STATE OF WISCONSIN PERSONNEL COMMISSION

KATHY WARREN,
Petitioner,

v.

Secretary, DEPARTMENT OF HEALTH AND FAMILY SERVICES,
Respondent.

Case No. 98-0146-PC, 98-0164-PC-ER

DECISION AND ORDER

NATURE OF THE CASE

This is an appeal of a disciplinary action, and a complaint alleging retaliation for engaging in protected fair employment activities. A hearing was conducted before Laurie R. McCallum, Chairperson, on September 25-29 and October 19, 2000. The parties were permitted to file post-hearing briefs and the schedule for doing so was completed on December 15, 2000.

FINDINGS OF FACT

1 Since April of 1987, petitioner has been employed by the Disability Determination Bureau, Division of Health, Department of Health and Family Services, or their predecessor units. Petitioner was promoted to a Program Assistant 2 Supervisor (PA 2 Sup) position in November of 1988. Petitioner had performance problems, including creating conflicts with other supervisors, while employed in this position. As a result, petitioner was assigned to a PA 2 Sup position in the newly created Telephone Support Unit some time prior to April of 1991.

2. Petitioner received a performance evaluation for the period April 1991 through March 1992 signed by her supervisor Gail Smith and Deputy Disability Determination Bureau Director Louise Bakke which indicated that she had not

consistently met performance expectations. This evaluation stated as follows, in relevant part:

> You have not been consistent in providing adequate direction and supervision to your unit due to your poor communication skills and behavior. Staff are reluctant to approach you or make mistakes because they fear how you will react.
>
> The example you set for your unit is not appropriate for the supervisor of the Telephone Support Unit. There have been incidents of you being rude to persons from outside and inside the bureau both on the phone and in person. You are to be helpful and courteous in order to carry out the duties of a service oriented unit. There have been too many complaints registered by staff throughout the office to conclude that your behavior has been appropriate. ..
>
> You need to improve impressions you give to your staff and visitors to the agency. Being stern, rude, or appearing too busy to help presents a poor image of you and this agency. You and your staff always need to be willing to help and/or seek a source that can provide assistance. While you may feel you are doing this, the perception by many is that you are not and perceptions make the difference.
>
> One project that was happening during this last year was the phone committee. You tried to help the committee understand the workings of TSU and you implemented changes that resulted from this committee. There was, however, a breakdown in the communication because people were not willing to come to you to discuss situations they saw as problems. You tended to be critical of the adjudicator and m.c. staff in general. Being critical and defensive cuts off communication. While you need to look out for your staff's interests, you also need to be more positive as you discuss and consider new approaches or ideas for the TSU. You need to improve your manner of communicating. ...

3. In August of 1992, petitioner was demoted from her supervisory position to a Program Assistant position. Ms. Smith and William Shelton, Director of the Disability Determination Bureau (hereafter "Bureau"), participated in this decision. Mr. Shelton believed that petitioner had slashed the tires on his car in retaliation for this demotion, and shared this belief with others in the Bureau.

4. In December of 1992, petitioner challenged her demotion by filing an equal rights complaint and a civil service appeal with the Commission. Respondent did not contest liability and the Commission issued a decision on the issue of remedy in October of 1996. Petitioner filed a petition for judicial review of the Commission's decision and the parties settled this dispute in May of 1997.

5. As a result of this litigation, petitioner was reinstated to a Program Assistant 2 Supervisor position in Support Unit 3 in the Bureau effective June 10, 1996. This was the unit in which petitioner had been employed as a Program Assistant during the period of her demotion.

6. Support Unit 3, before, during, and after petitioner's employment there, was marked, to a greater extent than the other support units, by rumors, gossip, unprofessional conduct, time reporting abuses, and productivity problems on the part of the Program Assistants and other clerical staff. During the relevant time period, this unit also had a significantly higher turnover rate in its Program Assistant and other clerical positions than the other support units. These problems were more prevalent and less effectively managed during petitioner's tenure as supervisor of the unit. Petitioner was the target of some of the rumors and gossip and she reported this to her supervisors who investigated if petitioner supplied sufficient details.

7. Soon after her reinstatement, Mr. Shelton told petitioner that Support Unit 3 had traditionally been a difficult unit to supervise, and that other, non-supervisory positions were available in the Bureau. Mr. Shelton did not believe at that time or thereafter that petitioner was capable of being a successful supervisor.

8. During her tenure in the Bureau, petitioner was observed on several occasions yelling at co-workers, demonstrating anger toward them, and invading their personal space by approaching them too closely; shared with co-workers accounts of her activities outside of work in which she attempted to intimidate and even damage the property of those with whom she had disagreements; and was demanding and uncompromising in regard to certain workplace issues. An example of such a workplace issue related to petitioner's loud demand that the outdoor smoking area be

moved further away from the space where she parked her car even though she was parking in a space other than her assigned one and even though a co-worker had offered to let petitioner use her space. During her tenure as a supervisor in the Bureau, petitioner was perceived to be an intimidating person by her subordinates due to the manner in which she interacted with them, not due to the performance expectations she set for them. At hearing, petitioner testified that she always treated co-workers in a professional manner.

9. James Twist was petitioner's supervisor during her tenure as a supervisor in Support Unit 3 (SU 3). In June of 1996, Mr. Twist was aware of petitioner's prior discrimination complaint. Upon her reinstatement, Mr. Twist provided petitioner with a Performance Planning and Development (PPD) planning document setting forth the major job objectives and expectations of her SU3 Program Assistant 2 Supervisor position. The planning and evaluation period for most positions in the Bureau was April 1 through March 31. As a result, this PPD indicated that it covered the period from June of 1996, the date of petitioner's reinstatement, through March 31, 1997

10. During 1997, Division and Bureau management held a series of meetings with SU 3 staff to discuss concerns which had been brought to management's attention by numerous SU 3 and Bureau staff members. One of the individuals who participated in these meetings was David Dunham, an Affirmative Action and Training Officer in the Division of Health. Mr. Dunham met at least twice with petitioner to discuss work performance issues, the manner in which petitioner supervised staff, and concerns certain of petitioner's subordinates had expressed about her. These concerns included taking work from subordinates' desks without providing notice to them and not passing work along to them in a timely fashion, both of which had a potential impact on the achievement of productivity requirements, and singling certain subordinates out for special treatment. Mr. Dunham concluded after these meetings with SU 3 staff that the unit suffered from arbitrary supervisory decisions, inconsistently stated and applied performance standards, ineffectively monitored work flow, substandard productivity, and an unusually high turnover rate.

11. One of the goals of these meetings with SU 3 staff was to develop an action plan for SU 3. One of the goals of this plan was to make petitioner a better supervisor. In an email to Mr. Twist dated March 14, 1997, Ms. Bakke asked Mr. Twist to incorporate relevant elements of this plan into petitioner's planning PPD for the upcoming evaluation period, and to complete petitioner's written results PPD for the current evaluation period by March 31, 1997 Mr. Twist's practice was to complete the results section of a subordinate's PPD on or around March 31 and to meet with the employee to discuss his evaluation of their performance around that date, but not to generate the written results PPD until some time in June. Mr Twist opposed Ms. Bakke's suggestion due to the press of business, i.e., he was scheduled to leave soon for a long-term assignment in Baltimore, and didn't feel that he had sufficient time to complete petitioner's written results PPD by March 31. In an email to Mr. Shelton dated March 22, 1997, Mr. Twist also explained that he questioned the new deadline because he did not want it to appear that petitioner was being treated differently than other support unit supervisors, because he was aware that petitioner had been in contact with her attorney in regard to this issue and that she may claim retaliation, and because this could be interpreted as a way of blaming petitioner for the SU 3 problems discussed in the earlier meetings without providing her an opportunity to respond.

