm.*, 93-CV-1247, 3/3/95; affirmed by Court of Appeals, 95-0747, 2/29/96.

m) In spring/summer 1997, James Connor, Domitrz, Greenhill, or others convinced Fern Young to sue complainant. The Commission finds that the reference to "spring/summer 1997" is sufficient to conclude that this action occurred during the actionable period from May 20 to July 21, 1997. The complainant has failed to supply any other specifics about this allegation. The Commission interprets the allegation as referring to some type of a civil action filed against complainant by a plaintiff other than an individual employed by the University of Wisconsin-Whitewater serving in the individual's official capacity. Alleged actions by UW-Whitewater's administration to convince a third party to commence a civil action against complainant is not a consequence commonly associated with job discipline under *Vander Zanden.*

n) Since 1991-92, Domitrz or Greenhill or Dave Kachel have put a price tag on Benson's head, for instance:

- *Wealthy benefactors of UWW have promised they will give additional sums of money provided UWW rids itself of Benson.* Complainant has failed to show that this conduct occurred within the actionable period. The allegation is untimely.

o) For several years, Domitrz has excluded Benson from committees for which he has expertise, for instance:

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[6] The Commission notes that the number of claims filed by complainant and the lack of specificity in those complaints caused Commission staff to organize complainant's allegations into the italicized claims [*a)* through *oo)*] that are set forth in this ruling. In many instances, the complainant submitted "additional information" regarding an existing claim when he filed a new complaint. Complainant supplied such information regarding allegation *l)* when he filed Case No. 97-0129-PC-ER on August 25, 1997.

-In 1996, the International Committee in COBE. The allegation is untimely.

Case No. 97-0115-PC-ER filed on July 28, 1997, alleges "whistleblower" retaliation and Fair Employment Act retaliation as to the following conduct:

p) In fall 1995, Domitrz, other COBE faculty members and perhaps other administrators and faculty mentors provided false and malicious information about Benson for articles written in the Milwaukee Journal/Sentinel and Royal Purple. The allegation is untimely.

q) For the years 1995-97, Domitrz removed Benson's funding to travel to professional meetings and conferences. Complainant has failed to show that this conduct occurred within the actionable period. The allegation is untimely.

r) On an ongoing basis, Professor Thielen, Don Zahn, Jan Olson, Domitrz, Clements and others have advised and/or discouraged students who express an interest in the Entrepreneurship Program. Complainant has failed to show that this conduct occurred within the actionable period. The allegation is untimely.

s) For a long time, Domitrz, Carla Lenk, T. J. Toberman and others have circulated false and malicious statements both oral and written about Benson, for instance:

- Lenk accused Benson of using a UWW car for personal use. Complainant has failed to show that this conduct occurred within the actionable period. The allegation is untimely.

- Toberman accused Benson of using UWW vehicles and gas cards for personal use. Complainant has failed to show that this conduct occurred within the actionable period. The allegation is untimely.

Case No. 97-0129-PC-ER filed on Aug. 25, 1997, alleges "whistleblower" retaliation and Fair Employment Act retaliation as to the following conduct:

t) In August 1997, Domitrz reminded Benson that all guest editorials must be coordinated through UWW. The claim was filed within the 60 day period. However, it does not reach to the level of a "disciplinary action." The contention is merely that complainant was reminded of ex-

isting policy, far short of a consequence "commonly associated with job discipline" under *Vander Zanden.*

u) In August 1997, Benson's car tires were flattened. The Commission understands complainant to contend that his tires were flattened by his superiors or at their directive, and in response to his protected activities. When coupled with allegation *w),* the cumulative impact on the complainant would constitute "physical harassment" as referenced in §230.80(2)(a), and as interpreted in *Seay.*

v) In August 1997, Domitrz sandbagged Benson's request as a taxpayer for information about the Chinese managers' visit. The materials filed with the complaint show that complainant, by memo dated July 28, 1997, and "as a taxpayer here in the State of Wisconsin," asked "how much it cost to have the group of Chinese managers here recently, where the money came from and how much State money was used." Complainant was dissatisfied with the response and later sought to commence a legal proceeding to force respondent to divulge additional information. An allegedly inadequate response to a taxpayer request for information relating to a public expenditure is not a "disciplinary action" within §230.80(2). The allegation does not involve the employment relationship.

