STATE OF WISCONSIN | PERSONNEL COMMISSION

WILLIAM STAPLES,
Complainant,

v.

State Public Defender, OFFICE OF THE STATE PUBLIC DEFENDER,
Respondent.

Case No. 95-0189-PC-ER

RULING ON COSTS AND FEES AND FINAL DECISION AND ORDER

NATURE OF CASE

This is a complaint of discrimination on the bases of race and conviction record with respect to the failure to hire complainant for a number of paralegal positions. In an interim decision and order dated September 22, 1999, the Commission concluded that respondent discriminated against him on the basis of conviction record with respect to its failure to have hired him for positions in the Waukesha office, but had not discriminated against him on the basis of race with respect to all the positions in question, and had not discriminated against him on the basis of conviction record with respect to any of the positions in question other than those in the Waukesha office. The Commission has retained jurisdiction over this case to make a decision with regard to attorney's fees and costs. Complainant has submitted a compilation of fees and costs, and respondent has submitted objections thereto, which the Commission now addresses.

To begin with, respondent has proceeded on the implicit assumption that the issue of whether to award attorney's fees and costs in this case is to be addressed under the aegis of §227.485, Stats., the Wisconsin analogue of the federal equal access to justice act. However, since this case was brought under the WFEA (Wisconsin Fair Employment Act; Subchapter II, Chapter 111, Stats.), that law provides an independent basis for an award of attorney's fees, *see Watkins v. LIRC,* 117 Wis. 2d 753, 345 N. W. 2d 482 (1984); *Ray v. UW,* 84-0073-PC-ER, 5/9/85; which is not preempted by §227.485, Stats., *see Schilling v. UW,* 90-0064-PC-ER, 10/1/92. Since an award of

attorney's fees under the WFEA does not involve the same prerequisites as an award under §227.485,[1] the Commission usually does not address the issue of entitlement under §227.485 in cases brought under the WFEA. *Id.*

To begin at the most general level, an award of fees and costs furthers the legislative intent behind the WFEA of discouraging discrimination, and encouraging people to come forward with complaints and to act as "private attorney[s] general." *Watkins,* 117 Wis. 2d at 764. These factors appear to be present in the instant case, and the Commission does not perceive any reason not to award appropriate fees and costs here.

Turning to the specific items of costs, respondent objects to complainant's claim for time that he has spent working on the case. The Commission agrees that a complainant, regardless of whether he is an attorney,[2] can not be compensated for time spent representing himself or herself. *See Dickie v. City of Tomah,* 190 Wis. 2d 455, 462, 527 N. W. 2d 697 (Ct. App. 1994) ("[A]ttorney fees cannot be awarded to a litigant unless an attorney/client relationship exists."); *State ex rel Young v. Shaw,* 165 Wis. 2d 276, 295, 477 N. W. 2d 340 (Ct. App. 1994); *Heikkinen v. DOT,* 90-0006-PC, 4/16/90.

Respondent also objects to complainant's claim for expenses he incurred in litigating this case—travel expenses, lodging, meals, and money he apparently spent on paying witness's wages and meals. The award of attorney's fees and costs is intended to cover direct costs an attorney incurs in the pursuit of a judicial or administrative proceeding, such as filing fees and the costs of service of process, and not complainant's incidental and collateral expenses connected with carrying on an administrative proceeding. *See Halverson v. Milwaukee Co.,* (LIRC, 5/22/87); *State v. Foster,* 100 Wis. 2d 103, 106, 301 Wis. 2d 103 (1981) ("The terms 'allowable costs' or 'taxable costs' have a special meaning in litigation. The right to recover costs is not synonymous with the right to recover the expense of litigation.").

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[1] The primary difference is that Section 227.485(3) provides that fees will not be awarded if the employer was "substantially justified" in taking its position.

Complainant also has claimed $25 for copies, postage, paper, etc., and $20 for phone calls. Respondent objects to complainant's entitlement for these items, with the exception of the phone calls and postage. Respondent contends that complainant is limited to the types of costs set forth in §§814.04(2) and 814.036, Stats. While these provisions do not explicitly apply to this proceeding, either by their terms or through incorporation by reference,[3] the enumeration of "items of costs" in §814.04(2) indicates the kinds of costs which normally are considered attorney's costs, and should be used for guidance in the absence of a compelling argument to the contrary. Section 814.04(2) specifically mentions the costs of postage and telephone calls. Photocopies, which §814.04(2) does not mention specifically, are not allowable costs. *Kleinke v. Farmers Coop. Supply & Shipping,* 202 Wis. 2d 138, 148, 549 N. W. 2d 714 (1996). Thus the actual compensable costs to be awarded in this case are limited to costs for telephone calls and postage.

