STATE OF WISCONSIN PERSONNEL COMMISSION

RONALD E. LANGFORD,
Complainant,

v.

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

Case No. 99-0013-PC-ER

RULING ON MOTION FOR SUMMARY JUDGMENT

This case is before the Commission to resolve respondent's motion for summary judgment. Both parties filed written arguments, with the final argument filed on October 27, 1999.

BACKGROUND

Complainant filed this case on January 19, 1999, alleging that respondent violated the Fair Employment Act (FEA), Subch. II, Ch. 111, Stats., by discriminating against him on the bases of age, color and race, as well as retaliating against him for participating in activities protected under the FEA. He further alleged that respondent violated the whistleblower law, Subch. III, Ch. 230, Stats., by retaliating against him for participating in activities protected under that law. The complaint contained four counts of retaliation or retaliation as noted below:

1. Respondent awarded complainant the minimum salary increase for fiscal year 1999.
2. Respondent initiated a disciplinary action in July 1998.
3. Respondent denied complainant's request to transfer to the Racine Office.
4. Respondent intentionally and maliciously communicated false information about complainant and refused to respond to his requests for information.

The Commission issued a ruling dated June 30, 1999 (hereafter, Prior Ruling) in regard to respondent's motion to dismiss counts one and two as barred by the terms of a settlement agreement reached by the parties in a federal lawsuit[1]. Respondent also moved to dismiss count four contending it "is so indefinite as to time that it is impossible to ascertain whether it, too, is barred by the settlement agreement." The final portion of respondent's motion was to dismiss claims of age, color, and race contending that complainant failed to assert any facts to support these claims. The Commission, in the Prior Ruling, granted respondent's motion in part and denied it in part. Counts one and two were dismissed as barred by the settlement agreement. The remaining portions of respondent's motion were denied.

A prehearing conference was held on July 22, 1999, when the following statement of the remaining issues for hearing was established (see Conference Report dated July 23, 1999):

> Whether respondent discriminated against complainant on the basis of age, color, or race, or retaliated against complainant for engaging in protected activities under the Fair Employment Act (FEA) or the "whistleblower" law:
>
> a) with respect to respondent's decision as reflected in its letter dated September 1, 1998, to deny complainant's transfer request to the Racine Trial Office as Assistant Public Defender;
> b) with respect to Deputy State Public Defender Miller stating to Kathy Lang in early summer of 1998 that complainant was deficient as a trial attorney;
> c) with respect to First Assistant State Public Defenders stating to Kathy Lang, in the period of April-July 1998, that complainant had a felony conviction record; and
> d) with respect to respondent denying, on or about June 19, 1998, complainant's request for Chapter 980 (sexual predator law) training.

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[1] *Langford, et al., v. Public Defenders Office, State of Wisconsin, et al.*, 98-C-416 (ED WI), dismissed based on settlement reach in court on July 8, 1998

OPINION

The Commission utilizes the following standard in reviewing a motion for summary judgment (*Grams v. Boss*, 97 Wis.2d 332, 338-339, 282 N.W.2d 637 (1980), citations omitted):

> On summary judgment the moving party has the burden to establish the absence of a genuine, that is, disputed, issue as to any material fact. On summary judgment the [Commission] does not decide the issue of fact; it decides whether there is a genuine issue of fact. A summary judgment should not be granted unless the moving party demonstrates a right to a judgment with such clarity as to leave no room for controversy; some courts have said that summary judgment must be denied unless the moving party demonstrates his entitlement to it beyond a reasonable doubt. Doubts as to the existence of a genuine issue of material fact should be resolved against the party moving for summary judgment.
>
> The papers filed by the moving party are carefully scrutinized. The inferences to be drawn from the underlying facts contained in the moving party's material should be viewed in the light most favorable to the party opposing the motion. If the movant's papers before the [Commission] fail to establish clearly that there is no genuine issue as to any material fact, the motion will be denied. If the material presented on the motion is subject to conflicting interpretations or reasonable people might differ as to its significance, it would be improper to grant summary judgment.

I. Allegations Time Barred by the Settlement Agreement

The comment about complainant's trial skills (allegation "b" of the hearing issue) and the denial of complainant's request for training (allegation "d" of the hearing issue) are barred by the terms of the settlement agreement reached in federal court. Complainant signed the settlement agreement on July 17, 1998. The agreement included the following paragraph (emphasis added):

> 10. *In consideration for the terms set forth above, the plaintiffs*, their agents, successors, heirs, executors, administrators and assigns do *hereby release, acquit and forever discharge defendant and the State of Wisconsin from any and all actions*, causes of action, claims demands, damages, costs, loss of services or expenses, of whatever kind or nature, either in law

> or equity, *arising from, in connection with or on account of, or in any way incidental to, events having occurred between plaintiffs and defendant in the course of plaintiffs' employment with defendant, prior to and including the date of plaintiffs' signing of this agreement, whether known or unknown, foreseen or unforeseen.* This release is for the benefit of defendant and defendant's agents and successors, the State of Wisconsin, and all others who may be liable to plaintiffs for any and all damages of any kind allegedly suffered by the plaintiffs.

