STATE OF WISCONSIN PERSONNEL COMMISSION

MICAH A. ORIEDO,
Complainant,

v.

Superintendent, DEPARTMENT OF PUBLIC INSTRUCTION, Secretary, DEPARTMENT OF EMPLOYMENT RELATIONS, Administrator, DIVISION OF MERIT RECRUITMENT AND SELCTION,

Respondents.

Case No. 98-0042-PC-ER

RULING ON MOTION TO AMEND AND MOTION TO DISMISS

This matter is before the Personnel Commission on the motion of the Department of Public Instruction (DPI) to dismiss for failure to state a claim, and on complainant's request to amend his complaint to add the State of Wisconsin as a separate respondent. The parties have had the opportunity to file briefs.

Complainant filed his complaint with the Commission on March 2, 1998, raising allegations of discrimination against DPI, the Department of Employment Relations (DER) and the Division of Merit Recruitment and Selection (DMRS) based on color, national origin or ancestry, and race, as well as retaliation under the Fair Employment Act and under the whistleblower law. The allegations arose from the process used to fill a vacant position of Education Administrative Director, Title 1 Programs - Career Executive at DPI.

Complainant waived the investigation of his claim and on April 9, 1998, DPI filed a motion to dismiss for failure to state a claim. Complainant filed an amendment to his complaint before the briefing schedule on the motion had been completed. In the amendment he sought to clarify his allegations and he also specifically identified the

State of Wisconsin as an additional, named respondent. The State, by a representative of the Department of Justice, objected to the complainant's effort to add it as a party.

I. Request to amend to add party

The Commission first deals with the question of whether the State of Wisconsin is a proper party in this matter. The Commission has issued several recent rulings reaffirming its conclusion in *Pellitteri v. DOR,* 90-0112-PC-ER, 9/8/93; affirmed by Dane County Circuit Court, *Pellitteri v. Wis. Pers. Comm.,* 94CV3540, 6/19/95, that it lacks jurisdiction, pursuant to the Fair Employment Act, over the State of Wisconsin as a party. *Balele v. DFI et al.,* 97-0117-PC-ER, 7/29/98; *Balele v. DHSS et al.,* 98-0045-PC-ER, 7/29/98; *Balele v. DNR et al.,* 98-0046-PC-ER, 7/29/98; *Balele v. PSC et al.,* 98-0088-PC-ER, 7/29/98.

In *Pellitteri*, the reviewing court noted as follows:

> As an administrative agency, the Commission's powers are limited to those expressly conferred or fairly implied from the four corners of the statutes under which it operates. *State v. ILHR Dept.*, 77 Wis. 2d 126, 136 (1977). Any reasonable doubt of the existence of an implied power of an administrative agency should be resolved against the exercise of such authority. *Id.*, *Basinas v. State*, 104. Wis. 2d 539, 546 (1981).
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> The Commission lacks the jurisdiction to add the State as a separate party respondent. The Commission's jurisdiction is set forth in §111.375(2), Wis. Stats., which states:
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> > This subchapter applies to each agency of the state except that complaints of discrimination . . . against the agency as an employer shall be filed and processed by the personnel commission . . .
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> Thus, the Commission's jurisdiction is expressly limited to cover only state agencies, not the State itself. Although it is arguable that the State as a separate entity has a duty to reasonably accommodate handicaps, the Commission lacks jurisdiction to add the State as a party to its proceedings. The legislature would have used broader jurisdictional language in §111.375(2), Wis. Stats., if it had intended the Commission to exercise jurisdictional authority over the State itself, rather than over "each agency of the state."

The analysis in *Pellitteri* remains applicable to the Fair Employment Act claims raised by the complainant in the present case.

