

Department of Workforce Development
Equal Rights Division
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Madison, WI 53708-8928
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Scott Walker, Governor
Reginald J. Newson, Secretary
Joe Handrick, Division Administrator

DATED AND MAILED DEC 02 2013

Daniel D. Bethards

[REDACTED]
Complainant

vs.

INITIAL DETERMINATION -
PROBABLE CAUSE

ERD Case No. CR201303023

Wisconsin Department of
Justice
P.O. Box 7857
Madison, WI 53707-7857
Respondent

I. THE DIVISION DECIDED:

There is probable cause to believe Wisconsin Department of Justice may have violated the Wisconsin Whistleblower Protection Law, sec. 230.80 - 230.89, Stats., by:

- A. Taking any retaliatory action because the Complainant lawfully disclosed, or the Respondent believed the Complainant had disclosed, information under sec. 230.81, Stats.

II. THIS MEANS:

The Equal Rights Division found reason to believe there is sufficient information to hold an administrative hearing. An Administrative Law Judge will hold the hearing and will decide whether the Respondents violated the Wisconsin Fair Employment Law.

III. THE NEXT STEP IS:

The Equal Rights Division Hearing Section will now schedule a hearing on the merits of the case. A notice of hearing stating the date, time, and place of hearing will be sent to the parties in the near future. This notice will also include an information sheet regarding things that need to be done for the hearing, as well as a copy of the statutes and administrative code. At the hearing, the parties will be given the opportunity to present evidence to support their cases. Neither the Initial Determination, nor the evidence presented to the Equal Rights Division during the investigation of this case, will automatically become part of the record at hearing. The Administrative Law Judge will only consider evidence presented at the hearing. The parties may wish to consult with an attorney for legal advice.

Contact the Administrative Law Judge by letter if you wish to pursue settlement of this case prior to hearing.

IV. DATE OF FILING AND/OR INITIAL WRITTEN CONTACT:

- A. The Complainant first contacted the Division in writing on October 24, 2013, alleging whistleblower retaliation. The Division accepted the Complainant's complaint on the same date.

V. THE DIVISION DECIDED THERE WAS PROBABLE CAUSE BASED ON THE FOLLOWING INFORMATION:

- A. The Respondent, Wisconsin Department of Justice (DOJ), is a Wisconsin state government agency responsible for protecting public safety.
- B. The Complainant, Daniel D. Bethards (Bethards), was employed from August 1992 until October 10, 2013, when DOJ terminated his employment. Bethards was most recently employed as a Special Agent in DOJ's Division of Criminal Investigation (DCI) at DCI's field office in Superior, Wisconsin.
- C. DOJ challenges the Division's jurisdiction over the complaint, maintaining that Bethards did not invoke protection from retaliation because he made his disclosure of information to another individual at the same time he did to his supervisor. However, for purposes of this Initial Determination, the Division assumes Bethards disclosure is protected from retaliation. Nonetheless, DOJ preserves its right to challenge jurisdiction at the hearing.
- D. Bethards alleges DOJ retaliated against him for disclosing information by terminating his employment.
- E. On December 19, 2012, Bethards sent an email to DCI Administrator David Matthews (Matthews) and DOJ Human Resources Director Mary Casey, stating that Special Agent in Charge Jay Smith (Smith) was manufacturing and selling firearms without a federal manufacturer's permit and possessed a stolen U.S. government machine gun.
- F. In August and September 2013 DOJ held pre-disciplinary meetings with Bethards to investigate numerous alleged work rule violations.
- G. In a letter dated October 10, 2013, DOJ informed Bethards that his employment was terminated because of his numerous work rule violations, including false allegations against Smith and for communicating to numerous people his accusations of DOJ covering up his allegations against Smith.

VI. INVESTIGATOR'S EXPLANATION:

- A. Bethards' written disclosure of December 19, 2012, to Matthews alleges a DOJ violation of federal law and, if made in good faith, is protected from retaliation. Although making false allegations is not protected from retaliation, DOJ has not established that Bethards' allegations against Smith were false. Bethards' communications about an alleged DOJ cover up are not protected from retaliation.
- B. Bethards' discharge was motivated, at least in part, by Bethards' disclosure. This complaint must proceed to hearing to determine whether Bethards' disclosure is

protected from retaliation and whether DOJ violated the Wisconsin Whistleblower Protection Law.

Gregory Straub
Equal Rights Officer

cc: Complainant
Respondent, Attn: Steven C. Kilpatrick, Assistant Attorney General
Officer Straub

Department of Workforce Development
Equal Rights Division
HEARING & MEDIATION SECTION
819 N 6th St Rm 723
Milwaukee WI 53203-1687
Telephone: (414) 227-4385
FAX: (414) 227-4981
TTY: (414) 227-4081
(TTY-Hearing Impaired Callers)



Scott Walker, Governor
Reginald J. Newson, Secretary

DANIEL D BETHARDS

Complainant

vs.