12. In May of 1997, Mr Twist completed a draft of an action plan for SU 3. He indicated in the introductory paragraph that he had developed the plan with input from petitioner, Ms. Bakke, Mr Shelton, and Mr. Dunham. This plan addressed team building, conflict resolution, training, and performance expectations for all SU 3 staff. As a result of this action plan, SU 3 staff were required to attend training sessions relating to managing change, handling conflict, fair employment law, the impact of gossip on a work environment, and other related topics.

13. Mr. Twist met with petitioner several times between March 24 and April 24, 1997, to discuss her performance during the June 1996 through March 1997 evaluation period. During this evaluation period, petitioner had performed under the close supervision of Mr. Twist. After March 1997, petitioner performed her duties

more independently. On June 5, 1997, Mr Twist prepared a written results PPD which indicated that complainant's performance for the prior evaluation period was satisfactory in regard to each major job objective. Also on June 5, 1997, petitioner and Mr. Twist signed a planning PPD for the April 1, 1997, through March 31, 1998, evaluation period. The major job objectives and expected results in this planning PPD were identical to those in petitioner's PPD for the 1996-97 evaluation period. Ms. Bakke initialed this planning PPD on June 5, 1997

14. During his supervision of petitioner, Mr. Twist consistently discussed with petitioner the concerns brought to his attention or to the attention of other Bureau managers by petitioner's subordinates. Management received these complaints on an almost daily basis during this entire period of time. He concluded that they resulted in large part from petitioner's failings as a supervisor.

15. During Mr. Twist's long-term assignment in Baltimore, William Wuestenhagen was assigned to supervise petitioner. On November 11, 1997, Mr. Wuestenhagen, with Ms. Bakke present, presented petitioner with a revised planning PPD covering the period from November of 1997 through March 31, 1998. Mr. Dunham had recommended that this PPD be developed. Petitioner questioned this revised planning PPD since she had already received a planning PPD for this period, and she refused to sign it. It was explained to petitioner that Division management had directed that these revisions be made as a means of assisting her in improving her performance.

16. The major job objectives of this revised planning PPD were identical to those included in petitioner's previous planning PPD.

17. The following performance expectations were added for the major job objectives in the revised planning PPD:

> Major Objective A (Supervise the activities of Support Unit 3 staff and manage the workload assigned to the Support Unit.)
>
> > A3. Understand the Agency and the Unit workload requirements. Identify needed staffing level to meet the workload requirements and take appropriate action to hire necessary staff.

A4. By 12/1/97 review and make revisions in the leave scheduling and notification procedures for the unit.

A5. By 1/1/98 review and make any necessary revisions to the written work expectations for the unit. Work expectations will be identified in the following areas: specific work tasks, "turnaround" times for specific tasks, back-up plans, effective interpersonal communications and teamwork. If the changes are significant, modifications to unit staff Planning PPD's may be made.

Major Objective C (Plan and oversee efforts and assignments for Support Unit staff to assist Disability Specialists.)

C2. Respond to feedback from other office components regarding Support Unit actions in disability case handling, and take corrective actions as necessary.

Major Objective D (Adhere to DHFS policy on Affirmative Action/Equal Employment Opportunities.)

D2. Properly investigate and report any complaints of discrimination by unit staff.

Major Objective E (Develop and maintain effective working relationships.)

E2. Provide accurate, clear and concise information to management on all issues.

E3. Communicate effectively with unit staff through concise, and clear work orders and assignments.

E4. Actively promote team building within the unit. Hold regular unit meetings to discuss significant changes in unit work procedures or policies (e.g. Expectations A4 and A5 above), as well as other staff issues. Carefully consider staff comments and suggestions and, where appropriate, incorporate into unit procedures and policies.

E5. Develop and maintain an effective working relationship with employees. Take action to successfully mediate

> disagreements between and among employees, and if necessary resolve any issues between you and your employees. The goal is to resolve differences within the unit setting so that staff movement out of the unit is minimized for reasons other than promotion, contractual transfer, administrative employee relocation or resignation.

Major Objective F (Implementation of an annual Harassment Prevention Program to ensure a harassment-free environment.)

> F2. Properly investigate and report any complaints of harassment by unit staff.

Major Objective G (Implement an effective employee evaluation and development system.)

> G2. Facilitate staff development training, using Bureau training resources, and recommending other training activities for unit staff.

18. These additional performance expectations were comparable to those included in the planning PPD's of certain other Bureau supervisors, and were consistent with an effort by Mr Dunham and Bureau management to establish specific and quantifiable performance expectations. The revisions of certain other supervisory PPD's were also effected in the middle of an evaluation period.

19. On November 18, 1997, Mr. Wuestenhagen asked petitioner to sign and return the revised planning PPD. Petitioner did not do so.

20. In a memo dated November 19, 1997, to Mr Shelton, Ms. Bakke, and Mr Wuestenhagen, petitioner indicated that she believed the revised planning PPD was an attempt to discriminate against her and to retaliate against her for filing her prior complaint with the Commission, that she questioned the timing of the revised planning PPD since she had already signed a planning PPD for the period April 1997 through March 1998, that she was concerned that she was being treated differently in this regard than other Bureau supervisors, that she had received no indication that her performance had been unsatisfactory in any way, that she was already implementing

certain of the new expectations, and that she would not sign the revised PPD until the reason for it was explained to her.

21. Frances Lyons was hired as an LTE clerical employee in SU 3 in April of 1997. Petitioner and Ms. Lyons worked smoothly together until Ms. Lyons' resignation in December 1997. In a December 18, 1997, email, Ms. Lyons stated as follows, in relevant part:

> I was just writing to say thanks for the opportunity to work in your unit. It has been a great experience and a pleasure to have you for a supervisor.
>
> You are a pretty cool understanding, fair, thoughtful and considerate person with a great sense of humor
>
> When I first came into this unit some of my co workers had nothing but negative comments about you and the whole unit. I must admit coming in the unit I was kind of hesitant and did not want to prejudge you as an individual or go by the vicious rumors they were spreading. Obviously the rumors were false. (Girl I do not know how you are going to hang in there) but I wish you well.
>
> I hope that maybe Jim or Bill will do something about the trouble makers in the unit so you do not continue to have to put up with them or lose good people because of them.
>
> You always communicated and listened well. You let us make decisions in our work day when possible. Keep up the good work.

22. In January of 1998, Ms. Lyons contacted petitioner and asked to return to SU 3. Petitioner recommended that Ms. Lyons be permitted to return and this recommendation was approved.

23. After Ms. Lyons' return to SU 3, she formed the impression that, even though petitioner was assigned to supervise and train her, petitioner was spending too much time seeking Ms. Lyons out and spending time with her Ms. Lyons suspected that petitioner had a sexual interest in her and asked petitioner's supervisors in March of 1998 to direct petitioner to limit her interactions with Ms. Lyons to those necessary to carry out work responsibilities in SU 3. Mr. Twist met with petitioner at least three

times in response to Ms. Lyons' complaints that petitioner's interactions with her made her uncomfortable. Mr Twist directed petitioner to reduce her contacts with Ms. Lyons to those necessary for conducting SU 3 business and to go into Ms. Lyons' work space only when necessary. During this period of time, petitioner shared with Ms. Lyons accounts of her interactions with others in which she portrayed herself as intimidating and retaliatory.

24. On April 3, 1998, Ms. Lyons complained to one of petitioner's supervisors that petitioner had called her "pussycat." Petitioner was asked about it, admitted that she had done it, and explained that the incident had occurred when petitioner had been reminded in a conversation among co-workers about the Tom Jones song "What's New, Pussycat?" Ms. Lyons filed an internal formal sexual harassment complaint about the incident in April of 1998. In a memo to Ms. Lyons dated July 14, 1998, Gladis Benavides, Director of respondent's Affirmative Action/Civil Rights Compliance Office, indicated that she had concluded that petitioner's actions were inappropriate but did not constitute actionable sexual harassment.

