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DISTRICT IV

October 22, 2013

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You are hereby notified that the Court has entered the following opinion and order:

2012AP1264 Deborah Hewko v. Department of Workforce Development, Equal Rights Division (L.C. # 2011CV4301)

Before Blanchard, P.J., Lundsten and Kloppenburg, JJ.

Deborah Hewko appeals an order affirming a decision by the Department of Workforce Development. Based on our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1) (2011-12).[1] We affirm.

While the appeal was pending, Hewko moved to amend her brief with certain minor corrections. We grant the motion.

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Hewko filed a complaint with the Department of Workforce Development alleging that the University of Wisconsin retaliated against her for making a protected disclosure of information under the state "whistleblower" statute. The department's administrative law judge (ALJ) ruled against Hewko, as did the circuit court on judicial review. Hewko appeals.

The university may not administer "retaliatory action" against an employee. *See* WIS. STAT. § 230.83(1). As relevant to this case, "retaliatory action" means disciplinary action taken because the employee lawfully disclosed information. *See* WIS. STAT. § 230.80(8)(a). "Information" means information gained by the employee which the employee reasonably believes demonstrates violation of a law, rule, or regulation, "mismanagement," or a substantial waste of public funds. § 230.80(5). "Mismanagement" means a pattern of incompetent management actions that are wrongful, negligent, or arbitrary and capricious, and which adversely affect the efficient accomplishment of an agency function. § 230.80(7).

The dispositive issue on appeal is whether Hewko disclosed "information." To obtain protection of the statute, Hewko must have disclosed information in writing to her supervisor. *See* WIS. STAT. § 230.81(1)(a). The only writing that might qualify as information is her note dated February 13, 2008. That note contained photocopied material telling employees how to report misappropriation of university assets and describing the whistleblower law. To that material Hewko added this sentence: "I will be seeking further review of the timesheet matter that was discussed at the 12/10/2007 meeting with the proper authorities." The ALJ found that Hewko placed this note in the mailbox of her supervisor David Riley. The ALJ also found that the "timesheet matter" discussed at their December meeting was Hewko's reporting to Riley that another employee's timesheet overstated the other employee's hours.

The ALJ concluded that this note did not qualify as a disclosure of information that could reasonably be believed to demonstrate mismanagement or the other wrongful conduct provided in the definition of "information." To properly analyze this issue on appeal, it is necessary to carefully review the ALJ's complete discussion of the "information" issue.

The ALJ began by stating that Hewko's note did not itself contain any substantive information, because it was only a statement that she would be taking further action on the "timesheet matter" previously discussed, and the note did not describe that matter in any way that would inform a reader about the nature of the alleged problem. Hewko does not appear to dispute that the note, read by itself, lacks any substantive content, and we do not see how the point could reasonably be disputed.

Then, over the next two paragraphs, the ALJ appeared to accept Hewko's argument that the February note must be read in context with the December 2007 oral discussion referred to in the note. In other words, that the oral discussion is incorporated into the note by reference. The ALJ cited law in support of that view, but did not offer any conflicting law or otherwise reject that point on a legal ground.

Instead, the ALJ concluded that even if Hewko's prior oral statements to Riley are considered, that still does not qualify as "information," because her oral comments did not assert to Riley that he had *approved* the other employee's false timesheet, or that he had a practice of doing so, and therefore those statements did not allege any action on Riley's part that could qualify as mismanagement or other wrongful action under the definition of "information." Again, Hewko does not appear to contest this point. She does not appear to claim that, before the December 2007 conversation, she had a reasonable basis to think Riley was approving false

timesheets, or that she told Riley at that meeting that she believed he was approving false timesheets.

From there, the ALJ acknowledged Hewko's claim that, during the December 2007 conversation, Riley admitted to her that he did not care about false timesheets, and was lenient about accepting them. Again, the ALJ did not appear to reject the legal concept that, if Riley made those statements, they would be information qualifying as mismanagement or other wrongful action.[2]

Instead, the ALJ found that "it is not clear whether he said these things, or if he did, what they meant." The ALJ suggested ways Hewko might have misunderstood statements by Riley that had other meanings in the context of their discussion. The ALJ concluded by saying that based on his findings about what was said and what was probably meant at that meeting, there is not a sufficient basis to conclude that Hewko made a protected disclosure.

Thus, read in total, the ALJ's decision seems to say that *if* Riley had said in the December conversation that he did not care about false timesheets and was lenient about accepting them, then Hewko's note *would* contain information that qualifies for protection, because Riley would have been admitting a pattern of mismanagement or other wrongful action, and his admission was incorporated into Hewko's February 2008 note by her reference to the timesheet matter

[2] The only legal doubt the ALJ expressed on that point was to question whether Hewko's repeating back to Riley of his own statements would qualify as a disclosure. While that is certainly a reasonable common-sense question, it appears that disclosing the information to the employee's supervisor is one way for the employee to obtain whistleblower protection. WIS. STAT. § 230.81(1)(a). There does not appear to be an exception when the employee is reporting to the supervisor the employee's perception of the supervisor's own wrongful actions. There is no requirement that the employee have "gained" the information from a source other than the supervisor. *See* WIS. STAT. § 230.80(5) ("Information" means information "gained" by the employee).

discussed with Riley in December 2007. This analysis is consistent with what the ALJ concluded in his earlier decision denying the employer's motion to dismiss the matter, where he stated the point quite clearly. Ultimately, the main reason the ALJ rejected Hewko's argument on the information issue is his finding that Riley did not admit to wrongful action in the December 2007 meeting. Accordingly, that finding should be the main point of contention on appeal.

Hewko's brief on appeal does not have a clear focus on that finding. However, it is apparent from her discussion that she regards Riley's testimony as false. Unfortunately, the Department's response brief does not appear to recognize the complete basis on which the ALJ rejected Hewko's argument about "information." The Department argues that her February 2008 note lacked substantive content and did not claim that Riley approved the false timesheets, but those are points Hewko does not appear to dispute. Beyond that, the Department does not appear to recognize the significance of the remainder of the ALJ's discussion, and does not address whether the alleged admissions by Riley during the meeting with Hewko would qualify as information. The Department does not recognize that the ALJ's decision against Hewko is based mainly on his finding that Riley did not make those admissions.[3]

Nonetheless, we reject Hewko's argument. Findings of fact must be affirmed if they are supported by substantial evidence. WIS. STAT. § 227.57(6). The court "shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact."

[3] The Department also argues that Hewko's note did not allege the required "pattern" of mismanagement because she left only one note. Obviously, as the ALJ seemed to recognize, a single note can allege more than one act of mismanagement, and thus can allege a pattern.

Id. In Riley's testimony before the agency, he denied saying to Hewko that he did not care about mistakes on timesheets, or that he was lenient about such mistakes. That is substantial evidence, and credibility is for the agency to determine on a disputed fact. Therefore, we affirm the Department's decision because Hewko's February 2008 note did not disclose wrongdoing by Riley, and thus did not qualify as "information" for purposes of protection under the relevant statutes.

IT IS ORDERED that the appellant's motion to amend the appellant's brief is granted.

IT IS FURTHER ORDERED that the order appealed from is summarily affirmed under WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals