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PASTORI M. BALELE,

Petitioner,

vs.

AUG 23 2002

PERSONNEL COMMISSION

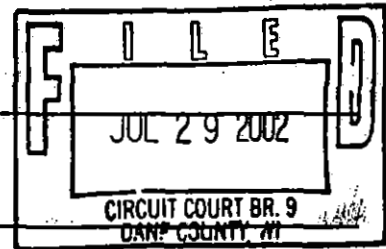
**MEMORANDUM DECISION
AND ORDER**

Case no. 01-CV-3396

**WISCONSIN PERSONNEL COMMISSION and
WISCONSIN DEPARTMENT OF NATURAL RESOURCES,**

Respondents,

ADMINISTRATIVE REVIEW



INTRODUCTION

This matter is before the circuit court on Petitioner Pastori M. Balele's (Balele) request for judicial review of a decision by Respondent Wisconsin Personnel Commission (Commission) concluding that Respondent Department of Natural Resources (DNR) did not discriminate nor retaliate against Balele when DNR did not selected him for the second round of interviews or for the position of Director, Bureau of Integrated Science Services (Director). Specifically, Balele challenges the Commission's deciding his case by summary judgment. Balele contends that the Commission's improper use of summary judgement procedure resulted in its failing to find that the DNR had discriminated against him under either disparate treatment or disparate impact theories, and had retaliated against him for engaging in activities protected under the Wisconsin Fair Employment Act (WFEA).

Balele also asserts the Commission erred when it did not require the DNR to follow its own procedural rules governing the filling of a career executive¹ position deemed underutilized² for racial minorities. Balele emphasizes that this as just one more example of the DNR top officials' mission to exclude minorities from holding career executive positions within DNR headquarters.

In the Commission response it stands firm behind the reasonableness of its decision that the DNR did not discriminate or retaliate against Balele when they choose to hire someone else for the position of Director. The Commission concedes Balele met his burden for establishing a *prima facie* case of disparate treatment discrimination. However, the Commission ruled that Balele failed to prove the DNR's articulated non-discriminatory reason for not hiring Balele was merely a pretext for its true discriminatory intentions. As for Balele's claim of disparate impact discrimination, the Commission found that Balele had failed to make a *prima facie* case. Finally, Petitioner's retaliation claim must also fail, for Balele failed to establish that the hiring panel³ was aware of his previous WFEA actions prior to its decision not to select him for this position.

¹ "Career executive" refers to a classified state civil service position, for which the selection procedures are set forth in Wis. Stat. § 230.24. The career executive program

[E]mphasizes excellence in administrative skills in order to provide agencies with a pool of highly qualified executive candidates, to provide outstanding administrative employees a broad opportunity for career advancement and to provide for the mobility of such employees among the agencies and the units of state government for the most advantageous use of their managerial and administrative skills."

Wis. Stat. Ann. § 230.24(1) (West 2000).

² To comply with Wis. Stat. § 230.04(9)(a), the DNR abides by these definitions

Underutilization is determined by comparing the percentages of racial/ethnic minorities and women in the relevant labor pool to their percentage in groupings of civil service job classification (job groups). The *relevant labor pool* is an estimate of the percentage of persons having the requisite skill, experience, training, ect., in the geographical area from which applicants could be expected. The *job groups* consist of classifications which are logically combined by such factors as similar responsibilities, pay ranges, and the nature of the work."

Wisconsin Department of Employment Relations, Standards for Agency Equal Employment Opportunity/Affirmative Action Plan April 2000 – December 2002, p. 1 (2000) (emphasis added).

³ In each of Balele's prior employment endeavors with the DNR his interview was conducted by a hiring panel comprised of different DNR employees.

The circuit court, for the reasons set forth below, affirms the Commission decision in its entirety. In particular, the court approves the Commission's use of summary judgment in deciding Balele's complaint at that level. The court further finds that this review constitutes a frivolous action by Balele under Wisconsin Statute § 814.025(3)(b). Wis. Stat. Ann. § 814.025 (West 2000). The court's action will be addressed at the time of the hearing, to which the parties will be given notice.

FACTUAL AND PROCEDURAL BACKGROUND

Pastori Balele is a black man who was born in Tanzania, Africa. Balele has applied for several career executive level positions, in several of the state agencies. In early 2000, the Current Opportunities Bulletin published a job announcement for the vacant position of Director, Bureau of Integrated Science Services, Division of Enforcement and Science, Department of Natural Resources. This announcement stated as follows, in pertinent part:

JOB DUTIES: Plan, direct, administer and supervise activities of the Bureau of Integrated Science Services. The Bureau consists of nine sections, which serve as a focus for scientific research and scientific policy analysis crossing organizational lines and combine research specialists with environmental analysis generalists to provide analytical reports and policy review. This position assures the continuous quality improvement and consistency of all bureau endeavors. Facilitates integration of scientific thought and application of scientific information in Department policy and programs. Facilitates adaptive management functions in the department, and provide a centralized location for integration and coordination of several cross program functions. Oversees the Department-wide Quality Assurance Program, coordination of agency-wide laboratory services, administration of inter-program scientific services and centralized services which support the application of scientific methodologies, data analysis, and risk assessment. Assures that participation on bureau standing teams, ad-hoc teams, and watershed and eco-region teams is managed to address the overall needs and objectives of the Department.

KNOWLEDGE REQUIRED: Program and quality management principles used in developing strategic planning, organizing people and resources, budget development and control, setting annual work objectives, and monitoring program process. Processes and the research procedures used to conduct scientific research supporting the implementation of integrated ecosystem management. Familiarity with the public and private sector scientific research community to enable the development of

partnerships and funding sources for necessary research initiatives. Ability to manage conflicting objectives and negotiate agreement on highly contentious issues in a fast moving, frequently inconsistent operating environment.

In a letter addressed to Cornell Johnson, at DNR's Bureau of Personnel, Balele applied to this position on April 5, 2000. Attached to the letter was Balele's resume. It provided a detailed account of his work history, beginning with positions he held in Africa. In 1970 Balele received a Certificate in Public Administration and Finance from Mzumbe School of Management. From January 1971 through December of 1972, Balele was employed as an administrative officer in Maswa County, which entailed the following responsibilities:

Assisted the County Executive in planning and implementation of all County affairs; authorized purchases for the county; deputized the County Executive in review of the county budget including revenue budgets; received and reviewed progress reports from all departmental programs and in turn briefed the County Executive on sensitive program issues; supervised staff in the executive branch (300-400); was responsible for hiring, discharge and grievance handling of employees in the executive branch.

Next on Mr. Balele's resume is the position he held from January 1973 to June 1975, he worked as an accountant. Also as part of this position he supervised a staff of twelve people for the Shirecu Association, a cooperative in Tanzania. One of his responsibilities, among others, was that of being accountable for external audits regarding financial policies and procedures. For the remainder of 1975, Balele was the general manager of Kigoma cooperative in Tanzania. Mr. Balele then moved to America, and attended the University of Wisconsin-Platteville from 1976 to 1980, earning both a bachelor's degree in Ag-business Administration and a master's degree in Agriculture Management. Balele began working for the State of Wisconsin at the Department of Administration (DOA) in May of 1981, as a marketing coordinator for the Federal Property Program. For the last fourteen years he has been employed at the DOA as a contractual services management assistant in the Bureau of Procurement.

The List of Certification for this position became available on April 28, 2000, from the Division of Merit Recruitment and Selection (DMRS) of the Department of Employment Relations (DER). It provided 16 certified candidates for the position. Balele was included in this list. Balele was interviewed for this position on May 19, 2000; by Dave Meier (Meier), Administrator of the Division of Enforcement of Science and supervisor of the position; and by Susan Sylvester (Sylvester), Administrator of the Division of Water. Prior to these initial interviews, the interview panel compiled five questions based on their familiarity with the position, to be answered by each candidate:

(1) How a candidate's training and work experience would help the candidate perform the duties of the Director position; (2) any weaknesses in the candidates background relative to the candidate's ability to perform the Director's position; (3) the candidate's reasons for seeking the position and their expectations concerning achievements to be made in the next five years in the Director's position; (4) the candidate's opinion on the issue of potential for conflict between the need to conduct scientific research and the potential for undue managerial influence; and (5) the candidate's vision as to how the Bureau could best contribute to the goal of providing integrated ecosystem management, as well as how that candidate would integrate the Bureau's sub-programs, motivate staff, and maximize the effectiveness of the Bureau in supporting natural resource protection.

Written benchmarks for rating the responses given by the candidates for each of the five questions were also created prior to the interviews. This provided both Meier and Sylvester with an opportunity to write down comments contemporaneously to the answer being given by each candidate during the interview. The purpose of this process was to discover the five strongest candidates out of the 16 who were certified as at least minimally qualified for the position. These five candidates would then be forwarded on to a final round of interviews, from which the person to fill the position was chosen.

The common threads found regarding Balele's interview are that, Mr. Balele did answer all five of the benchmark questions and an additional question posed by Mr. Meier. The sixth question to Balele inquired about his potential ability to supervise scientists. Balele responded that in his

previous managerial experience he had supervised people of different professions and had also conducted research, so he felt confident that this would not be a hindrance in his ability to supervise.

Despite Balele's assertions that his interview was superior.⁴ From the perspective of the interviewers, both Meier and Sylvester felt that during his interview Balele provided shallow and unresponsive answers. After the initial interviews were completed the panel decided on five candidates, all of whom were white, to be advanced for second interviews.

On June 12, 2000, Balele filed a WFEA complaint with the Commission, alleging that the DNR unlawfully discriminated and retaliated against him when he was not selected for the position of Director. Balele claimed this was further evidence of a pattern of intentional discrimination against minorities, when the DNR has had an opportunity to select a minority certified for a career executive position, and made the decision not to. Personally, Balele felt he had been a victim of this pattern eight times within the last two years.

Prior to this filing, Balele had complaints pending within the Commission all alleging discrimination and retaliation against him by the DNR when he was not selected for the positions of: (1) Deputy Administrator, Division of Land; (2) Section Chief, Bureau of Waste Management; (3) External Relation Section Chief, Bureau of Wisconsin State Parks; and (4) Section Chief, Bureau of Facilities and Land. On December 12, 2000, Balele and DNR agreed that all complaints except the one relating to the Director, Bureau of Integrated Science Services, would be dismissed

⁴ Balele knew that he provided the best answers for all of the questions, and thus was sure to be hired, even though he was keenly aware of the panels' aloofness and hostility toward him. His confidence was based on Meier's inquiries about whether someone at the DNR had spoken with him about the correct answers. Balele responded that he had not been trained in the correct answer, and knew by "looking at Meier's face he was very impressed by his interview." In closing, Meier asked for an additional reference, and then promised to get back to him.

Affidavit of Pastori Balele (2000).

but would remain for historical reference as prior complaints against the DNR. Each of these positions was ultimately filled by current DNR employees, all of whom were white.

The DNR filed a motion for summary judgment on February 21, 2001. On April 17, 2001, Balele filed his response to DNR's motion, as well as a cross-motion for summary judgment. Both the DNR and Balele filed affidavits and other written materials in support of their respective motions for summary judgment. These affidavits and materials establish the majority of the material facts, which are for the most part non-disputed. The Commission, in its November 9, 2001, decision ruled in favor of the DNR and granted summary judgment, and dismissed Balele's claim in its entirety. On December 11, 2001, Balele petitioned the Commission to review its decision, this petition was denied.

Further facts will be set forth as necessary in this opinion.

ISSUES FOR REVIEW

In his petition to this court, Balele alleges several issues beyond the incorrectness of the Commission's use of summary judgment to decide his complaint. Balele accuses the DNR of engaging in fraudulent post-certification processes, which resulted in the selection of someone other than Balele for the Director position.⁵ Finally, Balele claims the Commission abused its discretion by not ordering the DNR to follow its own affirmative action procedures in the appointment process.⁶

⁵ Mr. Balele made substantially similar claims in *Balele*, and while the factual situation is slightly different, the fundamental basis for the complaint is the same, as is the appellate court's evaluation of the claims. *Balele v. Wis. Pers. Comm'n, UW-Madison, UW System, DER & DMRS*, No. 01-CV-1182.

⁶ *Id.* n.4.