25. In order for the disability examiners to complete disability determinations, it is necessary for the support unit Program Assistants to distribute the case-related mail to them in a timely fashion. On May 12, 1998, petitioner noticed a large stack of mail on Ms. Lyon's desk, some of which had not been distributed since March. Petitioner brought this to Mr. Twist's attention and he directed petitioner to handle it herself.

26. On May 13, 1998, petitioner notified Ms. Lyons by email that she should not perform any of her other duties until she completed her mail responsibilities, and offered to help her.

27. Also on May 13, 1998, Mr. Twist met with petitioner to discuss her annual performance evaluation. Mr. Twist advised petitioner that her performance for the current evaluation period had been unsatisfactory overall and explained the specific bases for his evaluation. On June 25, 1998, Mr. Twist completed a results PPD for petitioner, based on the planning PPD presented to petitioner in November of 1997, incorporating the substance of what he had discussed with her on May 14. This results

PPD was not presented to petitioner for her signature because she was on administrative leave at the time that it was completed. This results PPD indicated petitioner's performance was unsatisfactory or needed improvement in regard to the following performance expectations:

> A2. Direct or perform activities to timely handle the Support Unit's work.
>
> B1. Satisfactory performance of the following tasks is necessary: Arrange and/or attend staff training; with other Program Assistant Supervisors, Section Disability Supervisors, plan and implement new procedures; plan, arrange and/or conduct necessary training for new Support Unit staff.
>
> E1. Develop and maintain an effective working relationship with all Bureau staff, co-workers, general public, other government agencies (includes Federal, State, City, county, etc.) and any other disciplines you have contact with in your position.
>
> E2., E3., E4., and E5. [See Finding 17, above]

The narrative section of this results PPD noted as follows in relevant part in regard to the areas rated unsatisfactory or needing improvement:

> [A2.] .[T]here have been complaints from examiners that mail was not timely associated with files and mail that has not been handled timely or appropriately has been discovered on some Program Assistants' desks. You will need to reinforce the mail handling expectations with the unit staff and do appropriate periodic reviews to assure that all mail is handled timely and appropriately.
>
> [B1.] .. There was difficulty in the planning, scheduling and training by the Unit's lead worker. The lead worker, being new to the training role, had some difficulty following through on expectations for training. When I reviewed the situation because of the interpersonal and communications conflicts between the lead worker and you, I noted to you that I felt that your expectations for a lead worker with that level of experience may be too high and that you needed to continue to meet with her prior to each training session and review the plan for the training. While you felt that she should be doing most of this work independently, I feel this is still a responsibility of the Support Unit supervisor to assure that the training is planned and conducted effectively.
>
> The plan for training and subsequent case review process needs continuing revision and improvement. There have been reports of inconsistent messages being given during the training and during

subsequent case review activities. For example, I see it as inappropriate for a trainer to tell a trainee that a process or procedure may be handled differently in another section and not train in the procedures for section the trainee is working in. These messages result in confusion and uncertainty of expectations for those who are being trained. Subsequent to the training, there should be no messages during case review, that case handling should be different than the procedures covered during the formal training. Since SU 3 trainees have reported these inconsistencies, I will expect you to change your performance in these areas.

E. This area has been a very serious problem for you. You have had significant difficulties in your interpersonal communications with the program assistants that you supervise. On several occasions I had complaints about the style of your communications with unit members. I have counseled you about appropriate communications, especially after I received a complaint from one unit member about the amount of time you were spending with her and communications that were not business related. I also directed you to limit your time around this unit member to necessary business interactions. Subsequent to the discussion, I received another complaint that you had referred to this unit member as "Pussycat" in her presence. Even though you said you immediately apologized, this was grossly inappropriate behavior for a supervisor, especially after I had previously counseled you about your interactions and communications with this unit member. ...

Another area of communication which has been troublesome is your work instructions to unit members about case priorities. Unit members have been confused and agitated by your change of workload assignments, sometimes several times during the day.

Since we have had a large turnover of staff in the unit and there are many unit members still in training, we need to be sure that we are providing the best possible service to the examiner units. There have been ongoing examiner complaints about inconsistent service including mail association and mail pickup service.

The staff turnover in the unit has been very high. Only two staff members with more than a year's experience are still in the unit. While there have been varying accounts and reasons given for the moves, there has been reporting of some dissatisfaction with the supervision of the unit and your communications from many of the staff who have left the unit.

28. The morning of May 14, 1998, petitioner noticed that Ms. Lyons had not completed her mail duties. Petitioner located Ms. Lyons in the work unit and told her that she wanted to speak with her in the conference room.

29. Ms. Lyons prepared a written account of what occurred at this meeting on May 18, 1998. This account states as follows:

> .She said she wanted to talk with me, I told her OK and followed her into the small conference room. She said she wanted to talk to me about my mail and that I needed to go to ICU or if it is at a doctors desk go there and associate the mail. So I agreed and told her I wasn't too sure where I had to go, and she said she would show me.
>
> Then she said that she wanted to go off the record, I said no! She said I understand if you are afraid you might say something that doesn't sound right, because I'm afraid to say anything to you or look at you because you might think the wrong thing. Then she says I just want to know what's going on? So I wouldn't say anything, and I could tell she was getting upset then she start saying how we use to could talk about anything until someone start spreading rumors and making things out to you like there was more behind them and there isn't! And when I find out who is spreading the rumors they won't be talking for a while because they will have not one but two fat lips! Because I know people who knows how to make other people stop talking! And I will find out because I have ask Jim to do a full investigation! Then she said you know I told my son about it last night and he was ready to kill somebody.
>
> Then she said, anyway I think you are a good worker and that's why I worked so hard to get you that project and my goal was to make you a permanent position. And I was just sitting there nodding my head the whole time scare to death (literally) after she said that! Then she said how she wanted me to stay here in the unit. And ask if I planned on leaving? I said no. Then she said OK and was getting ready to leave and she said can I ask you one more thing? I said yes, she said are you going to tell Jim that we talked I said well I have a meeting with him today and he will probably ask me if I had any problems or if I had talked to you and I will tell him yes. She got this look on her face and said he will ask you about that? I said probably, she said OK and we left.

Ms. Lyons' account of this incident is supported by the record here.

30. Ms. Lyons reported this incident immediately after it occurred. Ms. Lyons was crying, trembling, and acting in an agitated and fearful manner after this incident occurred. All those who observed Ms. Lyons's demeanor at this time, other than Ellen Greenwold, testified that Ms. Lyons was acting in this manner.

31. Ms. Bakke interviewed Ms. Lyons about the incident and sent her home for the rest of the day. Ms. Bakke then asked petitioner to come to her office. She advised petitioner that a serious allegation had been made about certain of her conduct, that an investigation would be conducted, and that petitioner would be placed on paid administrative leave until this investigation was completed. Petitioner was permitted to gather her things from her office, and Mr. Twist escorted her from the building.

32. Ms. Bakke conducted an investigatory meeting on May 20, 1998, relating to the Lyons incident. Present at this meeting were petitioner, petitioner's attorney, Mr. Twist, and Ms. Bakke. At this meeting, petitioner indicated that what she had said to Ms. Lyons in their meeting of May 14, in reaction to Ms. Lyons' statement that she had been told petitioner would try to do this to her, was that she hoped people who told lies would have their lips puff up so badly that they wouldn't be able to tell lies any more; and that she had not talked to her son for two weeks.

33. Some time after May 14, 1998, Mr. Shelton became aware that one of petitioner's co-workers had reported that petitioner had made a statement in the work unit about "getting a gun." Mr. Shelton reported this allegation as well as that relating to Ms. Lyons to the Capitol Police. The Capitol Police investigated these allegations, did not find evidence of criminal conduct, and concluded that the incidents should be treated as employment matters.

