

STATE OF WISCONSIN                    IN CIRCUIT COURT                    DOUGLAS COUNTY  
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DANIEL D. BETHARDS,  
   Plaintiff,

vs

HEARING MEMORANDUM

STATE OF WISCONSIN,  
DEPT. OF WORKFORCE  
DEVELOPMENT, EQUAL RIGHTS  
DIVISION and STATE OF  
WISCONSIN DEPT. OF JUSTICE,  
   Defendants.

Case No.: 15 CV 15

**FILED**  
**DEC 16 2015**  
MICHELE WICK  
CLERK OF CIRCUIT COURT

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Petitioner Daniel Bethards (“Petitioner”) was an employee of Respondent State of Wisconsin Department of Justice (“DOJ”). He served as a Special Agent and was a sworn law enforcement officer.

On December 19, 2012, Bethards sent an e-mail to David Matthews (Administrator of the Division of Criminal Justice at the DOJ) and to Mary Casey (Director of Human Resources, which is part of the Division of Management Services, at the DOJ). The e-mail alleged that Petitioner’s direct supervisor was violating state and federal gun laws.

Over the next several months, Petitioner filed three complaints against DOJ, each alleging violations of the Wisconsin Whistleblower Protection Law (Wis. Stats. §230.80 et seq.) (“WWPL”). Specifically, Petitioner alleged retaliation as a result of his December 19, 2012 e-mail to Matthews and Casey.

On March 26, 2014, Administrative Law Judge Allen T. Lawent (of Respondent State of Wisconsin Department of Workforce Development, Equal Rights Division) (“DWD”) consolidated Petitioner’s three whistleblower cases for the limited purpose of deciding a Motion to Dismiss filed by the DOJ.

Section 230.81(1) of the Wisconsin Statutes provides that an employee “with knowledge of information the disclosure of which is not expressly prohibited by state or federal law, rule or regulation may disclose that information to any other person.” The subsection continues: “However, to obtain protection order s. 230.83 [Retaliatory action prohibited], before disclosing that information to any person other than his or her attorney, collective bargaining representative or legislator, the employee shall...[d]isclose the information in writing to the employee’s supervisor.” Wis. Stats. §230.81(1)(a).

In his Decision dated December 26, 2014, ALJ Lawent found that Petitioner “reported to a Special Agent in charge who in turn reported to a Director of Operations who in turn reported to a Deputy Administrator who in turn reported to Matthews.” ALJ Lawent further found as follows:

“While it is argued essentially that the [Petitioner] perceived Casey to be one

of his supervisors, the information presented by the parties in relation to the motion to dismiss does not support that to be the case.”

DOJ’s Motion to Dismiss contends that Casey was not in Petitioner’s chain of command and, therefore, Petitioner is not covered under the WWPL because he reported information to Casey at the same time as he reported the information to Matthews (who was clearly in Petitioner’s supervisory chain of command). Hence, according to the DOJ, Petitioner violated the requirement under Wis. Stats. §230.81(1) that the information be disclosed to a supervisor before being disclosed to someone else (other than an attorney, collective bargaining representative or legislator).

ALJ Lawent summarized the issue as follows: “The crux of this case really revolves around ... whether Casey was part of the [Petitioner’s] supervisory chain of command or not. If she was, then the [Petitioner] did not violate the requirements of sec. 230.81(1) Wis. Stats.; if she was not, then the [Petitioner] did violate the requirements of sec. 230.81(1), Wis. Stats.”

In granting DOJ’s Motion to Dismiss, ALJ Lawent stated: “Because it appears that [Petitioner] simultaneously e-mailed Casey – who was not in his supervisory chain of command – at the same time as the [Petitioner] e-mailed Matthews (who was in the [Petitioner’s] supervisory chain of

command), the [Petitioner] did not comply with the requirements of sec. 230.81(1), Wis. Stats. and, therefore, any alleged retaliation stemming from the December 19 of 2012 disclosure is not prohibited by the WWPL.”

In conclusion, ALJ Lawent commented: “Because Human Resources Directors and/or Human Resources units arguably are in various organizations and/or in various circumstances options where employees may sometimes go with employment concerns in addition to or instead of their supervisors, it could be contended that whistleblowers would be better served if they also had the option of disclosing protected information to their Human Resources Director or Human Resources unit. However, that is not the way the WWPL is currently written.”

Subsequently, Petitioner filed a Petition for Judicial Review of the ALJ’s Decision. Oral argument was held before this Court on September 18, 2015.