Only those questions noticed for hearing before the Commission are properly before the reviewing court. *Wis. Tel. Co. v. ILHR Dep't.*, 68 Wis. 2d 345, 359-60, 228 N.W.2d 649, 656-57 (1974). Therefore, the issues for review are as follows:

1. Whether the Commission reasonably decided that the DNR did not unlawfully discriminate against Balele based on his race or national origin, or retaliate against Balele for engaging in protected activities under the WFEA when the DNR selected a white individual for the position of Director of Integrated Science Services.
2. Whether the Commission reasonably decided that the DNR's post-certification hiring processes for filling the Director position did not discriminate against Balele, in that these processes have a disparate impact upon members of the minority group to which Balele belongs.

STANDARD OF REVIEW

The standard for administrative review is set forth in Wisconsin Statute. §§ 227.52 to 227.57 Wis. Stat. Ann. § 227.52-57 (West 2000). The circuit court must affirm an agency's decision unless it finds grounds to do otherwise under Wisconsin Statute §227.57(2). Wis. Stat. Ann. § 227.57 (West 2000). Therefore, an administrative review under ch.227 is not a trial *de novo*. *Wis. Env'tl. Decade v. PCS*, 79 Wis. 2d 161, 170, 255 N.W.2d 917, 923 (1977). Rather, the judicial review is conducted without a jury, and is limited to the record generated by the agency, in this case the Commission. Wis. Stat. Ann. § 227.57(1) (West 2000). On review, the court must evaluate and treat separately issues of agency procedure, the agency's interpretations of law, and its findings of fact. *Id.* § 227.57(3). However, a circuit court is not bound by an agency's characterization of any of its determinations as either a finding of fact or a conclusion of law. *Madison Teachers, Inc. v. WERC*, 218 Wis. 2d 75, 84, 580 N.W.2d 375, 378-79 (Ct. App. 1998). A procedural issue is at the heart of this petition, for Balele argues that the use of summary judgment deprived him of the proper analysis of his complaint before the Commission.

Summary judgment at the agency level is not explicitly provided for in ch.227. However, in deciding the complaint underlying *Balele*, the Commission created a process that is the functional equivalent to judicial summary judgment procedures under Wis. Stat. § 802.08. *Balele v. WPC*, 223 Wis. 2d 739, 589 N.W.2d 418 (Ct. App. 1998). The purpose of the process is to eliminate cases where there are no genuine issues of material fact in dispute, by deciding the case without conducting an evidentiary hearing.⁷ Genuine issues of material fact, are those facts that have not only been raised by one side as issues of disagreement. Rather they are those facts that; when the court analyzes the conflicting evidence and renders a decision as to whether, after consideration of both parties' affidavits or other showing, a reasonable jury or other fact-finder could make the finding in question in favor of the non-moving party. *Baxter v. DNR*, 165 Wis. 2d 298, 312, 477 N.W.2d 648, 654 (Ct. App. 1991).

Further, "once the motion [for summary judgment] is made and demonstrates the support required by the statute, the opponent does not have the luxury of resting upon its mere allegation or denials of the pleading, but must advance specific facts showing the presence of a genuine issue for trial." *Moulas v. PBC Prod.*, 213 Wis. 2d 406, 410-11, 570 N.W.2d 739, 740-41 (Ct. App. 1997). Given *Balele's* vast experience with the Commission and its procedures, particularly those associated with his previous cases, this court can infer *Balele* is familiar with the correct processes. However, the Commission, in an effort to eliminate any uncertainty, has created a five-factored process to ensure the fairness in its application of summary judgment.

Recently in, *Balele v. DOT*, 00-0044-PC-ER, 10/23/2001, the Commission provided an in-depth discussion regarding the use of summary judgment at the administrative level. *Balele v.*

⁷ A process the Commission confirmed through use in the complaints underlying *Balele v. DNR*, No. 98-0046-PC-ER; *Balele v. DOA*, No. 00-0057-PC-ER; *Balele v. DOT*, No. 99-0103-PC-ER; *Balele v. DOT*, No. 00-0044-ER-PC; *Balele v. DOT*, No. 00-0088-PC-ER; and *Balele v. UW-Madison*, No. 91-0002-PC-ER.

DOT, 00-0044-PC-ER, p.18-20. The five factors identified as minimum considerations can be summarized as:

(1) Whether the factual issues raised by the motion are inherently more or less susceptible to evaluation on a disparities motion. Subjective intent is typically difficult to resolve without a hearing, whereas legal issues based on undisputed or historical facts typically can be resolved without the need for a hearing; **(2) whether a particular complainant could be expected to have difficulty responding to a dispositive motion.** An unrepresented complainant unfamiliar with the process in this forum should not be expected to know the law and procedures as well as a complainant either represented by counsel or appearing *pro se* but with extensive experience litigating in this forum; **(3) whether the complainant could be expected to encounter difficulty obtaining the evidence needed to oppose the motion.** An unrepresented complaint who either has had no opportunity for discovery or who is not familiar with the discovery process is unable to respond effectively to any assertion by the respondent for which the facts and related documents are solely in respondent's possession; **(4) whether an investigation has been requested and completed;** and **(5) whether the complainant has engaged in an extensive pattern of repetitive and/or predominately frivolous litigation.** If this situation exists it suggests that the use of a summary procedure to evaluate his/her claims is warranted before requiring the expenditure of resources required for a hearing.

The Commission also addressed the relationship of each of these factors to this case. First, it addressed how Balele the *pro se* litigant is not like the typical *pro se* litigant. Specifically, the Commission discussed how Balele previously has been involved in several complaints before them, that ultimately involved the concepts of a summary judgment procedure. *See* n. 6.

Second, the Commission acknowledged that Balele had conducted extensive research in this case, as well as many of his previous cases.⁸ This led the Commission to find it unlikely that Balele would be disadvantaged by having to set forth the merits of his claim before having the hearing. A relevant consideration because in this form of summary judgment, the non-moving party is given the opportunity to conduct its discovery before being required to make a showing in opposition to

⁸ The Commission also noted that he acted as a representative for other complainants in front of the Commission. *Oriedo v. DOC*, No. 99-0124-PC-ER, 2/2/1999. This case also included extensive discovery and a motion for summary judgment.

the motion. *Transp. Ins. Co. v. Hunziger Constr. Co.*, 179 Wis. 2d 281, 292, 507 N.W.2d 136, 140 (Ct. App. 1993).