Complainant has also raised an allegation under the whistleblower law, subch. III, ch. 230, Stats.[1] The Commission has authority, pursuant to §230.44(1)(gm), to "[r]eceive and process complaints of retaliatory disciplinary action under s. 230.85," which provides:

> (1) An employe who believes that *a supervisor or appointing authority* has initiated or administered, or threatened to initiate or administer, a retaliatory action against that employe in violation of s. 230.83 may file a written complaint with the commission. . . . (emphasis added)

The term "appointing authority" is defined in §230.80(1m) as "the chief officer of any governmental unit." According to §230.80(4):

> "Governmental unit" means any association, authority, board, commission, department, independent agency, institution, office, society or other *body in state government created or authorized to be created by the constitution or any law, including the legislature, the office of the governor and the courts*. "Governmental unit does not mean any political

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[1] When he filed his original complaint on March 2, 1998, complainant checked boxes on the complaint form for retaliation based on "activities protected by the Fair Employment Act" as well as retaliation based on "whistleblowing." Complainant used an earlier version of the complaint form when he filed his amendment on May 14, 1998. He checked a box preceding the general category of "retaliation" but did not check any of the boxes in front of the four listed bases for discrimination: 1) Elder abuse reporting; 2) Activities protected by the Fair Employment Act, 3) Occupational safety and health reporting; and 4) Whistleblowing. Both the original complaint and the amendment included the following paragraph as an allegation of fact:

> 9. Complainant had sued DPI, DER, MRS and other agencies in the Personnel Commission. In all cases, complainant had alleged that respondents had used racially discriminatory post certification practices to discriminate against blacks from being selected into career executive positions. Complainant therefore alleges respondents retaliated against him when they denied him the position at issue because he had filed the said complaints.

The Commission understands complainant to allege that he was not hired to the vacancy at DPI because of his prior complaints filed with the Personnel Commission and that the respondents' conduct constituted both Fair Employment Act retaliation and whistleblower retaliation.

> subdivision of the state or body within one or more political subdivisions which is created by law or by action of one or more political subdivisions. (emphasis added)

Subchapter III of chapter 230 remains substantially unchanged from when it was created by 1983 Wisconsin Act 409. The same act created §895.65, which established a cause of action in circuit court for retaliation taken by a government employer. Section 895.65 parallels the whistleblower law in many respects, and it includes an identical definition of "governmental unit." Pursuant to §895.65(2):

> An employe may bring an action inn circuit court against his or her employer or employer's agent, *including this state,* if the employer or employer's agent retaliates, by engaging in a disciplinary action, against the employe because the employe exercised his or her rights under the first amendment to the U.S. constitution or article I, section 3 of the Wisconsin constitution by lawfully disclosing information or because the employer or employer's agent believes the employe so exercised his or her rights. The employe shall bring the action within 2 years after the action allegedly occurred or after the employe learned of the action, whichever occurs last. No employe may bring an action against the department of employment relations as an employer's agent. (emphasis added)

While the companion provisions in §895.65 expressly permit a claim against the State, there is no similar language in §230.85. This contrast provides clear evidence of a legislative intent not to permit the State of Wisconsin to be named a respondent in a complaint of whistleblower retaliation filed with the Personnel Commission.

For the reasons expressed above, complainant is not permitted to amend his complaint to include the State of Wisconsin as an additional respondent in this matter.

II. Motion to dismiss

The second issue to be considered in this ruling is the motion by DPI to dismiss the complaint for failure to state a claim upon which relief can be granted. DPI states, in part:

> The petitioner makes four allegations of "violations of law" in his complaint. Each alleged violation of law is without a factual basis. Without

> a factual basis for his complaints, his complaint must fail and be dismissed.

An allegation should not be dismissed for failure to state a claim unless it appears to a certainty that no relief can be granted under any set of facts that complainant can prove in support of his allegations. *Morgan v. Pa. Gen Ins. Co.*, 87 Wis. 2d 723, 275 N.W.2d 660 (1979). In *Masuca v. UW (Stevens Point)*, 95-0128-PC-ER, 11/14/95, the Commission analyzed the respondent's motion to dismiss for failure to state a claim as follows:

