NO. 95-1592

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

RODNEY A. ARNESON,

PLAINTIFF-RESPONDENT,

V.

MARCIA JEZWINSKI, PERSONNEL COORDINATOR, ADMINISTRATIVE DATA PROCESSING, UW-MADISON, DURWOOD MEYER, ASSISTANT DIRECTOR, ADMINISTRATIVE DATA PROCESSING, UW-MADISON AND DAN THOFTNE, COMPUTER OPERATIONS MANAGER, ADMINISTRATIVE DATA PROCESSING, UW-MADISON,

DEFENDANTS-APPELLANTS.

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PLEASE TAKE NOTICE that the attached pages three through ten are to be substituted for pages three through ten in the above-captioned opinion which was released on February 26, 1998.

Dated this twenty-third day of April, 1998.

harassment complaint by a female subordinate employee. After investigating the complaint, the defendants found that Arneson had violated several university rules. The defendants suspended him for thirty days without pay and transferred him back to the highest nonsupervisory position that was then available.

Arneson appealed to the Wisconsin Personnel Commission, claiming that several procedural errors had marred the disciplinary proceedings. The commission agreed, concluding that the university had failed to provide Arneson with an adequate hearing prior to disciplining him and "reject[ing]" the disciplinary action. For some reason, however—defendants surmise the commission lacked confidence in that ruling—the commission went on to consider the merits of the discipline and concluded that the defendants had "just cause" to discipline Arneson.[1] Finally, noting that the position to which Arneson had been "demoted" was in a lower pay range than the position he held prior to his promotion to the supervisory post, and that the law entitled him to restoration to a position "in his previous … classification, or one in the same pay range," the commission awarded him back pay (with interest) and attorney fees—and apparently restored him to the MIS 4 position to which he had been promoted—to make him whole.[2] Neither Arneson nor the defendants sought judicial review of the commission's decision.

[1] Because the commission found that Arneson had violated only one rule of the several violations charged by the university, it modified the thirty-day suspension to five days.

[2] The commission decision gives no clear indication in which job Arneson was said to possess due-process rights—his "promotional" position or his previous post. Arneson maintains that the decision effectively restored him to the MIS 4 position to which he had been promoted. While restoration to either post does not affect our analysis in this case, we will assume Arneson is correct in that he was restored to the MIS 4 postition, or its equivalent.

Arneson then brought this action against the defendants "in their individual capacity," seeking money damages and other relief and claiming that the defendants violated his due process rights by not providing him with a hearing prior to disciplining him. Defendants moved for summary judgment to dismiss the action on qualified-immunity grounds, arguing that the hearing "rights" Arneson claimed were not clearly established in the law. The circuit court denied the motion, concluding that the defendants were not entitled to qualified immunity because decisions of the Wisconsin Personnel Commission provided notice that a person in Arneson's position was entitled to a predisciplinary hearing. We agree with the defendants that they are entitled to qualified immunity and therefore reverse the circuit court's order.

Whether qualified immunity applies in a given case is a question of law, which we review independently. ***Penterman v. Wisconsin Elec. Power Co.***, 211 Wis.2d 458, 468, 565 N.W.2d 521, 528 (1997). The rule protects public officials and employees from "harassing litigation" by rendering them immune from suit in the performance of their discretionary functions insofar as their conduct does not violate the clearly established statutory or constitutional rights of another person. ***Barnhill***, 166 Wis.2d at 406, 479 N.W.2d at 921. Thus, whether qualified immunity protects a public employee turns on the objective legal reasonableness of the challenged action, assessed in light of the legal rules that were clearly established at the time the action occurred. If the law was not clearly established, then the public employee cannot be held to know or anticipate that the action was unlawful. ***Id.*** at 407, 479 N.W.2d at 921. As the supreme court stated:

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he [or she] is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful;

> but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Id. at 408, 479 N.W.2d at 922 (quoting ***Anderson v. Creighton***, 483 U.S. 635, 640 (1987)). Stated another way, the right the public employee is alleged to have violated must have been clearly established "in a … particularized, … relevant sense." ***Anderson***, 483 U.S. at 640.

Immunity is favored, "protect[ing] … all but the plainly incompetent or those who knowingly violate the law," so that "if [officials] of reasonable competence could disagree on th[e] issue, immunity should be recognized." ***Baxter v. DNR***, 165 Wis.2d 298, 302, 477 N.W.2d 648, 650 (Ct. App.1991) (quoting ***Malley v. Briggs***, 475 U.S. 335, 341 (1986)).

