STATE OF WISCONSIN PERSONNEL COMMISSION

* * * * * * * * * * * * * * * * *

ROSANN HOLLINGER,

Complainant,

v.

Chancellor, UNIVERSITY OF WISCONSIN - MILWAUKEE,

Respondent.

Case No. 84-0061-PC-ER

* * * * * * * * * * * * * * * * *

DECISION
AND
ORDER

After consideration of the objections filed by both parties, the Commission adopts the proposed decision and order that is attached hereto and incorporated by reference with the following changes.

1. In order to more accurately reflect the record, Finding of Fact 1 is modified to read:

> The complainant was employed continuously by respondent's High School Equivalency Program (HEP) from October 1980 until June 30, 1984, under fixed-term, academic year contracts in the teaching academic staff, except that she was not employed during the summer months of 1981 and 1982.

2. In order to more accurately reflect the record, Finding of Fact 19 is modified to read:

> The complainant rejected the settlement offer on September 17, 1985, by moving to amend the complaint, claiming the settlement offer was retaliatory. The Commission denied the motion as well as a subsequent motion by the complainant to reconsider.

3. In order to better clarify the respondent's legal responsibilities in terms of the back pay award, the following language is added to Paragraph 3 of the Order:

> If the complainant is reinstated, the amount attributable to retirement benefits shall be withheld from the back pay award and shall be paid by respondent directly to the Employe Trust Fund for the complainant's account. The respondent shall withhold such sums from the back pay award for payment of federal and state income taxes and social security taxes as are appropriate.

4. In order to reflect the time spent by complainant's counsel on the objections to the proposed decision, Paragraph 5 of the Order is modified to read:

> That respondent also pay complainant, by check made payable to complainant and her attorney, attorney's fees and costs totalling $4,228.77 for the period prior to the issuance of the proposed decision and order and an additional $528.00, representing 4.0 hours at $110 per hour and a multiplier of 1.2 for time spent after the proposed decision was issued.

Dated: July 11, 1986 STATE PERSONNEL COMMISSION

Dennis P. McGilligan
DENNIS P. McGILLIGAN, Chairperson

Donald R. Murphy
DONALD R. MURPHY, Commissioner

Laurie R. McCallum
LAURIE R. McCALLUM, Commissioner

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Parties:

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Milwaukee, WI 53207

Frank E. Horton, Chancellor
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STATE OF WISCONSIN PERSONNEL COMMISSION

ROSANN HOLLINGER,

Complainant,

v.

Chancellor, UNIVERSITY OF WISCONSIN - MILWAUKEE

Respondent.

Case No. 84-0061-PC-ER

PROPOSED DECISION AND ORDER

This matter was filed as a complaint of retaliation under Subch. III, Ch. 230, Stats., (the "whistleblower law"). After an initial determination of both "probable cause" and "no probable cause", the respondent filed an answer of "no contest" with respect to those allegations for which probable was found. A hearing as to appropriate "damage[s]/relief" was held on November 26, 1985. The parties filed post-hearing briefs.

FINDINGS OF FACT

1. The complaint was employed continuously by respondent's High School Equivalency Program (HEP) from October 1980 until June 30, 1984, except during the summer months of 1981 and 1982.

2. The complainant's work schedule with the respondent was typically of 10 months duration, from September 1 until June 30, representing one academic year. During July and August of both 1981 and 1982 the complainant was eligible for, and did collect, unemployment compensation.

3. In 1983, for the first time, HEP conducted a summer program. The appellant was employed during the two months (July and August) the summer program was operating.

4. On June 5, 1984, the appellant filed a charge of retaliation against the respondent. Appellant's charge stated, in part, as follows:

> Mr. Robert Gertsch is technically the "whistle-blower" in this case; however, Mary Ann Parish (HEP office manager) and I, Rosann Hollinger (HEP instructor), are suffering Mr. Salazar's harassment because we are viewed as siding with Mr. Gertsch on the issue of whether or not illegal aliens are eligible for federal money and if there have been other types of ineligible students at HEP.
>
> As I told Dean Stolle in my grievance conference on May 14, 1984, I have been happy working at HEP; I enjoy teaching GED students, and I have a flawless record at HEP. At present I am not happy. I have been under a lot of stress the last couple of months. I feel I will not be rehired for the summer or fall semesters. My contract ends June 30, 1984.
>
> I want all harassment, retaliation, and reprisal, in any form - verbal and written - to stop immediately. The High School Equivalency Program is in an extremely unfortunate situation, but a professional director, handling federal money (and state money for a possible summer program), should have been able to handle this external investigation better. To walk around the building calling Mr. Gertsch names and not talking with "us" anymore, writing biting notes instead, etc., is just incredible and regrettable.
>
> I want to be offered a contract if the program receives money for a summer program or receives money for a 1984-1985 program. Being rehired year to year has been a usual occurrence at HEP since its start in 1970 (approximately).

5. Appellant's contract which ended June 30, 1984, was not renewed. Respondent conducted a limited summer program during July and August of 1984. Respondent did not employ the appellant for the summer program. Had she been so employed, complainant would have earned $1602.16. Complainant was employed at the State Fair Park for several days during August of 1984, earning a total of $292.04.

6. During the period from July 1, 1984, to October 15, 1984, the appellant was paid unemployment compensation (UC) totalling $1838.00. Of that total, $525.16 represented UC payments for the month of September and $262.58 was for the period from October 1 to October 14, 1984.

7. For the period from October 15, 1984, to June 30, 1985, the appellant was employed as a teacher at St. Stephen's School and earned a salary of $7,905.00.

8. During the summer of 1985, the appellant was not eligible for and did not receive unemployment compensation. She did work at State Fair Park for part of the summer.

