

STATE OF WISCONSIN

PERSONNEL COMMISSION

HALLEY YOUNG, JR.,
Complainant,

v.

**Secretary, DEPARTMENT OF
TRANSPORTATION,**
Respondent.

**RULING ON MOTION
TO DISMISS**

Case No. 00-0129-PC-ER

This is a complaint of retaliation for engaging in protected occupational safety and health reporting activities relating to respondent's failure to hire complainant for two permanent positions and a limited term position during 2000. On October 9, 2000, respondent filed a motion to dismiss based on lack of standing, lack of subject matter jurisdiction, untimely filing, and failure to state a claim for relief. The parties were permitted to brief the motion and the schedule for doing so was completed on October 23, 2000. The following findings of fact are based on information provided by the parties, appear to be undisputed, and are made solely for the purpose of deciding this motion.

FINDINGS OF FACT

1. This complaint was filed on September 11, 2000.
2. Complainant has not been employed by respondent at any time since November of 1999. Complainant alleges that he engaged in certain protected occupational safety and health reporting activities during his employment with respondent during 1999; that these activities related to the use and storage of a nuclear density gauge, work carried out near high voltage power lines, and work carried out on or near a roadway allegedly without the protection of a flag person to regulate traffic; and that he reported his safety and health concerns to Don Ostreng, Russ Frank, a crew foreman, and complainant's supervisors in District 5.

3. Complainant applied for certain permanent Engineering Technician and Engineering Specialist positions in respondent's District 5 office during 2000. Complainant was notified that he was not the successful candidate for these permanent positions on or before July 17, 2000.

4. Complainant had an application for employment for limited term (LTE) positions on file with District 5 during 2000.

5. Respondent's District 5 office filled an LTE Engineering Aide 2-Transportation position between August 12 and September 11, 2000. District 5 appointed an individual other than complainant to this position.

6. It is District 5's practice to have a continuous recruitment for LTE positions. As a part of this practice, District 5 does not notify applicants for LTE positions when a vacancy occurs or when a vacancy is filled by a different applicant.

OPINION

The statement of issue for hearing to which the parties agreed is as follows:

Whether complainant was retaliated against for engaging in protected occupational safety and health reporting activities when he was not selected for permanent Engineering Technician and Engineering Specialist positions in District 5 on or before July 17, 2000, or for limited term or seasonal positions in District 5 between August 10 and September 11, 2000.

The Commission's authority relating to occupational safety and health (OSH) reporting retaliation derives from §101.055, Stats., which states as follows, in relevant part:

101.055 Public employee safety and health.

(1) INTENT It is the intent of this section to give employees of the state, of any agency and of any political subdivision of this state rights and protections relating to occupational safety and health equivalent to those granted to employees in the private sector under the occupational safety and health act of 1970 (5 U.S.C. § 5108, 5314, 5315 and 7902; 15 U.S.C. § 633 and 636; 18 U.S.C. § 1114; 29 U.S.C. § 553 and 651 to 678; 42 U.S.C. § 3142-1 and 49 U.S.C. § 1421).

(2) DEFINITIONS. In this section, unless the context requires otherwise:

(b) "Public employee" or "employee" means any employee of the state, of any agency or of any political subdivision of the state.

(8) PROTECTION OF PUBLIC EMPLOYEES EXERCISING THEIR RIGHTS. ...

(ar) No public employer may discharge or otherwise discriminate against any public employee it employs because the public employee filed a request with the department, instituted or caused to be instituted any action or proceeding relating to occupational safety and health matters under this section, testified or will testify in such a proceeding, reasonably refused to perform a task which represents a danger of serious injury or death or exercised any other right related to occupational safety and health which is afforded by this section.

(b) A state employee who believes that he or she has been discharged or otherwise discriminated against by a public employer in violation of par. (ar) may file a complaint with the personnel commission alleging discrimination or discharge, within 30 days after the employee received knowledge of the discrimination or discharge.

(c) If the personnel commission determines that a violation of par. (ar) has occurred, it shall order appropriate relief for the employee, including restoration of the employee to his or her former position with back pay, and shall order any action necessary to ensure that no further discrimination occurs. If the personnel commission ... determines that there has been no violation of par. (ar), it shall issue an order dismissing the complaint.

Timeliness

Section 101.055(8)(b), Stats., requires that a complaint of OSH retaliation be filed "within 30 days after the employee received knowledge of the discrimination or discharge." Clearly, the complaint is not timely filed as to the two permanent positions referenced in the statement of the issue for hearing since complainant was aware that he was not the successful candidate for these positions on or before July 17, 2000, which is more than 30 days before the date this complaint was filed, i.e., September 11, 2000. In regard to any of the LTE positions filled in District 5 during 2000, the application of

a continuing violation theory would be appropriate to toll the filing period since the hiring process was ongoing and did not include notification of nonselection for each vacancy, and since an LTE position in District 5 was filled during the actionable period. *Dawsey v. DHSS*, 89-0061-PC-ER, 10/29/92. It appears, however, that complainant is only challenging here the LTE hire which occurred during the actionable period.