34. In investigating the gun allegation, the Capitol Police interviewed Ellen Greenwold. Ms. Greenwold characterized herself at hearing as a friend of petitioner's. The Capitol Police report of this interview stated as follows, in relevant part:

> Greenwold looked very nervous. I asked if Warren had made a statement regarding a gun to her. Greenwold stated that she (Warren) had made the statement, "Give me a gun and I'll blow her away" in reference to another employee. Greenwold stated that the comment was

> made to her over the telephone approximately six weeks earlier. Greenwold looked physically shaken at this point. I asked if she felt that Warren meant this statement or she was "blowing off steam"? Greenwold stated that she thought that Warren was just mad and that she didn't really think that she was going to shoot someone. At this point Greenwold appeared very frightened. When I asked her if she was afraid Greenwold stated that Warren knew where she lived and she was afraid for her family and herself. I was unable to access or confirm at this point whether or not she was so frightened that she was minimizing the intent of the gun statement or not. Greenwold went on to say that she had once made Warren angry and Warren would not respond to talk to her for six weeks, so she never wanted to get Warren that angry again.

At hearing, Ms. Greenwold testified that petitioner had called her at home after having a bad day at work and said, "Oh, just give me a gun."; that she had told the Capitol Police investigator she had regarded petitioner's statement as a joke; that she had not said she was afraid because petitioner knew where she lived, but instead, co-worker Nedlose, who was present during her meeting with the police investigator, asked Ms. Greenwold whether she wasn't afraid of petitioner because she knew where Ms. Greenwold lived; and that petitioner made her feel uncomfortable, not fearful.

35. The Capitol Police report indicates that, in her interview, petitioner denied having made any statements involving a gun.

36. Mr. Shelton then consulted Division management who recommended to him that the investigation of these employment matters involving petitioner should be conducted by an experienced investigator outside the Bureau. James Yeadon, an attorney and a supervisor in respondent's Clients Rights Office, was assigned to conduct the investigation. The record here does not show that Mr. Yeadon was aware or had any reason to be aware of the prior complaint petitioner filed with the Commission. Mr. Yeadon did a lengthy and thorough investigation and issued his report on July 2, 1998. In this report, Mr Yeadon described the scope of the investigation as follows:

> During our interviews with employees, it became clear that the vast majority of them did not appreciate Ms. Warren's supervisory style and

many are personally afraid of her. There were allegations made of intimidation by her of the people she supervises. These allegations included her doing the following:

- giving employees inconsistent instructions;
- "yelling" in a "red faced" manner at some employees;
- "belittling" some employees in front of others;
- violating people's "personal space" during discussions;
- making employees cry on several occasions;
- showing favoritism towards people she liked; and
- retaliating in terms of added workload or work product sabotage for people who challenged her authority.

Since her supervisor, Jim Twist, is keenly aware of these personnel issues and is dealing with them through the PPD process, we left the handling of these issues up to him. Instead, we focused our investigation on the facts surrounding three particular matters. These are:

- An allegation that Ms. Warren had shown documents from someone else's personnel file to Ms. Lyons;
- An allegation that Ms. Warren said something about bringing a gun to work; and
- An incident that took place on May 14, 1998, between Ms. Warren and Frances Lyons, during which Ms. Lyons says she was threatened with violence.

Before getting into these matters, however, it should be noted that Ms. Warren has a legacy of rumors about her amongst co-workers that has followed her through her employment history at DDB. They include the following:

- There was a break-up of a past personal relationship with a former co-worker that included mutual restraining orders and allegations of violence such as phone harassment, stalking, vehicle damage and tire-slashing. [Many employees related versions of this to us. However, Sabine Lobitz of the Capitol Police said she read the Madison Police reports about the incidents in question and they indicated Ms. Warren was primarily the victim of violence rather than the perpetrator.]
- She allegedly has Mafia connections. Frances Lyons informed us that Ms. Warren told her she previously worked as a receptionist for a man with Mafia connections in an office off Badger Road. Ms. Lyons said Ms. Warren had lots of stories about it, such as having to

cover for him when his wife showed up and he had other women there.

- She allegedly "trashed" someone's house. Linda Martin stated that Ms. Warren told her about it. According to Ms. Martin, Ms. Warren called her into a conference room alone one day and told her this story. She said that a woman had tried to take her (Ms. Warren's) dogs out of her yard. Ms. Warren and her son got the license number of the vehicle the woman was driving and tracked her down to her house. They then broke into the woman's house and cut up her leather furniture. Ms. Martin said that Ms. Warren finished the story by saying, "That's what I do to people who mess with me." Ms. Martin did not know why Ms. Warren would tell her something like that except to intimidate her. Ms. Martin said she believed the story to be true at the time and even told her boyfriend and son about it, "in case something happened."

Whether or not these allegations are true, they are believed by most of the people who work with Ms. Warren. The fact cannot be ignored that these allegations affect how people feel about her.

If the witnesses who reported stories Ms. Warren herself told them (such as the Mafia connection and the house "trashing") are accurate, then Ms. Warren is herself, for whatever reason, fostering her own image as a violent person whom people should be afraid of.

37. In his report, Mr. Yeadon concluded, in regard to the personnel file issue, that there were insufficient facts from which to conclude that the document in question came from an actual personnel file and not from some other file, so no violation of respondent's work rules was found.

38. In his report, Mr. Yeadon concluded, in regard to the gun issue, that there was not enough evidence from which to conclude that petitioner's comment about the gun was in reference to using it on others and, therefore, this incident did not meet the definition of a "threat" within the meaning of respondent's zero-tolerance policy on threats or violence in the workplace.

39. In his report, Mr Yeadon concluded as follows in regard to the incident involving Ms. Lyons:

> .[T]here was testimony by several people who saw Ms. Lyons immediately after the meeting with Ms. Warren took place. They all

> used different terms to describe her demeanor, but they were unanimous in their opinion that she was very frightened. She was so scared of Ms. Warren that she hid behind a file cabinet and "jumped" back behind that file cabinet when an unexpected person (Ellen Greenwold) appeared. This is not the behavior or a person who is only afraid that her work performance is not up to par, as suggested by Ms. Warren.
>
> Whatever was said to Ms. Lyons by Ms. Warren during their private meeting on May 14, 1998, was enough to make her very frightened. She was described as "trembling." That is something that would be difficult to fake and none of the witnesses thought she was faking her behavior.
>
> This evidence lends credibility to the version of the facts put forth by Ms. Lyons. She appears to be a reasonable person and all the evidence indicates that Ms. Warren aroused "fear" and "apprehension of harm" in Ms. Lyons by her conduct and comments during their meeting. It is therefore hereby concluded that it is more likely than not that Ms. Warren did threaten Ms. Lyons during their meeting of May 14, 1998.
>
> It is therefore also concluded that Ms. Warren violated the Department's policy on "zero tolerance" for violence and threats in the workplace. ...
>
> It is recommended that Ms. Warren be given appropriate discipline for violating this policy.

As a part of his investigation, Ms. Yeadon asked Ms. Greenwold about Ms. Lyons' demeanor when she saw her immediately after the subject incident occurred, and Ms. Greenwold's description did not differ in any significant respect from that of the others he interviewed who described Ms. Lyons' demeanor as agitated and fearful.

40. In an addendum to his report, Mr. Yeadon made several observations about the work atmosphere in SU 3. These included the following, in relevant part:

> The apparent atmosphere among the staff on SU-3 is uneasy and fearful. The turning of the rumor-mill and the interest raised by the Capitol Police investigation and our own, has drawn a great deal of attention to Ms. Warren and her relationships with other employees. Most people who work on SU-3 reported to us an immense sense of relief over Ms. Warren's absence, stating that the feeling in the workplace has dramatically shifted from one of extreme unease to a much more calm and warm environment. Many employees also felt that the Bureau was

> unresponsive to Ms. Warren's dominating/intimidating supervisory style, leading to feelings of disempowerment and frustration on their behalves. ..
>
> The staff response to the alleged statements made by Ms. Warren regarding bringing a gun to work are a good example of the wide-spread perceptions of Ms. Warren and the group fear that exists for many of the employees. ...
>
> To return Ms. Warren to work as a Supervisor of SU-3 is a recipe for disaster. ... To return Ms. Warren with modest disciplinary action. will, in our opinion, bring emotional and social chaos to SU-3. ..
>
> A functional collapse of morale and a great anger at the administration are likely to occur. Employee turnover is likely to increase dramatically as people flee from a fearful and intimidating workplace that is strife with negative emotionality. Several people have already stated in writing their intention to quit if Ms. Warren comes back as a supervisor.
>
> Given the information gathered by our investigation, it may be appropriate for the state to take a firm stance prohibiting Ms. Warren from returning to the DDB, especially in a supervisory position.