Complainant contends the comment about his trial skills was made in early summer of 1998, and the denial of training occurred on or about June 19, 1998. These events occurred before he signed the settlement agreement. Complainant did not address the time-barred nature of these allegations in his reply to respondent's motion. Accordingly, allegations "b" and "d" are barred by the terms of the settlement agreement and are dismissed under the FEA and the whistleblower law.

II. Felony-Conviction Comment

Respondent contends that the felony-conviction comment (allegation "c" of the hearing issue) does not rise to the level of a cognizable adverse action. Respondent's argument is shown below:

> Complainant asserts . . . that First Assistant Joe Ehmann told someone else[2] that Complainant has a felony record. Respondent takes this allegation at face value solely for present purposes. Even if true, the allegation is not conceivably tantamount to an adverse employment action. At most, Complainant has alleged one off-handed remark by one OSPD employee to another, with adverse consequences neither alleged nor remotely apparent.
>
> In any event, the alleged statement, even if made and even if false, evinces no discriminatory intent. The declarant did not express an intent to punish Complainant for his presumed background. To the contrary, the statement is at most a declaration of presumed fact. Complainant may believe that he was slandered, but the Commission has neither the charter nor the resources to regulate every form of speech in the work-

[2] The "someone else" is a reference to Kathy Lang.

> place. Any injury that Complainant may have suffered was purely a private one.

Complainant did not address the above arguments in his reply to respondent's motion.

The question of whether a cognizable adverse action has been alleged is relevant to complainant's claims under the FEA as an element of a prima facie case of discrimination or retaliation. The Commission discussed the standard of analysis to be used in determining whether an adverse action occurred under the FEA in *Dewane v. UW*, 99-0018-PC-ER, 12/3/99, as shown below in relevant part (pp. 3-6 of the decision):

> In the context of a discrimination claim, §111.322(1), Stats., makes it an act of employment discrimination to "refuse to hire, employ, admit or license any individual, to bar or terminate from employment . . . or to discriminate against any individual in promotion, compensation or in terms, conditions or privileges of employment."
>
> The applicable standard, if the subject action is not one of those specified in these statutory sections, is whether the action had any concrete, tangible effect on the complainant's employment status. (Citation omitted.) In determining whether such effect is present, it is helpful to review case law developed under Title VII, which includes language parallel to the statutory language under consideration here. In *Smart v. Ball State University*, 89 F.3d 437, 71 FEP Cases 495 (7th Cir. 1996), the court stated as follows:
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> > Adverse employment action has been defined quite broadly in this circuit. (Citation omitted.) In some cases, for example, when an employee is fired, or suffers a reduction in benefits or pay, it is clear that an employee has been the victim of an adverse employment action. But an employment action does not have to be so easily quantified to be considered adverse for our purpose. "[A]dverse job action is not limited solely to loss or reduction of pay or monetary benefits. It can encompass other forms of adversity as well. (Citation omitted.)
> >
> > While adverse employment actions extend beyond readily quantifiable losses, not everything that makes an employee unhappy is an actionable adverse action. Otherwise, minor and even trivial employment actions that "an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit."

> *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270, 70 FEP Cases 1639 (7th Cir. 1996) . . .
>
> *Spring v. Sheboygan Area School District*, 865 F.2d 883 (7th Cir. 1989) ("humiliation" claimed by school principal to result from transfer to another school did not constitute adverse employment action because "public perceptions were not a term or condition" of plaintiff's employment. . . .
>
> In regard to the allegations of fair employment retaliation, the analysis . . . would parallel the analysis of these allegations in the context of . . . discrimination . . .

The conviction-record comment had no concrete adverse impact on complainant's employment. The allegation is akin to the "humiliation" or "public perception" claims which, as noted above, have been rejected by the Seventh Circuit. Accordingly, allegation "c" of the defined hearing issue is dismissed for failing to allege a cognizable adverse action under the FEA.

The question remains whether allegation "c" meets the requirements under the whistleblower law. A retaliatory action under the whistleblower law must meet the definition of a "disciplinary action," under §230.80(2), Stats., the text of which is shown below:

> "Disciplinary action" means any action taken with respect to an employe which has the effect, in whole or in part, of a penalty, including but not limited to any of the following:
>
> (a) Dismissal, demotion, transfer, removal of any duty assigned to the employe's position, refusal to restore, suspension, reprimand, verbal or physical harassment or reduction in base pay.
>
> (b) Denial of education or training, if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation or other personnel action.
>
> (c) Reassignment.
>
> (d) Failure to increase base pay, except with respect to the determination of a discretionary performance award.

The Commission has held that an action which is not one of those listed in this definition must have a substantial or potentially substantial negative impact on an employe in

order for it to be considered as a disciplinary action, within the meaning of §230.80(2), Stats. *Vander Zanden v. DILHR*, 84-0069-PC-ER, 8/24/88.

As noted previously, the conviction-record comment did not have a substantial or potentially substantial negative impact on complainant's employment. Accordingly, allegation "c" of the defined hearing issue is dismissed for failing to allege a disciplinary action under the whistleblower law.