Complainant claimed $20 for phone calls, and $25 for "cop[y]ing, postage, paper, etc." In the absence of a more specific accounting for the latter items, the Commission will allow $8.00 for postage.

Finally, respondent contends that any award of costs and fees must be reduced because complainant prevailed as to only part of his overall claim.[4] The Commission agrees with the general principle of prorating costs and fees under such circumstances. *See Warren v. DHSS,* 92-0750-PC-ER, 10/2/96. However, such prorating has more application to attorney's fees than the kind of costs awarded in this case. Considering the matter in which the case was litigated, it would not be realistic to allocate percentages of costs for postage and telephone calls to specific parts of complainant's claims,

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[2] Complainant is not an attorney.

[3] Section 227.485, Stats., incorporates by reference §814.245. Since in this case the question of attorney fees and costs is not being considered under § 227.485, there is no such incorporation by reference here.

[4] Complainant's claim ran to a number of vacant positions, and was based on both race and conviction record. He prevailed only as to his conviction record claim with regard to the two Waukesha vacancies.

particularly in light of the modest sums involved. The Commission declines to reduce the award of costs to complainant on the basis of partial success.

ORDER

1. The interim decision and order entered on September 22, 1999, a copy of which is attached hereto and incorporated by reference as if fully set forth, is adopted as the Commission's final decision and order in this case.

2. Respondent is ordered to cease and desist from refusing to hire complainant on the basis of his conviction record for any future vacancies for which he might apply, without considering whether the circumstances of complainant's conviction record substantially relate to the circumstances of the particular job.

3. Respondent is ordered to pay complainant's costs in the amount of $28.00.

Dated: November 3, 1999.

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

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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 (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.

2/3/95

STATE OF WISCONSIN PERSONNEL COMMISSION

WILLIAM STAPLES,
Complainant,

v.

State Public Defender, OFFICE OF THE STATE PUBLIC DEFENDER,
Respondent.

Case No. 95-0189-PC-ER

INTERIM DECISION AND ORDER

NATURE OF CASE

This is a complaint of discrimination on the basis of race and conviction record with respect to the failure to hire complainant for a number of paralegal positions.

A hearing examiner appointed pursuant to §227.46, Stats., held a hearing on July 30, 1998. Respondent made a motion to dismiss at the close of complainant's case in chief. The examiner then verbally advised the parties that in his opinion the motion should be granted, but that because he lacked the authority to grant the motion, §PC 5.01(2), Wis. Adm. Code, he would issue a proposed decision, §227.46(2), Wis. Stats., embodying this opinion and proposed order.[1]

In the course of preparing the proposed decision, and as a result of further reflection and research, the examiner concluded that the motion should not be granted as to one facet of this case—the claim of conviction record as to the Waukesha position. Therefore, the examiner *sua sponte* rescinded so much of his verbally stated conclusion that said aspect of this case should be dismissed, and issued an examiner's ruling which had the effect of returning this case to the stage of the process where the hearing had been adjourned and continuing with that hearing.

The following findings are based on the record of both parts of the hearing.

[1] The hearing then was adjourned.

FINDINGS OF FACT

1. Complainant is a member of the black race.

2. Complainant was convicted of attempted murder in 1976, and approximately two other crimes of indeterminate nature and dates.

3. Complainant has experience working in a paralegal capacity as a pro se litigant and by helping others to resolve legal problems.

4. In 1995, complainant applied for a paralegal job with respondent.

5. Complainant was qualified for said employment.

6. Respondent did not hire complainant for any of its vacant positions.

7. The duties of the paralegal jobs in question include conducting investigations, doing research, providing trial assistance for attorneys, and regularly testifying in court and administrative hearings on behalf of criminal defendants.

8. In the legal proceedings in which paralegals testify, they are subject to impeachment on the basis of criminal conviction records under the rules of evidence.

9. The first assistant public defender for the Waukesha region was the effective appointing authority for the two Waukesha vacancies in question.

10. One of the persons hired for the Waukesha vacancies had operated her own private detective agency for 10 years and had extensive other relevant training and experience. The other person hired was already working as a paralegal and had extensive other relevant training and experience. Both the persons hired were substantially better qualified for the position than complainant.

