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DEBRA TOLLEY,

Complainant,

v.

Commissioner, OFFICE OF THE
 COMMISSIONER OF TRANSPORTATION,
 [Secretary, DEPARTMENT OF
 TRANSPORTATION],

Respondent.

Case No. 93-0086-PC-ER

* * * * *

RULING
 ON MOTION
 FOR STAY
 AND
 TO DISMISS

This matter is before the Commission on complainant's motion for stay filed November 25, 1994, and respondent's subsequent motion of December 19, 1994, for dismissal.

BACKGROUND

On June 1, 1993, complainant filed a charge of discrimination with the Commission alleging respondent retaliated against her for whistleblowing in violation of §§230.80 et seq. Wis. Stats. The Commission issued an Initial Determination, October 21, 1993, finding probable cause to believe that retaliation occurred in regard to ten separate incidents. At the prehearing conference held on December 21, 1993, a four-day hearing was scheduled to begin June 27, 1994. By letter dated June 13, 1994, the Commission was advised that complainant had retained a different attorney. The newly retained attorney requested a stay of proceedings pending filing action in state or federal court. Over respondent's objection to a stay, the hearing was postponed to consider complainant's request. At a status conference June 27, 1994, the parties agreed to a temporary stay until August 26, 1994, during which time complainant was to choose a forum to pursue her case. In a telephone conference, complainant advised the Commission and opposing counsel that she had decided to pursue her case in the Commission and the hearing was rescheduled for December 15, 16, 19, and 20, 1994.

On November 15, 1994, complainant again requested stay of proceedings pending intent to file suit in court. Two days later, respondent filed an

objection. Complainant replied to respondent's objections on November 29, 1994, a day later than requested by the Commission.

The Commission convened a telephone conference on December 4, 1994. The hearing scheduled for December 15, 1994, was postponed, complainant was directed to provide opposing counsel and the Commission copies of all pertinent pleadings and documents filed by her in federal court. Also, complainant was requested to file her argument for stay by December 15, 1994.

In compliance with the conference agreement, complainant immediately provided copies of her complaint, filed in Dane County Circuit Court under 42 U.S.C. Section 1983, to opposing party and the Commission. And on December 15, 1994, filed her arguments with the Commission for stay. In reply, respondent objected to the stay and moved for dismissal.

DISCUSSION

Complainant argues that respondent could not be prejudiced by a stay, since she has filed a court complaint and it is anticipated dispositive motions and trial will be completed within six to nine months. Complainant asserts that a stay would involve a period of less than one year.

Respondent argues that complainant sought and obtained two postponements of hearings; that respondent is a defunct agency; none of the witnesses currently work for the state, some having left the state and the delay would prejudice respondent. Also, respondent argues, citing Lindas v. Cady, 183 Wis. 2d 547 (1994), that courts look disapprovingly on two separate actions in these types of cases and requests the Commission to follow its decision in Servais v. DOT, 92-0042-PC-ER, where it dismissed a discrimination case without prejudice, after complainant filed a Section 1983 action, involving the same issue, in court.

Complainant's Circuit Court complaint alleges:

Defendant's harassment of plaintiff and their imposition of a hostile and abusive working environment resulted in the constructive termination of plaintiff's employment from the Office of the Commissioner of Transportation.

Complainant also alleged that defendant's actions were committed in retaliation of her exercise of her right to free speech, thus violating 42 U.S.C. Section 1983. And for a second cause of action complainant alleged defendant's actions were in violation of her rights under §230.80, et. seq.. Wis. Stats. In

comparison, complainant alleged in her complaint to this Commission that she was retaliated against by respondent after she complained to them and filed a formal whistleblower complaint, when respondent created a hostile work environment forcing her to resign her position. The defendants in complainant's Section 1983 action are referenced in her complaint to the Commission and are principals in the same alleged acts of discrimination, during the same time period.

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

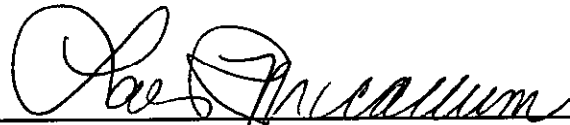
No later than 10 days before the specified time of hearing under s. 230.85(2), an employe shall notify the commission orally or in writing if he or she has commenced or will commence an action in a court of record alleging matters prohibited under s. 230.83(1). If the employe does not substantially comply 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).

Inasmuch as complainant has filed a complaint in a court of record that involves the same subject matter as the instant proceeding, the Commission has no jurisdiction over this proceeding except to dismiss it. Accordingly, complainant's request for a stay must be denied.

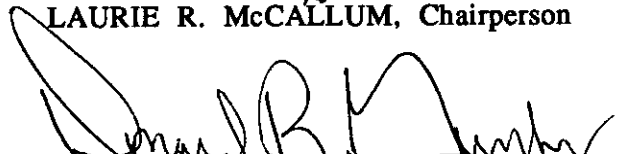
ORDER

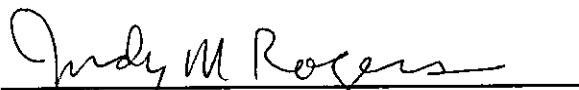
Complainant's request for a stay of proceedings is denied and this complaint is dismissed pursuant to §230.88(2)(c), Stats.

Dated: February 22, 1995 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

DRM:jan


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

Parties:

Debra Tolley
3701 Goodland Drive
Madison, WI 53704

Charles Thompson
Secretary, DOT *
P.O. Box 7910
Madison, WI 53707

* Pursuant to 93 Wis. Act 16, the Office of the Commission of Transportation was abolished, effective January 1, 1994, and certain functions transferred to the Public Service Commission, to the Department of Transportation and to the Division of Hearings and Appeals in the Department of Administration. 1993 Wis. Act 16, §§9154(2) and 9454. The complainant's area of responsibility was transferred to the Department of Transportation. 1993 Wis. Act 16, §3206, et. seq.

**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 (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) 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.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.

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