9. Had the appellant been employed under a standard contract with HEP for the 1984-85 academic year (September 1 to June 30), she would have received $12,817.32 or $1,281.73 per month for the duration of that contract.

10. On April 8, 1985, an initial determination was issued regarding the appellant's complaint as well as a complaint filed by Robert Gertsch, one of the appellant's co-workers. The initial determination found that events that occurred before the effective date of the whistleblower law were not retaliatory and went on to find:

> Probable Cause to believe that respondent retaliated against complainants with respect to the following transactions:
>
> a) Mr. Salazar's refusal to communicate with both complainants except in a rude manner.
>
> b) Mr. Salazar's memo to Ms. Hollinger dated June 20, 1984, challenging her use of sick leave.
>
> c) The non-renewal of both Ms. Hollinger's and Mr. Gertsch's contracts.

11. On May 1, 1985, the appellant entered into a teaching contract for the period from August 15, 1985 to June 15, 1986, with the Holy Assumption School at a yearly salary of $11,595.00 payable in twice-a-month installments over a period of twelve months.

12. The Holy Assumption contract provided, in part, as follows:

THE SCHOOL AGREES:

* * *

4. This Agreement may be terminated or altered by mutual agreement of the parties.

* * *

LIQUIDATED DAMAGES FOR WRONGFUL TERMINATION BY TEACHER:

If this contract is terminated unilaterally by the teacher 30 days before the first day of teacher attendance or during the course of the school year without a 30 day notice, a penalty of Two hundred fifty dollars ($250) shall be due the school.

13. The appellant's contract with St. Stephen's School included identical language. When she was hired by St. Stephen's on October 15, 1984, the appellant filled a position vacated by another teacher who had left to accept a job offer from the Milwaukee Public Schools. St. Stephen's made no effort to enforce the contract by obtaining liquidated damages from that teacher.

14. On August 14, 1985, one day before she was scheduled to begin teaching at Holy Assumption, the appellant completed a job application for a teaching position in the Waukesha School District. On the application form, the appellant stated she would have to give two weeks notice under her existing contract with Holy Assumption.

15. During 1985, more than 125 teachers employed by schools within the Milwaukee Diocese (including St. Stephen's and Holy Assumption) left their schools without giving the required 30 day notice. None of the parishes within the Milwaukee Diocese sought to enforce the contracts with these teachers.

16. While employed by HEP, the appellant received medical insurance coverage for her entire family. While unemployed and during the course of her employment at both St. Stephens and Holy Assumption, the appellant had to pay an additional premium to extend what would otherwise have been

individual health insurance coverage to include her whole family. Those amounts are reflected on the attached worksheet.

17. For the period she was not employed by HEP, the appellant also did not receive a 5% employer contribution to the state retirement program.

18. In a letter dated September 13, 1985, the respondent proposed an offer to settle the case. One of the listed terms of the offer was the "[r]einstatement of Rosann Hollinger by 10/1/85 to a teaching position as a specialist, fixed-term appointment in the High School Equivalency Program". The letter went on to provide:

> Notwithstanding the acceptance or non-acceptance of the terms contained in this letter, reinstatement of Ms. Hollinger is hereby offered unconditionally as of September 30, 1985.

19. The appellant declined the reinstatement offer.

20. On November 7, 1985, the respondent answered interrogatories posed by the complainant. The interrogatories and the response read as follows:

> INTERROGATORY NO. 1. In conceding that Respondent, University of Wisconsin-Milwaukee is liable to Complainant, Rosann Hollinger, is the Respondent conceding that the following statement is true and accurate in fact and in law: Respondent retaliated against Rosann Hollinger in violation of subchapter SUBCH. III, Ch. 230, Wis. Stats., with respect to the following conduct: (a) Mr. Salazar's refusal to communicate with her except in a rude manner; (b) Mr. Salazar's memo to her dated June 20, 1984 challenging her use of sick leave; and (c) The nonrenewal of Ms. Hollinger's contract.
>
> Answer: For the purpose of the disposition of the complaint in Case No. 84-0061-PC-ER now before the Personnel Commission and only for that purpose, Respondent answers "no contest" to Interrogatory No. 1. which is substantially the same as paragraph 5. of the Conclusions in the initial determination in said case.
>
> In submitting the answer of "no contest", Respondent hereby informs Complainant that it will only dispute the amount of damages, if any, that the complainant is entitled to with respect to a) reasonable attorney fees to be paid by

respondent, b) employee compensation or other related damages (past and prospective) and c) costs.

Respondent formulates its answer to this interrogatory in the manner "no contest" because it intends that such answer not be admissible in any other civil proceeding in the fashion that such answers are restricted in their use by sec. 904.10, Wis. Stats.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to §230.45(1)(gm), Stats.

2. In light of the respondent's answer of "no contest", no finding of liability is necessary.

3. Complainant is entitled to recover back pay for respondent's failure to employ her beginning on July 1, 1984.

4. Respondent's offer of reinstatement effective September 30, 1985, was a valid reinstatement offer that terminated the accrual of back pay.

5. The complainant is entitled to reimbursement for attorney's fees and costs.

OPINION

Scope of the Proceeding

This case arises from a complaint of retaliation. Complainant alleges that respondent retaliated against her in violation of the "whistleblower law" (Subch. III, Ch. 230, Stats.) because she had assisted in the disclosure of information under the law. The respondent's answer to complainant's interrogatory, set forth in finding 20, eliminates the need for any finding of liability in this matter, so the only remaining issue is one of relief.