And while qualified immunity is an affirmative defense, the plaintiff has the burden of "demonstrat[ing] by closely analogous case law that the defendant has violated [the plaintiff's] clearly established constitutional right." ***Penterman,*** 211 Wis.2d at 469, 565 N.W.2d at 528. The law must be "sufficiently analogous to provide the public official with guidance as to the lawfulness of his or her conduct." ***Barnhill***, 166 Wis.2d at 408, 495 N.W.2d at 922. Stated another way, "The plaintiff's claimed right must be sufficiently particularized to put the defendants on notice of analogous case law indicating that their conduct is unlawful." ***Penterman,*** 211 Wis.2d at 470, 565 N.W.2d at 529 (quoted source and internal quotation marks omitted). A plaintiff who simply alleges a violation of a right that may be clearly established in the constitution will not pierce a public employee's qualified immunity. "Instead, the test is whether the law was clear in relation to the specific facts confronting the defendant[s] at the time of [their] action[s]." ***Id.*** at 471, 565 N.W.2d at 529.

In this case, we must determine whether, in April 1990, according to clearly established law, a reasonable University of Wisconsin administrative supervisor reasonably could have believed that Arneson, who was serving a probationary term in a supervisory position to which he recently had been promoted, could, for disciplinary reasons, be reassigned to a lower position roughly equivalent to the one he had occupied prior to his promotion, without first providing him with a hearing. This inquiry raises the more narrow issue of whether, at the time of Arneson's disciplinary transfer, either Wisconsin law or federal law clearly granted him an established "property interest" either in the position he then occupied or in his former position, which would warrant the conclusion that the defendants did not enjoy qualified immunity from his lawsuit. As indicated above, we conclude that it did not.

Prior to 1990, courts had recognized that government employment may include property rights that afford the employee some type of hearing, or "opportunity to respond," prior to termination of the employment. ***Cleveland Bd. of Educ. v. Loudermill,*** 470 U.S. 532, 538, 547 (1985). The Supreme Court also observed in ***Loudermill*** that such property interests are created not by the Constitution but rather by "independent source[s] such as state law." ***Id***. at 538 (quoted source and internal quotation marks omitted). Thus, where states have conferred such a right in employment, they "may not constitutionally authorize the deprivation of such an interest … without appropriate procedural safeguards." ***Id***. at 541 (quoted source and internal quotation marks omitted). States, of course, also have the right to "elect not to confer a property interest in public employment," thus precluding a due process challenge. ***Id.*** (quoted source and internal quotation marks omitted).

In Wisconsin, a state civil servant has no property interest in his or her employment unless statutes or provisions of the administrative code provide specific job protections. In the absence of such protections, the employee may be fired at will. *See, e.g.*, ***Castelaz v. City of Milwaukee***, 94 Wis.2d 513, 520-23, 289 N.W.2d 259, 262-63 (1980), *overruled on other grounds*, ***Casteel v. Vaade***, 167 Wis.2d 1, 21 n.18, 481 N.W.2d 476, 484 (1992) (civil service employee has only such procedural rights created by state or municipal law); ***Board of Regents v. Wisconsin Personnel Comm'n***, 103 Wis.2d 545, 553, 309 N.W.2d 366, 370 (Ct. App. 1981) (state employees without prior permanent status are "subject to dismissal … at any time"). The Wisconsin Legislature has, however, given a property interest to those employees who have gained "permanent status in class" in a particular position—that is, they have successfully completed the probationary period required for all state civil-service positions. *See* WIS. ADM. CODE § ER-MRS 1.02(23). Section 230.34(1)(a), STATS., states that such permanent-status employees may not be fired, suspended without pay or demoted except for "just cause."

As indicated, although Arneson had gained permanent status in class in his nonsupervisory position, he was still serving a probationary period in the supervisory position to which he had recently been promoted when the disciplinary proceedings were begun, and thus, under § 230.28(1)(a), STATS., he could be "[d]ismiss[ed] … at any time" during that period.[3]

Arneson's position is unclear. Regardless of whether he is arguing that the source of his clearly established property right is in his MIS 4 position or

[3] Section 230.28(1)(a) and (am), STATS., provides that "promotional appointments" to supervisory positions "shall be for a probationary period" of one year.

is in his former MIS 3 position (to the extent that he could not be demoted to a lower position), we disagree with him.

We see little question that § 230.28(1)(a), STATS., bars any claim that Arneson had a property right in the MIS 4 position. Arneson claims, however, that because he had permanent status in class in his former position, he had a property right that somehow carried over to the new supervisory post. As a result, he maintains that, despite his probationary status in the "new" position, the defendants could not suspend him without pay or demote him to a position below his previous position "without just cause." And he contends that such a property right is so clearly established in the law that the defendants' qualified immunity defense must fail. He rests the argument largely on § 230.28(1)(d), which states that a "promotion or other change in job status within an agency shall not affect the permanent status in class and rights previously acquired by an employee within such agency."