This Court must first address the proper standard of review. Statutory interpretation is a question of law that is reviewed de novo, and as such, the reviewing court is not bound by an agency’s interpretation. See Hutson v. State Personnel Comm’n, 263 Wis. 2d 612, 628, 665 N.W.2d 212 (2003). Because the ALJ cites to no precedent and cites no internal rule in reaching his conclusion, this Court finds the issue to be one of first impression for the

agency. See Id. at 631. Even if the case is not one of first impression, this Court believes that the DWD lacks any special expertise or experience in determining the question presented for review. The DWD is not necessarily in a better position than this Court to interpret the applicable statute.

The policy behind the WWPL is to protect employees from retaliation and encourage disclosure of certain information. See Wis. Stats. §230.01(2). The statute is to be “construed liberally in aid of the purposes declared in §230.01.” See Wis. Stats. §230.02.

Although the ALJ granted DOJ’s Motion to Dismiss on the finding that Casey “was not in the [Petitioner’s] supervisory chain of command,” the plain language of the Statute does not require the disclosure of the protected information to be made to someone in the employee’s “supervisory chain of command” before it is disclosed to any other person. Rather, the statute merely provides that the employee make a written disclosure to a “supervisor” before disclosing that information to any person (other than an attorney, collective bargaining representative or legislator).

The Wisconsin Supreme Court, in a whistleblower law case, has reaffirmed that “meaning should be given to every word, clause and sentence in the statute.” Hutson, 263 Wis. 2d at 64 (emphasis added). Wis. Stats. §230.80 (Definitions) does not specifically define a “supervisor” under

Chapter 230 of the Wisconsin Statutes. Nor does Chapter DWD 224 of the Wisconsin Administrative Code (whistleblower Protection). See DWD 224.02. Hence, the intent as to the scope of the term “supervisor” cannot be determined from the plain language of the statute.

However, the term “supervisor” has been defined by the Wisconsin legislature in the context of the State Employment Labor Relations Act. Wis. Stats. §111.81(19) defines supervisor to mean “any individual whose principal work is different from that of the individual’s subordinates and who has authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline employees, or to adjust their grievances, or to authoritatively recommend such action, if the individual’s exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.” See also Black’s Law Dictionary (1979) which adopts a similar definition from the National Labor Relations Act, sec. 2(11). This definition certainly provides guidance to this Court in interpreting the definition of the term “supervisor” in the context of the WWDL.

This Court agrees with Petitioner that it “is axiomatic that HR departments in all manner of work environments are responsible for hiring, firing, discipline, benefits management, payroll, promulgating workplace

rules, training employees, and other like tasks.” (See Petitioner’s Brief in Support of Petition for Judicial Review at p.7.) In fact, ALJ Lawent himself commented and recognized that employees go to Human Resource Directors with “employment concerns.”

Moreover, according to the Affidavit of Bonnie L. Cyganek (filed by DOJ in support of its Motion to Dismiss), Casey was employed as the Human Resources Director from June 11, 2012 to April 18, 2014.

According to Crganek, Division of Management Services (which includes the Bureau of Human Resource Services) “provides operational support to the DOJ. It prepares the agency’s budget, manages personnel and training issues, performs accounting and fiscal control, oversees agency facilities and provides information technology services.” (emphasis added)

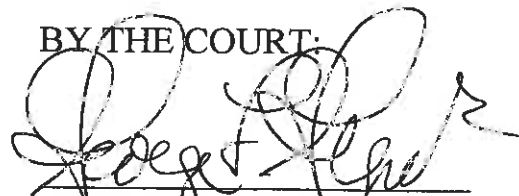
Therefore, based upon a reasonable and liberal interpretation of the statute, it is the conclusion of this Court that Casey did indeed qualify as one of Petitioner’s supervisors (as did Matthews). Hence, any simultaneous e-mail sent by Petitioner to both of these supervisors did not violate the requirements of Wis. Stats. §230.81(1).

It should be noted that the ruling of this Court is not necessarily at odds with the ruling of the Personnel Commission in Morkin v. UW-Madison, Case No. 85-0137-PC-ER. This Court agrees with the Personnel

Commission in that case that disclosure to individuals within an employee's supervisory chain of command was sufficient to fulfill the "supervisor" requirement of Wis. Stats. §230.81(1)(a). Rather, it is the conclusion of this Court that an individual need not necessarily be within the direct "supervisory chain of command" to actually qualify as a "supervisor" under the statute.

For the foregoing reasons, this Court hereby sets aside the Agency's Order dismissing Petitioner's complaints in this matter. The Court finds that Petitioner has sufficiently met the requirements of Wis. Stats. §230.81(1). The matter is remanded back to the Agency for further proceedings. Petitioner's counsel shall prepare the appropriate Order (for the Court to sign) setting aside the Agency's Order and remanding this case for further proceedings.

Dated this 16 day of December, 2015.

BY THE COURT:  
  
GEORGE L. GLONEK  
Circuit Court Judge