STATE OF WISCONSIN PERSONNEL COMMISSION

RONALD E. LANGFORD,
Complainant,

v.

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

INTERIM RULING

Case No. 99-0013-PC-ER

This complaint, filed on January 19, 1999, alleges discrimination based on age, color and race and retaliation based on Fair Employment Act activities and under the whistleblower law. Respondent has raised various motions. The following findings appear to be undisputed.

1. Complainant is employed by respondent as an attorney.

2. In a March 30, 1998, letter to Fritz Miller, Deputy State Public Defender, complainant raised concerns about a decision made by Mr. Miller in a letter dated March 25, 1998, to Christopher Carson, an attorney in private practice. Mr. Miller's letter reinstated Mr. Carson, with certain conditions, to his prior certification status. The net effect of Mr. Miller's letter was to reverse complainant's decision barring Mr. Carson from handling certain types of cases for SPD clients. In his March 30th letter to Mr. Miller, complainant wrote, in part: "Restoring Carson to SPD certification lists demonstrates the continuous negative racial attitude of this agency toward both the minority professionals [like complainant] that serve this agency and the largely minority clientele this agency serves."

3. Both Mr. Miller and State Public Defender Nicholas Chiarkas responded in writing to complainant's March 30th letter.

4. Complainant filed suit in federal court[1] on May 4, 1999, as co-plaintiff with another attorney employed by respondent. The complaint set forth two causes of action, the first alleging the conduct of Mssrs. Chiarkas and Miller described in paragraphs 8 through 31 of the complaint violated the plaintiffs' "rights to free speech . . . and to their right to equal protection of the laws and due process of law . . . and . . . violation of 42 U.SW.C. §1983." In their second cause of action, plaintiffs alleged that the conduct by Mssrs. Chiarkas and Miller described in paragraphs 8 through 32 "constitute discrimination against the plaintiffs because of their race in the terms and conditions of their employment . . . in violation of 42 U.S.C. §§ 1981, 1985 and the Civil Rights Act of 1964 and 1991." The complaint included the following language:

> 2. The plaintiff, Ronald E. Langford, . . . is an African-American who is an attorney by profession and has been employed by the Office of the State Public Defender for the State of Wisconsin from 1985 until 1991 and from 1992 until the present.
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> 3. The plaintiff, Marcus T. Johnson, . . . is an African-American who is an attorney by profession and has been employed by the Office of the State Public Defender for the State of Wisconsin continuously since 1977. . . .
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> 9. As First Assistant Public Defender in the Assigned Counsel Division the plaintiff, Langford, was required among other responsibilities/duties to monitor and evaluate attorneys from the private bar, including attorneys certified to represent indigent defendants through fixed-fee contracts with the State Public Defender. In circumstances where it was determined that an attorney failed to represent his clients in a satisfactory manner, that attorney could be removed from his contract. During 1997 and 1998 the responsibility for recommendation of decertification rested with the plaintiff, Langford.
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> 10. On February 6, 1998 the plaintiff, Langford, suspended an attorney because of deficient performance and sent a letter so advising. . . .

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[1] *Langford & Johnson v. Office of the Public Defender, et al.*, Case No. 98 C 0416, United States District Court for the Eastern District of Wisconsin.

11. After completing the investigation into the matter the plaintiff decided to decertify the attorney and remove him from the list of private bar assigned counsel and sent a letter so advising on March 2, 1998. . . .

12. On March 23, 1998, the attorney, who was a white male, wrote a letter to the defendant, Chiarkas, requesting an opportunity to meet with Chiarkas to reconsider the decertification. . . .

13. On the morning of March 25, 1998, the attorney met with the defendants, Chiarkas and Miller, and the plaintiff, Johnson, in Madison, Wisconsin at the offices of the State Public Defender. At the meeting the attorney pleaded to be recertified as assigned counsel. The attorney made false claims concerning the plaintiff, Langford. The defendants, Chiarkas and Miller, declined to have the plaintiff, Langford, or the other most knowledgeable person on the matter, First Assistant Jennifer Bias, also an African-American, present at the meeting either in person or by telephone.

14. On the afternoon of March 25, 1998 the defendants, Chiarkas and Miller, ordered that the attorney be recertified immediately and a letter so indicating was sent to the attorney. . . .

15. On March 30, 1998 the plaintiff, Langford, wrote a letter to the defendant, Miller wherein he sets forth his position objecting to the extraordinary procedures followed, how his authority has been undermined and the apparent racially discriminatory undertones and ramifications of the incident. . . .

16. The defendant, Chiarkas, retaliated against the plaintiff on April 2, 1998 with a written directive that the plaintiff was to submit to a mandatory training program to correct his "leadership deficiencies" which included an "apparent incapacity to accept responsibility for your own failures." . . . [The memo, attached to the complaint as an exhibit, also stated, "I have asked Fritz Miller in his dual role as Deputy State Public Defender and Acting Assigned Counsel Division Director to look into all of the various issues separately."]

17. The defendant, Miller advised the plaintiff on April 2, 1998 that because of his "unfortunate" letter of March 30, 1998 and pursuant to the directive from the defendant, Chiarkas, that the defendant, Miller, intended "to investigate your behavior in this matter." . . . [The memo, attached to the complaint as an exhibit, also stated, "Rather than accepting as true the disturbing public claim that you accepted a lunch from

one of our contract firms which you regulate, I asked you directly whether this was true. You said that it was, and when asked, said there were other such firms and proceeded to name them. Because you said you saw no problem with this unethical behavior I was forced to give you a direct work order on the telephone to refrain from all such behavior. I intend to investigate your behavior in this matter as directed by Nick Chiarkas, State Public Defender."]

18. The plaintiff, Marcus Johnson, has been employed in the Office of the Wisconsin State Public continuously since 1977 most recently as the Director of the Assigned Counsel Division.

19. On or about February 12, 1998 the plaintiff requested to step down from the position of Director of Assigned Counsel Division. He was reassigned as the Principal Deputy First Assistant Public Defender at the Juvenile Center Milwaukee effective April 6, 1998.

20. As a result of the plaintiff, Johnson's reassignment the position of Director of the Assigned Counsel Division was posted as open and application of qualified persons were sought.

21. The plaintiff, Langford, applied for the position of Director in March, 1998 and his application was received. . . .

22. On or about April 1, 1998 the plaintiff, Johnson approached Virginia A. Pomeroy in her capacity as the affirmative action officer for the State Public Defender and requested a meeting with her in order to express his concerns, particularly that the Agency Management Team of the Office of the State Public Defender was woefully lacking in ethnic diversity and representation of minority members. There was only one African-American and he, Johnson would now be transferring out.

23. On April 3, 1998 at the Comfort Inn hotel in Madison, Wisconsin at a First Assistant's meeting Ms Pomeroy sought out the plaintiff, Johnson, indicated she would like to discuss the matter of his concerns and inquired if he would mind if the defendants, Chiarkas and Miller, met with them. The plaintiff agreed.

24. The four people, the plaintiff, Marcus Johnson, the defendants, Micholas L. Chirkas and Frederick H. Miller, and Virginia Pomeroy sat down in chairs located at the end of the lobby in the Comfort Inn hotel. The plaintiff, Johnson, said that he had concerns, that this was 1998 and there was very little or indeed no ethnic diversity on the Agency Man-

agement Group. He encouraged them to advance programs of hiring, retention and promotion of African-American lawyers. . . .

25. The defendant, Miller responded and questioned the plaintiff, Johnson, "This is really about Ron Langford isn't it? I'm sick of Ron always calling me a racist and I don't like it. Ron Langford is just not qualified for Assigned Counsel Directorship."

26. The defendant, Chiarkas, agreed and said "Ron Langford is not qualified for the Directorship. Is this about diversity or about Ron Langford? Because if it's about diversity we can talk but not if it's about Ron Lanford. This letter is another demonstration of that. Have you seen a copy? You're cc'd on it." The plaintiff, Johnson, said "yes."

