STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 17

STATE OF WISCONSIN,
Plaintiff,

v. Case No. 00-CV-2776

PASTORI BALELE,
Defendant.

AMENDED DECISION AND ORDER

On November 3, 2000, Pastori Balele brought various counterclaims, including one stemming from 42 U.S.C. § 1983 against the State of Wisconsin. In response, the state moved to strike Balele's assertions. The court granted the state's motion on March 19, 2001. Balele re-filed his § 1983 counterclaim on February 28, 2001. Again, the state motioned the court to dismiss based on a failure to state a claim. *See* Wis. Stat. § 802.06(2). As requested, the court dismissed Balele's counterclaim. The defendant now asserts that because the court did not specifically address the state's failure to file an answer to the defendant's counterclaim the case should be reopened, vacated, and a default judgment entered in his favor.

Wis. Stat. § 802.06(2) requires a party answering a pleading to assert every defense "in law or fact." The statute, however, provides a number of exceptions; failure to state a claim upon which relief can be granted is one of those exceptions. Wisconsin's courts have consistently held that; "While the complaint must be liberally construed it must still state a cause of action and must fairly inform the opposite party of what he is called upon to meet by alleging specific acts. A pleading may fairly inform an opposite party what he is called upon to meet and yet not state a cause of action." *See Wilson v. Continental Ins. Cos.*, 87 Wis.2d 310, 317 (1979), quoting *Kagel v. Brugger*, 19 Wis.2d 1 (1963). In this case, the state, as allowed by Wis. Stat. § 802.06(2)(f), rather than answer a pleading, chose to answer the defendant's complaint with a motion to dismiss. The state has no obligation or requirement to provide a specific answer since it filed a motion to dismiss for failure to state a claim. Since the state is not required to provide an answer, defendant's motion for default judgment is inappropriate.

For the reason stated above, the defendant's motion to reopen and vacate the court's August 23, 2001 judgment is DENIED. Judgment in favor of the State of Wisconsin is reaffirmed with costs.

Dated this 13 day of September, 2001

BY THE COURT:

Paul B. Higginbotham
Circuit Court Judge

cc. David C. Rice
David J. Vergeront
Krystal Willimas-Oby
Charles D. Hoornstra
Pastori Balele

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DECISION AND ORDER

I. INTRODUCTION

The State of Wisconsin, on behalf of the Wisconsin Department of Employment Relations and its Division of Merit Recruitment and Selection, commenced this action against Pastori Balele seeking judgment in the amount of $398.11. In response, Balele filed a counterclaim against the State of Wisconsin, the Wisconsin Personnel Commission, David J. Vergeront, Krystal Williams-Oby, and Charles D. Hoornstra. The State of Wisconsin now brings a motion to dismiss Balele's counterclaim. The parties also bring cross-motions for judgment on the pleadings.

II. FACTS

On August 6, 1998, Pastori Balele ("Balele") filed a discrimination complaint with the Wisconsin Personnel Commission ("Commission"). In the complaint, Balele alleged that the Wisconsin Department of Employment Relations ("DER") and its Division of Merit Recruitment and Selection ("DMRS") unlawfully discriminated against him and other racial minorities by using an achievement history questionnaire to screen candidates for certification for administrative manager and career executive positions.

During the discovery phase of the case, the DER and DMRS filed a motion to compel Balele to answer interrogatories and a motion for costs and sanctions. In a decision dated July 19, 1999, the Commission granted in part and denied in part the DER and DMRS' motion to compel and denied the DER and DMRS' motion for sanctions as premature.

On December 3, 1999, the Commission granted DER and DMRS' motion for sanctions against Balele for failing to comply with its July 19th order. The Commission concluded that Balele failed to adequately respond to the DER and DMRS' requests for discovery and, as such, acted in bad faith. The Commission dismissed Balele's complaint as a sanction for his misconduct, but retained jurisdiction to consider whether to award reasonable expenses to DER and DMRS pursuant to Wis. Stat. § 804.12.

