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PASTORI BALELE,

Complainant,

v.

President, UNIVERSITY OF
WISCONSIN SYSTEM (Madison),

Respondent.

Case No. 91-0002-PC-ER

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RULING
ON
MOTION FOR COSTS

On October 12, 1992, complainant filed a motion for costs he incurred rebutting respondent's motions for summary judgment. On October 14, 1992, respondent filed a written response to complainant's motion. As requested by complainant, in a letter accompanying his motion for the Commission to "act as fast as possible," the motion was entertained, reviewed, and the hearing examiner stated orally at a status conference held October 15, 1992 that, in his opinion, the motion would be denied. The following is the Commission's formal disposition of complainant's motion.

Complainant asserts that respondent brought motions for summary judgment before the Circuit Court and this Commission and in both instances they were denied. Complainant contends, pursuant to the Commission rule, §PC 5.05, Wis. Adm. Code, and §§227.485 and 230.85(3), Wis. Stats., that he is entitled to costs.

Complainant argues that, while the law allows petitions for summary judgment, respondent should have known that this matter could not be resolved by this method. In support, he cites Lopez v. Modisitt, D.C. Mich. 1980 488 F. Supp. 1169 and Harris v. Harvey, D.C. Wis. 1977, 436 F. Supp. 143.

Also, complainant asserts that respondent maliciously introduced motions for summary judgment causing him to take seven days off work to research, write briefs and photocopy materials in response to respondent's motions.

Complainant submitted costs as follows:

7	days
8	hours
<u>\$13</u>	per hour
\$728	Subtotal
60	photocopy materials (Circuit Court)
<u>50</u>	photocopy materials (Personnel Commission)
\$838	Total

In response, respondent in a letter wrote:

Mr. Balele will never be entitled to the salary-equivalent payment he seeks, whether he is ultimately successful before the Commission or the court. "[A] pro se litigant who is not a lawyer is not entitled to attorney's fees." Kay v. Ehrler, ___ U.S. ___, 111 S. Ct. 1435, 113 L.Ed.2d 486, 491 (1991). See also sec. 814.04(1)(c), Stats.

Mr. Balele is not entitled at this time to reimbursement of the copying expenses he allegedly has incurred. Copying costs as an item of costs are includable in a bill of costs in circuit court, but only the prevailing party in a litigation is entitled to costs. Secs. 814.01(1) and 814.04(2), Stats. At this time, Mr. Balele has not prevailed within the meaning of those statutes.

Previously, in an order resulting from respondent's motion for summary judgment, the Commission dismissed complainant's claims of "whistleblower" retaliation and FEA retaliation. What remains of complainant's original complaint before the Commission is his allegation that respondent discriminated against him on the basis of race, color, national origin or ancestry in violation of the Wisconsin Fair Employment Act (FEA) in connection with his unsuccessful application for its Director of Office of Purchasing Services position.

The Commission has authority to award fees and costs as provided under §§227.485 and 230.85(3), Stats., and Watkins v. LIRC, 117 W(2d) 753, 345 N.W. (2d) 482 (1984). Section 227.485, Stats., is applicable in cases other than those brought under FEA. Section 230.85(3) involves recovery of costs in "whistleblower" actions. Therefore, since complainant's case is before this Commission under the provisions of FEA and his "whistleblower" retaliation allegations have been dismissed, any award of costs in this action is limited to the Commission's authority under Watkins, where the court provided recovery of costs under the FEA. In Watkins, the court held that a victim of discrimination who prevails in an action brought pursuant to the Fair Employment Act should be "made whole," including reasonable attorney's fees

In the instant case, a hearing on the merits has not been held, and no decision has been made regarding the prevailing party. For this reason, complainant's motion for fees and costs is premature.

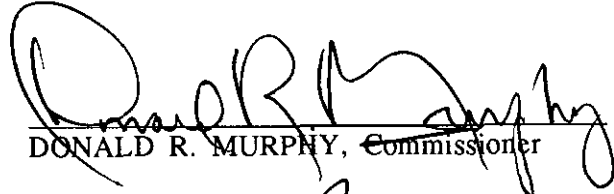
ORDER

Complainant's motion for costs is dismissed as prematurely filed.

Dated: October 29, 1992 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

DRM:rcr


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner