COURT OF APPEALS
DECISION
DATED AND FILED

July 21, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP2080 **Cir. Ct. No. 2014CV1543**

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

CATHERINE LEAVERTON,

PETITIONER-APPELLANT,

V.

DEPARTMENT OF WORKFORCE DEVELOPMENT, EQUAL RIGHTS DIVISION AND WISCONSIN DEPARTMENT OF VETERANS AFFAIRS,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: PETER ANDERSON, Judge. *Affirmed*.

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

¶1 PER CURIAM. Catherine Leaverton appeals the circuit court order affirming a decision by the Equal Rights Division of the Department of Workforce Development. The Division concluded that the Department of Veterans Affairs did not retaliate against Leaverton in violation of WIS. STAT. § 230.83 (2013-14), a

provision of Wisconsin's whistleblower law, when the Department of Veterans Affairs laid Leaverton off.[1] Leaverton argues that the Division erroneously concluded that she was not entitled to the presumption of retaliation under WIS. STAT. § 230.85(6) and asks this court, for that reason, to reverse and remand the matter to the Division "to enter a finding that [the Department of Veterans Affairs] unlawfully terminated her employment." We conclude that, regardless of whether Leaverton was entitled to the statutory presumption of retaliation, Leaverton must show that the Division's finding—that the Department of Veterans Affairs did not retaliate against Leaverton when it laid her off—is not supported by substantial evidence and Leaverton utterly fails in this regard. More specifically, Leaverton fails to show that the Division's finding that the elimination of her position was solely the result of a reorganization not related to any action of Leaverton, is not supported by substantial evidence. Accordingly, we affirm.

BACKGROUND

¶2 The following facts, taken from the Division's findings of fact and testimony at the administrative hearing, are undisputed.

¶3 Leaverton was employed by the Department of Veterans Affairs in a Therapist Supervisor position as Director of Activities at the Wisconsin Veterans Home in King, Wisconsin, from May 1994, when she was hired, to July 2007, when she was laid off.

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[1] Subchapter III of ch. 230 of the Wisconsin Statutes, which includes WIS. STAT. §§ 230.80-.89, is Wisconsin's whistleblower law. ***Department of Justice v. Department of Workforce Dev.***, 2015 WI 114, ¶23, 365 Wis. 2d 694, 875 N.W.2d 545.

All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶4 Leaverton supervised the activities staff who worked in four different residence halls, each of which is a separate nursing facility. Along with other staff, Leaverton also processed donations to the King Veterans Home from residents and members of the public. On three occasions—December 2004, December 2005, and June 2006—as detailed in the following three paragraphs, Leaverton reported to her supervisors her concerns about alleged financial mismanagement regarding those donations.

¶5 In 2004, staff approached Leaverton with concerns about the processing of certain donations. Leaverton investigated and discovered that a co-worker had deposited two or three donations in a fund other than the fund indicated by the donor on the check. Leaverton met with the Commandant of the King Veterans Home in December 2004 and provided the donation slips to support her concern that the co-worker was mismanaging the donations.

¶6 After staff told Leaverton about another donation that appeared to have been mismanaged, Leaverton sent an email to the Commandant in December 2005 reporting this allegation. The Commandant asked Chris Wrolstad, who was the Deputy Commandant and Leaverton's supervisor, to check into the donation identified in Leaverton's email.

¶7 After staff presented Leaverton with additional donation slips suggesting that the same co-worker was mismanaging donations on an ongoing basis, Leaverton met in June 2006 with Deputy Commandant Wrolstad and Adjutant Jacqueline Moore, who was the business manager for the King Veterans Home, and showed them the additional donation slips.

¶8 In June 2007, Adjutant Moore sent a memorandum to Amy Franke, the Department of Veterans Affairs Human Resources Director, proposing a

reorganization of staff at the King Veterans Home. The reorganization would integrate Bureau of Activities staff (then supervised by Leaverton) into the Bureau of Nursing, "[a]s part of the culture change movement to more person-centered care," and the activities staff in each of the four residence halls would function as a section under the Director of Nursing in their building. Moore explained,

> The reorganization will help to create a strong care team with a focus on the needs of the members within their building and it will break down the barriers created by having separate bureaus. This is a logical move, as the Activities staff in each building currently work independent of the activities staff in other buildings. They will have access to more resources as part of a larger organization, with nursing supervisors available at all times.... With this reorganization, the therapy programming hours will expand.