In this particular case, with full knowledge of Commission procedure, Balele waived his right to a Commission investigation of his charges. In a typical case such an action would run against the underlying policy goals of a WFEA claim.⁹ Requiring a complainant to support its claim without the benefit of a Commission investigation would impair the typical litigant. However, from Balele's history it can be assumed that this is not a problem he would face.

After concluding that the administrative summary judgment is a proper procedure, the court turns to an evaluation of the underlying facts. When reviewing an agency's findings of fact, the court must sustain the Commission's finding if they are supported by substantial evidence¹⁰ within the record. *Hamilton v. DILHR*, 94 Wis. 2d 611, 617-19, 288 N.W.2d 857 (1980). Where the evidence is such that two conflicting conclusions may reasonably be drawn, it is for the agency to determine which view of the evidence it accepts. *Id.* at 617. Furthermore, an agency's conclusions of law must be affirmed if they are reasonable, at least with respect to those issues which the agency has expertise or specialized knowledge. *Balele v. WPC*, 223 Wis. 2d 739, 589 N.W.2d 418 (Ct. App. 1998).

Although the reviewing court is not bound by an agency's conclusions, the general rule in Wisconsin is to afford a presumption of validity to the agency. *Sauk County v. WERC*, 165 Wis. 2d 406, 413, 477 N.W.2d 267, 270-71 (1991). However, varying levels of deference apply, depending

⁹ A 'Conference Report' was issued following a pre-hearing conference between Balele, the DNR and the Commission on July 14, 2000. One aspect to this report was a two page informational handout titled "Instructions for Unrepresented Parties Before the State Personnel Commission." The handout detailed for a petitioner that with regards to an Equal Rights complaint, typically the Commission will conduct an 'Initial Determination'. However, these findings will have no bearing on the actual hearing, for the hearing is *de novo*.

CONFERENCE REPORT: *Balele v. DNR*, case Nos. 90-0046-PC-ER, 00-0056-PC-ER, 00-0078-PC-ER, and 00-0087-PC-ER (July 14, 2000).

upon the “comparative institutional capabilities and qualifications” between the court and the administrative agency. *Jarrett v. LIRC*, 2000 WI App 46, 233 Wis. 2d 174, 607 N.W.2d 326. The “great weight” standard is the appropriate standard when the court finds that the agency is charged with administering the law in question, the agency has specialized knowledge or expertise in interpreting the law, and the agency’s interpretation provides uniformity of application of the law. *Knight v. LIRC*, 220 Wis. 2d 137, 148, 582 N.W.2d 448, 453 (1998). Under great weight deference, the court must uphold the agency so long as its interpretation is at least reasonable and not contrary to the clear meaning of the law. *UFE, INC. v. LIRC*, 201 Wis. 2d 274, 286-87, 548 N.W.2d 57, 62-63 (1996). Even if another interpretation of the facts may be more reasonable. *Id.*

The Commission is an agency that fulfils the requirement for application of the great weight deference. The Commission is charged by the legislature with the duty of hearing and deciding discrimination claims, as well as applying the provisions of the WFEA. Wis. Stat. Ann. §§ 111.375(2), 230.45(1)(b) (West 2000); *Phillips v. Wis. Pers. Comm’n*, 167 Wis. 2d 205, 216, 482 N.W.2d 121, 125 (Ct. App. 1992). The Commission has also developed considerable expertise in the interpretation and application of the provision within the WFEA regarding disparate treatment and disparate impact claims, as evidenced through its lengthy performance of this function. *See History*, Wis. Stat. Ann. § 230.45 (West 2000).

Finally in passing, the Commission raised its most significant insight into Balele and his use of the Commission. Summarized in *Balele*, the Commission dismissed Balele’s complaint as a sanction for misconduct during the proceedings, especially significant when taken in the context of his prior record of misconduct and actions in bad faith. *Balele v. DHFS*, No. 00-0133-PC-ER (8/15/01). Again the Commission noted that Balele has never been successful in any of his complaints before the Commission, the Circuit Court, the Wisconsin Court of Appeals and the

¹⁰ *Substantial evidence* does not mean a preponderance of the evidence, but rather is defined as relevant evidence that a

Federal Appellate Court. However, the Commission correctly acknowledged it must evaluate each new claim independently based on the substantive merits of that case. Thus, based solely on the court's review of the merits in this case, the court finds Balele has again brought a case capable of determination by summary judgment.

ANALYSIS

Wisconsin courts have acknowledged two separate theories of employment discrimination contemplated by the WFEA. *Racine Unified Sch. Dist. v. LIRC*, 164 Wis. 2d 567, 594-95, 476 N.W.2d 707, 717-18 (Ct. App. 1991). The first type is known as 'disparate treatment,' which can be identified as the 'direct method' of discrimination. To show disparate treatment the plaintiff is required to prove that the defendant had a discriminatory intent or motive. *Watson v. Fortworth Bank Trust*, 487 U.S. 977, 108 S.Ct. 2777 (1988). The second type of employment discrimination is called 'disparate impact,' known as the 'indirect type' of discrimination. A disparate impact claim is based on the premise "that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination." *Id.* Thus, disparate impact discrimination ultimately results in result one group being impacted more harshly than another, a result that cannot be justified by business necessity. *Int'l Bhd. of Teamsters v. U.S.*, 431 U.S. 324, 97 S.Ct. 1843 (1977).

I. Disparate Treatment Claim

Under a disparate treatment theory of employment discrimination, a complainant must show that the employer treats some individuals less favorably than others due solely to their status as a member of a protected class. *Racine Unified Sch. Dist. v. LIRC*, 164 Wis. 2d 567, 595, 476 N.W.2d

reasonable person could accept as adequate to support the determination at issue. *Id.* at 617. (emphasis added)

707, 718 (Ct. App. 1991). Thus, a complainant must show intentional discrimination by the employer on the basis of the complainant's race or gender, etc. *Id.* Under the *McDonnell-Douglas paradigm*,¹¹ when alleging discrimination in hiring, the complainant must first establish a *prima facie* case by demonstrating that he/she was a member of a statutorily protected class. Once the complainant satisfies that burden, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason(s) for the hiring decision. *Id.* If the employer satisfies its burden of production, the burden shifts back to the complainant to prove that the reason(s) articulated by the employer are merely a pretext for discrimination. The latter burden merges with the complainant's ultimate burden of proving intentional discrimination. *Id.*¹²

Here, the Commission ruled that Balele had met his initial burden established a *prima facie* case of discrimination. The burden then shifted to the DNR to articulate a non-discriminatory reason for the actions taken. *See Id.* at 792; *Tex. Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089 (1981). The Commission felt that the DNR had offered a legitimate and non-discriminatory reason for not selecting Balele, i.e. that Balele had not performed at the desired level during his initial interview.