STATE OF WI DOJ
17 W MAIN ST
MADISON WI 53707-7857
Respondent

**NOTICE OF APPEAL RIGHTS
REVIEW BY COURT**

Re: ERD Case No. CR201303023

A final decision and order in this case is enclosed. Any party whose interests are adversely affected by this administrative decision may seek judicial review of the decision. Such review is authorized by Section 227.52, Wis. Stats.

A petition for review must be filed within thirty (30) days after this decision is mailed to the parties. It shall designate as the Petitioner the party filing the petition, and as the Respondent the Department of Workforce Development, Equal Rights Division. The petition for review shall state the nature of the petitioner's interest, the facts showing that the petitioner is a person aggrieved by the decision, and the grounds upon which a review is sought.

The petition for review must be filed in the office of the clerk of circuit court for the county where the petitioner resides. If the petitioner is a non-resident of the State of Wisconsin, the proceedings shall be in the county where the property affected by the decision is located, or if no property is affected, in the county where the dispute arose. A copy of the petition must be served either personally or by certified mail upon the Department of Workforce Development, Equal Rights Division. The address of the Department of Workforce Development, Equal Rights Division is 819 North Sixth Street, Room 723, Milwaukee, Wisconsin 53203 or 201 East Washington Avenue, Room A300, P. O. Box 8928, Madison, Wisconsin 53708. Copies of the petition for review must also be served upon all parties who appeared before the Department in the case being appealed no later than thirty (30) days after commencing the proceedings for review. The copies shall be served personally or by certified mail (or, when service is timely admitted in writing, by first-class mail). The Complainant(s) and Respondent(s) whose names and addresses appear in the caption of this decision are considered parties for purposes of judicial review.

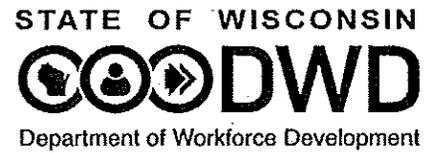
Any person aggrieved by this decision and order may petition the Equal Rights Division for rehearing within twenty (20) days after the decision is mailed to the parties. The petition for rehearing must specify in detail the grounds for the relief sought, as well as supporting authorities, in accordance with Section 227.49, Wis. Stats. Copies of the petition for rehearing shall be served on all parties of record. Please note that the filing of a petition for rehearing does not delay the effective date of this order.

Dated and Mailed: December 26, 2014

c c Complainant
Respondent
KYLE H TORVINEN, Attorney for the Complainant
LUKAS J SAUNDERS, Attorney for Complainant
J B VAN HOLLEN, ATTORNEY GENERAL
STEVEN C KILPATRICK ASST ATTORNEY GENERAL

Enclosure

Department of Workforce Development
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Scott Walker, Governor
Reginald J. Newson, Secretary

CERTIFICATION

I, Kathleen Braun, Legal Secretary for the Hearing & Mediation Section of the Equal Rights Division, hereby certify that the attached copy of the decision in the matter of Daniel D Bethards vs State of Wisconsin - DOJ, ERD Case No. 201303023, issued on December 26, 2014 is an exact copy of the original decision on file with the Equal Rights Division.

A handwritten signature in cursive script that reads "Kathleen Braun".

Kathleen Braun
Hearing & Mediation Section
Equal Rights Division

**STATE OF WISCONSIN
DEPARTMENT OF WORKFORCE DEVELOPMENT
EQUAL RIGHTS DIVISION**

Daniel D. Bethards


Complainant

**State of Wisconsin, Department of Justice
P.O. Box 7857
Madison, WI 54707**

Ruling on Motion to Dismiss

ERD Case Nos. CR 201300903, CR
201302058 and CR 201303023

Respondent

Complaints were filed with the Equal Rights Division (ERD) of the Wisconsin Department of Workforce Development as follows: ERD Case No. CR 201300903 was filed on April 11 of 2013; ERD Case No. CR 201302058 was filed on July 31 of 2013 and ERD Case No. CR 201303023 was filed on October 24 of 2013. The Complainant, Daniel Bethards, filed the complaints against the Respondent, State of Wisconsin, Department of Justice (WDOJ).

In an "Initial Determination - No Probable Cause" (ID-NPC) dated October 1 of 2013, an Equal Rights Officer for the ERD concluded that there was no probable cause to believe that the Respondent violated the Wisconsin Whistleblower Protection Law (WWPL) -- sec. 230.80, et seq., Wis. Stats. as follows:

- in regard to "Taking any retaliatory action because the Complainant lawfully disclosed, or the Respondent believed the Complainant had disclosed, information under sec. 230.81, Stats."