¶9 Moore's memorandum concluded, "The Therapist Supervisor position [held by Leaverton] will be abolished and will be replaced by two 50% Therapy Assistants. The Therapy Assistant positions are greatly needed. We depend very heavily on LTEs to provide our activity programming. (We currently have just 11 permanent Therapy Assistants and 11 LTE Therapy Assistants.)"

¶10 Before Moore sent the memorandum, she spoke to the Nursing Administrator, "because the intent was to put the activities, all the people who worked in each building, under the direction of the Director of Nursing of each building .... That's ... standard for ... nursing homes ...." She also spoke to the Commandant about the proposed reorganization plan and obtained his support.

¶11 Franke, the Department of Veterans Affairs Human Resources Director, determined that the proposed reorganization "was cost effective and the end result would be better care for the members.... [I]t was a piece of a culture change that King was working to implement at the time, where a member's care

would be much more integrated from the standpoint of the actual care team, rather than isolated units treating pieces." The Department's Division of Homes was undertaking other reorganizations consistent with this concept. Franke forwarded Moore's memorandum to the Administrator for the Division of Homes and the Department Secretary for their approval. Both approved the reorganization.

¶12 On July 3, 2007, Leaverton was given a letter of the same date informing her that she was being laid off effective July 21, 2007, due to the reorganization described above. The letter stated:

> The Wisconsin Veterans Home-King is undergoing a reorganization of the Bureau of Activities Services. Your current Therapist Supervisor position as the Director of Activities will be affected by this reorganization. The Bureau Activities Services and the Bureau of Nursing will be consolidated with both units under the Director of Nursing of each building. Consequently, the position you currently hold will be fractionated to create two 50% therapy assistant positions.
>
> I therefore must inform you that your Therapist Supervisor position will be eliminated and you will be laid off ....

¶13 On the same day that she received this letter, Leaverton was escorted to her office, told to pack her personal belongings and to leave the property, and instructed to contact the King Veterans Home Human Resources Manager if she wanted to come back to the Home for any reason.

¶14 In September 2007, Leaverton filed a "retaliation complaint" with the Equal Rights Division, claiming that she was laid off in retaliation for reporting the alleged mismanagement of donated funds in December 2004 and June 2006. We briefly review the protracted series of administrative and judicial proceedings that followed.

¶15 In January 2008, the Equal Rights Division issued an initial determination that there was not probable cause to believe that the Department of Veterans Affairs unlawfully retaliated against Leaverton. Leaverton promptly appealed and requested a hearing, which was conducted in January 2009. In March 2010, the Division issued a decision reversing its initial determination. The parties unsuccessfully attempted mediation in mid-2010, and the Department of Veterans Affairs then filed a motion to dismiss. The Division issued a decision denying the motion to dismiss in November 2011, and held the hearing on Leaverton's complaint in May 2012. Three witnesses testified at the hearing: Leaverton, Amy Franke, and Jacqueline Moore.

¶16 The Equal Rights Division issued an initial "Decision and Memorandum Opinion" in April 2014, determining that the Department of Veterans Affairs did not unlawfully retaliate against Leaverton when it laid her off. Leaverton sought judicial review in May 2014. In November 2014, the circuit court remanded for additional factual determinations and explanation. In December 2014, the Division issued a "Clarifying Decision and Memorandum Opinion" incorporating the initial decision and making additional factual determinations in response to the court order. The Division again determined that the Department of Veterans Affairs did not unlawfully retaliate against Leaverton when it laid her off. In March 2015, the circuit court vacated the Division's decision and remanded for a new decision.

¶17 In May 2015, the Division issued a third decision, titled "Decision and Memorandum Opinion—Second Remand," finding that the Department of Veterans Affairs "did not take an unlawfully retaliatory disciplinary action under [Wisconsin's whistleblower law] against [Leaverton] when [the Department] laid [Leaverton] off in July of 2007." The Division concluded that, "taking the

evidence as a whole, ... the evidence presented does not support that [the Department of Veterans Affairs'] having laid [Leaverton] off when it integrated the Bureau of Activities staff into the Bureau of Nursing was in retaliation for [Leaverton's] having raised the issue of" her co-worker's alleged financial mismanagement.