Standing

The relevant language of the federal Occupational Safety and Health Act (OSHA) of 1970, as embodied in §29 USC 660(c)(1), states as follows:

No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this chapter.

In support of its contention that complainant lacks standing, respondent does not assert, consistent with a typical challenge to a petitioner's standing, that complainant has suffered no injury in fact, but instead asserts that complainant fails to satisfy the statutory definition of "employee" for purposes of §101.055, Stats., since he was not employed by the state at the time the alleged retaliation took place.

Several factors support a conclusion that the term "employee" in §101.055, Stats., includes former as well as current employees. First, it is the stated intent of §101.055 (1), Stats., to give state employees "rights and protections relating to occupational safety and health equivalent to those granted to employees in the private sector" under the federal occupational safety and health act (OSHA) of 1970. Whether a petitioner qualifies for protection from retaliation under the federal OSHA depends upon "whether the person alleging discrimination was an 'employee' at the time of engaging in the protected activity," and not upon whether this person was an employee

at the time the retaliation charge was filed. (29 CFR 1977.5; *NLRB v. Lamar Creamery*, 246 F.2d 8 (5th Cir., 1957))

In addition, Title VII, in prohibiting and providing a remedy for certain types of retaliation, uses language similar to that under consideration here. §§42 U.S.C. 2000e-3(a) and e(f). The federal courts, in interpreting this language, have concluded that the term “employee” should include current as well as former employees in order, among other reasons, to further the remedial purpose of the statute. *Veprinsky v. Fluor Daniel, Inc.*, 71 FEP Cases 170 (7th Cir. 1996); *Robinson v. Shell Oil Co.*, 72 FEP Cases 1856 (*U.S. Sup. Ct.*, 1997). Wisconsin’s OSH retaliation statute, as embodied in §101.055, Stats., has a similar remedial scheme and purpose. It is concluded that, as a former employee of respondent’s District 5 operation, complainant qualifies as an “employee” within the meaning of §101.055, Stats., and respondent’s motion must fail in this regard.

Failure to state a claim for relief

Respondent argues with respect to this aspect of its motion that complainant did not engage in any of the protected activities specified in §101.055(8), Stats. However, the language of this provision which states that an employee earns protection if he or she has “exercised any other right related to occupational safety and health which is afforded by this section,” has been construed broadly to include complaints filed with an employer. *Leinweber v. DOC*, 97-0104-PC-ER, 8/14/97; *Sadlier v. DHSS*, 87-0046, 0055-PC-ER, 3/30/89. Respondent further argues in this regard that complainant does not qualify for protection since he failed to report his concerns directly to management. Although complainant, in order to prevail on this claim, does have to prove that the individuals who made the hiring decision for the subject LTE position were aware of his protected activities, the language of §101.055, Stats., does not state a requirement that a safety or health concern must be directly disclosed to a member of management in order to qualify an employee for protection from OSH retaliation.

Subject Matter Jurisdiction

Respondent contends that, due to the fact that the federal Nuclear Regulatory Commission (NRC), not the federal Occupational Safety and Health Administration (OSHA), has exclusive authority over the use or misuse of nuclear density gauges by District 5, the safety or health activity complainant is relying upon here does not qualify for protection pursuant to §101.055, Stats., since only those activities protected by OSHA would be protected by the parallel Wisconsin law. However, complainant is also claiming protection for reporting concerns relating to high voltage power lines and lack of protection from traffic flow. As a result, even if respondent's argument relating to the respective authority of OSHA and the NRC were applicable and persuasive here, this would not be a sufficient basis for concluding that the Commission does not have subject matter jurisdiction over complainant's claim.

In view of the conclusions reached above, the statement of issue for hearing is now:

Whether complainant was retaliated against for engaging in protected occupational safety and health reporting activities when he was not selected for a limited term Engineering Aide position in District 5 between August 10 and September 11, 2000.

Finally, the Commission would like to address complainant's continuing contention that the Commission has the authority to review the merits of his occupational safety and health disclosures or to refer him to the state or federal agency which does have such authority. As explained to complainant and as reiterated here, the Commission is only empowered, within the context of this claim, to review the allegation that complainant was retaliated against in regard to his employment as the result of his making such disclosures.

CONCLUSIONS OF LAW

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

2. Complainant has the burden to show that his complaint was timely filed.
3. Complainant has failed to sustain this burden in regard to the two permanent positions at issue here. Complainant has sustained this burden in regard to the LTE position at issue here.
4. Complainant has the requisite standing to pursue this claim, the complaint states a claim for relief, and the Commission has subject matter jurisdiction over this claim.

ORDER

Respondent's motion to dismiss is granted in part and denied in part, consistent with the above discussion.

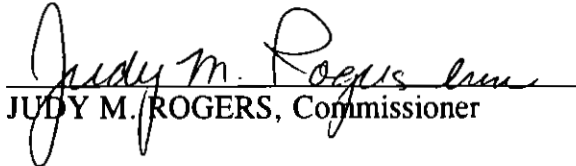
Dated: October 27, 2000

STATE PERSONNEL COMMISSION



LAURIE R. McCALLUM, Chairperson

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JUDY M. ROGERS, Commissioner

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