At that point, the burden shifted back to Balele to prove the DNR's reason was merely a pretext for its unlawful discriminatory intentions. The Commission ruled that Balele did not meet that burden. The Commission found that Balele failed to provide "any evidence that he had

¹¹ The complainant must show that he/she: (1) is a member of a protected class; (2) applied and was qualified for the open position; (3) was rejected despite being qualified; and (4) that after this rejection, the employer continued to seek applicants among persons of complainant's qualifications. *McDonnell Douglas v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973); *Puetz Motor Sales, Inc. v. LIRC*, 126 Wis. 2d 168, 376 N.W.2d 372 (Ct. App. 1985).

¹² The burden and order of proof for retaliation claims is essentially the same as that for disparate treatment claims. The complainant must first establish a *prima facie* case by showing that the complainant engaged in protected fair employment activities, that the plaintiff suffered an adverse action by the employer, and that a causal link exists between the protected activities, and the adverse action. Wis. Stat. Ann. § 111.322(3) (West 2000); *Acharya v. Carroll*, 152 Wis. 2d 330, 340, 448 N.W.2d 275, 280 (Ct. App. 1989). The employer then must articulate a legitimate, non-discriminatory reason for its action. *Acharya*, 152 Wis. 2d at 341, 448 N.W.2d at 281. Finally, the plaintiff must prove that the reasons articulated by the employer for its action are pretext for intentional retaliation. *Id.*

anything resembling the kind of scientific background that would have provided the skills, knowledge, and abilities” required to be a serious candidate for the position. While Balele does possess degrees that make him at least familiar with science and scientific research, based on the detailed job description, the interview panel could easily have viewed Balele’s “generalist” knowledge as inadequate.

Balele’s second assertion, that the absence of a racially-balanced interview panel proves pretext, must fail. DNR rules permit the waiver of the racially-balanced interview panel requirement by a Division Director or Division Administrator. The panel was comprised of two Division Administrators, Meier and Sylvester, leading the Commission to reasonably infer that one (or both) of them must have waived that requirement. Balele provided no evidence to the contrary. That action alone cannot be seen as proof that the DNR violated its affirmative action policy.

While Balele was certified as a valid applicant for the Director position, ultimately certification means little more than being considered minimally qualified for the position. At that point, a minor factual dispute is raised. Balele was confident he would be offered the job based on Meier’s questioning about who at the DNR had coached him regarding the answers he gave at his interview. However, the DNR asserts that Balele’s answers at the interview were so inadequate, they did not justify moving him to the next round of interviews. The Commission concluded the only reasonable inference a trier of fact would draw from the evidence submitted by the parties was that Balele’s interview responses did not satisfy the established benchmarks,¹³ and as a result could not justify his advancement to the final round of interviews. Thus, Balele failed to show pretext on any of his versions of how the DNR was attempting to keep him out of the career executive level of employment and out of their headquarters.

¹³ The validity and job-relatedness of the five interview questions has not been challenged.

II. Retaliation

The Commission pointed out that many of the elements of retaliation parallel those of the disparate treatment analysis. *See* n. 10. However, the key question in retaliation analysis is whether the alleged retaliators were aware of Balele's protected activities. Again at that point there was a factual dispute, but the Commission ruled it was superficial and not one of genuine dispute. Balele's assertions rest on the fact that one of the DNR's staff attorneys, Richard Henneger, was aware of his protected activity. Balele speculated that Henneger had to have been involved somehow with the selection process, and thus made Meier and Sylvester aware of his previous WFEA complaints. DNR rebuts this allegation with the affidavits of Meier and Sylvester, in which they both deny any knowledge of Balele's previous history with the DNR.

Balele's conclusion that Henneger influenced Meier and Sylvester is not based on his own knowledge, but purely on speculation. Neither the Commission, nor this court, in this type of proceeding is required to accept as fact the unsubstantiated conjecture of a party. Thus, Balele has failed to establish a *prima facie* case of retaliation.

Further evaluation by the Commission led it to conclude that even if a genuine dispute of fact existed, that would not have affected its decision on the DNR motion. For even if Balele had established the *prima facie* case of retaliation, the remainder of the analysis would follow that of the disparate treatment analysis. Therefore, the Commission's conclusions would not change.

III. Disparate Impact Claims

The test applied in disparate impact analysis is whether a facially neutral employment policy has a significantly disproportionate effect on the opportunity for racial minorities to compete for the position. *Dothard v. Rawlinson*, 433 U.S. 321, 97 S.Ct. 2702 (1977); *Balele v. DATCP, DER & DMRS*, No. 98-0199-PC-ER. Balele argues that within the context of the subject recruitment, he, as

the sole minority candidate, was screened out of the process based solely on the results of his first interview. Therefore, Balele claims the DNR's use of an interview as a 'screening device' had a disparate impact on minorities. However, Balele's argument is flawed, as seen below.

There were no facts in dispute relating to that aspect of Balele's complaint. The question was thus one for summary judgment, i.e., was the DNR entitled to judgment in its favor as a matter of law.

The DNR admits that at the time it declined to select Balele for the Director position, racial minorities were underutilized in the administrator-senior executive job group, both at their Madison headquarters and statewide.¹⁴ Given that admission, Balele cited *Melendez* as substantiating his claim that the DNR discriminated against him, because under *Melendez*, in a disparate impact case the plaintiff must prove the challenged practice is discriminatory in that it has a disparate impact on minorities, and is unjustified by the defendant's legitimate business needs. *Melendez v. Ill. Bell Tel. Co.*, 79 F.3d 661 (7th Cir. 1996). The Commission disagreed, concluding that Balele had failed to prove the DNR's use of an interview as a screening device had a disparate impact on racial minorities for three reasons.