w) In August 1997, Benson's cell phone was stolen from his office. The Commission understands complainant to contend that his cell phone was stolen by his superiors or at their directive, and in response to his protected activities. When combined with allegation *u),* the cumulative impact on the complainant would constitute "physical harassment" as referenced in §230.80(2)(a), and as interpreted in *Seay.*

Case No. 97-0132-PC-ER filed on September 4, 1997, alleges "whistleblower" retaliation as to the following conduct:

nn) Respondent released complainant's personnel file to unauthorized individuals. The only reference to specific conduct relating to this allegation is in an undated memo from complainant to Chancellor Greenhill. In the memo, complainant refers to a statement made by the Dean, when the Dean was discussing an "unrelated" topic at an Annual Retreat. According to complainant, the Dean said personnel files and records of individual faculty members are public documents and are available for inspection upon demand. Such a statement is not a "disciplinary action" within the scope of §230.80(2), as interpreted in *Vander Zanden.*

oo) Respondent criticizes complainant for activities on which it used to commend him. Complainant's only specific allegation in this regard relates to a written comment apparently made by Chancellor Greenhill between the dates of July 25 and August 27, 1997. The comment appears on a fax originally received by complainant from David Jacinsky of Mukwonago High School, asking for information about a sister city agreement and stating there would be approximately 100 students enrolled in the high school's "Entrepreneurship courses" during the approaching school year. Complainant wrote a note on the fax that he had a "great deal to do with all this" and forwarded the fax to Chancellor Greenhill who wrote: "Nice but does not relate to job at UW-Whitewater." The Chancellor's notation does not constitute a "disciplinary action" covered by the whistleblower law because it does not have a "substantial negative impact" as required in *Vander Zanden.*

Case No. 97-0140-PC-ER was filed on September 15, 1997. In it, complainant alleges "whistleblower" retaliation and Fair Employment Act retaliation with respect to the following conduct:

x) In September 1997, Jim Freer denied Benson use of the inter/intra-campus mailing system. Complainant's only explanation of this allegation is the following statement in a letter to Jim Freer dated September 9, 1997: "I have just learned that you are now blocking my use of the intercampus, or intracampus, mail system." Without further information about the allegation from complainant, the Commission understands the complainant to allege that he was completely barred from using the university's mail system. The Commission assumes complainant to allege that this action had a drastic effect on complainant's ability to perform his responsibilities, and that it was taken in response to complainant's protected activities. At least at this point in the proceedings and with the limited information available, the Commission concludes that the alleged conduct meets the definition of "disciplinary action."

Case No. 97-0165-PC-ER was filed on October 22, 1997. Complainant alleges "whistleblower" retaliation with respect to the following conduct:

y) Domitrz enforces non-existent policies and procedures against Benson, for e.g., Domitrz's 9/22/97 memo to Benson regarding his Cuba license. In the memo, Dean Domitrz explained that, pursuant to university policy, "no one at the university is authorized to engage in activities

as a representative of the university with or in a country whose government is not recognized by the U.S." The dean asked complainant to clarify whether his work in Cuba was as a private citizen or as a representative of UW-Whitewater. Such a request is not a "disciplinary action" within the scope of §230.80(2), as interpreted in *Vander Zanden.*

