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CYNETH DAHM,

Complainant,

v.

Executive Director,
WISCONSIN LOTTERY,

Respondent.

Case No. 92-0053-PC-ER

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RULING
ON
MOTION
TO HOLD IN
ABEYANCE
AND
ORDER OF
DISMISSAL

This matter is before the Commission on complainant's "Motion to Hold in Indefinite Abeyance Pending the Outcome of Federal Lawsuit," filed July 27, 1992. The parties have filed briefs.¹

By way of background, the complaint, filed March 10, 1992, alleges retaliation on the basis of "whistleblowing" (see subchapter III, Chapter 230, Stats.), with respect to the "deskilling" and proposed elimination of her position because of complainant's testimony before a legislative committee. The relief sought by the complainant is "reconstitution of all duties and responsibilities outlined in the position description & signed in April 1988 and payment of all attorney fees and costs associated with this charge."

On May 4, 1992, respondent filed a response to the complaint and moved to dismiss for: "failure to comply with the disclosure requirement pursuant to §230.81(1), Wis. Stats.; and for failure to state a claim for which relief can be granted." Alternatively, respondent moved to dismiss "the majority of complainant's claims as being untimely filed pursuant to §230.85(1), Stats." The Commission established a briefing schedule on respondent's motions.

Following extensions to the briefing schedule, and before briefs were filed, complainant filed a complaint under 42 USC §1983 in federal court. This complaint alleged that respondent took a number of adverse employment

¹ Respondent filed what amounts to a second reply brief on August 18, 1992, the day before the Commission decided this matter. On August 19, 1992, complainant filed an objection to this reply brief, requested that it not be considered, but that complainant be given an opportunity to respond if it would be. Since respondent's last reply brief did not affect the decision of this matter, the Commission will not address this issue any further.

actions against complainant, including reductions in her duties, less favorable performance evaluations, and ultimately the elimination of her position, in retaliation for her testimony before and cooperation with a legislative committee. This action seeks compensatory and punitive damages and declaratory and injunctive relief.

Complainant then requested that the Commission dismiss her administrative complaint without prejudice. After respondent objected to dismissal without prejudice, complainant filed the instant motion for a stay of proceedings.

Respondent argues, in opposition to a stay, that it would be a denial of due process, a violation of the Commission's statutory responsibilities, an abuse of discretion, and an "abuse of process" for the Commission to stay this proceeding and not to decide the pending motions to dismiss. Complainant disputes these contentions and argues that a stay would be appropriate with principles of federal-state comity in the 42 USC §1983 context. Because the Commission concludes that the express language of §230.88(2)(c), Stats., mandates dismissal of this complaint, it will not address the issues raised by these arguments.

Section 230.88(2)(c), Stats., provides:

(c) No later than 10 days before the specified time of hearing under s. 230.85(2), an employe shall notify the commission orally or in writing if he or she has commenced or will commence an action in a court of record alleging matters prohibited under s. 230.83(1). If the employe does not substantially comply with this requirement, the commission may assess against the employe any costs attributable to the failure to notify. Failure to notify the commission does not affect a court's jurisdiction to proceed with the action. Upon commencement of such an action in a court of record, the commission has no jurisdiction to process a complaint filed under s. 230.85 except to dismiss the complaint, and if appropriate, to assess costs under this paragraph. (emphasis added.)

Complainant has commenced an action in a court of record that alleges that respondent reduced her job duties, gave her less favorable performance evaluations, and eliminated her position, in retaliation for her testimony before, and cooperation with, a legislative committee. This alleged conduct involves an alleged "retaliatory action," §230.80(8)(a), Stats., because of an alleged lawful disclosure to a legislative committee pursuant to §230.81(3), Stats. Therefore, the federal action alleges "matters prohibited under

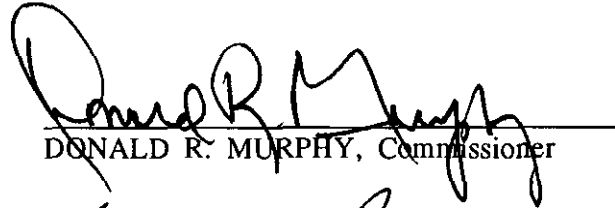
§230.83(1), Stats.: 'No appointing authority ... may initiate or administer ... any retaliatory action against an employe.'" Accordingly, pursuant to §230.88(2)(c), Stats., "the Commission has no jurisdiction to process [this] complaint ... except to dismiss the complaint."

ORDER

Complainant's motion for a stay of proceedings filed July 27, 1992, is denied. This complaint is dismissed pursuant to §230.88(2)(c), Stats.

Dated: August 26, 1992 STATE PERSONNEL COMMISSION

AJT:rcr


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner

Parties:

Cyneth Dahm
7203 Old Sauk Road
Madison, WI 53717

William F. Flynn, Jr.
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**NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION**

Petition for Rehearing. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the

Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.