> This complaint contains the following statement of discrimination:
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> > Prior to August 1, 1994 I worked in the maintenance department of the UW-SP at the Collins Classroom Center. I was transferred to the College of Professional Studies Building in august, 1994 where Joan North, Dean of the College of Professional Studies, works. Dean North repeatedly criticized my work performance as being inadequate to my supervisors without any factual foundation. My supervisors checked on my work and found it was totally satisfactory. It is my belief that Dean North made unfounded complaints about my work performance because I am Hispanic and she does not like me because of that fact. Because of the situation I was transferred to the College of Natural Resources Building in connection with my employment at the end of February, 1995.
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> The pleading requirements for an FEA complaint of discrimination are extremely minimal. *See, e.g., Goodhue v. UWSP,* 82-PC-ER-24, 11/9/83 (document stating that complainant felt she was treated differently because of her sex with respect to denial of tenure and promotion a sufficient complaint). Neither the WFEA nor this Commission's rules require that a complainant identify in the complaint the elements of a WFEA claim. The complaint in this case alleges that complainant was discriminated against because of his race with respect to criticism of his work and a transfer. This complaint is sufficient to withstand a motion to dismiss for failure to state a claim under the WFEA.

In the present case, the complainant has clarified his allegations in his amended complaint, which was filed after DPI filed its motion to dismiss. Complainant's allegations may be summarized as follows:[2]

1. In September of 1997, complainant took the examination for the Career Executive position in question at DPI, was ranked fifth, but was not invited for an interview because of his black race.
2. When complainant did not hear for a period of more than 60 days, he contacted all three respondents and informed them that he should be appointed to the vacancy, but no such action was taken. Complainant alleges respondents did not select and appoint him into the position because of his black race.
3. On February 25, 1998, complainant learned that the position had been filled in late November of 1997. Complainant alleges that DPI failed to notify him because of his black race and national origin.
4. Complainant contends that DER and DMRS should have carried out an investigation after complainant notified them that DPI had not filled the position in sixty days. Complainant alleges that the failure to investigate constituted discrimination against the complainant because of his race and national origin.
5. Complainant alleges that the post-certification practices used by the respondents have a disparate impact on qualified racial minorities seeking career executive positions.
6. Complainant alleges that respondents used post-certification practices in this instance with the intent of discriminating against complainant because of his race and national origin.
7. Complainant alleges that use of all-white interview panels has a disparate impact on qualified black people.
8. Complainant alleges that respondents have excluded blacks from interview panels in order to discriminate against black candidates for career executive positions.
9. Complainant alleges that respondents retaliated against him for having filed prior complaints against them before the Personnel Commission when they did not hire him for the position in question.

The question raised by respondents' motion is whether complainant alleges any conduct which falls within the scope of §111.322 under the Fair Employment Act, or meets the definition of "retaliatory action" under the whistleblower law.

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[2] The numbering corresponds to the "Allegations of Fact" set forth in section C. of the amended complaint.

Pursuant to §111.322:

> Subject to ss. 111.33 to 111.36, it is an act of employment discrimination to do any of the following:
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> (1) To refuse to hire, employ . . . any individual . . because of any basis enumerated in s. 111.321. . . .
>
> (3) To discharge or otherwise discriminate against any individual because he or she has opposed any discriminatory practice under this subchapter or because he or she has made a complaint . . . under this subchapter.

Complainant's allegations that he was not interviewed, not selected, not appointed and not notified of the appointment to fill the vacancy in question, because of his protected status, all fall within the scope of an allegation of a refusal to hire. Similarly, complainant's allegations that respondents did not investigate his concerns and used discriminatory post-certification practices (including unbalanced interview panels) are also covered by the statute.[3] Finally, complainant contends he was not hired because, at least in part, he had previously filed complaints of discrimination against the respondents. This contention fits within the scope of §111.322(3). Therefore, complainant's motion to dismiss for failure to state a claim must be denied as to all of complainant's FEA claims.