We are unsure precisely what rights Arneson claims § 230.28(1)(d), STATS., grants him. Again, to the extent he argues that the statute gives him a property interest in the MIS 4 position, its terms conflict with the plain language of § 230.28(1)(a) and (am), STATS., which provides that "[a]ll original *and all promotional appointments* to permanent … positions" are subject to a one-year probationary period during which, as indicated above, the employee can be suspended, fired or demoted at the will of the employing agency. (Emphasis added.) If Arneson is arguing that the defendants could not demote him to a position paying less than his MIS 3 position, we note that the commission reduced his suspension from thirty to five days and restored him to the MIS 4 position. This result was, as indicated, more than equivalent to his "former position or a similar position within the department." *See* ***DHSS v. State Personnel Bd.***, 84

Wis.2d 675, 681, 267 N.W.2d 644, 647 (1978) (employee promoted "within a department" and then demoted may retain permanent-status rights in the former position entitling him or her to reinstatement to the "former position or a similar position within that department").

Arneson also refers us to prior personnel commission cases which he claims support his argument that he has a "clearly established" property interest in his position. We question whether isolated state administrative decisions constitute adequate indicia of clearly established Wisconsin law, but regardless, the ones he cites are largely inapposite. One, ***Letzing v. Department of Development,*** No. 88-0036-PC (Jan. 25, 1989), involved a civil service employee who was disciplined with a ten-day suspension without an adequate presuspension hearing. While the commission recognized that the suspension deprived the employee of a property right, the employee was not on probation but had permanent status and thus a right not to be suspended without just cause under § 230.34(1)(a), STATS. Arneson, who was suspended during probation, lacks any such statutory entitlement. Arneson also quotes from ***Jensen v. University of Wis.,*** No. 88-0077-PC (Dec. 14, 1988), where the commission stated that "an employe[e] who is removed from his/her position during a promotional probationary period and who is *not* restored to [his or her] 'former position or a similar position … shall be subject to s. 230.44(1)(c), Stats.'" ***Id***. at 4. Arneson describes § 230.44(1)(c) generally as "a provision for pre-disciplinary due process." That is an overstatement. This statute deals with procedures for appealing personnel actions to the commission, and § 230.44(1)(c) simply states that "[i]f an employe[e] has permanent status in class …. the employe[e] may appeal a demotion, layoff, suspension, discharge or reduction in base pay to the commission, if the appeal alleges that the decision was not based on just cause."

We do not see how a provision giving employees with permanent status in class—and which has nothing to say about demotions—aids his argument that he has a clear legal right to a hearing prior to any suspension or demotion.[4] And we note again that, as a result of the commission's action, Arneson was essentially "made whole" when he was restored to his MIS 4 position.

Finally, citing ***Loudermill***, 470 U.S. 532, Arneson argues that the law is clearly established in the federal courts that he has a property interest in his position that is subject to due-process protections in case of suspension or demotion. But the Ohio employee in ***Loudermill*** had a statutory right to be dismissed only for "misfeasance, malfeasance, or nonfeasance in office," ***id***. at 538-39—just as a Wisconsin state employee *with permanent status in a position* has a statutory right not to be fired, suspended or demoted without just cause. Arneson is correct that a Wisconsin employee with permanent status in class has a property right in the position—as did the employee in ***Loudermill***—which may be abridged only pursuant to "constitutionally adequate" procedures. ***Hanson v. Madison Serv. Corp.,*** 150 Wis.2d 828, 835, 443 N.W.2d 315, 317 (Ct. App. 1989). As we have stressed throughout this opinion, Arneson was on probation in his MIS 4 position at the time he was disciplined, and was, in essence, restored to that position by the commission's ruling. Beyond that, the Supreme Court recently recognized that it has not yet "had [the] occasion to decide" whether even tenured

[4] Arneson also refers us to WIS. ADM. CODE § ER-MRS 14.03, which states that an employee who has been promoted may be removed from the new position "without the right of appeal" and shall then be restored to his or her "former position or a similar position and former rate of pay" and that "[a]ny other removal, suspension without pay, or discharge during the probationary period shall be subject to s. 230.44(1)(c), Stats." Here, too, the reference is to § 230.44(1)(c), which, as we have just indicated, provides only for appeal procedures in disciplinary matters involving employees with permanent status in class. We do not see how either § ER-MRS 14.03 or § 230.44(1)(c) aids Arneson's cause.