The statutory basis for awarding relief in cases filed under the whistleblower law is found in §230.85(3), Stats:

(3) (a) After hearing, the commission shall make written findings and orders. If the commission finds the respondent engaged in or threatened a retaliatory action, it shall order the employe's appointing authority to insert a copy of the findings and orders into the employe's personnel file and, if the respondent is a natural person, order the respondent's appointing authority to insert such a copy into the respondent's personnel file. In addition, the commission may take any other appropriate action, including but not limited to the following:

1. Order reinstatement or restoration of the employe to his or her previous position with or without back pay.

2. Order transfer of the employe to an available position for which the employe is qualified within the same governmental unit.

3. Order expungement of adverse material relating to the retaliatory action or threat from the employe's personnel file.

4. Order payment of the employe's reasonable attorney fees by a governmental unit respondent, or by a governmental unit employing a respondent who is a natural person if that governmental unit received notice and an opportunity to participate in proceedings before the commission.

5. Recommend to the appointing authority of a respondent who is a natural person that disciplinary or other action be taken regarding the respondent, including but not limited to any of the following:

a. Placement of information describing the respondent's violation of §230.83 in the respondent's personnel file.

b. Issuance of a letter reprimanding the respondent.

c. Suspension.

d. Termination.

* * *

(d) Interim earnings or amounts earnable with reasonable diligence by the person subjected to the retaliatory action or threat shall reduce back pay otherwise allowable. Amounts received by the person subjected to the retaliation action or threat as unemployment benefits or welfare payments do not reduce the back pay otherwise allowable, but shall be withheld from the person subjected to the retaliatory action or threat

> and immediately paid to the unemployment reserve fund or to the welfare agency making the payment.

One period of time for which complainant seeks back pay is the summer of 1984. Her contract for the 1983-84 academic year ended on June 30, 1984, and in her retaliation complaint, she stated that she felt she would not be rehired for the two month summer program or for the 1984-85 academic year. She was not hired for either period. Although the initial determination did not specifically refer to the summer of 1984, the reference in the finding of probable cause to "non-renewal of both Ms. Hollinger's and Mr. Gertsch's contracts" is sufficiently broad to include the non-continuation of complainant's employment through the months of July and August of 1984. That summer employment presumably would have occurred either under a separate contract or simply as a continuation of the 1983-84 contract.

The respondent has not argued that the summer months of 1984 were outside the scope of the hearing on relief/remedy. To the contrary, the respondent has contended that there were fewer positions open during the 1984 summer program than in the 1983 program and that, as a consequence, complainant was not rehired due to funding constraints and due to complainant's lack of bilingual skills. These arguments are inconsistent with the respondent's "no contest" answer to all of the probable cause findings listed in the initial determination. That answer, coupled with the scope of the initial determination's probable cause findings, means that the complainant is entitled to recover back pay for the two month summer program in 1984 (as well as the 1984-85 academic year program) irrespective of any arguments that she was not sufficiently qualified for the summer position or that the selection decision was made for reasons other than retaliation.

Effect of Offer of Reinstatement

Respondent contends that its offer to reinstate the complainant as of September 30, 1985, should terminate the accrual of any back pay obligation. Complainant argues that the respondent should not be able to force complainant to break her contract with Holy Assumption in order to return to HEP.

In Anderson v. Labor & Industry Review Commission, 111 Wis. 2d 245 (1983), the Wisconsin Supreme Court interpreted mitigation of damages language in the Fair Employment Act[1] that was substantially identical to the language of §230.85(3)(d), Stats., to allow a valid offer of reinstatement to terminate an employer's back pay obligation as of the date the offer is rejected or accepted by the former employe. The Court went on to articulate guidelines for determining whether a reinstatement offer is valid:

> First, the offer of reinstatement must be for the same position or a substantially equivalent position. Comparability in salary should not be the sole test of a reasonable offer of alternative employment; it is only one factor to be considered. Comparability in status is often more important, especially as it relates to opportunities for advancement or for other employment. Williams v. Albemarle City Board of Education, 508 F.2d 1242, 1243 (4th Cir. 1974).
>
> > "Accordingly, a discharged or demoted employee is not required in mitigation of damages, to accept alternative employment of an 'inferior kind,' or of a more 'menial nature,' or employment outside of his usual type or for which he is not sufficiently qualified by experience, or employment the inferiority of which might injuriously affect the employee's future career or reputation in his profession." Id. (Footnote omitted.)

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[1] Section 111.36(3)(b), Stats., 1973, provided that "amounts earnable with reasonable diligence by the person discriminated against shall operate to reduce back pay otherwise allowable."

> Second, the offer of reinstatement must be unconditional. Any requirements attached to the offer must be the usual job requirements. See, NLRB v. Huntington Hospital, Inc., 550 F.2d at 924.
>
> Third, the employee must be afforded a reasonable time to respond to the offer of reinstatement. The employee then has the responsibility of informing his employer of his intentions concerning reinstatement within the stated reasonable time after he receives notice of the offer. NLRB v. Betts Baking Company, 428 F.2d 156, 158 (10th Cir. 1970). Whether the time allowed is reasonable will depend on the totality of the circumstances surrounding the making of the offer and the employee's response thereto. Id.; NLRB v. Izzi, 395 F.2d 241 (1st Cir. 1968).
>
> Finally, the offer should come directly from the employer or its agent who is authorized to hire and fire, rather than from another employee or other unauthorized individual. This requirement, we believe, will further facilitate the goal of giving the employee a clear, definite offer which he would not reasonably hesitate to accept. Anderson, 111 Wis. 2d 245, 256-57. (Footnote omitted.)