27. The defendant, Chirakas, became angry and said to the plaintiff, Johnson, "you know what you are? You are a terrorist." . . .

[28. through 31. describe additional comments allegedly made during the same meeting on April 3, 1998.]

32. As a direct and proximate result of the actions of the defendants as set forth in paragraphs 8 through 31 above the plaintiffs have been subjected to a hostile work environment and discriminated against because of their race in the conditions of their employment. The plaintiff, Langford, has been maligned as unqualified, had his authority and responsibilities undermined, disciplined because of the exercise of his right of free speech, humiliated and denied consideration for promotion. The plaintiff, Johnson, has been threatened by the defendant, Chiarkas, falsely accused of misconduct, terrorism and conspiracy.

5. As an employe of respondent, complainant was eligible for certain pay awards. Decisions involving merit salary awards for employes were finalized by the respondent and forwarded to the Department of Administration for processing on July 6, 1998.[2]

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[2] Respondent filed an affidavit from its Payroll and Benefits Specialist. The affidavit stated, in part: "On Monday, July 6, 1998, I hand delivered the Final Worksheets for processing Discretionary Awards for SPD Classified and Unclassified Attorneys to the Department of Administration."

6. The parties to the complainant's federal suit reached a settlement agreement that resulted in the stipulated dismissal of the action. The settlement agreement, signed by the plaintiffs on July 17, 1998, included the following language:

> 3. 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 for the period from July 10, 1998 through June 30, 1999. On July 1, 1999, Langford's annual salary will be reduced by $5,000.76. . . .
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> 8. Plaintiffs agree to file all necessary documents to dismiss with prejudice this complaint, and any other pending complaints in any other forum, relating to the claims covered by this Agreement. . . .
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> 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. . . .
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> 12. This Agreement contains the entire agreement between the parties hereto. The terms of this Agreement are contractual and not a mere recital. (emphasis added)

7. The parties subsequently executed a supplemental agreement which read:

> The parties, Ronald E. Langford, Nicholas L. Chiarkas, Frederick H. Miller and the Office of State Public Defender as a Supplemental Agreement to the Settlement Agreement And Complete And Permanent Release executed prior hereto agree that regarding the investigation of Ronald E. Langford pending as of the date of the settlement if any disci-

> pline is imposed upon Ronald E. Langford it will not exceed an oral reprimand.

The supplemental agreement was signed by complainant on July 27, 1998, and by his attorney on July 18, 1998.

8. By letter dated July 28, 1998, Marla Stephens, respondent's Appellate Division Director, concluded that complainant should receive an oral reprimand for certain conduct. The letter stated, in part:

> On July 28, 1998, you appeared for an investigatory interview regarding the allegations contained in my July 1, 1998 letter to you. On the basis of that interview, and other pertinent information, I find that you violated SPD work rules 5 and 17, as contained in sec. 5.040 of the SPD Policies & Procedures Manual. I conclude that the imposition of discipline is an appropriate and necessary response to the violations. . . .
>
> I find that, at the Town Hall Meeting held in conjunction with the SPD Fall Conference in November 1996, you solicited lunches from private bar attorneys. I also find that you accepted a lunch from a private bar attorney, Craig Miller, some time prior to the Town Hall meeting at issue. . . .
>
> I also conclude that, on or about March 25, 1998, you failed to provide the SPD with complete and accurate information about Attorney Scott Connors' reaction to the SPD decision to conditionally reinstate the certification of Attorney Christopher Carson for appointment under Attorney Connors' fixed fee contract, thus violating work rule 5. . . .
>
> Pursuant to the terms of the settlement agreement between you and the SPD, I conclude that an oral reprimand is the appropriate disciplinary action.

9. By letter dated August 27, 1998, complainant requested transfer to respondent's Racine Trial Office as an Assistant Public Defender. Respondent denied the request by letter dated September 1, 1998.