On February 28, 2000, the Commission ruled on the DER and DMRS' motion for expenses. Relying on the language of Wis. Admin. Code § PC 4.03 and Wis. Stat. § 804.12, the Commission ordered Balele to pay $398.11 to the DER and DMRS for the reasonable expenses each incurred in bringing the motion to compel and the motion for sanctions. Balele petitioned for rehearing, but was denied relief. Balele did not seek judicial review of any of the Commission's rulings.

In late April 2000, the DER and DMRS, by their chief legal counsel, David J. Vergeront ("Vergeront"), wrote to Balele to demand that he pay the $389.11 by May 5, 2000, and to notify him that if he failed to pay by that date, action would be taken to collect the amount owed. On June 7, 2000, Vergeront requested that the Attorney General obtain a judgment for the $398.11, plus interest, and then commence proceedings to satisfy the judgment.

On July 5, 2000, Assistant Attorney General Krystal Williams-Oby wrote a "final demand" letter to Balele. The letter advised Balele that formal collection proceedings would commence unless he made payment by July 17, 2000. Balele failed to do so and, as a result, the present action was initiated.

On November 3, 2000, Balele filed an answer, in which he admitted all the allegations of the complaint and alleged, as an affirmative defense, that the Commission did not have authority to award costs and expenses to DER and DMRS. Balele brought various counterclaims in his answer, as well as a separately filed 42 U.S.C. § 1983 counterclaim. In November 2000, the DER and DMRS moved to strike the counterclaims contained in Balele's answer. This Court granted the motion in a written Order dated March 19, 2001. On February 28, 2001, Balele re-filed his § 1983 counterclaim.

DER and DMRS now bring a motion to dismiss Balele's most recent counterclaim. In addition, the parties bring cross-motions for judgment on the pleadings.

III. STANDARD OF REVIEW

A. THE STATE'S MOTION TO DISMISS BALELE'S COUNTERCLAIM

A complaint should be dismissed for failure to state a claim upon which relief may be granted if the plaintiff can prove no set of facts in support of the claim that would entitle him to relief. Heinritz v. Lawrence Univ., 194 Wis. 2d 606, 610, 535 N.W.2d 81, 83 (Ct. App. 1995). In reviewing a complaint under this standard, the court must accept as true the allegations contained in the complaint, construe the pleadings in the light most favorable to the plaintiff, and resolve all doubts in the plaintiff's favor. Id. at 611, 535 N.W.2d at 83. Although all reasonable inferences must be drawn in favor of the plaintiff,

the complaint must set forth factual allegations sufficient to establish the elements that are crucial to recovery under the plaintiff's claim. United Capital Ins. Co. v. Bartolotta's Fireworks Co., Inc., 200 Wis. 2d 284, 298, 546 N.W.2d 198, 203 (1996). Legal conclusions without factual support are not sufficient. Morgan v. Pennsylvania General Ins. Co., 87 Wis. 2d 723, 731, 275 N.W.2d 660, 664 (1979).

B. THE PARTIES' CROSS-MOTIONS FOR JUDGMENT ON THE PLEADINGS

Wisconsin Statute section 802.06(3) states that if, "on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment." Such matters have been put before the court in the present case. As such, the summary judgment standard is applicable to the parties' cross-motions.

Summary judgment is governed by Wis. Stat. § 802.08. Its purpose is to avoid trials where there is nothing to try. Rollins Burdick Hunter of Wis., Inc. v. Hamilton, 101 Wis. 2d 460, 304 N.W.2d 752 (1981). It allows judgment to be rendered on the merits without a trial where there are no genuine issues as to material facts and no reasonable competing inferences arise from undisputed facts. Heck & Paetow Claim Service, Inc. v. Heck, 93 Wis. 2d 349, 286 N.W.2d 831 (1980). The moving party bears the burden to establish its right to judgment with sufficient clarity to leave no room for controversy. Kramer Bros., Inc. v. U.S. Fire Ins. Co., 89 Wis. 2d 555, 278 N.W.2d 857 (1979).