Complainant in the instant case does not argue that any of these four guidelines were not met. The record shows that the respondent's reinstatement offer was to the same position, was unconditional, provided a reasonable period of seventeen days for a response to the offer and was directly from the employer. However, the Anderson decision does not specifically address the situation where a complainant is employed under contract, at the time of the reinstatement offer. Complainant's arguments are summarized in her brief as follows:

> First, she had a legal and moral obligation not to leave her employ during the school year and thereby disrupt the education of her students. Second, she was not required to risk a suit by Holy Assumption School. Third, she was not required to become a teacher who treats the interests of her employer and the students she serves with contemptuous disregard of their legitimate expectations for such action could threaten her teaching career. Fourth, UW-Milwaukee may not, after discharging her for exercising her constitutional and statutory rights, humiliate her by compelling her to enter into a term contract to mitigate damages and then require her to breach it for the same reason. She is not its puppet. Finally, adoption of UW-Milwaukee's construction of the State Employment Relations Act, Subch. III, [sic] Wis. Stats., that a person who enters into a valid

> contract must breach that contract to minimize State agency's damages would render that Act unconstitutional, or, at least, create a serious question about its constitutionality.

The complainant's arguments would have been entitled to substantially more weight in the absence of evidence that the appellant was willing to "break" her contract with Holy Assumption if she had been offered a position at a public school. The Commission is unwilling to rule that the complainant's employment relationship with Holy Assumption was sacrosanct when just one month earlier, the complainant had sought employment elsewhere. Her August 14th application to the Waukesha School District specified that she needed to give two weeks notice, even though the school year at Holy Assumption was to begin on August 15th and her contract required 30 days notice. Just one month later, respondent made its reinstatement offer giving the complainant at least two weeks to decide. Nothing in the record indicates that the respondent was aware of the provisions in the Holy Assumption contract at the time it made the reinstatement offer. The record also does not indicate that the complainant advised the respondent of any conditions imposed by that contract.

Testimony showed that during 1985, Milwaukee parishes lost more than 125 teachers who failed to comply with the 30 day notice provision. Testimony also indicated that the parishes never sought to invoke the liquidated damages provision against these teachers.[2] The complainant was able to begin teaching at St. Stephens on October 15, 1984, because a

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[2]Norbert Riegert, coordinator of school personnel for the Milwaukee Diocese, is responsible for teacher recruitment. He testified that it would be up to the individual parish to initiate legal action to recover damages under the contract. He also testified that he was not aware of any parish having taken such action.

teacher there had left to take a public school position. That teacher had been employed at St. Stephens for some time, had left before, returned and then left again without an effort by St. Stephen's to enforce the terms of her contract.

The mere fact that a complainant has found other employment does not mean that they may continue in that position and accrue back pay irrespective of a reinstatement offer. In Ford Motor Co. v. EEOC, 458 US 219, 73 L. Ed2d 721, 102 S. Ct. 3057 (1982), the U.S. Supreme Court held that two Title VII claimants were required to accept an "unconditional" offer of the job originally sought, even though the offer did not include retroactive seniority, where the claimants were already employed elsewhere. The claimants in that case, all of whom were females, were on layoff status from "picker-packer" jobs in a General Motors warehouse when they applied for vacancies in a Ford warehouse. Ford filled the vacancies with males and claimants filed discrimination complaints. General Motors subsequently recalled the claimants. Ford then offered other vacancies to the claimants who refused them, both because they did not want to be the only women in the warehouse and because they did not want to lose the seniority they had earned at General Motors.

It should also be noted that the complainant in the present case has made no attempt to show that her reinstatement under the respondent's offer would have returned her to an uncomfortable supervisory relationship or to some other circumstances that would have caused her reemployment to be tainted by the same factors that generated her initial complaint of retaliation.

Back Pay Calculation

Pursuant to §230.85(3)(a) 1, Stats., the commission may order "reinstatement . . . with or without back pay." Nothing in this record indicates that back pay would be an inappropriate remedy in this matter. The actual calculation of back pay (as well as the cost of other benefits lost by the complainant) is set forth on an attached worksheet. The inclusion of benefits other than salary and the provision of prejudgment interest fall within the general remedial authority granted to the Commission under §230.85(3)(a), Stats., which permits the Commission to "take any other appropriate action." In addition, prejudgment interest on back pay awards was specifically approved under what is, at least arguably, the more restrictive language of the Fair Employment Act in Anderson v. Labor & Industry Review Commission, 111 Wis. 2d 245, 260 (Supreme Court, 1983). There, the court adopted a rate of seven percent per annum. However, in Wilmot Union High School District, Case IX, Decision No. 18820-B (December 12, 1983), the Wisconsin Employment Relations Commission concluded that the interest rate cited by the court in the Anderson case was based on §814.04(4), Stats., a statutory rate of interest which had subsequently been changed to 12% per annum. In s. Ind 88.18(4), Wis. Adm. Code, the Department of Industry, Labor & Human Relations has adopted a rule setting an annual rate of 12% simple interest for computing interest payable in Fair Employment Act proceedings processed by the Equal Rights Division:

> (4) COMPUTATION OF INTEREST. Interest on any award made pursuant to this subchapter shall be added to that award and computed at an annual rate of 12% simple interest. Interest shall be computed by calendar quarter. Interest shall begin to accrue on the last day of each calendar quarter, or portion thereof in the back pay period on the amount of back pay attributable to that calendar quarter, or portion

> thereof, after statutory set-offs or other amounts actually received during that calendar quarter, or portion thereof, and shall continue to accrue until the date of compliance with the back pay order.

Given the statutory reference in §814.04(4), Stats., and the practices of other agencies in this area, the Commission will also apply a 12 percent annual interest rate in the present case.