41. In a letter to petitioner dated July 23, 1998, Mr. Shelton summarized the process that had been followed to date in investigating the allegations against her, and advised her that discussion was ongoing as to how best to implement her orderly and fair return to the office. In this letter, Mr. Shelton informed petitioner that the recent allegations about her conduct had added to the existing anxieties certain staff members had about her, suggested that one way to alleviate some of this anxiety may be to distribute to staff certain portions of Mr. Yeadon's report, sought petitioner's input about distributing this information to staff, and gave her a deadline of August 5, 1998, to provide this input. Finally in this letter, Mr. Shelton suggested that her return may best be facilitated by placing her in a non-supervisory position for a period up to six months, and described for petitioner the duties and responsibilities of this temporary position.

42. Also on July 23, 1998, petitioner was provided and given the opportunity to respond to a draft disciplinary letter imposing a reprimand for violating respondent's Zero-Tolerance: Violence and Threats in the Workplace policy, which would be treated

as a three-day suspension without pay for purposes of future discipline. Petitioner responded to this letter. Her response was provided to Mr. Yeadon who concluded that nothing in this response would alter the conclusions in his report.

43. On August 7, 1998, petitioner was issued the disciplinary letter described in Finding 42 by John Chapin, Administrator of the Division of Health.

44. Respondent's Zero-Tolerance: Violence and Threats in the Workplace policy, which was effected in 1996, states as follows, in relevant part:

> Policy
>
> DHSS is committed to providing a safe workplace for its employees and a safe place of business for its clients. This Department maintains a policy of zero tolerance and therefore will not tolerate any act or threat of violence made in the workplace or through Department property. Disciplinary procedures will be applied for employees violating this policy in accordance with the Department's work rules.
>
> a. No person may engage in violent conduct or make threats of violence, implied or direct, at a Department workplace or in connection with Department business.
>
> b. All threats will be taken seriously, not dismissed as harmless, joking, a mere personality issue, or just "blowing off steam." ...
>
> e. Each employee is responsible for notifying his/her immediate supervisor or the next supervisor in the chain of command of any potentially dangerous behavior or threats they have received, witnessed, or been told of, regardless of the degree of severity or the relationship between the parties. ...
>
> Definitions
>
> Workplace violence is any direct, conditional or implied threat, intentional act or other conduct which reasonably arouses fear, hostility, intimidation or the apprehension of harm in its target or witnesses. This includes any situation that causes a reasonable individual to fear for his or her personal safety, the safety of his or her family, friends, coworkers, clients, employer and/or their property.

> A threat is the implication or expression of intent to inflict physical or emotional harm and/or actions that a reasonable person would perceive as a threat to personal safety or property. . .
>
> Zero-tolerance is a standard that states no behavior, implied or actual, that violates the standard/requirement/policy will be tolerated.

Respondent's employees received training in regard to this policy around the time it was effected.

45. After August 7, 1998, respondent provided petitioner with various options for her return to work, and engaged in extensive discussions with petitioner about these options. Petitioner rejected all options offered as alternatives to her return to her previous supervisory position in SU 3.

46. Some time after the Lyons incident, but before petitioner returned from administrative leave, Muriel Harper, respondent's Employee Assistance Director, met with SU 3/Bureau staff at management's request at least three times in a group setting. During these meetings, a number of staff members indicated they were very fearful of petitioner. Ms. Harper had never experienced such a large number of employees expressing such a high level of fear of a co-worker. Ms. Harper recommended to management, as a result of the views expressed during these meetings, that Bureau management get a restraining order against petitioner, change building locks, and release information relating to the specifics of petitioner's discipline to SU 3 staff. Other violations of respondent's zero-tolerance policy regarding threats and violence have generally resulted in more serious discipline. In Ms. Harper's opinion, more serious discipline of petitioner was warranted.

47 While petitioner was on administrative leave, several employees of SU 3 indicated that they would resign or request transfer rather than work with petitioner because they feared for their safety. In 2000, respondent convened a meeting of SU 3 and other Bureau staff to announce petitioner's return. The level of concern and fear expressed in this meeting was intense and did not differ significantly from that expressed by SU 3 and Bureau staff in 1998.

48. Petitioner was returned to work from her paid administrative leave in June of 2000, after Mr. Shelton and Ms. Bakke retired and new administrators were hired to take their place, in a temporary non-supervisory position in the same pay range as her previous Program Assistant 2-Supervisor position.

49. Petitioner did not receive a general wage adjustment for the 1997-98 or 1998-99 fiscal years, but she did for the 1999-00 fiscal year. General wage adjustments for an employee on administrative leave rely upon the last results PPD in place prior to the commencement of the leave. If such a results PPD was unsatisfactory, management has discretion to deny a general wage adjustment.

50. Respondent has explained that petitioner was not returned to work sooner from administrative leave because it had required that amount of time to review new case law (including two Wisconsin Court of Appeals decisions issued in March and April of 1998) and the new report of the state task force on the Prevention and Management of Discrimination and Harassment claims issued October 28, 1998 (including recommendations regarding the release of information relating to the discipline of state employees), for purposes of determining their proper application to petitioner's return to work.

51. The record here does not indicate that Ms. Lyons was aware or had any reason to be aware during the relevant time period of the prior complaint petitioner filed with the Commission.

52. A Bureau employee named Paul Miller stated to a female co-worker that he was going to "tear her arm off and beat her with it." The female employee immediately reported this to Vicki Davis, a support unit supervisor Ms. Davis immediately discussed it with Mr. Miller, who apologized to the female employee. Ms. Davis counseled Mr. Miller not to engage in this type of conduct. Ms. Davis had handled the situation before Ms. Bakke or any other member of Bureau management became aware of it. No further investigation was conducted, Mr. Miller was not disciplined, and Mr. Miller was not placed on administrative leave.

53. Prior to the Lyons incident, another of petitioner's co-workers filed a sexual harassment complaint against her, alleging that petitioner was seeking her out too often and trying to spend too much time with her at work. Mr. Dunham investigated this complaint since it had been filed directly with his office and concluded that, although petitioner had been spending an inappropriate amount of time with the complaining employee, no actionable sexual harassment had occurred. Petitioner was counseled by Mr. Dunham to limit the amount of time she spent with this employee.

54. Margaret (Jill) Carlson was hired as a Program Assistant in SU 3 early in 1998. In her fourth or fifth week of employment, when petitioner returned work to her for correction, Ms. Carlson said on two occasions, "I could just kill you." Petitioner counseled Ms. Carlson not to say this on the first occasion, and reported the matter to Mr. Twist on the second occasion. Mr. Twist, consistent with his usual practice, investigated the matter but did not report the results of his investigation to petitioner Ms. Carlson was not disciplined for making the statements. Ms. Carlson resigned from SU 3 in May of 1998.

55. Vicki Davis, a supervisor of a support unit other than SU 3, assumed responsibility for supervising SU 3 during petitioner's administrative leave, and supervised both units for more than a year. During this period of time, daily complaints about the SU 3 supervisor ceased. Ms. Davis's performance expectations of the Program Assistants in SU 3 were not less rigorous than petitioner's, and, although many performance issues remained, Ms. Davis handled them successfully.