z) In late September or early October 1997, Benson found anonymous, derogatory notes posted on or slipped under his office door and respondent refused to take any action. The complainant filed copies of two documents to support his claim. The first is entitled "Certification of Upgrade to Complete Asshole" that was "Awarded to Gary Benson" by "Assorted Colleagues" and dated September 22nd. The second was denominated Volume 1, Issue 1 of a one-page newsletter entitled "Gary Benson - An American Fool." Complainant contacted University Police about the documents and, in an October 1st memo, asked "if this is the kind of thing I can file a complaint over." Chief Janis Goder replied by memo dated October 17, 1997, asked complainant to contact her, asked him the meaning of certain language, and stated: "These matters appear to be personnel matters and civil issues. Without further information from you, however, it is not possible to offer an informed opinion as to the appropriateness of police involvement." The anonymous notes may be considered a form of "physical harassment." The Commission understands complainant to contend that these notes were left by complainant's superiors or at their directive, and in response to protected activities. When this allegation is viewed in conjunction with allegations *l)*, *u)* and *w)*, the "cumulative impact" on the complainant satisfies the requirement of a "disciplinary action" under *Seay.*

aa) The administration told lies about Benson that found their way into the media and/or resulted in negative things being written about Benson, for e.g., 9/17/97 newspaper article entitled "Benson exposes university 'wrongdoing'" or Royal Purple article entitled, "Case of semantics not to blame." The only portions of the first article, which totals 34 column inches, attributed to UW-Whitewater administration, rather than to complainant, are the following:

> The university said that Benson's criticisms began around the same time he was a candidate for the Walworth County Board.
>
> Reportedly, Joseph Domitrz, dean of the College of Business and Economics, discovered that Benson was creating campaign materials on university stationery. Benson's complaints began at this time. . . .

> Chancellor H. Gaylon Greenhill strongly disagrees with Benson's contention that the university is wasteful and mismanaged.
>
> "UW-Whitewater does an excellent job of managing its funds, as stated in *U.S. News and World Report*," he said. "Anything we find we would report, as we have done in the past. This is a well-run university."

The second "article" is on the editorial page of the *Royal Purple*, and is clearly identified as an editorial. Accepting, for purposes of this ruling, the accuracy of complainant's allegations, there is no suggestion that the article and the editorial were written by the administration at UW-Whitewater. The respondent's activity is in the nature of a "public criticism by an employer of an employe's or group of employes' approach to a controversial issue" which was found to be outside the scope of "verbal or physical harassment" in *Kuri v. UW-Stevens Point*, 91-0141-PC-ER, 4/30/93. Therefore, this allegation fails because the alleged conduct is not a "disciplinary action."

bb) In October 1997, respondent removed Benson's library photocopying privileges. This allegation is clarified by a memo dated October 22, 1997, to complainant from Dean Domitrz, stating, in part:

> I have received your response to my memo concerning copying costs at the UW-Whitewater Library. As a result, I have paid the nearly $500 in copying charges for the month of September and have informed the library to approve copying expenditures for the remainder of the year not to exceed a total of $50. If you have copying expenses at the library which will exceed this limit, they will need to be approved by your department chairperson (Chris Clements) in advance.
>
> Please have all of your instructional and research copying done through the department's copying procedure. There are significant budget savings using the department process when compared to copying at the library.

Subsequent correspondence from complainant indicates he had used up the $50 allotment no later than November 3, 1997. Respondent's October action can best be described as a temporary suspension of complainant's photocopying privileges *at the library* until Dean Domitrz reviewed complainant's justification. This action did not have an effect on complainant's ability to obtain photocopying services through his department. While this action by an employer is more significant than the one consid-

ered by the Commission in *Vander Zanden,* it still did not result in a loss of pay, position, upgrade or transfer or another consequence "commonly associated with job discipline." It does not "rise to the level of a penalty or disciplinary action akin to those enumerated in §230.80(2)."

cc) In October 1997, respondent failed to support/approve Benson's request for a 1998-99 sabbatical. The application, for a sabbatical during the periods of fall of 1998 and the spring and summer of 1999, was dated October 20, 1997. Respondent's alleged action had a "substantial negative impact" on the complainant and is comparable to a loss of pay, position, upgrade or transfer. Therefore, it meets the definition of "disciplinary action."

