

STATE OF WISCONSIN

PERSONNEL COMMISSION

PASTORI M. BALELE,
Complainant,

v.

**Secretary, DEPARTMENT OF
ADMINISTRATION, Secretary,
DEPARTMENT OF HEALTH AND
FAMILY SERVICES, and Attorney
General, DEPARTMENT OF JUSTICE,**
Respondents.

**RULING ON
RESPONDENTS'
MOTION TO DISMISS**

Case No. 96-0156-PC-ER

Respondents' request to file a motion to dismiss was granted at a prehearing conference on February 7, 1997. All parties filed briefs with the final argument received by the Commission on May 7, 1997. The facts recited below appear to be undisputed by the parties unless specifically noted to the contrary.

FINDINGS OF FACT

1. Complainant filed a discrimination complaint on August 28, 1995, which the Commission designated as case number 95-0124-PC-ER (hereafter, Prior Complaint). Complainant alleged in the Prior Complaint that the Department of Justice (DOJ) discriminated against him on the bases of color, national origin/ancestry and race; as well as retaliated against him for participating in activities protected under the Fair Employment Act (FEA) (§111.31, et. seq., Stats.) and under the Whistleblower Law (§230.80, et. seq., Stats.). Such discrimination/retaliation allegedly occurred in regard to actions taken by DOJ legal staff in providing legal counsel for state agencies to defend against prior cases filed by complainant and, ultimately, by one of those state agencies obtaining a court order authorizing garnishment of complainant's wages to pay its costs in successfully defending against complainant's litigation. An amendment was filed in the Prior Complaint on September 5, 1995, which added the Department of Administration (DOA) as a respondent but failed to allege that DOA took any action against complainant.

2. By letter dated August 29, 1995, complainant requested waiver of the investigation of his Prior Complaint to proceed directly to hearing and such request was granted by the Commission on September 13, 1995. On September 15, 1995,

respondents filed a motion to dismiss the Prior Complaint on the grounds that DOJ involvement as a respondent was not "as an employer" and that while DOA was complainant's employer the amended complaint contained no allegations of any actions taken by DOA. Briefs were filed by all parties with the final brief submitted by letter dated September 22, 1995. Before resolution of the motion, complainant requested dismissal of the Prior Complaint by letter dated September 25, 1995, stating as noted below:

This memo is to inform the Commission that this complaint will be filed in the U.S. District Court for the Western District of Wisconsin on Monday, September 25, 1995. For this reason I am asking the Commission to dismiss this complaint to avoid litigating . . . in two forums. . .

The Prior Complaint was dismissed by order dated September 28, 1995, based on complainant's request for dismissal.

3. By letter dated November 4, 1996, complainant requested that his Prior Complaint be reopened. Respondents opposed the request in written arguments dated November 19, 1996, which included the following description of intervening events at the federal district court level (*Balele v. Barnett, et al.*, 95-C-0679-S (W.D. WI)):

On December 15, 1995, the federal district court granted summary dismissal of Balele's federal claims with prejudice and his state law claim without prejudice. The court determined that there was insufficient evidence in the record from which a reasonable jury could find that the defendants intentionally discriminated against Balele on the basis of his race or color when they filed the garnishment actions against him. The court further determined that (1) the garnishment actions were filed because Balele owed the State of Wisconsin over \$3000 for court costs and the cost of collecting these costs was minimal, (2) the decision would have been made regardless of the plaintiff's race, (3) no evidence exists to demonstrate that the reason for initiating the garnishment actions was a pretext for race discrimination, and (4) the garnishment actions were not based upon any retaliatory animus and they would have been commenced absent any retaliatory animus. The court declined to exercise continuing supplemental jurisdiction over Balele's remaining state law tort claim for invasion of privacy because the court dismissed all the federal claims . . .

On November 22, 1996, the Commission issued a ruling which denied complainant's request to reopen the Prior Complaint because his request was made more than a year after dismissal of the Prior Complaint and, accordingly, the Commission lacked authority to grant the request.

4. Complainant filed another discrimination complaint on November 25, 1996, which the Commission designated as case number 96-0156-PC-ER (hereafter, Present Complaint). In the Present Complaint, he alleges that DOJ, DOA and the Department of Health and Family Services (DHFS) discriminated against him because of his color, national origin/ancestry and race; as well as retaliated against him due to his participation in activities protected under the FEA and under the whistleblower law. The alleged adverse actions relate to respondents' failure to refund the amount of money collected through garnishment of his wages (as he requested by letter dated October 15, 1996), and to respondents' garnishment of his wages. The Present Complaint also contained an allegation that respondents offered to forego the garnishment if complainant would withdraw the federal court action described in the prior paragraph, an offer which he declined.

5. By letter dated December 5, 1996, complainant requested waiver of the investigation of his Present Complaint to proceed directly to hearing. The Commission granted his request on December 18, 1996. At a prehearing conference on February 7, 1997, respondents' request to file a motion to dismiss the Present Complaint was granted. A briefing schedule was established and all parties' briefs have been received.

OPINION

The crux of respondents' motion is shown below (pp. 4-5, letter dated March 17, 1997):

The respondents move the Commission to dismiss this "new" complaint on the same grounds and for the same reasons which were advanced by DOJ and DOA for dismissing and for denying reopening or rehearing in Case No. 95-0124-PC-ER. First, the Commission does not have jurisdiction over the claims against the DHFS and DOJ. The Commission only has jurisdiction against a state agency "as an employer," sec. 111.375(2), Stats., DHFS and DOJ are not Balele's employer, and Balele's complaint does not challenge any actions by DHFS or DOJ as an employer. Consequently, the Commission is without jurisdiction over DHFS or DOJ.