56. As of September 29, 2000, there was a 45% vacancy rate in Program Assistant positions in the Bureau. Half of these vacancies had occurred since July 1, 2000, and had resulted from petitioner's return to work.

57. Employees investigated by management based on allegations of threats or violence are placed on administrative leave.[1] Most employees placed on administrative leave by respondent based on allegations of threats or violence are ultimately terminated.

CONCLUSIONS OF LAW

1. Case No. 98-0146-PC is properly before the Commission pursuant to §230.44(1)(c), Stats.

2. Respondent has the burden in Case No. 98-0146-PC to show that there was just cause for the subject discipline and that such discipline was not excessive.

3. Respondent has sustained these burdens in Case No. 98-0146-PC.

4. Case No. 98-0164-PC-ER is properly before the Commission pursuant to §230.45(1)(b), Stats.

5. Petitioner has the burden in Case No. 98-0164-PC-ER to show that she was retaliated against for engaging in protected fair employment activities as alleged.

6. Petitioner has failed to sustain this burden in Case No. 98-0164-PC-ER.

OPINION

Case No. 98-0146-PC: Appeal of disciplinary action

The parties agreed to the following statement of issue in Case No. 98-0146-PC:

> Whether there was just cause for the discipline imposed on appellant by letter dated August 7, 1998, from respondent.

The two-step analysis for disciplinary cases was discussed by the Commission in *Barden v. UW-System,* 82-237-PC, 6/9/83, as follows:

> First the Commission must determine whether there was just cause for the imposition of discipline. Second, if it is concluded that there is just cause for the imposition of discipline, the Commission must determine whether under all the circumstances there was just cause for the discipline actually imposed. If it determines that the discipline was excessive, it may enter an order modifying the discipline. (citations omitted.)

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[1] This sentence was added to clarify the record.

The just cause standard was described in *Barden*, relying on the Wisconsin Supreme Court case of *Safransky v. Personnel Board,* 62 Wis.2d 464, 215 N.W.2d 379 (1974), as follows:

> one appropriate question is whether some deficiency has been demonstrated which can reasonably be said to impair his performance of the duties of his position or the efficiency of the group with which he works. (citations omitted.)

If just cause is shown, the focus of the inquiry shifts to the question of whether the discipline imposed was excessive. Some factors which enter into this determination include the weight or enormity of the employee's offense or dereliction, including the degree to which, under the *Safransky* test, it did or could reasonably be said to tend to impair the employer's operation; the employee's prior record (*Barden v. UW*, 82-237-PC, 6/9/83); the discipline imposed by the employer in other cases (*Larsen v. DOC*, 90-0374-PC, 5/14/92); and the number of the incidents cited as the basis for discipline for which the employer has successfully shown just cause (*Reimer v. DOC*, 92-0781-PC, 2/3/94). *Kleinsteiber v. DOC,* 97-0060-PC, 9/23/98.

The first question is whether the greater weight of credible evidence shows that petitioner committed the conduct alleged by respondent in imposing the discipline. *Mitchell v. DNR*, 83-0228-PC, 8/30/84. This inquiry is made more difficult here by the fact that only petitioner and Ms. Lyons were present when the alleged conduct occurred. However, the record shows that Ms. Lyons's version of the incident is more credible than petitioner's. First, Ms. Lyons' demeanor immediately after the incident was observed by all who came in contact with her, with the exception of Ms. Greenwold, to be agitated and fearful to an extent that would not be possible to fake. Ms. Greenwold's credibility in this proceeding is undermined not only by the fact that she alone testified that Ms. Lyons did not exhibit agitation or fear immediately after the incident, but also by the fact that her testimony in this regard apparently conflicted with the information she gave to Mr. Yeadon during his investigation and by the inconsistencies between her statement to the Capitol Police about the gun incident and her testimony about this incident at hearing. Second, Ms. Lyons' version of events was

concluded by an impartial investigator to be accurate. In addition, petitioner's description of what she said in her meeting with Ms. Lyons, i.e., that she hoped the lips of those telling lies would puff up, seems contrived and not believable. At hearing, Ms. Greenwold testified that petitioner used funny phrases such as "shuffle off to Buffalo" and "put a sock in it." Petitioner relies upon this testimony to support her contention that the "puffy lips" statement would be consistent with her typical office banter. However, the examples cited by Ms. Greenwold reflect phrases recognized as a part of common parlance. The "puffy lips" statement is not such a commonly recognized phrase but, in fact, the "fat lip" statement attributed to petitioner by Ms. Lyons would be. Finally, the record shows that petitioner, during her entire tenure as a supervisor in the Bureau, engaged in conduct perceived by her subordinates and co-workers to be intimidating and frightening.

Petitioner argues that Ms. Lyons' credibility is suspect because aspects of her testimony at hearing were inconsistent with the written statement she gave soon after the subject incident occurred. It should first be pointed out that Ms. Lyons had not reviewed her written statement or discussed the incident with anyone for the two-year period prior to her testimony. It would be expected that, after two years, the memory of certain details would be less clear. Moreover, Ms. Lyons testified that petitioner stated at their meeting that she knew people who knew how to get people to stop talking and that her son was angry and ready to hurt or kill somebody. Petitioner points to no inconsistency between this testimony and the earlier written statement. Ms. Lyons also testified at hearing, after reviewing her written statement, that it was true and accurate. The inconsistencies to which petitioner points are that Ms. Lyons testified that petitioner told her during the subject meeting that she had discovered that Ms. Lyons had asked for a formal investigation of her sexual harassment complaint against petitioner, and that petitioner had identified Harriet Schmidt as one of those spreading rumors about her, but that neither of these facts is reflected in Ms. Lyons' written statement. Ms. Lyons testified that she may have forgotten some of the details of the meeting with petitioner but she remembered the statements she perceived as threats

because they frightened her and stood out in her mind. The fact that this explanation is a reasonable one, paired with Ms. Lyons' accurate recollection of the statements she perceived as threats; her agreement under oath with the written statement she prepared within a few days of the subject incident; and the consistency between Ms. Lyons' written statement and her statements to the Capitol Police and to Mr. Yeadon, lend support to the conclusions that Ms. Lyons' written statement is reliable and her version of events is credible.

In contrast, there are several problems with petitioner's credibility. For example, petitioner testified that she always acted in a professional manner at work, yet the evidence shows that she had been observed yelling at others in the workplace, showing anger towards them, staring at them so long that it made them uncomfortable, and invading their personal space by approaching them too closely; and that she had shared with co-workers accounts of certain of her exploits outside of work in which she attempted to intimidate and even committed vandalism against those who displeased or disagreed with her. At hearing, petitioner also tried to characterize her demeanor as reserved yet approachable, but the evidence showed the overbearing, demanding, and uncompromising manner she sometimes demonstrated toward her subordinates and others even in regard to issues such as the location of the smoking area. Petitioner's friend and ally Ms. Greenwold testified about the gun-related statement petitioner made to her, yet petitioner denied in her testimony that she had ever made a statement about a gun.

It is concluded that petitioner engaged in the conduct which formed the basis for her discipline.

The next question is whether the greater weight of credible evidence shows that the subject conduct constitutes cause for the imposition of discipline, i.e., can reasonably be said to impair petitioner's performance of the duties of her position or the efficiency of the group with which she works. *Safransky, supra.* For a supervisor to engage in conduct sufficient to cause a subordinate employee to reasonably fear for her physical safety obviously meets this *Safransky* standard. *See, e.g., Chyba v. DOC*, 94-

0500-PC, 7/23/96. This conclusion is buttressed by the evidence of record which shows that this incident had a substantial impact on the group with which petitioner worked, i.e., this incident evoked intense feelings of fear and apprehension on the part of petitioner's subordinates in SU 3 and other staff in the Bureau, and significant resources were devoted by respondent in an attempt to address and allay these feelings; this incident contributed to significant turnover among the Program Assistants in SU 3 once they learned that petitioner would be returning to the unit; and petitioner's statements to Ms. Lyons, implying as they did the intent to inflict physical harm, violated an important policy of respondent's (See Finding 44, above).