dd) In fall 1997, respondent removed Benson's printing and labeling privileges. Without further information about the allegation from complainant, the Commission understands the complainant to allege that he was completely barred from using respondent's printing and labeling equipment. The Commission assumes complainant to allege that this action had a drastic effect on complainant's ability to perform his responsibilities, and that it was taken in response to complainant's protected activities. At least at this point in the proceedings and with the limited information available, the Commission concludes that the alleged conduct meets the definition of "disciplinary action."

Case No. 97-0185-PC-ER was filed on November 24, 1997. In this complaint, complainant alleges "whistleblower" retaliation with respect to the following conduct:

ee) On November 11, 1997, Domitrz accused Benson of using university funds to take students to a professional football game. This allegation arises from a five sentence long memo from Dean Domitrz. The following sentence is the source of the allegation: "In addition, you should not be using university funds to take students to see a Chicago Bear football game." The memo did not subject complainant to any sort of discipline nor was it ever identified as a disciplinary action. The memo informed complainant that he was still required to obtain approval from the Dean for any expenditure request. The sentence in question is not a "disciplinary action" within the scope of §230.80(2), as interpreted in *Vander Zanden.*

ff) In November 1997, Benson's car again was vandalized and respondent's police did nothing. The Commission understands complain-

ant to contend that his car was vandalized by his superiors or at their directive, and in response to his protected activities. When combined with allegations *u)* and *w)*, the cumulative impact on the complainant would constitute "physical harassment" as referenced in §230.80(2)(a), and as interpreted in *Seay*.

gg) In November 1997, Domitrz blocked Benson's use of respondent's mailing services. This action related to complainant's effort to mail a memo to "All Wisconsin Area Venture Capital Companies, Venture Capitalists, Private Investors in Entrepreneurial Ventures or Related Kinds of Investors" and a separate memo to "All Those Who Have Graduated From UWW With An Area of Emphasis In Entrepreneurship Since The Entrepreneurship Program Was First Established At/In The College Of Business and Economics at UWW in 1990." The memos requested information complainant could use in various books he was writing. There is no indication that respondent's action extended to any other effort by complainant to use the mailing services. While this action is more significant than the one considered by the Commission in *Vander Zanden,* it still did not result in a loss of pay, position, upgrade or transfer or another consequence "commonly associated with job discipline." Respondent's action merely prevented complainant from using the mail service for 2 specific memos. Therefore, it does not "rise to the level of a penalty or disciplinary action akin to those enumerated in §230.80(2)."

hh) In November 1997, Domitrz gave Benson written goals and objectives for the year, but cut off all support for achieving those goals. Complainant has not provided any clarification of this allegation. The complainant has failed to offer any explanation of what he means when he says that "all support" for meeting the goals of his position have been "cut off." Therefore, there is no basis on which the Commission could conclude that this claim arises from a "disciplinary action," so respondent's motion to dismiss will be granted.

ii) Domitrz paints Benson in the worst possible light to his colleagues. This allegation arises from a November 10, 1997, memo by Dean Domitrz to faculty and staff of the College of Business and Economics, offering congratulations to 8 named individuals for receiving grants or donations. Complainant contends his name should have been on the list. Respondent's action did not result in a loss of pay, position, upgrade or transfer or another consequence "commonly associated with job discipline." Therefore, it does not "rise to the level of a penalty or

disciplinary action akin to those enumerated in §230.80(2)." *Vander Zanden(supra)*

jj) Respondent will not give Benson access to 1PG office to remove his belongings. Complainant explained this allegation in a memo to Dean Domitrz dated November 20, 1997: "I would still like to get the 1PG products that belong to me out of the old 1PG office in McCutchan Hall – I paid for those, myself, just as I paid for much of what 1PG did. . . . I have thousands of dollars of my own money tied up in that 1PG inventory and you are preventing me from getting to it." Complainant has not explained or defined the term "1PG." The Commission understands complainant to allege that he was prevented from retrieving his personal belongings which may be considered a form of "physical harassment." When this allegation is viewed in conjunction with allegations *l), u), w)* and *z)*, the "cumulative impact" on the complainant satisfies the requirement of a "disciplinary action" under *Seay*.