Similarly, the method of computing back pay (and interest thereon) on a quarterly basis was approved for use by the National Labor Relations Board in NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 73 S. Ct. 287 (1953) and has since been considered standard practice. O.C. & A. Workers v. NLRB, 547 F.2d 598, 604 (7th Cir. 1971). As noted in s.Ind 88.18(4), Wis. Adm. Code, above, it is also the practice of the Equal Rights Division. The Commission will also make use of this practice in the instant case.

The following notes explain specific aspects of the back pay computation worksheet.

1. The testimony of Luis Salazar, who was the director of HEP until August of 1985, indicates that persons hired for the HEP Summer program in 1984 were paid at five-eighths of their normal rate. Two months at five-eighths of the monthly salary for 1984-85 yields $1602.16.

2. Retirement benefits are calculated as 5% of the wage loss line. These benefits would have been paid by complainant's employer had she continued to work at HEP. She did not receive offsetting benefits while she was employed by St. Stephen's and Holy Assumption.

3. The complainant paid additional health insurance premiums while she was not employed at HEP in order to raise her coverage to the same level provided by HEP. For purposes of completing the back pay schedule, these payments have been broken down into a monthly cost for each of the

three periods covered by different methods of payment utilized by the complainant.

4. The complainant's Holy Assumption contract is for a period from August 15, 1985 to June 15, 1985, but the (yearly) salary of $11,595.00 is payable in installments twice a month for twelve months. This language suggests that if the complainant had left Holy Assumption after working there one month, she would have been entitled to keep one-tenth of her yearly salary (or $1,159.50) rather than one-twelfth thereof (or $966.25). However, the respondent (as indicated by Respondent's Exhibit 5) states that complainant received $966.25 from Holy Assumption for the entire period up to September 30, 1985. In the absence of any evidence other than Respondent's Exhibit 5 as to complainant's actual pay for this period, the Commission will adopt the $966.25 figure advanced by the respondent.

5. There was no HEP summer program in 1985. But for the nonrenewal of the complainant for the regular 1984-85 academic year, she would have been entitled to unemployment compensation during the summer of 1985. Because of her contracts with St. Stephen's and Holy Assumption, complainant was not eligible for unemployment compensation. Neither party offered any specific evidence as to the amount of UC benefits that complainant would have received had she been eligible in 1985. The Commission will assume this amount is at the same weekly rate as awarded her in 1984. ($131.29 per week as determined in note 6, below, for a two month total of $1050.32). The complainant worked at the State Fair Park for 10 days in both 1984 and 1985. She worked for fourteen cents an hour more in 1985 than the $3.92 per hour she earned working there in 1984, or a 3.5% increase. Therefore, the Commission will offset the $1050.32 in UC benefits that complainant would have received by $302.47 (which is 3.5% more than the $292.04 earned at the State Fair Park in 1984). Even though the

complainant paid out $243.94 to "equalize" her health insurance benefits for the July and August of 1985, she is not entitled to reimbursement for this amount because she would have incurred this cost anyway.

6. Complainant received a total of $1,838.00 in UC benefits for the period of July 1 to October 15, 1984. Exhibit 5 attached to Respondent's Exhibit 2 indicates that complainant claimed 14 weeks of benefits during the period, or $131.29 per week.

Attorney's Fees

Complainant has requested that the Commission award attorney's fees in this matter. Pursuant to §230.85(3)(a)4, Stats., the Commission is specifically given the authority to order payment of "reasonable attorney fees." Although this case is the first in which a complainant has sought attorney's fees under the "whistleblower law", a substantial body of case law has been developed to apply the terms of the Civil Rights Attorney's Fees Awards Act of 1976 (Title 42 USC §1988) which provides that in federal civil rights actions, "the court, in its discretion, may allow the prevailing party. . .a reasonable attorney's fee as part of the costs."

In exercising its discretion in awarding attorney's fees under the whistleblower law, the Commission recognizes that the goal is to facilitate meritorious suits brought by state employes. Fee awards should be sufficient to attract competent counsel without producing a windfall.

a. Hours

In Hensley v. Eckerhart, 461 US 424, 76 L. Ed. 2d 40, 103 S. Ct. 1933 (1983), the Court stated:

> The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services. The party seeking an award of fees should submit

> evidence supporting the hours worked and rates claimed. Where the documentation of hours is inadequate, the district court may reduce the award accordingly. 461 US 424, 433

Complainant's counsel, Mr. Williamson, filed an affidavit dated January 8, 1986 that responded to respondent's contention that complainant's reasonable attorney's fees should be limited to 13.5 hours. Mr. Williamson's affidavit provided, in part:

> Although I believe the figure 13.5 hours set forth in UW-Milwaukee's statement grossly understates the amount of time that was necessary to cover the period prior to preparation for the hearing, I shall accept that figure as accurate with the following two exceptions: there were 4 hours spent in the preparation and presentation of the facts to the Commission's investigator. Moreover, 2 hours were spent on preparation of Complainant's Motion To Reconsider and the Interrogatories served on UW-Milwaukee. In addition, 3 hours' time was spent in preparation for the hearing; 3.5 hours were spent driving to and from Madison; 2.5 hours were spent in the hearing. Research and preparation of the brief (Introduction and Point I, 10 hours; Point II, .5 hours; Point III, 1 hour); the Affidavit, 2 hours; and the Appendix, 1 hour.
>
> * * *
>
> The total reasonable at $120.00 per hour=$4,320.00 multiplied by 1.5 (lodestar)=$6,480.00.

