



TERRY NOLEN,
Complainant,

v.

**Secretary, DEPARTMENT OF
INDUSTRY, LABOR AND HUMAN
RELATIONS (DILHR) [DEPARTMENT
OF WORKFORCE DEVELOPMENT],
(DEPARTMENT OF COMMERCE),¹**
Respondent.

**RULING ON
MOTION TO DISMISS**

Case No. 95-0163-PC-ER

The hearing issues to which the parties agreed are as follows:

Whether respondent retaliated against complainant for engaging in activities protected by the whistleblower law in regard to the following actions:

- (a) whistleblower letter sent to local fire departments,
- (b) overtime policies changed in September 1995,
- (c) denial of overtime pay for pay periods ending September 30 and October 15, 1995,
- (d) change of "advanced travel procedures,"
- (e) particular attention paid to complainant's hours of work and work reports,
- (f) reprimand of complainant in January of 1996.

¹ Effective July 1, 1996, the name of the Department of Industry, Labor and Human Relations [DILHR] was changed to the Department of Workforce Development [DWD]. Also, effective on the same date, the Division of Safety and Buildings functions transferred to the Department of Commerce.

On November 7, 1997, respondent filed a motion to dismiss issue (c), above, and stated as follows, in relevant part, as the basis for this motion:

Respondent . . . moves the Personnel Commission, pursuant to Chapter PC, Section 1.08 of the Wisconsin Administrative Code, for an order dismissing a portion of Complainant's complaint in this action which states that the Respondent retaliated against Complainant for whistleblowing by denying Complainant overtime pay for pay periods ending September 30 and October 15, 1995 or in the alternative, Respondent moves the Personnel Commission to find that said claim lacks probable cause as the Commission did in its Initial Determination with the additional claims filed by the Complainant in this matter on the grounds of mootness because:

1. Complainant was not denied overtime pay for pay periods ending September 30 and October 15, 1995. Complainant was paid and made whole for those hours as of pay periods ending July 7, 1997 (#15) and August 2, 1997 (#17). . . .
2. Complainant was paid during pay periods #15 and #17 rather than the September 30 and October 15, 1995 pay periods because Complainant was not providing his supervisors with timely and specific explanations which would account for his overtime claims. The reason for delaying payment of overtime hours was not related in any way to Complainant's "whistleblower letter," which is the subject of this action. . . .

Respondent appears to be asking the Commission to re-investigate the allegation relating to overtime pay for the two referenced pay periods based on the information provided in the motion and accompanying affidavits. However, it is not the Commission's practice to re-investigate an allegation after an Initial Determination has been issued. It should also be noted here that respondent would have been aware, prior to the issuance of the Initial Determination, of its reasons for withholding or delaying the subject overtime payments, and has not provided any showing that it did not have a full and fair opportunity to provide that information during the course of the investigation.

The remaining basis for the motion relates to the question of mootness. In this regard, respondent argues that the payments made to complainant in 1997 for overtime

hours he accrued in 1995 resolves the matter in dispute, and, as a result, the Commission's determination of the issue cannot have any practical, legal effect upon an existing controversy.

In *Watkins v. DILHR*, 69 Wis. 2d 782, 12 FEP Cases 816 (1975), the Wisconsin Supreme Court ruled, in a case where it was concluded that the complainant had been discriminated against by her state agency employer on the basis of her race when she was denied a requested transfer to a different position in 1969 and in 1970, that the controversy was not moot even though the complainant had been transferred to the position she sought in 1971, after she had filed the underlying complaint of discrimination. The basis for the Court's ruling was that, since the complainant remained an employee of DILHR, an order could be entered which would have the practical, legal effect of requiring that the complainant be considered for all future transfers on the basis of her qualifications and ability, and without regard to her race; that the complainant was entitled, having suffered frustration in her employment over an extended period of time, to know whether or not this was due to race discrimination; and that it would foster, not eliminate, discrimination if employers in such situations could escape liability by simply waiting until enforcement proceedings were begun and then remedying the subject adverse action. In *County of Los Angeles v. Davis*, 440 U.S. 625, 19 FEP Cases 282 (1979), the Court ruled that the burden of demonstrating mootness "is a heavy one," and that a case becomes moot if "it can be said with assurance that there is no reasonable expectation . . . that the alleged violation will occur [recur] . . . and . . . interim relief or events have completely and irrevocably eradicated the effects of the alleged violation."

Here, complainant remains an employee of respondent and it is certainly possible that a controversy could arise in the future between the parties relating to the impact on complainant's requests for overtime pay of the letter complainant has claimed as a whistleblower disclosure. As a result, if the Commission were to decide issue (c) in complainant's favor and issue an order that respondent cease and desist from retaliating against complainant in regard to his requests for overtime pay, this

would have a practical, legal effect in much the same way as described in the *Watkins* decision. It is concluded, as a result, the respondent has failed to sustain its “heavy burden” of showing that there is no reasonable expectation that the alleged violation will recur and that the 1997 overtime payments made to complainant have “completely and irrevocably eradicated the effects of the alleged violation.”

ORDER

This motion to dismiss issue (c) is denied.

Dated: December 17, 1997

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

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