11. The effective appointing authority was aware as a result of a record check that complainant had a criminal conviction record. She did not have any information about that record beyond the fact that complainant had been confined in prison.

12. The effective appointing authority's practice and policy was not to hire as paralegals any applicants who had a criminal conviction record.

13. The parties stipulated, and it is found that complainant's conviction record was a causative factor with respect to respondent's failure to hire complainant in a Waukesha paralegal position.

14. If the effective appointing authority had not considered complainant's conviction record, complainant still would not have been hired, because the persons hired had substantially better training and experience than complainant.

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §230.45(1)(b), Stats.

2. Complainant has the overall burden of proving that he was discriminated against on the basis of race or conviction record in connection with respondent's failure to hire him for any of the vacant positions in question.

3. Complainant failed to establish a prima facie case as to his claims of race discrimination as to all the positions in question, and failed to establish a prima facie case as to his claims of conviction record as to all positions except the Waukesha positions, and thus failed to sustain his burden of proof as to those claims for which he did not establish prima facie cases.

4. Respondent did not discriminate against complainant on the basis of race by failing to hire him for any of the positions in question.

5. With the exception of the Waukesha positions, respondent did not discriminate against complainant on the basis of his conviction record by not hiring him for any of the positions in question.

6. Complainant established a prima facie case as to his claim of conviction record discrimination with respect to the Waukesha positions.

7. Respondent admitted that complainant's conviction record was a factor in the decision not to hire complainant for any of the vacant paralegal positions in Waukesha, and thus respondent has the burden of proof to establish the

§111.335(1)(c)1., Wis. Stats.[2], exception to conviction record discrimination with respect to the Waukesha positions.

8. Respondent has failed to sustain its burden of proof under §111.335(1)(c)1., Wis. Stats., with respect to the claim of conviction record discrimination as to the Waukesha positions.

9. Respondent discriminated against complainant on the basis of conviction record with respect to its failure to hire him for the Waukesha positions.

10. Respondent has the burden of proof to establish that it would have reached the same decision with regard to not hiring complainant for either of the Waukesha positions in the absence of consideration of complainant's conviction record.

11. Respondent has satisfied its burden of proof in this regard.

12. Complainant's remedy is limited to a cease and desist order and attorney's fees and costs, if any.

OPINION

In order to establish a prima facie case of discrimination in hiring, the complainant must show 1) he is a member of a protected group; 2) he applied for a vacancy which the employer was trying to fill; 3) he was qualified for the position in question; 4) he was rejected under circumstances which give rise to an inference of discrimination. *See, e.g., Halsell v. Kimberly-Clark Corp.*, 683 F. 2d 285, 29 FEP Cases 1185 (8th Cir. 1982)

Complainant is in protected groups on the basis of race and conviction record. He applied and was not hired for vacant positions for which he was qualified. Thus he has satisfied the first three elements of a prima facie case. The question then is whether he has satisfied the fourth step—i.e., rejection under circumstances which give rise to an inference of discrimination.

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[2] "(c) Notwithstanding s. 111.322, it is not employment discrimination because of conviction record to refuse to employ . . . any individual who: 1. Has been convicted of any felony, misdemeanor or other offense the circumstances of which substantially relate to the circumstances of the particular job. . . ."

With regard to race, complainant has failed to establish the fourth step in a prima facie case because there is nothing in the record which creates an inference that he was not hired because of race. While complainant presented some evidence of his own qualifications for these positions, there is no evidence that he was as well qualified, or better qualified, than any of the candidates who were hired. There is no other evidence that suggests he was discriminated against on the basis of race.

With respect to conviction record, there is no evidence (with the exception of the Waukesha positions) that respondent's agents who were responsible for the hiring knew about complainant's conviction record. Thus complainant has failed to establish the fourth element of a prima facie case of conviction record discrimination as to the non-Waukesha positions.

As to the positions in Waukesha, the parties stipulated that complainant's conviction record was a factor in the decision not to hire complainant there, and this was consistent with the testimony of the effective appointing authority. However, §111.335(1)(c)1., Wis. Stats., provides an exception to the prohibition of conviction discrimination: "(c) Notwithstanding s. 111.322, it is not employment discrimination because of conviction record to refuse to employ . . . any individual who: 1. Has been convicted of any felony, misdemeanor or other offense the circumstances of which substantially relate to the circumstances of the particular job. . . ."