III. Transfer Denial

Respondent contends that the transfer denial (allegation "a" of the hearing issue) should be dismissed either because it is barred by the terms of the settlement agreement or because it does not rise to the level of a cognizable adverse action. The Commission agrees that this claim is barred by the settlement agreement and, accordingly, does not discuss respondent's alternative theory.

The settled federal lawsuit arose out of complainant's employment at respondent's Racine office where he had leadership responsibilities in the position of First Assistant State Public Defender Assigned Counsel Division. (See ¶¶7-17 of the Summons and Complaint, a copy of which is attached to respondent's 4/16/99 letter as Exh. A2). Complainant's claims were settled with respondent agreeing to complainant's request for a transfer to the Milwaukee office as a staff attorney. In August 1998, two months after the settlement agreement was signed, complainant requested a transfer back to the Racine office and respondent denied the request.

Respondent's arguments is shown below using the same emphasis as appears in the original document (pp. 5-6, written arguments dated September 14, 1999):

> The operative facts are undisputed. Complainant alleges discrimination in the denial of a *lateral* transfer, from the Milwaukee trial office, *whose placement he had specifically negotiated as part of the federal case settlement*, to the Racine trial office. More particularly, Complainant himself sought the Milwaukee Criminal Office assignment, on July 6, 1998. Respondent acceded to this request as part of [the] settlement agreement, effective July 10, 1998:

> The parties have agreed that plaintiff Ronald E. Langford will, in exchange for executing this settlement agreement, be transferred to the position of Staff Attorney in the Trial Division of the Office of the State Public Defender, in the Milwaukee Criminal Office, effective Friday, July 10, 1998. The parties have further agreed that Langford's salary will not be affected by this transfer from July 10, 1998 through June 30, 1999. On July 1, 1999, Langford's salary will be reduced by $5,000.76.

Settlement Agreement, p. 2, ¶3.

> Then, by letter dated August 27, 1998, or less than two months after landing the assignment *that he himself sought*, Complainant requested another transfer, this time to the Racine trial office. Respondent's denial of that request is the subject of the first, remaining allegation of discrimination.
>
> This allegation is, in the final analysis, a somewhat clumsy attempt to relitigate the settled lawsuit . . . [T]he transfer request is barred by the settlement agreement. The parties agreed, in exchange for settling the suit, that Complainant would transfer to Milwaukee (his current assignment), and that his "salary will not be affected by *this transfer* from July 10, 1998 through June 30, 1999," during which time he would receive the $5,000+ manager's increment (emphasis supplied). Complainant thus received $5,000+ in salary that he was *not* otherwise entitled to, as a result of his transfer to *Milwaukee*. Complainant in effect now seeks to collaterally attack the transfer provision of the settlement agreement, which would be bad enough. More, for that matter, is at stake: Respondent kept its end of the deal, but Complainant seeks to have his cake and eat it, too. This is, to put it bluntly, manipulation of the legal system. The transfer issue was settled by the agreement, which bars Respondent (sic) from this end-run around it.

Complainant did not address the above argument in his reply to respondent's motion. The facts recited by respondent have not been contested by complainant and, accordingly, are taken as true.

The wording of ¶3 of the settlement agreement is clear and unambiguous and, accordingly, must control, 17A Am Jur 2d, *Contracts*, §337 (1991). Complainant's request to transfer back to the Racine office, such request being made just two months after he signed the settlement agreement, was an attempt to undo the clear underpin-

nings of the settlement agreement *and* at the same time retain the monetary benefits of the agreement. The Commission concludes that allegation "a" of the defined hearing issue is barred by the settlement agreement and is dismissed under FEA and under the whistleblower law.

CONCLUSIONS OF LAW

1. This case is before the Commission pursuant to §230.45(1)(b) and (gm), Stats.

2. It is respondent's burden to show entitlement to summary judgment. Respondent met its burden.

3. The following claims are dismissed under the FEA and the whistleblower law, as time-barred by the settlement agreement reached in federal court:

- With respect to Deputy State Public Defender Miller stating to Kathy Lang in early summer of 1998 that complainant was deficient as a trial attorney, and
- With respect to respondent denying, on or about June 19, 1998, complainant's request for Chapter 980 (sexual predator law) training.

4. The following claim is dismissed as failing to constitute an adverse action under the FEA and failing to constitute a disciplinary action under the whistleblower law:

- With respect to First Assistant State Public Defenders stating to Kathy Lang, in the period of April-July 1998, that complainant had a felony conviction record.

5. The following claim is dismissed under the FEA and the whistleblower law, as being barred by the settlement agreement reached in federal court:

- With respect to respondent's decision as reflected in its letter dated September 1, 1998, to deny complainant's transfer request to the Racine Trial Office as Assistant Public Defender.

ORDER

This case is dismissed.

Dated: February 11, 2000 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

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JUDY M. ROGERS, Commissioner

Parties:

Ronald E. Langford
3034 Lorie Drive
Racine, WI 53406

Nicholas L. Chiarkas
State Public Defender
315 N. Henry St., 2nd Fl.
P.O. Box 7923
Madison, WI 53707-7923

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