The determination of whether summary judgment is appropriate begins with an examination of the pleadings to determine whether a claim for relief or a defense has been stated. If a claim or a defense has been stated, inquiry then shifts to determine whether there exist any material issues of fact. Dziewa v. Vossler, 149 Wis. 2d 74, 77,

438 N.W.2d 565 (1989). To determine whether issues of fact exist, pleadings, affidavits or other proof submitted in support of a motion for summary judgment are examined and considered. Kallembach v. State, 129 Wis. 2d 402, 404-05, 385 N.W.2d (Ct. App. 1986). If the moving party has made a *prima facie* case for summary judgment, examination of the affidavits submitted by the opposing party is made in order to identify evidentiary facts and other proof and to determine whether a trial is necessary, because of the existence of a genuine issue regarding a material fact or of a reasonable conflicting inference arising from undisputed fact. In re Cherokee Park Plat, 113 Wis. 2d 112, 116, 334 N.W.2d 580 (Ct. App. 1983). Proof must be submitted in the form of evidentiary facts that would be admissible in evidence. Wis. Stat. § 802.08(3).

Under Wis. Stat. § 802.08(2), summary judgment is entered "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Green Spring Farms v. Kersten, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). When material facts are not in dispute and when inferences which may reasonably be drawn from the facts are not doubtful and lead to only one conclusion, summary judgment is appropriate. Radlein v. Industrial Fire & Cas. Ins. Co., 117 Wis. 2d 605, 609, 345 N.W.2d 874 (1984). Any doubts as to the existence of a genuine issue of material fact should be resolved against the party moving for summary judgment. Independence Bank v. Equity Livestock, 141 Wis. 2d 776, 781, 417 N.W.2d 32 (1987). Similarly, competing inferences must be viewed in the light most favorable to the non-moving party. Kramer Bros., supra.

IV. ANALYSIS

A. BALELE'S 42 U.S.C. § 1983 COUNTERCLAIM CANNOT BE MAINTAINED.

Balele alleges in his counterclaim, brought pursuant to 42 U.S.C. § 1983, that Vergeront "instigat[ed] the State to selectively harass [Balele] because of his race and national origin." Balele further alleges that Williams-Oby and Hoornstra violated § 1983 by filing the "lawsuit [against Balele] without investigating . . [whether it] was frivolous and baseless." Balele seeks declaratory and injunctive relief against the State of Wisconsin and the Personnel Commission, and monetary relief against Vergeront, Williams-Oby, and Hoornstra. Such relief is inappropriate.

1. The State of Wisconsin and the Wisconsin Personnel Commission are Not "Persons" Subject to Suit Within the Meaning of 42 U.S.C. § 1983.

Balele brings his counterclaim under 42 U.S.C. § 1983. The statute provides as follows:

> § 1983. Civil action for deprivation of rights
>
> Every **person** who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(emphasis added).

Section 1983 is plain in its requirements. A party asserting a claim under the statute must allege that: (1) the conduct complained of was committed by a "person" acting under color of state law and (2) the conduct deprived the plaintiff of rights, privileges or immunities secured by the Constitution of the United States. Weber v. City of Cedarburg, 129 Wis. 2d 57, 65 384 N.W.2d 333, 338 (1986).

The United States Supreme Court held in Will v. Michigan Department of State Police, 491 U.S. 58, 64, 70 (1989), that a state or any governmental entities considered to be "arms of the state" are not "persons" amenable to suit under § 1983. Relying on Will, the Wisconsin Supreme Court held in Lindas v. Cady, 150 Wis. 2d 421, 431, 441 N.W.2d 705, 709 (1989), that governmental entities such as the Department of Health and Social Services are not "persons" subject to suit under § 1983. As such, such entities could not be sued under the statute. Id. Following Will and Lindas, this court concludes that neither the State of Wisconsin nor the Wisconsin Personnel Commission, an "arm of the state," are "persons" within the meaning of § 1983. Accordingly, Balele's claims against them are barred.

2. Vergeront, Williams-Oby, and Hoonstra, Insofar as They are Being Sued in Their Official Capacities, are Not "Persons" Subject to Suit Within the Meaning of 42 U.S.C. § 1983.