First, Balele was attempting to prove disparate impact by the fact that he had been screened out of the running by the interview process. Thus, his adversely impacted group consisted of only one member and that is insufficient to establish disparate impact. Sixteen certified candidates were interviewed for the Director position. The Commission also ruled a group of sixteen was too small of a sample to sustain a finding of disparate impact.

¹⁴On June 30, 2000, the DNR had 202 career executives, six of whom were racial minorities. On the same date the DNR had 199 senior managers, five of whom were racial minorities. Between August 1999 and August 2001, eight persons were appointed to senior executive positions at DNR headquarters, none of whom were racial minorities. Thus, the availability factor for racial minorities in the senior executive job group for this time was 7.5 percent. This availability factor has since improved, for the period of April 2000 to December 2001 in the senior executive job group raised to 9.1 percent.

Second, as of June 30, 2000, only six members, or three percent, of the DNR career executives were racial minorities. However, that too was insufficient to prove disparate impact, because it failed to address the number of opportunities the DNR had to hire or appoint a minority and failed to do so.

Third, in addressing Balele's many claims, the Commission ruled that the 1998 statistics were not relevant to the time period at issue in this case. The Commission further found that, even if they were applicable, the eight positions for which no minorities were hired again too small a statistical sample to establish disparate impact. This is especially true given that in each of the eight opportunities presented to hire a minority, Balele was the minority who had applied. Based on his extensive history of applying for jobs for which he is not qualified, it could be inferred that the minority was not hired for reasons other than his race, primarily that he was unqualified. That inference is supported by *Melendez*, which states, "if direct evidence demonstrating the discriminatory employment practices is absent, the court will assume that the unqualified plaintiff was not hired due to their unfitness for the position." *Melendez*, at 668.

Thus, even assuming Balele had made a *prima facie* case of disparate impact discrimination, the Commission decided the DNR had successfully proven that the interview questions were reasonably job-related. The Commission also agreed that the interview process is a universally recognized and utilized screening and selection tool. The Commission therefore ruled there was no genuine dispute of material fact, and that the DNR was entitled to a judgment in its favor as a matter of law on the question of disparate impact discrimination.

CIRUIT COURT ANALYSIS SUA SPONTE

In the case before the court, the respondents seek only affirmance of the Commission's decision and have not asked for any costs from Balele, nor for the court to sanction him. However,

the court has mounted ample evidence to aid itself in rendering a *sua sponte* decision that it believes will promote fundamental public policy. The WFEA was implemented to protect minority groups from unfair and unlawful discrimination based on race, sex, disability, etc. Abuse of a statute that has the sole purpose of protecting people at a disadvantage within the system creates a negative environment for those who truly are in need of the WFEA's protection. Evidenced in the extensive list below (Federal Court of Appeals - Seventh Circuit, four cases; Court of Appeals - District Four, six cases; Dane County Circuit Court, 17th case is addressed by this decision; and Wisconsin Personnel Commission, 65 cases) is Balele willingness to abuse the process of seeking protection under the WFEA for his own purposes, and his willingness to neglect the larger concept of the statute's protection for persons who have experienced actual discrimination.

**FEDERAL COURT OF APPEALS
SEVENTH CIRCUIT**

1. *Balele v. Barnett*, 108 F.3d 1379 (Table), 1997 WL 11608, **1(7th Cir. Wis. 1997).

The 8th appeal filed in the 7th Circuit by Balele regarding the lawsuits he filed for promotions he was denied by his employer. As a result of Balele's refusal to make payments toward the judgments against him, garnishments were taken out of his paycheck. Balele made this appeal to stop the garnishments; the appellate court ruled it was a frivolous appeal, resulting in Balele being barred from making any more appeals.

2. *Balele v. Dept. Of ILHR, DER, DMRS & DOA*, 124 F.3d 203(Table), 1997 WL 547920, **1(7th Cir. Wis. 1997).

Title VII case filed by Balele with regard to 2 positions for which he believed he was not hired because of his race and in retaliation for previous lawsuits. This was the 9th appeal filed by Balele, and only allowed to be heard as it was ready to proceed when the court filed the above - referenced restriction. The court affirmed the judgment of the circuit court, granting the cross-motion for summary judgment.

3. *Balele v. Schuster, Frankel*, 1 F.3d 1244 (Table), 1993 WL 288322 **1(7th Cir. Wis. 1993).

A civil action brought pursuant to 42 U.S.C. §§ 1981, 1983, and 1985, the Fourteenth Amendment and the Civil Rights Act of 1964 - Balele alleged that the defendants conspired to deprive him of his rights to due process and a fair judicial hearing. As Judge Frankel was absolutely immune to a suit

for damages based on actions taken in his judicial capacity, his motion to dismiss was granted. As to Schuster, his motion to dismiss was granted based on Balele's failure to state a claim against him. While this case involved payment of attorney fees incurred by Schuster, it still casts light on Balele's view of the legal process. In its decision, the court found that Balele was using this appeal as a sole means for attempting to pay fees ordered by the court to which he was legally obligated.

4. *Balele v. Klauser et al.*, 74 F.3d 1242 (Table), 1996 WL 15825, **1(7th Cir. Wis. 1996).

Various actions for discrimination on the basis of race and national origin filed under 42 U.S.C. §§ 1981, 1983, 1985; Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. §§ 2000e, et seq.; the First, Fifth and Fourteenth Amendments; the Wisconsin Fair Employment Act, §§ 111.31-111.39, Wis. Stats.; and the Wisconsin Civil Service Law, ch.230, Wis. Stats. The Court found no error in the circuit courts ruling, and affirmed all of that court's decisions.

o *Balele v. Klauser et al.*, 518 U.S. 1029, 116 S.Ct. 2573 (U.S. 1996).

Balele petitioned for writ of certiorari to the Supreme Court of the United States; his petition was denied.

o *Balele v. Klauser et al.*, 571 U.S. 1172, 116 S.Ct. 1577 (U.S. 1996).

Balele's petition for rehearing was denied by the Supreme Court.

**COURT OF APPEALS
DISTRICT FOUR**

1. *Balele v. Wis. Pers. Comm., DHFS, DOJ, & DOA*, 223 Wis. 2d 267, 588 N.W. 2d 928 (Table) (Ct. App. 1998).