The Complainant subsequently appealed the ID-NPC in ERD Case No. CR 201300903. The appeal (of the ID-NPC) was scheduled for hearing, but the hearing was postponed (pursuant to a digitally recorded telephone conference with legal counsel for the parties that was held on March 26 of 2014) in order to address a motion to dismiss that the Respondent wished to file and a schedule for written submissions in relation to the motion to dismiss was established. In addition, it was determined that motion to dismiss would also encompass ERD Case Nos. CR 201302058 and CR 201303023, cases in which (for each) an Initial Determination - Probable Cause had been issued (and which were awaiting the scheduling of a hearing).

In each of the cases - ERD Case Nos. CR 201300903, CR 201302058 and CR 201303023 - the Complainant appears to in effect be alleging retaliation as a result of a disclosure of

(protected) information made via an e-mail on December 19 of 2012 that was sent simultaneously to David Matthews, the Administrator of the Division of Criminal Justice at the Department of Justice, and to Mary Casey, the Director of Human Resources that is part of the Division of Management Services at the Department of Justice.

The last submission in relation to the "Respondent's Motion to Dismiss" (dated April 16 of 2014) was dated May 29 of 2014 and received on June 2 of 2014.

These cases comes under sec. 230.80 - 230.89, Wis. Stats. (sometimes referred to as the Wisconsin Whistleblower Protection Law or WWPL).

As this is a motion to dismiss, any disputed facts must at this juncture be construed in favor of the Complainant for purposes of ruling on the motion, even if those facts may possibly turn out to be otherwise if the case were to proceed to a hearing.

Section 230.80, Wis. Stats. reads as follows:

230.80 Definitions. In this subchapter:

(1) "Abuse of authority" means an arbitrary or capricious exercise of power.

(1m) "Appointing authority" means the chief officer of any governmental unit unless another person is authorized to appoint subordinate staff by the constitution or any law.

(2) "Disciplinary action" means any action taken with respect to an employee which has the effect, in whole or in part, of a penalty, including but not limited to any of the following:

(a) Dismissal, demotion, transfer, removal of any duty assigned to the employee's position, refusal to restore, suspension, reprimand, verbal or physical harassment or reduction in base pay.

(b) Denial of education or training, if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation or other personnel action.

(c) Reassignment.

(d) Failure to increase base pay, except with respect to the determination of a discretionary performance award.

(3) "Employee" means any person employed by any governmental unit except:

(a) A person employed by the office of the governor, the courts, the legislature or a service agency under subch. IV of ch. 13.

(b) A person who is, or whose immediate supervisor is, assigned to an executive salary group or university senior executive salary group under s. 20.923.

(4) "Governmental unit" means any association, authority, board, commission, department, independent agency, institution, office, society, or other body in state government created or authorized to be created by the constitution or any law, including the legislature, the office of the governor, and the courts, but excluding the Health Insurance Risk-Sharing Plan Authority. "Governmental unit" does not mean any political subdivision of the state or body within one or more political subdivisions that is created by law or by action of one or more political subdivisions.

(5) "Information" means information gained by the employee which the employee reasonably believes demonstrates:

(a) A violation of any state or federal law, rule or regulation.

(b) Mismanagement or abuse of authority in state or local government, a substantial waste of public funds or a danger to public health and safety.

(6) "Merit further investigation" means reasonably indicates the existence of a situation justifying inquiry.

(7) "Mismanagement" means a pattern of incompetent management actions which are wrongful, negligent or arbitrary and capricious and which adversely affect the efficient accomplishment of an agency function.

"Mismanagement" does not mean the mere failure to act in accordance with a particular opinion regarding management techniques.

(8) "Retaliatory action" means a disciplinary action taken because of any of the following:

(a) The employee lawfully disclosed information under s. 230.81 or filed a complaint under s. 230.85 (1).

(b) The employee testified or assisted or will testify or assist in any action or proceeding relating to the lawful disclosure of information under s. 230.81 by another employee.

(c) The appointing authority, agent of an appointing authority or supervisor believes the employee engaged in any activity described in par. (a) or (b).

(9) "Substantial waste of public funds" means an unnecessary expenditure of a substantial amount of money or a series of unnecessary expenditures of smaller amounts of money.

Section 230.81 of the Wisconsin Statutes reads as follows:

230.81 Employee disclosure.

230.81(1)(1) 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. However, to obtain protection under s. 230.83, before disclosing that information to any person other than his or her attorney, collective bargaining representative or legislator, the employee shall do either of the following:

(a) Disclose the information in writing to the employee's supervisor.