Both parties presented testimony that complainant's credibility in court proceedings could be impeached by questioning on cross-examination about his felony conviction. *See, e.g., State v. Kuntz*, 160 Wis. 2d 722, 753, 467 N. W.2d 531(1991) ("Wisconsin law presumes that all criminal convictions have some probative value regarding truthfulness."). Complainant apparently contends that the negative impact of such a line of questioning would be limited, because if he answered truthfully, the questioning could not go beyond the bare fact that he had been convicted of one or

more crimes[3]. Notwithstanding this, the susceptibility to being impeached in this manner has been recognized as a significant problem for someone who has to testify in court. *See Law Enforcement Stds. Bd. v. Lyndon Station*, 101 Wis. 2d 472, 492-93, 305 N.W.2d 89 (1981). However, the party whose witness is impeached in this manner on cross-examination has the right on redirect to attempt to rehabilitate the witness by showing, for example, that the crime was not related to veracity. *See State v. Bailey*, 54 Wis. 2d 679, 689-90, 196 N.W.2d 664 (1972). In this regard, the only information in the record concerning complainant's conviction record is that he has approximately three criminal convictions, one of which was in 1976 for attempted first degree murder.

Respondent has the burden of proof to establish the §111.335(1)(c)1., Stats., exception to conviction record discrimination. *See Gibson v. Transp. Comm.*, 106 Wis. 2d 22, 29, 31 N.W.2d 346 (1982). In deciding whether to hire an employe with a conviction record, the employer is required to make a case by case application of the "substantial relationship" test. Section 111.335(1)(c)1., Stats., provides that it is not employment discrimination to refuse to hire a convicted applicant if the applicant "[h]as been convicted of any felony, misdemeanor or other offense the *circumstances* of which substantially relate to the *circumstances* of the *particular* job." (emphasis added) It is clear from this language that the employer is to consider the circumstances of the conviction as it relates to the circumstances of the job, not merely the fact of a conviction. *See Gibson v. Transp Comm.*, 106 Wis. 2d at 28-29, where the Court pointed out that if it were not appropriate to consider the factual circumstances of the crime, "the 'circumstances of which' language . . . would be superfluous and it is clear from the legislative history of that statute that the legislature specifically intended to include such language in the statute." (footnote omitted)

In the instant case, the record is clear that the effective appointing authority not only had no specific knowledge about the crimes for which complainant had been

[3] *See e.g., Voith v. Buser*, 83 Wis. 2d 540, 541, 266 N. W.2d 304 (1978).

convicted[4], but also that she followed a blanket policy against hiring anyone with a criminal record as a paralegal.[5] Thus respondent did not sustain its burden of establishing that there was a substantial relationship between the circumstances of complainant's criminal record and the circumstances of the particular jobs in question.

While it is clear that respondent violated the WFEA by considering as it did complainant's conviction record, it also is clear that in the absence of such consideration it would have reached the same hiring decision, due to the marked disparity in the applicants' relative qualifications. Under these circumstances, complainant is entitled to a cease and desist order and attorney's fees and costs (if any), but neither compensation for lost pay nor an order requiring respondent to hire him. *See Hoell v. LIRC,* 186 Wis. 2d 603, 608-09, 522 N. W. 2d 234 (Ct. App. 1994):

> A mixed motive case is one in which the adverse employment decision resulted from a mixture of legitimate business reasons and prohibited discriminatory motives. . . .
>
> In modifying the remedies ordered by the [Administrative Law Judge], LIRC applied the mixed motive test as interpreted under federal Title VII cases . . . 'an unlawful employment practice is established when the complaining party demonstrates that [an unlawful factor] was a motivating factor for any employment practice, even though other factors motivated the practice.' However, if the employer can demonstrate that it would have taken the same action in the absence of the impermissible motivating factor, the plaintiff may be awarded declaratory relief, injunctive relief, and attorney's fees and costs, but not monetary damages or reinstatement. (citations and footnotes omitted)

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[4] She testified that the only thing she knew about complainant's conviction record was that he had spent time in prison.

[5] She testified that "I will not hire anyone [as a paralegal] with a prior record."

ORDER

1. Respondent is ordered to cease and desist from refusing to hire complainant on the basis of his conviction record for any future vacancies for which he might apply, without considering whether the circumstances of complainant's conviction record substantially relate to the circumstances of the particular job.

2. Respondent is ordered to pay complainant's reasonable attorney's fees and costs, if any.

Dated: September 22, 1999.

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

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