By dividing the complainant's basic fee request ($4,320.00) by the requested hourly rate ($120.00), one arrives at a figure of 36 hours. However, Appendix I to complainant's brief that was also filed on January 8, 1986 refers to 43 hours. That total is consistent with a tabulation derived from the rest of the affidavit:

13.5 hrs	--Suggested by respondent
4.0	--Preparation/presentation of facts to investigator
2.0	--Motion to Reconsider and Interrogatories
3.0	--Preparation for hearing
3.5	--Travel to and from Madison hearing
2.5	--Hearing
14.5	--Post-hearing brief, appendix and affidavit
43.0	--Total hours

On April 23, 1986, the Commission directed the complainant to file "photocopies of time and charge records made contemporaneously with the

administration of legal services relating to this case as well as copies of any billings to the complainant," citing Hensley v. Eckerhart, 461 US 424, 424 (1983) and Serebin v. Milwaukee County Mental Health Complex, ERD Case No. 8254772 (LIRC, 1/15/85). By letter dated May 1, 1986, complainant's counsel stated:

> I did not keep time and charge records. My Affidavit was based on my estimate as to the time spent. While time and charge records are perhaps better evidence than an Affidavit, the Affidavit is evidence. Moreover, even if the Commission concludes the Affidavit is inadequate, there is no requirement in Hensley v. Eckerhart, 461 US 424 that the Commission must, as opposed to may, reduce the attorneys' award.

It should be noted that complainant and Mr. Williamson signed a retainer contract on August 20, 1985. The contract was in the nature of a contingent fee agreement stating there would be "[n]o charge for services ...unless there is a recovery." The Commission investigation file includes summaries of telephone messages received on September 10, 1984 from the complainant and October 5, 1984 from Mr. Williamson indicating that Mr. Williamson represented the complainant as of those dates. The Commission must conclude that, given the response to the Commission's request of April 23, 1986, Mr. Williamson did not bill the complainant for services rendered prior to the August 20, 1985 contract, even though he represented her during that period.

It should also be noted that between approximately September 20, 1984 and March 25, 1985, Mr. Williamson also represented Mr. Gertsch in his related case (84-0063-PC-ER) with the Commission.[3] Clearly, to the extent

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[3] In a September 19, 1984 letter, a copy of which was sent to the Commission, Mr. Gertsch wrote:

> Since several employes were terminated from UW-M HEP along with myself, we are hiring an attorney in Milwaukee together to handle our complaints.

Mr. Williamson may have spent some time on Mr. Gertsch's case, that time would not be compensable here.

Although the existence of the contingent fee agreement might tend to cause an attorney to forego keeping time records, Mr. Williamson had notice of the Commission's authority to award attorneys fees under the whistle-blower law. By the time the respondent filed its "no contest" answer, the need to keep time records should have been clear. Such records are very important in determining the reasonableness of a fee request. In part to encourage counsel to maintain these records, the Commission will reduce Mr. Williamson's time estimate by approximately 25%, from 43 hours to 32.5 hours. Thirty-two and one-half hours, from the Commission's perspective, represents a far more reasonable estimate of the time necessary to provide representation in this matter.

Respondent contends that the complainant should not be awarded fees for any time spent on the unsuccessful effort to amend her charge[4] or for any hours claimed by complainant's counsel subsequent to a September 6, 1986, conciliation conference "since there was no good faith effort on Complainant's part to seriously negotiate." The complainant's motion to amend was made after the respondent had moved for an expedited hearing "without contesting liability except as to the issue of remedy." The Commission agrees that complainant's motion to amend was clearly without merit and, accordingly, will further reduce complainant's attorney's fees by one hour of the two hours designated as "Motion to Reconsider and Interrogatories." However, there is no basis on this record on which the

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[4]The motion to amend was denied by the Commission in an interim decision and order dated October 14, 1986, and complainant's motion to reconsider was denied on November 21, 1985.

Commission would reduce complainant's fees for a failure to seriously negotiate.

Based on the above analysis, the Commission finds that complainant's attorney should be compensated for 31.5 hours for this matter.

b. Rate

The second component in calculating a reasonable fee is determining the appropriate hourly rate.

In Blum v. Stenson, 465 U.S. 886, 79 L Ed 7d 891, 899 (1984), the U.S. Supreme Court construed "reasonable fees" to mean "calculated according to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or non-profit counsel." In a footnote, the Court went on to state:

> We recognize, of course, that determining an appropriate "market rate" for the services of a lawyer is inherently difficult. Market prices of commodities and most services are determined by supply and demand. In this traditional sense there is no such thing as a prevailing market rate for the service of lawyers in a particular community.
>
> * * *
>
> In seeking some basis for a standard, courts properly have required prevailing attorneys to justify the reasonableness of the requested rate or rates. To inform and assist the court in the exercise of its discretion, the burden is on the fee applicant to produce satisfactory evidence -- in addition to the attorney's own affidavits -- that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation. A rate determined in this way is normally deemed to be reasonable, and is referred to -- for convenience -- as the prevailing market rate. 79 L Ed 2d 900, fn 11

In the present case, the complainant's counsel seeks a rate of $120.00 per hour. In an affidavit, Mr. Williamson states that since 1960, his practice has been almost exclusively related to employment matters and

since January of 1985 has "expanded to include cases involving alleged discrimination against individual employees." Mr. Williamson's affidavit also states:

> 3. Because I normally represent either institutional clients (unions) in which I have a continuing relationship or retainer arrangements, or represent employees on a contingent fee or partial contingent fee basis, the number of times I have a fixed hourly rate is comparatively few. In those cases, the rate for my services is $120.00 per hour.
>
> 4. I consider this to be a reasonable rate for my services because of my experience and skill. Before drafting this Affidavit, I asked Walter F. Kelly, an attorney in the Milwaukee area who is active in the employee discrimination bar to confirm whether the rate of $120.00, based on his knowledge of rates in Milwaukee and my experience and ability, is a reasonable rate. He confirmed that it is.