(b) After asking the division of equal rights which governmental unit is appropriate to receive the information, disclose the information in writing only to the governmental unit that the division of equal rights determines is appropriate. The division of equal rights may not designate the department of justice, the courts, the legislature or a service agency under subch. IV of ch. 13 as an appropriate governmental unit to receive information. Each appropriate governmental unit shall designate an employee to receive information under this section.

(2) Nothing in this section prohibits an employee from disclosing information to an appropriate law enforcement agency, a state or federal district attorney in whose jurisdiction the crime is alleged to have occurred, a state or federal grand jury or a judge in a proceeding commenced under s. 968.26, or disclosing information pursuant to any subpoena issued by any person authorized to issue subpoenas under s. 885.01. Any such disclosure of information is a lawful disclosure under this section and is protected under s. 230.83.

(3) Any disclosure of information by an employee to his or her attorney, collective bargaining representative or legislator or to a legislative committee or legislative service agency is a lawful disclosure under this section and is protected under s. 230.83.

This case essentially involves an allegation that the Complainant was retaliated against by the Respondent for having allegedly reported to his supervisor "information" which is defined in sec. 230.80 (5), Wis. Stats as follows:

(a) A violation of any state or federal law, rule or regulation.

(b) Mismanagement or abuse of authority in state or local government, a substantial waste of public funds or a danger to public health and safety.

David Matthews is the Administrator of the Division of Criminal Justice at the Department of Justice. Mary Casey was the Director of Human Resources that is part of the Division of Management Services at the Department of Justice.

The Complainant was a Special Agent and as such a sworn law enforcement officer. The Complainant 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. While it is argued essentially that the Complainant 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.

The Respondent contends essentially that the Complainant is not covered under either one of

two theories:

- that Casey was not in the Complainant's supervisory chain of command and therefore the Complainant 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 in the Complainant's supervisory chain of command), and thus violated the requirement under 230.81 (1) that the information be disclosed to a supervisor (i.e., someone in the supervisory chain of command) or a governmental unit designated by the equal rights division before being disclosed to someone else (other than his her attorney, collective bargaining representative or legislator); or
- if Casey is determined also to be in the Complainant's supervisory chain of command (in addition to Matthews), then the Complainant is not covered under the WWPL because the Complainant did not then disclose the information to someone outside the chain of command.

As regards the second theory, this Administrative Law Judge does not find that the law requires disclosure to someone outside the supervisory chain of command (or outside the governmental unit designated by the Equal Rights Division) to be required in order to obtain the protection of the statute. While an employee may later disclose to someone outside of the supervisory chain of command (or outside of the governmental unit designated by the Equal Rights Division), it is the disclosure to someone within the supervisory chain of command (or to the governmental unit that is designated by the Equal Rights Division) that triggers the whistleblower protection so long as the disclosure to someone in the supervisory chain of command or to the governmental unit designated by the Equal Rights Division has occurred prior to the communication to someone else other than the individual's attorney, collective bargaining representative or legislator.

The crux of this case really revolves around the first theory and whether Casey was part of the Complainant's supervisory chain of command or not. If she was, then the Complainant did not violate the requirements of sec. 230.81 (1) Wis. Stats.; if she was not, then the Complainant did violate the requirements of sec. 230.81 (1), Wis. Stats.

First, there appears to be a dispute about whether the Complainant on December 17 of 2012 disclosed information to Casey prior to a December 19 of 2012 e-mail that was sent to both Matthews and Casey.

For purposes of ruling on the Respondent's Motion to Dismiss, it will be construed (as argued by the Complainant) that the December 17 of 2012 communication to Casey was not a prior disclosure of (protected) information.

However, it is assumed for purposes of ruling on the Respondent's Motion to Dismiss that (as essentially contended by the Complainant) the Complainant's e-mail sent simultaneously to Matthews and Casey on December 19 of 2012 was a disclosure of (protected) information as such information is defined under sec. 230.80 (5).

Because it appears that the Complainant simultaneously e-mailed Casey - who was not in his supervisory chain of command - at the same time as the Complainant e-mailed Matthews (who was in the Complainant's supervisory chain of command), the Complainant 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 protected by the WWPL.

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.

Therefore, for the reasons indicated above, the Administrative Law Judge now enters the following:

ORDER

That the complaints in this matter, ERD Case Nos. CR 201300903 and CR 201302058 and CR 201303023, be and hereby are dismissed with prejudice and in their entirety.

DEC 26 2014

Dated at Milwaukee, Wisconsin _____.



Allen T. Lawent
Administrative Law Judge

cc: Complainant
Respondent
Lukas J. Saunders and Kyle H. Torvinen, Attorneys for the Complainant
J. B. Van Hollen, Attorney General, and Steven C. Kilpatrick, Assistant Attorney General,
for the Respondent