10. Complainant filed his complaint of discrimination and retaliation with the Personnel Commission on January 19, 1999. The complaint states, in part:

I will list four instances of the continuing discriminatory, harassing, and retaliatory conduct. This does not exhaust my knowledge of other information supporting this conduct.

First, merit pay awards for OSPD attorneys. I received the minimum salary increase for fiscal year 1999.

. . . . In July 1998, OSPD distributed merit pay increases authorized by the State Legislature as part of the 1997-98 biennial budget. Those pay increases, designated by OSPD as merit pay, ranged from $0.77/hr. to $2.48/hr. I was awarded $0.77/hr. . . .

I believe this action to be a direct result of my March 30th letter to DSPD Miller and the May 4th filing of the lawsuit. . . .

Second, abuse of disciplinary process

. . . . In July 1998, Mr. Chiarkas, Mr. Miller, and Ms. Stephens initiated a bogus disciplinary action against me. . . .

I believe this action to be a direct result of my March 30th letter and filing of the lawsuit. . . .

Third, denial of my request to transfer to the Racine Trial Office.

In August, in response to a recruitment by OSPD, I requested to transfer to the OSPD Racine Trial Office. . . .

Once again, I believe this action to be a direct result of filing the lawsuit against OSPD, Mr. Chiarkas, and Mr. Miller.

Fourth, OSPD has intentionally and maliciously communicated false information about me, and refuses to respond to my requests for information which I am entitled to receive.

Since filing of the lawsuit, the OSPD has told others that I am deficient as a trial attorney and that I have a felony conviction record. Both allegations are false and without merit. In addition, OSPD has failed to respond to my request to attend relevant and necessary training. Also, OSPD has failed to respond to my requests to continue with community service work.

I believe this action to be a direct result of filing of the lawsuit.

11. Complainant waived the investigation of his complaint to the Personnel Commission. A prehearing conference was held on March 17, 1999. The prehearing conference report indicates the parties agreed to a hearing commencing on August 30, 1999, and continuing to September 3, 1999. The commissioner presiding at the conference proposed the following statement of issue for hearing:

> Whether respondent discriminated against complainant based on age, color, and race and/or retaliated against complainant for engaging in protected activities under the Fair Employment Act and the whistleblower law, as set forth in his complaint of discrimination.

A schedule was also established for the parties to submit arguments relating to the proposed issue.

OPINION

I. Failure to state relief

Respondent moves to dismiss the complaint "for failure to state what relief is being sought."

In *Masuca v. UW (Stevens Point)*, 95-0128-PC-ER, 11/14/95, this Commission held as follows:

> 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.

The Commission's complaint form merely indicates the complainant "should specify the relief or remedy you are requesting." This request does not establish a pleading requirement. Respondent has failed to offer any authority in support of this aspect of its motion and it is denied.

II. Lack of facts to support age, color and race claims

Respondent moves to dismiss complainant's age, color and race claims "because he does not assert any facts in support of these claims."

Complainant has marked the boxes on the Commission's complaint form indicating he alleges discrimination based on age, color and race, and he has identified various adverse personnel actions. The Commission's rules do not require that the complaint state the facts upon which complainant rests his claim of WFEA discrimination: "Complainants *should* identify . . . the facts which constitute the alleged unlawful conduct." (emphasis added) §PC 2.02(1), Wis. Adm. Code. The bottom line is the complaint in this case is not defective because it does not allege additional facts.

III. Claim preclusion and the effect of the settlement of the federal suit

Respondent moves to dismiss allegations 1 and 2. In its submission dated April 16, 1999, respondent contends the doctrine of claim preclusion bars these two allegations. In its submission dated March 18, 1999, respondent contends these two allegations are barred by the language of the settlement agreement reached by the parties to the federal suit, and specifically by paragraph 10 of that agreement. Complainant contends:

> No one can sign away his or her right to be protected by the laws or policies against discrimination, harassment, and retaliation. Such an agreement would be *per se* void, unenforceable and clearly illegal.