Respondent countered by filing an affidavit by John Sweeney, an Assistant Attorney General with the Wisconsin Department of Justice who has twelve years of experience in civil rights litigation and seven in employment litigation. That affidavit states, in part:

> From time to time the Department of Justice hires outside legal counsel to litigate civil rights cases. We generally pay between $60.00 and $75.00 per hour for an attorney with civil rights experience. On other occasions the State of Wisconsin, through the Department of Justice, has paid opposing attorneys an average hourly rate of $75.00. In my opinion, that is a reasonable and customary rate for attorneys in the State of Wisconsin with extensive civil rights experience.

In his response to Mr. Sweeney's affidavit, Mr. Williamson stated:

> The rate that Jack Sweeney refers to is a hypothetical state rate. The rate I referred to is the Milwaukee rate. <u>The rate is also based on the fact that my retainer is a contingent, not an hourly one.</u> (emphasis added)

The last sentence indicates that Mr. Williamson's hourly rate is less than $120.00 when the likelihood of payment is higher.

The Commission must somehow try to reconcile the two affidavits to ascertain the appropriate hourly rate. There is clearly a significant difference between $75.00 an hour and $120.00 an hour. As noted above, Mr.

Williamson has indicated that his rate would be lower than $120.00 if there were no contingent fee agreement in effect. In Thompson v. Village of Hales Corners, 115 Wis 2d 289, 340 NW 2d 704 (Supreme Court, 1983), the Wisconsin Supreme Court disapproved a reduction of attorney's fees where the reduction had been based on the existence of a contingent fee agreement. However, the existence of such an agreement does not mean that counsel can bump up his hourly rate. The "reasonable rate" for determining Mr. Williamson's base fee is a non-contingent rate.

The affidavit of Mr. Sweeney is also flawed. It indicates that the State retains outside counsel "with civil rights experience" at rates typically ranging from $60.00 to $75.00 an hour. Mr. Sweeney also indicates that State has "on other occasions... paid opposing attorneys an average hourly rate of $75.00." The affidavit does not specify whether these fees are paid as part of a court-ordered award or are paid pursuant to a contract for providing representation for a state agency in those cases where the Department of Justice is representing another party. The affidavit also does not specify the degree of experience of the opposing attorneys in those cases, whether any of the attorneys received more than $75.00, or whether there was any distinction between the rates paid to Milwaukee area attorneys as compared to other areas of the state.

After consideration of the competing affidavits and the various factors outlined above, the Commission finds that $110.00 is a reasonable hourly rate for this matter.

Multiplying $110.00 per hour times 31.5 hours generates a basic fee ("lodestar") of $3,465.00.

Adjustment to the Base Fee

Once the base fee has been ascertained, adjustment may be made to come up with the final fee award. There are two general adjustment methods that have been developed for calculating fee awards. The first, as announced in Johnson v. Georgia Highway Express Inc., 488 F. 2d 714 (5th Cir. 1974), really combines the computation of the base fee with the adjustments by listing twelve factors that the trial judge must consider in justifying the fee award. Those factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the legal skill required; (4) the preclusion of other employment by the attorney because of acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the circumstances or by the client; (8) the amount involved and the results that were obtained; (9) the experience, reputation and ability of counsel; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. It was the twelve Johnson factors that were cited with approval in Hensley v. Eckerhardt, 461 US 424 (1983) and also, therefore, in Thompson v. Village of Hales Corners, 115 Wis 2d 289 (Supreme Court, 1983). However, many of these twelve factors clearly overlap with the "reasonable hours times reasonable rate" calculation that both Hensley and Thompson say are to precede any adjustment.

The second method of adjustment was described in Lindy Bros. Builders, Inc. v. American Radiator and Standard Sanitary Corp., 487 F.2d 161 (3rd Cir, 1973). In Lindy, the "lodestar" may be adjusted by a "multiplier" reflecting a relatively subjective evaluation of the increase merited by the contingent nature of the case, and, if appropriate, reflecting the exceptional quality of counsel's services. Although in at least one case it was said that the "contingent nature of the case" is unrelated to

contingent fee agreements, Copeland v. Marshall, 641 F 2d 880, 893 (DC Cir. 1980), it makes little sense to utilize a multiplier for the contingent nature of the case where the attorney was assured of payment by the terms of an hourly retainer. So when the fee is contingent on success, "the hourly rate should ordinarily be raised to compensate the attorney for the risk of nonrecovery." Carmichael v. Birmingham Saw Works, (11th Cir., 1984.) The Lindy analysis, which requires an appraisal of the chance of success as of the commencement of the litigation, appears to be less subject to wide fluctuation than the Johnson analysis. Ramey, Calculation of Attorney's Fees Awards in Title VII Action Against Private Defendants, 58 Univ. of Detroit Journal of Urban Law 609, 624. While the Johnson and Lindy analyses are, for the most part, asking for the same information in different formats, the Commission will follow the Lindy approach in applying the whistleblower law to this case because it is organized in a more logical sequence.

The instant complaint was brought without the benefit of any precedent under the whistleblower law. Because of respondent's "no contest" answer, it is difficult to assess the likelihood of success as of the date that Mr. Williamson first became involved in the case, presumably during September of 1984. However, this case must be viewed in the context of at least two other similar cases filed by complainant's co-workers. When viewed together, we see three or four employes alleging retaliation by a supervisor acting alone. Looking simply at the number of co-complainants, complainant's case should have been considered a strong one as of September of 1984. In addition, the respondent has already received negative publicity regarding the information disclosed by Mr. Gertsch. If the likelihood of success is analyzed as of the date the contingent fee

agreement was signed (August 20, 1985), the complainant's case was even stronger. The initial determination of probable cause as to the non-renewal decision had been issued on April 8th and on August 15th, the Commission had issued an interim decision denying respondent's motion to dismiss and, in the alternative, for an order of no probable cause. These intervening events certainly diminished the complainant's prospects of non-recovery. Based on these factors relating to the likelihood of success (i.e., the likelihood of receiving a favorable settlement or a fee award by the Commission), the Commission finds that the complainant is entitled to a multiplier of 1.2.