Balele appealed the circuit court's affirmation of the Wisconsin Personnel Commission's dismissal of this case for lack of jurisdiction to hear the complaint.

o *Balele v. Wis. Pers. Comm.*, 225 Wis. 2d 490, 594 N.W.2d 384 (Table) (1999).

Supreme Court of Wisconsin denied the petition for review of Case no. 98-1432, *Balele v. Wis. Per. Comm.*, 223 Wis. 2d 267.

2. *Balele v. Wis. Pers. Commission & DOA*, 2002 WI App. 134, 646 N.W.2d 855 (Table) (Ct. App. 2002).

The court affirmed the circuit court's decision approving the Commission's utilization of an administrative form of summary judgment as Balele had failed to meet his initial burden of discrimination and retaliation.

3. *Balele v. Wis. Pers. Comm., DOA, DER, and DMRS*, 228 Wis. 2d 511, 597 N.W.2d 774 (Table) (Ct. App. 1999).

The court ruled the Commission was correct in deciding that Balele's claims were barred on the doctrine of issue preclusion. Court held the issues Balele wanted decided in the state courts have already been ruled upon in the federal courts, and therefore could rightfully be disposed of through issue preclusion. The court also laid out five factors that protect the rights of all parties to the full and fair adjudication of all issues involved. The court further found that barring petitioner's claim on the basis of issue preclusion was not fundamentally unfair.

4. *Balele v. Wis. Pers. Comm., DER, DMRS, DOT, and DHSS*, 223 Wis. 2d 739, 589 N.W.2d 418 (Ct. App. 1998).

The court concluded that the Commission correctly dismissed DER & DMRS as parties to Balele's complaint, because they lacked the authority to participate in the alleged discriminatory and retaliatory actions. The court also affirmed the additional orders of the circuit court. The appellate court also provided three factors that must 'at least' be evaluated to make sure a party's rights have not been overlooked through the use of summary judgment.

- o *Balele v. Wis. Pers. Comm.*, 225 Wis. 2d 491, 594 N.W.2d 384 (Table) (1999).

Petition for review of *Balele v. Wis. Pers. Comm.*, 225 Wis. 2d 491, denied by the Wisconsin Supreme Court.

5. *State of Wisconsin, Plaintiff-Respondent, v. Balele, Defendant-Appellant, DOA, Garnishee-Defendant-Respondent*, 201 Wis. 2d 217, 549 N.W.2d 793 (Table) (Ct. App. 1996).

The court affirmed the circuit courts ruling in full, and refused to stay the garnishment order against Balele.

- o *State v. Balele*, No. 95-2377, 540 N.W.2d 203 (Table) (1995).

On October 3, 1995 Balele's petition for review in *State v. Balele*, 201 Wis. 217, was dismissed.

6. *State of Wisconsin v. Pastori Balele*, No. 01-3325, 2002 WL 1581486, (Wis. Ct. App. 2002).

Balele appealed from a judgment ordering him to pay the State of Wisconsin \$1,114.91. The court affirmed the circuit court's decision that the Commission had imposed reasonable and valid sanctions.

DANE COUNTY CIRCUIT COURT

1. *Balele v. Wis. Pers. Comm. et al.*, No. 01-CV-3396, filed Dec. 11, 2001.

This is the case currently before the court.

2. *Balele v. Wis. Pers. Comm. et al.*, No. 01-CV-1182, filed May 2, 2002.

Administrative Agency Review. Commission ruled against Balele, and the circuit court upheld the decision. Balele appealed.

3. *Balele v. Wis. Pers. Comm. et al.*, No. 00-CV-2873, filed Oct. 25, 2000.

Administrative Agency Review. Commission ruled against Balele, and the district court upheld the decision. Balele appealed.

4. *Balele v. Wis. Pers. Comm. et al.*, No. 00-CV-2877, filed Oct. 25, 2000.

Administrative Agency Review. Commission ruled against Balele.

5. *State of Wis. v. Balele*, No. 00-CV-2776, filed Oct. 13, 2000.

Money Judgment. The court awarded \$1,114.91 to Balele; he appealed this judgment.

6. *Balele v. Wis. Pers. Comm. et al.*, No. 00-CV-2206, filed Aug. 10, 2000.

Administrative Agency Review. Commission ruled against Balele; the circuit court upheld the decision. Balele appealed.

7. *Balele v. Dept. of Agriculture Trade & Consumer*, No. 00-CV-1108, filed Apr. 25, 2000.

Administrative Agency Review. Commission ruled against Balele; the circuit court upheld the decision.

8. *Balele v. Wis. Pers. Comm.*, No. 98-CV-2867, filed Nov. 5, 1998.

Administrative Agency Review. Commission ruled against Balele; the circuit court upheld the decision.

9. *Balele v. Wis. Pers. Comm.*, No. 98-CV-0257, filed Feb. 2, 1998.

Administrative Agency Review. Commission ruled against Balele; the circuit court upheld the decision.

10. *Balele v. Wis. Pers. Comm. et al.*, No. 97-CV-3354, filed Dec. 18, 1997.

Intentional Tort.

11. *Balele v. Wis. Pers. Comm. et al.*, No. 97-CV-2724, file Oct. 07, 1997.

Administrative Agency Review. Commission ruled against Balele; the circuit court upheld the decision.

12. *Balele v. Wis. Pers. Comm. et al.*, No. 97-CV-1927, filed July 17, 1997.
Administrative Agency Review. Commission ruled against Balele; the circuit court upheld the decision.
13. *Balele v. Wis. Pers. Comm. et al.*, No. 97-CV-1389, filed May 22, 1997.
Administrative Agency Review. Commission ruled against Balele; the circuit court upheld the decision.
14. *Klauser et al. v. Balele*, No. 95-TJ-0084, July 26, 1995.
Transcript Judgment. Judgment for money. Commission found against Balele, fining him \$970.00. Balele filed an appeal.
15. *Klauser v. Balele*, No. 95-TJ-0056, May 18, 1995.
Transcript Judgment. Judgment for money. Commission found against Balele, fining him \$441.00. Balele filed an appeal for relief.
16. *Whitburn et al. v. Balele*, No. 95-TJ-0049, filed May 5, 1995.
Transcript Judgment. Judgment for money. Commission found against Balele, fining him \$1,033.90. Balele filed an appeal for relief.
17. *Balele v. Skornicka et al.*, 95-CV-0119, filed Jan. 13, 1995.
Intentional Tort.