Finally, the question becomes one of determining whether the level of discipline was excessive. There were no examples in the record of a fact situation on all fours with that under consideration here. The record does show that most violations of respondent's zero-tolerance for threats and violence policy resulted in termination, and that Ms. Harper, who had extensive experience applying this policy specifically and dealing with workplace violence issues generally, was of the opinion that petitioner's discipline was not sufficiently severe when considered in the context of other discipline imposed by respondent. Although petitioner points to the situation involving Mr. Miller's threat against a co-worker for which no discipline was imposed (See Finding 52, above), that situation is distinguishable from the present one for the reasons that the record does not show that Mr. Miller was a supervisor, and the female employee to whom Mr. Miller's statement was directed did not file a formal complaint with Bureau management.[2]

Petitioner also testified about two instances, which she reported to Mr. Twist, during which Jill Carlson, one of petitioner's probationary subordinates, stated to petitioner, when she returned work to her for correction, "I could just kill you." (See Finding 54, above) Mr. Twist investigated these incidents but he did not report the results of his investigation to petitioner, and Ms. Carlson was not disciplined for her statements. Petitioner argues that these incidents were comparable to the Lyons

incident and the fact that Ms. Carlson received no formal discipline demonstrates that petitioner's discipline was excessive. However, the situations are not comparable. First of all, Ms. Carlson was not a supervisor Second, Ms. Carlson had never been counseled about inappropriate contacts with co-workers as petitioner had on more than one occasion. Finally, petitioner's statements to Ms. Lyons would more likely be interpreted as a threat by a reasonable person, within the meaning of respondent's zero-tolerance policy, than the statements by Ms. Carlson.

It should finally be noted, in regard to considerations relating to the level of discipline, that petitioner's statements violated an important policy of respondent's, that petitioner had been counseled previously about inappropriate interactions with Ms. Lyons and others; and that petitioner was a supervisor, with a higher level of responsibility to see that respondent's policies were followed.

The record supports the conclusion that the discipline imposed on petitioner was not excessive.

Case No. 98-0164-PC-ER: Fair employment retaliation

The issue to which the parties stipulated in Case No. 98-0164-PC-ER is as follows:

> Whether complainant was retaliated against by respondent for engaging in fair employment activities with respect to the following:
>
> **a.** In November of 1997, respondent drafted revised performance expectations for complainant.
>
> **b.** On May 14, 1998, respondent placed complainant on a paid administrative leave.
>
> **c.** In a letter dated August 7, 1998, respondent issued complainant a letter of reprimand that was characterized as a three day suspension for progressive disciplinary purposes.

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[2] This sentence was modified to better reflect the Commission's rationale.

d. After August 7, 1998, respondent refused to return complainant to work.

e. Respondent failed to provide complainant a satisfactory 1997-98 performance evaluation and thereby denied her a 1998-99 wage increase.

Under the Wisconsin Fair Employment Act (FEA), the initial burden of proof is on the complainant to show a prima facie case of retaliation. 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 retaliation. *McDonnell Douglas v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 5 FEP Cases 965 (1973), *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 25 FEP Cases 113 (1981).

To establish a prima facie case in the retaliation context, 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.

The second element of this prima facie case requires petitioner to show that she was subject to a cognizable adverse employment action. *Klein v. DATCP*, 95-0014-PC-ER, 5/21/97. In the context of a retaliation claim, §111.322(3), Stats., makes it an act of employment discrimination "[t]o discharge or otherwise discriminate against any individual because he or she has opposed any discriminatory practice under this subchapter or because he or she has made a complaint, testified or assisted in any proceeding under this subchapter." Section 111.322(1), Stats., makes it an act of employment discrimination to "refuse to hire, employ, admit or license any individual, to bar or terminate from employment . or to discriminate against any individual in promotion, compensation or in terms, conditions or privileges of employment."

The applicable standard, if the subject action is not one of those specified in these statutory sections, is whether the action had any concrete, tangible effect on the

complainant's employment status. *Klein, supra,* at 6. In determining whether such an effect is present, it is helpful to review case law developed under Title VII, which includes language parallel to the statutory language under consideration here. 42 USC §2000e-2. In *Smart v. Ball State University*, 89 F.3d 437, 71 FEP Cases 495 (7th Cir. 1996), the court stated as follows:

> Adverse employment action has been defined quite broadly in this circuit. *McDonnell v. Cisneros,* . . . 84 F.3d 256, 70 FEP Cases 1459 (7th Cir. 1996). In some cases, for example, when an employee is fired, or suffers a reduction in benefits or pay, it is clear that an employee has been the victim of an adverse employment action. But an employment action does not have to be so easily quantified to be considered adverse for our purpose. "[A]dverse job action is not limited solely to loss or reduction of pay or monetary benefits. It can encompass other forms of adversity as well." *Collins v. State of Illinois,* 830 F.2d 692, 703, 44 FEP Cases 1549 (7th cir 1987). . .
>
> While adverse employment actions extend beyond readily quantifiable losses, not everything that makes an employee unhappy is an actionable adverse action. Otherwise, minor and even trivial employment actions that "an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit." *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270, 70 FEP Cases 1639 (7th Cir. 1996). [I]n *Flaherty v. Gas Research Institute*, 31 F.3d 451, 65 FEP Cases 941 (7th Cir. 1994), we found that a lateral transfer, where the employee's existing title would be changed and the employee would report to a former subordinate, may have caused a "bruised ego," but did not constitute an adverse employment action. Most recently, in *Williams*, we found that the strictly lateral transfer of a salesman from one division of a pharmaceutical company to another was not an adverse employment action.
>
> The dispositive question in our case is not whether Vivian's [Smart's] performance evaluations were undeservedly negative, but whether even undeserved poor evaluations can alone constitute the second element of her prima facie case. . . .
>
> There is little support for the argument that negative performance evaluations alone can constitute an adverse employment action. There are certainly cases where allegedly undeserved performance evaluations have been presented as evidence of discrimination on the basis of sex or age. But Vivian has not identified, nor have we discovered, a single

> case where adverse performance ratings alone were found to constitute adverse actions.
>
> Looking to the facts of the case before us, in the light most favorable to Vivian, we can only conclude that the evaluations alone do not constitute an actionable adverse employment action on the part of Ball State. Vivian was in training, and the evaluations were characteristic of a structured training program. They were facially neutral tools designed to identify strengths and weaknesses in order to further the learning process.

In *Crady v. Liberty Nat'l Bank & Trust Co.*, 993 F.2d 132, 136 (7th Cir 1993), the court ruled that an employee did not suffer an adverse employment action as the result of a lateral transfer from assistant vice president and manager of one branch of a bank to a loan officer position at a different branch with the same salary and benefits. The court, in requiring that an actionable employment consequence be "materially adverse," stated:

> A material adverse change in the terms and conditions of employment must be more disruptive than a mere inconvenience or an alteration of job responsibilities. A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.

See, Rabinowitz v. Pena, 89 F.3d 482 (7th Cir. 1996) (plaintiff failed to establish prima facie case of retaliation under Title VII – lower performance rating and work restrictions were, at most, mere inconveniences, not adverse employment actions); *Flaherty v. Gas Research Institute*, 31 F.3d 451 (7th Cir. 1994) (lateral transfer resulting in title change and employee reporting to former subordinate may have caused "bruised ego" but did not constitute adverse employment action); *Spring v. Sheboygan Area School District*, 865 F.2d 883 (7th Cir. 1989) ("humiliation" claimed by school principal to result from transfer to another school did not constitute adverse employment action because "public perceptions were not a term or condition" of plaintiff's employment).