¶18 The Division also found that: (1) Leaverton was laid off more than two years after she first reported her co-worker's alleged financial mismanagement, and, therefore, she was not entitled to the statutory presumption of retaliation; and (2) Leaverton had not established that the Department of Veterans Affairs' articulated reason for her layoff—the reorganization of the King Veterans home "to more person-centered care"—was a pretext for unlawful retaliation. The circuit court affirmed the Division's decision in August 2015, and this appeal follows.

DISCUSSION

¶19 Leaverton argues that the Division erroneously concluded that she was not entitled to the presumption of retaliation under WIS. STAT. § 230.85(6) and asks this court, for that reason, to reverse and remand the matter to the Division "to enter a finding that [the Department of Veterans Affairs] unlawfully terminated her employment." We understand Leaverton to be arguing that if the statutory presumption of retaliation applied, then she proved her case. But Leaverton does not support the apparent assertion that she, with the benefit of the presumption, proved her case. Leaverton provides virtually no additional argument and therefore completely misses the target, which is the Division's finding that the Department of Veterans Affairs did not violate Leaverton's rights under Wisconsin's whistleblower law when it laid her off. Regardless of whether

Leaverton was entitled to the statutory presumption of retaliation, Leaverton fails to show that the Division's finding—that the Department of Veterans Affairs did not retaliate against Leaverton when it laid her off as a result of a reorganization at the King Veterans Home unrelated to any action by Leaverton—was not supported by substantial evidence. Accordingly, we affirm.

¶20 In an administrative appeal, we review the agency's decision, not the circuit court's decision. *See* ***Department of Justice v. Department of Workforce Dev.***, 2015 WI 114, ¶21, 365 Wis. 2d 694, 875 N.W.2d 545. In the discussion that follows, we first briefly review Wisconsin's whistleblower law. We then summarize Leaverton's only argument as to why we should reverse the Division's decision applying that law, and explain why we need not resolve the issues that Leaverton raises in light of the Division's factual findings. We then provide the governing standard of review for those findings and apply that standard to those findings.

I. Wisconsin's Whistleblower Law

¶21 Wisconsin's whistleblower law provides protection for state employees from retaliation by their supervisors for the disclosure of certain information. ***Hutson v. Wisconsin Pers. Comm'n***, 2003 WI 97, ¶¶37-38, 263 Wis. 2d 612, 665 N.W.2d 212. The whistleblower law statutes provide specific parameters for protection, and although the statutes are to be liberally construed, "only certain disclosures made a particular way and regarding [specified] subject matter[s] ... will qualify for protection." ***Id.***, ¶37 "In order to gain protection under the whistleblower law, an employee must meet the requirements laid out in the relevant statutory provisions." ***Id.***, ¶38.

¶22 WISCONSIN. STAT. § 230.83 prohibits "retaliatory action" against an employee. "Retaliatory action" is defined in WIS. STAT. § 230.80(8)(a) to include taking disciplinary action against an employee who "lawfully disclosed information." "Information" is defined in WIS. STAT. § 230.80(5)(b) to include "information gained by the employee which the employee reasonably believes demonstrates ... [m]ismanagement." "Mismanagement" is defined in WIS. STAT. § 230.80(7) as "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." "Before an employee is entitled to protection, the employee must make a disclosure of information in writing, typically to his or her supervisor." ***Hutson***, 263 Wis. 2d 612, ¶39; *see* WIS. STAT. § 230.81(1)(a).

¶23 Under Wisconsin's whistleblower law, if a disciplinary action occurs within two years after an employee discloses information, then the disciplinary action is presumed to be an unlawful retaliatory action. WIS. STAT. § 230.85(6). The burden then falls to the employer to rebut that presumption by showing by a preponderance of the evidence that the disciplinary action was not taken in retaliation for the employee's disclosure of information. WIS. STAT. § 230.85(6)(a).