The second adjustment under Lindy is for exceptional quality of the attorney's services. The base for this determination has to be the level of services that can be expected from an attorney who is paid at the hourly rate previously set as being reasonable. Here, the Commission finds that level of services in this case were not above those that could be expected from an attorney paid at the $110.00 per hour rate.

Complainant is entitled to reimbursement of attorneys fees according to the following computations:

$3,465.00 (base fee) x 1.2 (multiplier) = $4,158.00

Computation of Costs

Complainant has submitted a listing of costs incurred in this matter totalling $147.91, representing long distance telephone calls, photocopies, mileage, and accommodation and meal costs associated with the hearing held before the Commission on November 26, 1985. Respondent objected to the accommodations and meal costs (totalling $77.14) as follows:

> Although no documentation was provided, it can be assumed that those expenses were incurred because the hearing was in Madison. Since Madison is such a short drive from Milwaukee and the hearing was scheduled for 9:30 a.m. (not the crack of dawn), it is not reasonable to charge for an overnight stay. Respondent's brief, page 6.

The Commission agrees with the respondent and denies the complainant's claim for accommodations and meals. Costs are allowed in the amount of $70.77.

Based on the above discussion, the Commission enters the following

ORDER

1. That respondent cease and desist from retaliating against the complainant.

2. That respondent immediately offer complainant reinstatement to her former position or its equivalent. Respondent is not required to continue complainant's employment beyond the existence of HEP. As noted in respondent's settlement offer, HEP funding is scheduled to end on August 31, 1986.

3. That respondent make complainant whole for losses in pay and benefits that she has suffered due to the non-renewal of her contract. This amount, calculated as of June 11, 1986 equals $8,930.55. The amount actually due pursuant to this paragraph must be refigured so that it is current as of the date of payment, thereby reflecting the appropriate amount of interest.

4. Notwithstanding paragraph 3, amounts received by complainant as unemployment benefits shall not reduce the back pay allowable but shall be withheld from complainant and immediately paid to the Unemployment Reserve Fund.

5. That respondent also pay complainant, by check made payable jointly to complainant and her attorney, attorney's fees and costs totalling $4,228.77.

Dated: _____,1986 STATE PERSONNEL COMMISSION

_____
DENNIS P. McGILLIGAN, Chairperson

KMS:jmf
JMF01/2

_____
DONALD R. MURPHY, Commissioner

Attachment

_____
LAURIE R. McCALLUM, Commissioner

Parties:

Ms. Rosann Hollinger
3729 S. Packard Ave.
Milwaukee, WI 53207

Frank E. Horton, Chancellor
UW-Milwaukee
P.O. Box 413
Milwaukee, WI 53201

BACK PAY COMPUTATION WORKSHEET Case Name Hollinger v. UW-Milw No. 84-0061-PC-ER Computed as of June 11, 1986

1. Calendar Quarter	7-1-84 to 9-30-84	10-1-84 to 12-31-84	1-1-85 To 3-31-85	4-1-85 to 6-30-85	7-1-85 to 9-30-85	10-1-85 to 12-31-85	1-1-86 To 3-31-86	4-1-86 to 6-31-86
2. Years from end of quarter to date of computation[1]	1.69	1.44	1.19	.94	.69	.44	.19	0
Wage Loss	7-1 to 8-31: 1,602.16 / 9-1 to 9-30: 1,281.73	3,845.19	3,845.19	3,845.19	7-1 to 8-31: 1,050.32 / 9-1 to 9-30: 1,358.64	—		
Benefit Loss								
a. retirement (@ 5%)	80.11 / 64.09	192.26	192.26	192.26	— / 67.93			
b. health ins. equalization	— / 197.19	394.38	365.91	365.91	— / 137.47			
c. ——								
+								
3. Gross Back pay	1,682.27 / 1,543.01	4,431.83	4,403.36	4,403.36	1,050.32 / 1,564.04	N/A	N/A	N/A
Unemployment Comp.	1,050.32 / 525.16	262.58	—	—	— / —			
Welfare	— / —	—	—	—	— / —			
Interim Earnings	292.04 / —	2,325.00	2,790.00	2,790.00	302.47 / 966.25			
+								
4. Total Offsets	1,342.36 / 525.16	2,587.58	2,790.00	2,790.00	302.47 / 966.25	N/A	N/A	N/A
5. Net Back Pay [2] (line 3 minus line 4)	339.91 / 1,017.85 / 1,357.76	1,844.25	1,630.36	1,630.36	747.85 / 597.79 / 1,345.64	—	—	—
6. Interest on net Back Pay (line 5 x 0.12 x line 2)	275.35	318.69	232.82	183.90	111.42	—	—	—
7. Total (line 5 + line 6)	1,633.11	2,162.94	1,863.18	1,814.26	1,457.06	—	—	—

8. Total Back Pay Due[3] (Sum of all amounts found on line 7) $8,930.55

[1] When interest is computed quarterly, it only begins to accrue once the calendar quarter has ended. If the computation date is January 30, 1986, then line 2 for the quarter ending December 31, 1985 equals 30 ÷ 365 or .08 years from December 31 until the date of computation.

[2] Where total offsets (line 4) exceed gross back pay (line 3), a zero should be placed on line 5.

[3] This line assumes that unemployment benefits and welfare benefits are to be immediately paid to the unemployment reserve fund or to the welfare agency making payment, where appropriate.