The respondent contends that the language of the settlement agreement reached in the federal proceeding acts as a bar to complainant's claims before the Personnel Commission relating to both the merit pay level and the oral reprimand. Respondent contends the settlement agreement should be read so as to include the subject matter of the instant complaint. The key language of that agreement is paragraph 10:

> 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. . . . (Emphasis added)

After the federal claim was filed, but before the settlement agreement was signed by complainant, respondent made various decisions involving merit salary awards for its employes, including complainant. Those decisions were finalized by July 6, 1998. Complainant, an attorney, chose to sign the settlement agreement on July 17th, thereby agreeing to forego claims regarding events occurring in the course of his employment through that date. By doing so, he gave up his option to contest the merit salary awards. The properly executed supplemental agreement signed by complainant on July 27th made specific reference to the pending investigation of complainant. The signed document reflected an agreement by the parties that the discipline imposed "will not exceed an oral reprimand." By agreeing to this specific language, complainant also gave up any claim relating to the oral reprimand imposed by letter on July 28th. He chose to bargain regarding the degree of discipline he could receive from the pending investigation. An upper limit of an oral reprimand was established. Complainant was not giving up some future right that might raise public policy issues. Complainant may not now repudiate the agreement he reached in the federal case.

Based on the analysis above, the Commission does not address respondent's arguments premised on the claim preclusion doctrine.

IV. Indefiniteness of allegation 4

Respondent moves to dismiss allegation 4 because it "is so indefinite as to time that it is impossible to ascertain whether it, too, is barred by the settlement agreement."

Respondent notes: "[T]he point is to avoid respondent being blindsided at the hearing because it is impossible to anticipate the underlying facts supporting this allegation or being compelled to defend against a claim that is clearly barred."

Relating to the indefiniteness objection, complainant contends:

> The complaint merely lists examples of discriminatory, harassing and retaliatory conduct by Respondent, and is not an exhaustive presentation of illegal acts by respondent. Such presentation is reserved for the hearing before the Personnel Commission.

The Commission agrees that allegation 4 should not be dismissed due to a lack of specificity in the initial complaint. Again, this result is consistent with the minimal pleading requirements for a complaint filed with the Commission. However, the parties to an administrative hearing are entitled to adequate notice of the matters asserted or the issues involved. Sec. 227.44(2)(c), Stats. Under certain circumstances, a reference in a statement of issue to allegations raised in an underlying complaint may provide sufficient notice of the matters being asserted. In other circumstances, where the complaint is unspecific, a reference to the complaint may not be sufficient. Here, the complaint states:

> Since filing of the lawsuit, the OSPD has told others that I am deficient as a trial attorney and that I have a felony conviction record. Both allegations are false and without merit. In addition, OSPD has failed to respond to my request to attend relevant and necessary training. Also, OSPD has failed to respond to my requests to continue with community service work.

Respondent could have opted to carry out discovery in order to determine the exact time of, and persons involved in, the events described in complainant's 4th allegation. While respondent has apparently not chosen to use discovery to obtain further information about the complainant's allegations, respondent is entitled to more notice of the alleged discriminatory/retaliatory conduct than has been provided to date. This is especially true where, as here, complainant has stated that the list of conduct in the complaint "is not exhaustive." The specifics of complainant's allegations would have been developed in the investigative stage of these proceedings, but complainant chose to

waive the investigation and proceed directly to hearing. Under the circumstances presented by this particular case, the Commission will promptly schedule a conference so that complainant may provide additional specification and clarification of the alleged conduct that serves as the basis for his charge.

ORDER

Respondent's motion to dismiss complainant's first and second claims set forth in his complaint of discrimination/retaliation is granted. The Commission will contact the parties for the purpose of promptly scheduling a conference for the purpose noted above.

Dated: June 30, 1999 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

KMS:990013Crul1

JUDY M. ROGERS, Commissioner