As to complainant's whistleblower claim, the question is whether complainant alleges any acts or threatened acts which meet the statutory definition of "retaliatory action." Section 230.83(1) provides: "No appointing authority, agent of an appointing authority or supervisor may initiate or administer any retaliatory action against any employe." Section 230.80(8) provides:

> "Retaliatory action" means a disciplinary action taken because of any of the following:
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> (a) The employe lawfully disclosed information under s. 230.81 or filed a complaint under s. 230.85(1).
>
> (b) The employe testified or assisted or will testify or assist in any action or proceeding relating to the lawful disclosure of information under s. 230.81 by another employe.

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[3] The Commission assumes that complainant contends that the interview panel for the vacancy in question included no Blacks.

> (c) The appointing authority, agent of an appointing authority or supervisor believes the employe engaged in any activity described in par. (a) or (b).

The Commission has previously ruled that the filing of a Fair Employment Act complaint with the Personnel Commission is *not* a protected activity under the whistleblower law that entitles a complainant to protection under §230.80(8)(a). In *Butzlaff v. DHSS*, 91-0044-PC-ER, 11/19/92, the Commission explained:

> Complainant's previous complaints were filed pursuant to subch. II, ch. 111, Stats., and were not complaints filed pursuant to §230.85(l), Stats. Therefore, with respect to the complainant's allegations here, the relevant language is whether the complainant's previous complaints constitute lawful disclosures under §230.81, Stats., which provides, in pertinent part:
>
> > (1) An employe with knowledge of information the disclosure of which is not expressly prohibited by state or federal law, rule or regulation may disclose that information to any other person. However, to obtain protection under s. 230.83, before disclosing that information to any person other than his or her attorney, collective bargaining representative or legislator, the employ shall do either of the following:
> >
> > (a) Disclose the information in writing to the employe's supervisor.
> > (b) After asking the commission which governmental unit is appropriate to receive the information, disclose the information in writing only to the governmental unit the commission determines is appropriate.....
> >
> > (2) Nothing in this section prohibits an employe from disclosing information to an appropriate law enforcement agency, a state or federal district attorney in whose jurisdiction the crime is alleged to have occurred, a state or federal grand jury or a judge in a proceeding commenced under s. 968.26, or disclosing information pursuant to any subpoena issued by any person authorized to issue subpoenas under s. 885.01. Any such disclosure of information is a lawful disclosure under this section and is protected under s. 230.83.

> (3) Any disclosure of information by an employee to his or her attorney, collective bargaining representative or legislator or to a legislative committee or legislative service agency is a lawful disclosure under this section and is protected under s. 230.83.

> The filing of the FEA complaint was not a written disclosure to the complainant's supervisor and was not a written disclosure to a governmental unit specified by the Commission as appropriate. The only remaining question is whether the Commission can be considered a "law enforcement agency" under §230.81(2), Stats. While that term is not defined in the whistleblower law, the general usage of the term is not broad enough to include the Personnel Commission, a quasi-judicial administrative agency. This distinction is supported by the reference in the same subsection to "state or federal grand jury or a judge in a proceeding commenced under s. 968.26." By specifically referencing judicial proceedings, the legislature has clearly excluded the court system, and by necessary implication the system of administrative law, from law enforcement agencies. In addition, a definition of the term "law enforcement agency" found elsewhere in the statutes is consistent with excluding the Commission from [the] scope of the term used in the whistleblower law.

The only protected activity identified by complainant in the present case was having filed previous complaints against DPI, DER and DMRS: "In all cases, complainant had alleged that respondents had used racially discriminatory post-certification practices to discriminate against blacks from being selected into career executive positions."[4] For the same reasons set forth in *Butzlaff*, the complainant's previous Fair Employment Act complaints do not satisfy the requirements of §230.81. Therefore, he has failed to state a whistleblower claim.

[4] Amended complaint, allegation of fact 9.

ORDER

Complainant's request to add the State of Wisconsin as a party respondent is denied. Respondents' motion to dismiss for failure to state a claim is denied as to complainant's FEA claims and is granted as to complainant's whistleblower claim. Complainant's claim of whistleblower retaliation is dismissed.

Dated: August 12, 1998. STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

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JUDY M. ROGERS, Commissioner

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