In addition to the State of Wisconsin and the Wisconsin Personnel Commission, Balele named Vergeront, Williams-Oby, and Hoonstra as counter-defendants, suing them for acts committed in their official capacities. However, state officials acting in their official capacities are not "persons" amenable to suit under § 1983. See Will, 491 U.S. at 71. As such, Balele's "official capacity" claims against Vergeront, Williams-Oby, and Hoonstra, cannot be maintained.

3. Public Officer Immunity Bars Balele's Claims Against Vergeront, Williams-Oby, and Hoonstra Insofar as They are Being Sued in Their Personal Capacities.

Balele also sues Vergeront, Williams-Oby, and Hoonstra in their "personal capacities." Specifically, Balele challenges Vergeront's decision to ask the Attorney General to seek collection of the reasonable expenses awarded by the Commission and the decisions of Williams-Oby and Hoornstra to file a lawsuit to collect the expenses.

Generally, public officials, like Vergeront, Williams-Oby, and Hoornstra, are immune from liability for injuries resulting from acts performed within the scope of their public duties. C.L. v. Olson, 143 Wis. 2d 701, 710, 422 N.W.2d 614, 617 (1988). This "public officer" immunity is distinct from sovereign immunity in that it is a common law, substantive limitation on the official's personal liability for damages. Lister v. Bd. of Regents, 72 Wis. 2d 282, 298-99, 240 N.W.2d 610 (1976). The limitation of liability, however, is not absolute. The most generally recognized exception to the rule of immunity is that an officer is liable for damages resulting from his negligent performance of a purely ministerial duty. Id. at 300. A duty is ministerial only when it is absolute, certain and imperative, involving merely the performance of a specific task when the law imposes, prescribes and defines the time, mode, and occasion for its performance with such certainty that nothing remains for judgment or discretion. Id.

In the present case, the decisions of which Balele complains were clearly discretionary and clearly made within the scope of Vergeront, Williams-Oby, and Hoornstra's official duties. Accordingly, public officer immunity shields the counter-defendants from Balele's § 1983 claim.

B. THE STATE IS ENTITLED TO JUDGMENT AGAINST BALELE AS A MATTER OF LAW.

In the present case, the Commission awarded the DER and DMRS $398.11 for reasonable expenses incurred in bringing the motion to compel and the motion for sanctions against Balele. Balele does not contest the amount of the expenses that were awarded. Rather, he contests, for the first time, the Commission's authority to have awarded the expenses.

It is well-established Wisconsin law that where a statute relating to an administrative agency provides a direct method of judicial review of agency action, such method of review is generally regarded as exclusive, especially where the statutory remedy is plain, speedy, and adequate. See Kegonsa Joint Sanitary District v. City of Stoughton, 87 Wis. 2d, 131, 145, 274 N.W.2d 598 (1979), citing Underwood v. Karns, 21 Wis. 2d 175, 179-80, 124 N.W.2d 116 (1963). Thus, a party to an administrative agency proceeding cannot challenge the agency's order "as being in excess of its statutory authority in any action by or against [the party] unless it shall have first resorted to the review procedure provided in ch. 227, Stats." See Superior v. Committee on Water Pollution, 263 Wis. 23, 27, 56 N.W.2d 501 (1953). As Balele admits that he "did not file a petition for review of his case" and "did not pay the attorney fees" awarded to the DER and DMRS by the Commission, he is now barred from challenging the award.

No material facts regarding the amount owed to the DER and DMRS for reasonable expenses are in dispute and, as such, summary judgment in favor of the State is appropriate.

V. CONCLUSION

For the reasons discussed above, the State of Wisconsin's motion to dismiss Balele's counterclaim and motion for judgment on the pleadings are granted in their entirety. Balele's motion for judgment on the pleadings is denied.

BY THE COURT, this 23rd of August, 2001.

Paul B. Higginbotham
Circuit Judge

cc: David C. Rice
David J. Vergeront
Krystal Willimas-Oby
Charles D. Hoornstra
Pastori Balele