Petitioner cites *Spearman v. Ford Motor Co.*, 84 FEP Cases 443 (7th Cir. 2000) and *Mead v. U.S. Fidelity & Guar. Co.*, 442 F.Supp. 114, 123 (D.Minn. 1977), in support of her argument that each of the actions under consideration here should be considered adverse employment actions. However, neither of these decisions appears to be pertinent to the fact situations under consideration here.

Allegation a. here relates to the creation of revised performance expectations. These expectations were not only consistent with the duties and responsibilities of petitioner's position but with expectations crafted and implemented in regard to other supervisory positions within the Bureau. If neither an alteration of job responsibilities (*See, Crady, supra*) nor an unfavorable performance evaluation (*See, Smart, supra*), constitute adverse employment actions, then certainly the simple creation of more precise performance expectations would not.

Even if it were concluded that this allegation states an adverse employment action, the record here does not support a conclusion that retaliation occurred. The new expectations were consistent not only with the duties and responsibilities assigned to petitioner's position but also with expectations included in the PPD's of other Bureau supervisors; the new expectations were a predictable and justifiable outgrowth of the action plan developed to address the myriad of problems in SU 3; and the recommendation to develop these expectations for petitioner came from Mr Dunham who was not an employee of the Bureau and who was not shown to have had any reason to retaliate against petitioner

Allegation b. relates to placing petitioner on paid administrative leave at the time of the Lyons incident. Placing an employee on paid administrative leave in order to investigate allegations of misconduct against her does not have any concrete, tangible effect on her employment status similar in nature to those offered as examples above, and does not, therefore, constitute an adverse employment action. Even if it did, the

record does not support a conclusion that retaliation occurred in this regard, i.e., the record shows that this was respondent's typical practice in situations of this nature.

Allegation c. relates to the discipline imposed on petitioner. In view of the impact this disciplinary action could have on future discipline against petitioner, it would have to be concluded that it constituted an adverse employment action. However, the record does not support a conclusion that retaliation occurred in this regard. As discussed above in relation to Case No. 98-0146-PC, the discipline imposed on petitioner was justified by her conduct in the Lyons incident.

Allegation d. relates to respondent's failure to return petitioner from administrative leave for a period of 25 months. In support of her argument that this constituted an adverse employment action, petitioner states that the length of this leave prevented her from earning a positive performance evaluation and, as a result, prevented her from earning a general wage adjustment. However, the record shows that petitioner was on administrative leave from May of 1998 to June of 2000, i.e., essentially the 1998-99 and 1999-00 fiscal years. Petitioner's pay for the 1998-99 fiscal year, for which she did not receive a general wage adjustment, would have been based on the results PPD completed by Mr. Twist on June 25, 1998. As a result, petitioner's administrative leave could have had no impact on her pay for the 1998-99 fiscal year. Petitioner's administrative leave could have had an impact on her pay for the 1999-00 fiscal year since it would have relied on the results PPD in place prior to July 1, 1999, but, according to petitioner's testimony, she received a general wage adjustment for the 1999-00 fiscal year, so sustained no adverse action in this regard. The record does not show what impact, if any, petitioner's administrative leave had on her pay for the 2000-01 fiscal year. It is concluded, as a result, that petitioner has failed to show that her 25-month paid administrative leave constituted an adverse employment action.

Even if the length of this administrative leave did constitute an adverse employment action, petitioner has failed to show that it was in retaliation for the filing

of her earlier complaint with the Commission. It should first be noted that it is not the Commission's role here to determine whether this action constituted a sound personnel practice. Instead, the Commission must determine whether this action was retaliatory. The record shows that, although respondent has offered several reasons, including researching new case law and negotiating with petitioner and her attorney, and these reasons may account for some of the delay, the primary reason that petitioner was not brought back to the Bureau for twenty-five months was Mr. Shelton's reluctance, as he anticipated his impending retirement, to have to deal with the certain fallout from other Bureau staff once they were notified that petitioner would be returning and once petitioner returned. Mr. Shelton's reluctance was reinforced by the feedback received from SU 3 and other Bureau staff while petitioner was on administrative leave. This feedback consistently highlighted the intense fear and intimidation that staff felt for petitioner as well as the fact that the intensity of these feelings did not dissipate over time. Although petitioner argues here that these feelings were created and fostered by Bureau management, the record does not support this. The record shows instead that SU 3 and other Bureau staff developed these feelings about petitioner independent of any influence by Bureau management. Moreover, the record does not establish any connection between these feelings that SU 3 and other Bureau staff had about petitioner and her protected fair employment activity. The record does not show that petitioner's subordinates and peers in the Bureau who expressed concern about her return had any reason to retaliate against her because she had filed an earlier complaint with the Commission or even that they were all aware or had reason to be aware of this earlier complaint. These feelings of fear and intimidation appear to have primarily resulted from the personal stories petitioner shared with others at work detailing the violent and bullying way she handled certain situations outside of work, the intimidating manner in which she treated certain of her subordinates at work, and the threats she expressed to Ms. Lyons.

Although petitioner contends that Bureau management retaliated against her by not doing enough to squelch the rumor mill in SU 3, the record shows that Bureau

management generally investigated specific rumors or incidents petitioner brought to their attention, convened meetings of SU 3 staff in an attempt to officially discourage the spreading of gossip and rumors, and provided training to SU 3 staff on the pernicious effect gossip and rumors can have on a work environment. More importantly, however, it should be emphasized here that petitioner shared stories about her personal life with SU 3 staff and created situations in the workplace which fueled many if not most of the rumors about her. This is not a situation over which Bureau management had control and they should not be held to account for it.

Finally, petitioner attributes the rumors spread about her by her subordinates to her demanding management style and the high performance expectations she set for them. First of all, even if this were true, these rumors would not, according to petitioner, be attributable to a motive to retaliate against her for engaging in protected fair employment activities. Moreover, the record does not support petitioner's contention in this regard, i.e., the supervisor who took over petitioner's responsibilities during her administrative leave also set high performance expectations for her SU 3 subordinates and did not experience the problems that petitioner had.

Allegation e. relates to petitioner's unfavorable 1997-98 performance evaluation. Although an unfavorable performance evaluation, standing alone, would not constitute an adverse employment action, one such as this which could have an impact on a general wage adjustment, would. However, petitioner has failed to show that this evaluation was developed in retaliation for her filing of a previous equal rights complaint with the Commission. The record here shows that petitioner had performance problems, including problems getting along with and communicating with co-workers, i.e., problems similar to those detailed in the subject performance evaluation, in earlier supervisory positions.[3] (See Finding 1, above) Petitioner points to the fact that she received a favorable evaluation immediately prior to this one as evidence of retaliation. However, the evaluation period for this prior results PPD reflected a time during which

petitioner was being closely supervised by Mr. Twist, while the unfavorable evaluation covered a period of time during which Mr. Twist was permitting petitioner to function more independently. Moreover, the fact that petitioner's favorable results PPD was more closely connected in time to her protected activity than her unfavorable results PPD lends further support to the conclusion that retaliation was not at work here.

Petitioner was not successful as a supervisor either before or after she engaged in the protected activity at issue here. Although the actions under consideration here were taken by Bureau management, they resulted directly from concerns brought to management's attention by petitioner's subordinates and other Bureau staff. The record does not provide any reason why these individuals would be motivated to retaliate against petitioner because she filed a complaint with the Commission in 1992.

ORDER

In Case No. 98-0146-PC, the action of respondent is affirmed and the appeal is dismissed. In Case No. 98-0164-PC-ER, the complaint is dismissed.

Dated: February 9, 2001

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

LRM:980146A+dec1

JUDY M. ROGERS, Commissioner

Parties:
Kathy Warren
3510 Ridgeway Avenue
Madison WI 53704

Joe Leann
Secretary, DHFS
P.O. Box 7850
Madison, WI 53707-7850

[3] This sentence was modified to better reflect the Commission's rationale.

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 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