kk) In November 1997, respondent attempted to plant an LTE in Benson's office to sabotage his work. Complainant's sole support of this allegation is a memo he wrote on November 12, 1997, directed "To whom it may concern at the UWW Personnel Office." The memo stated, in relevant part:

> Dean Domitrz has given me permission to hire another LTE in my office. My question is whether I can hire whoever I want or whether I have to hire whoever you send me – i.e. someone who is already on campus etc.
>
> The last time you sent me someone to consider as a hire it was obvious that she was sent here as a possible "plant" to spy on me and what I am doing by the administration that I would have to have been a moron not to see that.

This memo shows that complainant is alleging that respondent's personnel office might forward the name of a candidate for complainant "to consider as a hire" for the LTE position. The possibility that complainant would receive the name of a candidate in the future is neither a "disciplinary action" nor the threat thereof.

ll) In November 1997, someone filed a false complaint against Benson with respondent's Equal Employment Opportunity office. Complainant supports this allegation with several memos he wrote to the EEO office in response to their request to meet with him about the EEO com-

plaint. In one of those memos, complainant contends the EEO complaint was filed "by someone who had no choice but to file it because of things the administration has over, or on, that person." For reasons similar to those in *Flannery v. DOC*, 91-0157-PC-ER, 91-0047-PC, 7/25/91, and *Sadlier v. DHSS*, 87-0046, 0055-PC-ER, 3/30/89, filing a complaint with an agency's EEO office and initiating an investigation of that complaint are not "disciplinary actions" within §230.80(2).[7]

mm) Respondent took a bottle of copy machine toner that Benson purchased. Complainant alleges that the toner was taken "when they took my copy machine away from me" and that he had paid for the toner himself. The Commission understands complainant to contend that toner was taken by complainant's superiors or at their directive, and in response to protected activities. When combined with allegations *u)*, *w)* and *ff)*, the cumulative impact on the complainant would constitute "physical harassment" as referenced in §230.80(2)(a), and as interpreted in *Seay*.

ORDER

Respondent's motions are granted in part and denied in part. The investigation of whistleblower claims will proceed as to allegations *a)* [relating to the alleged removal of complainant's secretary, only], *b)*, *e)*, *j)* [relating to the alleged threat in the fall of 1997, only], *l)* [relating to the fax from the father of a University of Guadalajara student], *u)*, *w)*, *x)*, *z)*, *cc)*, *dd)*, *ff)*, *jj)*, and *mm)*. The remaining allegations of whistleblower retaliation are dismissed as noted above. Case No. 97-0132-PC-ER is dismissed. The Commission's equal rights staff will proceed with requesting respondent

[7] This result is consistent with the Commission's conclusion regarding claim *m)* discussed above.

to file an answer to the remaining claims of retaliation under the Fair Employment Act[8] and whistleblower law.

Dated: August 26, 1998. STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

KMS: 970112Crul1

Parties:

Gary Benson
2295 North 650 East
Provo, UT 84604-1710

Katharine Lyall
President, UW System
1720 Van Hise Hall
1220 Linden Dr.
Madison, WI 53706

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

[8] While complainant's Fair Employment Act retaliation claims were not the subject of respondent's motions, the Commission will provide the parties with a list of remaining FEA claims in order to assist them in submitting information as part of the investigation process: *a), b), c), d), e), f), g), h), i), j), k), l), m), n), o), p), q), r), s), t), u), v), w)* and *x)*.

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