

STATE OF WISCONSIN

PERSONNEL COMMISSION

PASTORI M. BALELE

Complainant,

v.

**Secretary, DEPARTMENT OF
ADMINISTRATION,
Secretary, DEPARTMENT OF
EMPLOYMENT RELATIONS, and
Administrator, DIVISION OF MERIT
RECRUITMENT AND SELECTION,
*Respondents.***

RULING

Case No. 00-0077-PC-ER

This is a complaint of discrimination on the bases of color, national origin or ancestry, and race, and of retaliation for engaging in protected fair employment and whistleblower activities in regard to a decision not to certify complainant for a vacancy in the position of Director, State Bureau of Procurement, Department of Administration (DOA). On August 7, 2000, respondent filed a Motion for Reasonable Attorney's Fees. Complainant subsequently filed a cross-motion for compensatory, punitive, and deterrent damages. The parties were permitted to brief these motions, and the final argument was filed on October 4, 2000. The following findings of fact are derived from the file in this matter, appear to be undisputed, and are made solely for the purpose of deciding these motions.

FINDINGS OF FACT

1. On May 30, 2000, complainant filed a motion to enjoin respondents from making a permanent appointment to the position at issue here, i.e., Director, State Bureau of Procurement, Department of Administration.

2. In a ruling dated July 19, 2000, the Commission denied complainant's motion as it related to the charges brought pursuant to the Fair Employment Act, but granted the motion as it related to the charge of whistleblower retaliation.

3. On July 21, 2000, respondent filed a motion for reconsideration of the Commission's July 19 ruling. A telephone conference for the purpose of determining the manner of proceeding in regard to this motion was conducted by the Commission on July 24, 2000. At this conference, complainant and counsel for respondent agreed to a hearing on the following issue:

Whether there is a substantial likelihood that complainant will succeed on the merits of his whistleblower claim.

4. This hearing was conducted on July 31, 2000, and Commissioner Laurie R. McCallum was invested by the Commission with final decision-making authority. At the close of the hearing, she presented an oral decision concluding that complainant had failed to show a substantial likelihood that he would succeed on the merits of his whistleblower claim, and that, as a result, the injunction should be lifted. This oral decision was memorialized in a written ruling issued on August 2, 2000.

OPINION

In its motion, respondents request that the Commission order the following:

(1) that the Secretary of the Department of Administration insert a copy of the August 2 ruling (See Finding 4, above) into complainant's personnel file.

(2) that, since complainant's whistleblower charge was frivolous, complainant pay respondents' actual attorney's fees of \$500 which were incurred in litigating the request for a preliminary injunction.

Section 230.85(3), Stats., provides as follows in relevant part:

230.85 Enforcement.

(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, specifying the nature of the retaliatory action or threat thereof and requesting relief, within 60 days after the retaliatory action allegedly occurred or was threatened or after the employe learned of the retaliatory action or threat thereof, whichever occurs last.

(2) The commission shall receive and, except as provided in s. 230.45 (1m), investigate any complaint under sub. (1). If the commission finds probable cause to believe that a retaliatory action has occurred or was threatened, it may endeavor to remedy the problem through conference, conciliation or persuasion. If that endeavor is not successful, the commission shall issue and serve a written notice of hearing, specifying the nature of the retaliatory action which has occurred or was threatened, and requiring the person named, in this section called the "respondent", to answer the complaint at a hearing.

(3) (a) After hearing, the commission shall make written findings and orders. If the commission finds the respondent engaged in or threatened a retaliatory action, it shall order the employe's appointing authority to insert a copy of the findings and orders into the employe's personnel file and, if the respondent is a natural person, order the respondent's appointing authority to insert such a copy into the respondent's personnel file. In addition, the commission may take any other appropriate action,

(b) If, after hearing, the commission finds that the respondent did not engage in or threaten a retaliatory action it shall order the complaint dismissed. The commission shall order the employe's appointing authority to insert a copy of the findings and orders into the employe's personnel file and, if the respondent is a natural person, order the respondent's appointing authority to insert such a copy into the respondent's personnel file. If the commission finds by unanimous vote that the employe filed a frivolous complaint it may order payment of the respondent's reasonable actual attorney fees and actual costs. Payment may be assessed against either the employe or the employe's attorney, or assessed so that the employe and the employe's attorney each pay a portion. To find a complaint frivolous the commission must find that either s. 814.025 (3) (a) or (b) applies or that both s. 814.025 (3) (a) and (b) apply.

(c) Pending final determination by the commission of any complaint under this section, the commission may make interlocutory orders. ...

In this motion, respondents are asking the Commission to order the requested relief based on the authority granted the Commission in §230.85, Stats., and on the record developed at the July 31 hearing and the conclusions of the August 2 ruling. It is apparent from the statutory scheme set forth in §230.85, Stats., however, that the relief sought by respondents is available only after a determination by the Commission of the merits of a whistleblower retaliation claim. The hearing conducted here related solely to complainant's application for injunctive relief, and the determination by the Commission that complainant had failed to show that there was a substantial likelihood that he would succeed on the merits of his whistleblower claim is not a determination of the merits of this claim. The Commission concludes, as a result, that it does not have the authority to take the actions requested by respondents at this stage of these proceedings.

Due to the above conclusion, it is not necessary to address the parties' arguments relating to the amount of fees claimed by respondents.

In regard to complainant's cross-motion for "compensatory, punitive, and deterrent damages" of \$1,000,002, complainant has cited no authority which would permit the Commission to award such damages even if they were merited under the circumstances here, and the Commission is unaware of any such authority.

The Commission would, however, like to take this opportunity to address certain arguments advanced by the complainant. In these arguments, complainant states that he never advanced the position that the requested injunction should be issued in regard to his whistleblower claim and, as a result, should not be held liable for what occurred as a result of the issuance of the preliminary injunction and the subsequent lifting of the injunction. It should first be noted that complainant's charge specifies whistleblower retaliation as one of the bases for his claim here. In addition, complainant applied for a preliminary injunction based on the claims in his charge. Not really understanding his arguments, recognizing that complainant appears *pro se* here, and taking into account the fact that his other claims, all brought pursuant to the Fair Employment Act (FEA), could not support the issuance of injunctive relief, the

Commission gave complainant the benefit of the doubt and inferred from these circumstances that complainant's claim for injunctive relief was based at least in part on his whistleblower retaliation claim.

Complainant also contends that respondents engaged in fraud and perjury in relation to their claim for attorney's fees. These contentions do not fall within the scope of the Commission's authority here and, as a result, will not be addressed.

CONCLUSIONS OF LAW

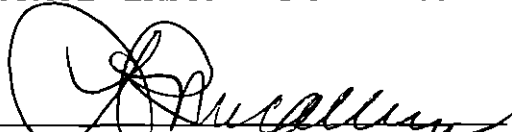
1. Respondents have the burden to show entitlement to the requested relief.
2. Respondents have failed to sustain this burden.
3. Complainant has the burden to show entitlement to the requested damages.
4. Complainant has failed to sustain this burden.

ORDER

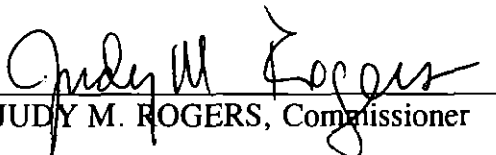
Respondents' motion requesting placement of the Commission's August 2, 2000, ruling in complainant's personnel file and the award of attorney's fees is denied. Complainant's cross-motion for damages is denied.

Dated: October 18, 2000

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

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JUDY M. ROGERS, Commissioner