Second, Balele's "new" complaint fails to state a claim for relief against DOA. The complaint against DOA fails to state a claim because it fails to allege that DOA took any action against Balele, much less any action against him as his employer. Even if DOA failed to refund to Balele (at his request) the money which DOA had withheld from Balele's paychecks pursuant to the court-ordered garnishment, such failure would not be an act of employment discrimination or retaliation within the meaning of the WFEA. Moreover, Balele cites no legal authority under

which DOA could refund the money which it withheld from Balele's paychecks pursuant to the court ordered garnishment.

Third, insofar as Balele is actually contesting the garnishment of money from his paychecks, the claims against all respondents are barred by the doctrines of claim preclusion and/or issue preclusion. *Schaeffer v. State Personnel Comm.*, 150 Wis. 2d 132, 138-44, 441 N.W.2d 292 (Ct. App. 1989); *Parks v. City of Madison*, 171 Wis. 2d 730, ___ N.W.2d ___ (Ct. App. 1992); *Northern States Power Co. V. Bugher*, 189 Wis. 2d 541, 550, 525 N.W.2d 723 (1995). The respondents submit that Balele cannot create a different claim under the WFEA simply by requesting a refund of the money withheld pursuant to the garnishment action, and then having his request denied by inaction.

The responsive materials filed by complainant were extensive. In some instances, his arguments were contradictory. The point complainant intended to make was unclear at times. All arguments raised by complainant were considered by the Commission. His main contentions are discussed below.

Complainant states in his responsive materials (dated April 16, 1997), that in his Present Complaint he is not challenging the "garnishment order or judgment by the Wisconsin Circuit Court." (p. 23 of materials dated April 16, 1997) However, he continues to base his claim of discrimination/retaliation on his assertion (taken as fact for purposes of resolving this motion) that respondents have not taken garnishment action against white litigants. (e.g., p. 36 of materials dated April 16, 1997) This element of his Present Case is barred because it is the same type of allegation raised in his Prior Complaint which was dismissed at his own request on September 28, 1995.

Another element of the Present Complaint relates to the federal court action filed after dismissal of the First Complaint (see ¶4 of this ruling). Complainant reports that respondents offered to forego implementing the garnishment order if he would withdraw his federal court action and, in fact, that respondents refunded the one week of garnishment already made prior to the settlement offer and stayed further garnishment while he considered the settlement offer. Garnishment resumed once complainant communicated to respondents that he rejected their settlement offer. Complainant's Present Case is based, in part, on his nonsensical notion that respondents by virtue of the settlement offer "abandoned their garnishment award in the state court." (p. 26 of materials dated April 16, 1997) This claim is dismissed for lack of legal merit and for failing to invoke a viable basis for Commission jurisdiction to review the claim.

A third element of the Present Complaint arose after complainant rejected respondents' settlement offer. Specifically, complainant "[a]s a good gesture to settle matters out of the judicial system" tendered an offer to respondents by letter dated October 15, 1996, wherein he requested that respondents refund the money obtained through garnishment of his wages. (p. 18-19, materials dated April 16, 1997) He interpreted respondents' failure to reply to the request as evidencing their "intent to maliciously continue to hurt complainant and his family because he refused to drop the charges." This claim is dismissed because the Commission lacks jurisdiction to consider alleged retaliation based upon complainant's rejection of a settlement offer in his federal case.

The Commission further notes that its jurisdiction under the FEA is over employment actions by a state agency acting in the capacity of an employer. *See, Pellitteri v. DOR*, 90-0112-PC-ER, 9/8/93; affirmed, *Pellitteri v. Pers. Comm.*, 94CV3540, Dane County Cir. Court, 7/19/95; *Hassan v. UW-Madison*, 93-0189-PC-ER, 3/29/94; and *Collins v. DHSS*, 83-0080-PC-ER. DHFS's claimed connection to the Present Complaint is as the agency defendant in the prior litigation for which the garnishment order was obtained. (p. 26-27, materials dated 4/16/97) DOJ's connection to the Present Complaint stems from its role of defending various state agencies in various lawsuits filed by complainant. Neither of these agencies acted in the capacity of an employer within the meaning of the FEA. Similarly, none of the alleged adverse actions by DOJ or DHFS were "disciplinary actions," within the meaning of §230.80(2), Stats.

Complainant is employed by DOA. One adverse action alleged in the Present Complaint relates to DOA's participation in a telephone conference with DOJ and complainant wherein the settlement offer was made. DOA's action occurred in a litigation context outside of its role of complainant's employer and, accordingly, complainant has no claim under the FEA regarding this matter. *See, Larsen v. DOC*, 91-0063-PC-ER, 7/1/91. Similarly, DOA's action was not a "disciplinary action" protected under the whistleblower law.

The only other adverse action alleged in the Present Complaint relates to DOA's garnishment of complainant's wages pursuant to the court order issued in complainant's litigation against DHFS. The Commission has no jurisdiction to review an employer's action of implementing garnishment pursuant to a valid court order resulting from litigation in which the employing agency was not a party.

ORDER

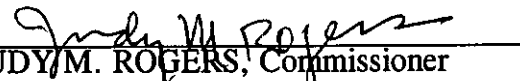
That respondents' motion to dismiss is granted and this case is dismissed.

Dated: June 4, 1997.

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

JMR
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JUDY M. ROGERS, Commissioner

Commissioner Donald R. Murphy did not participate in the consideration of this matter

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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