II. Leaverton's Challenge to the Division's Decision

¶24 The Division determined that the Department of Veterans Affairs' layoff of Leaverton could be a disciplinary action within the meaning of WIS. STAT. §§ 230.80(2) and (8) and 230.83, if it were motivated by unlawful retaliation. The Division also assumed that Leaverton did disclose information within the meaning of WIS. STAT. § 230.81 when she first met with the

Commandant in December 2004. However, the Division found that Leaverton's December 2005 email merely provided "another example" of what she believed to be a mismanaged donation. The Division reasoned that the December 2005 email did not by itself constitute a disclosure of information under WIS. STAT. § 230.81 because it did not provide new information. Accordingly, the Division determined that Leaverton was not entitled to the statutory presumption of retaliation. The Division then reviewed "the evidence as a whole" and determined that "the evidence presented does not support that the [Department of Veterans Affairs'] having laid [Leaverton] off when it integrated the Bureau of Activities staff into the Bureau of Nursing was in retaliation for [Leaverton's] having raised the issue of" her co-worker's alleged financial mismanagement.

¶25 Leaverton's sole argument on appeal is that the Division erred when it concluded that her December 2005 email and June 2006 meeting did not bring the alleged retaliation within the statutory two-year window and, therefore, did not trigger the statutory presumption in her favor. We need not resolve this issue.

¶26 Leaverton does not explain why the presumption dispute matters in this case. That is, she does not explain why the outcome, even giving her the statutory presumption of retaliation, would be different. We could therefore reject her arguments as inadequately developed. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) ("We may decline to review issues inadequately briefed."). However, we choose to demonstrate that, regardless of whether the statutory presumption of retaliation applied, we must affirm because the Division properly found that the Department of Veterans Affairs "did not take an unlawfully retaliatory disciplinary action under [Wisconsin's whistleblower law] against [Leaverton] when the [Department] laid [Leaverton] off in July of 2007."

III. The Division's Finding that Leaverton was Laid Off for a Non-retaliatory Reason

¶27 As stated above, the Division found that the Department of Veterans Affairs "did not take an unlawfully retaliatory disciplinary action under [Wisconsin's whistleblower law] against [Leaverton] when the [Department] laid [Leaverton] off in July of 2007." The Division also concluded that, "taking the evidence as a whole, the ... evidence presented does not support that the [Department of Veterans Affairs'] having laid [Leaverton] off when it integrated the Bureau of Activities staff into the Bureau of Nursing was in retaliation for [Leaverton's] having raised the issue of" her co-worker's mismanagement of donated funds. Leaverton does not argue that this finding and conclusion are not supported by substantial evidence. Indeed, she fails even to point to evidence that might refute these findings.

¶28 An agency's findings of fact will be upheld so long as they are supported by substantial evidence. ***Hutson***, 263 Wis. 2d 612, ¶29. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." ***Bucyrus-Erie Co. v. DILHR***, 90 Wis. 2d 408, 418, 280 N.W.2d 142 (1979) (quoted source omitted). The reviewing court may not substitute its judgment for the agency's as to the weight of the evidence. ***Id.***

¶29 As the Division found, there is no evidence that the reorganization was proposed or approved because of any animus towards Leaverton for reporting alleged instances of mismanagement of donated funds. Moore, who initiated the proposed reorganization, testified that the proposed reorganization was not a disciplinary action against Leaverton, that she did not propose it for that purpose, and that any issues related to Leaverton did not arise when she discussed the reorganization with others. Franke, who forwarded the reorganization proposal to

the Department Secretary for his approval, testified that no one had ever told her that Leaverton had reported misuse of donated funds. Evidence showing that a supervisor in the same class as Leaverton in the Medical Bureau at the King Veterans home was laid off at the same time, also supports the inference that the reorganization was not proposed or implemented to retaliate against Leaverton.

¶30 The Division likewise found that the Department of Veterans Affairs was not motivated to lay off Leaverton "in order to end her continuing to raise the issue of the [allegedly mismanaged] funds." To the contrary, the evidence showed that the Department of Veterans Affairs investigated mismanagement of funds in 2007 resulting in the co-worker identified by Leaverton resigning and being convicted of a felony.

¶31 In sum, Leaverton fails to show there is a lack of substantial evidence supporting the Division's factual finding that Leaverton was not laid off in retaliation for her reports of alleged mismanagement of donated funds. Our review of the record shows that the Division's finding is supported by substantial evidence. Accordingly, we affirm the Division's dismissal of Leaverton's retaliation complaint.

CONCLUSION

¶32 For these reasons, we affirm the circuit court.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.