WISCONSIN PERSONNEL COMMISSION

1. *Balele & Humphrey v. DMRS/DER & DETF*, Nos. 87-0047, 0048-PC-ER, 12/3/1987.
DECISION & ORDER ON MOTION TO DISMISS FOR LACK OF STANDING – The motion for lack of standing filed by DER/DMRS was denied. The Commission ruled that the language in the Wisconsin FEA called for a broader approach to standing than was called for under Title VII.
2. *Balele v. DATCP et al.*, No. 98-0199-PC-ER, 4/19/2000
RULING ON MOTIONS FOR SUMMARY JUDGEMENT – Balele's motion for summary judgment was denied. Respondent's motion for summary judgment was granted. Complaint was dismissed.
3. *Balele v. DATCP et al.*, No. 98-0199-PC-ER, 2/11/2000
RULING ON MOTION FOR SUBSTITUTION – Balele attempted to have Chairperson Laurie McCallum removed from this case. His motion for substitution was denied.
4. *Balele v. DATCP et al.*, No. 98-0199-PC-ER, 5/12/1999
RULING ON STATEMENT OF ISSUES FOR HEARING – Identifies three sub-issues.

5. *Balele v. DER & DMRS*, No. 98-0145-PC-ER, 7/19/2000
RULING ON MOTION – Respondent sought certain sanctions against Balele. Respondent's motion was denied.
6. *Balele v. DER & DMRS*, No. 98-0145-PC-ER, 2/28/2000
RULING ON MOTION FOR EXPENSES & FINAL ORDER – Matter dismissed based on the reasons set forth in the ruling issued 12/3/1999.
7. *Balele v. DER & DMRS*, No. 98-0145-PC-ER, 12/3/1999
INTERIM RULING ON MOTION FOR SANCTIONS – Case was dismissed except to the extent that the Commission retained the jurisdiction to consider reasonable expenses as to sanctions.
8. *Balele v. DER & DMRS*, No. 98-0145-PC-ER, 4/7/1999
RULING ON MOTION – Petitioner and respondent each proposed issues for the hearing. Ended up following the issues Balele (petitioner) wanted to address.
9. *Balele v. DER & DMRS*, No. 98-0145-PC-ER, 12/18/1998 --- §§ 717.1, 734
RULING ON MOTION TO PRIORITIZE PROCESSING OF CASE NO. 98-0145-PC-ER – Balele's motion to hold in abeyance the cited cases while proceeding on case No. 98-0145-PC-ER was denied.
10. *Balele v. DER et al.*, No. 97-0012-PC-ER, 7/23/1997 ---§724
RULING ON COMPLAINANT'S MOTION TO COMPEL DISCOVERY & RULING ON DOC'S MOTION FOR PROTECTIVE ORDER – Ruled that the DOC was required to answer Balele's interrogatives, and follow the production request subject to this protective order. Also excluded four questions from those the DOC was required to answer.
11. *Balele v. DER et al.*, No. 97-0097-PC-ER, 9/24/1997 --- §§ 702.005, .03, 710
RULING ON STATEMENT OF HEARING ISSUE – Balele's request to add an additional hearing issue was denied. The statement of issues for the hearing remained as it had been previously agreed upon on 8/20/1997.
12. *Balele v. DHFS*, No. 98-0045-PC-ER, 11/3/1999
DECISION & ORDER – This case was dismissed.
13. *Balele v. DHFS*, No. 99-00002-PC-ER, 5/31/2000
FINAL DECISION & ORDER – After addressing the objections of Mr. Balele, this case was dismissed.
14. *Balele v. DHFS*, No. 99-0123-PC-ER, 6/29/2001
DECISION & ORDER – This complaint was dismissed.

15. *Balele v. DHFS et al.*, No. 00-0133-PC-ER, 8/15/2001

RULING ON MOTION FOR RECUSAL & FINAL DECISION & ORDER – [1] Balele's request for the removal of Chairperson McCallum from participation in this matter was denied. [2] Due to Balele's failure to show cause why sanctions should not be imposed, detailed in the Ruling on Motions & Order to Show Cause on 5/24/2001, the Commission therefore adopted those rulings and imposed the sanctions.

16. *Balele v. DHFS et al.*, No. 00-0133-PC-ER, 5/24/2001

RULING ON MOTIONS & ORDER TO SHOW CASUE – Before the Commission entered final order with regard to this case, it provided Balele with the opportunity to show cause (set by a schedule), if he had any, why the proposed sanctions should not be imposed.

17. *Balele v. DHSS & DMRS*, No. 91-0118-PC-ER, 3/19/1992 --- §710

RULING ON MOTIONS – [1] Allowed Balele to amend his complaint to also allege retaliation, [2] denied Balele's motion to add on named parties, & [3] set a date for the hearing.

18. *Balele v. DHSS & DMRS*, No. 91-0118-PC-ER, 4/30/1993 --- §§ 770.03(2), 780.03(2), 784.03(2), 796.15

DECISION & ORDER – Previously it had been decided that the only purpose for this case was how Respondent's decision to use Option 2 (method) to recruit for the position at issue had a desperate impact on minorities, including Balele. Balele's complaint was dismissed & the matter was remanded to DHSS for action consistent with its stipulation.

19. *Balele v. DHSS & DMRS*, No. 91-0118-PC-ER, 6/17/1993 --- § 742

RULING ON PETITION FOR REHEARING – Balele petitioned the Commission for a rehearing because the Commission in its decision [a] did not specify a type of relief for the complainant and [b] Balele was concerned that allowing DHSS to make changes per their stipulation without supervision would leave them great opportunity to keep practicing the same discriminatory methods. The Commission disagreed, and denied Balele's request for a rehearing.

20. *Balele v. DHSS et al.*, No. 95-0005-PC-ER, 5/15/1995 --- §714.1

ORDER – Mr. Balele wanted DHSS's responses to the charges rejected due to untimely filing. The Commission denied that request.

21. *Balele v. DILHR et al.*, No. 94-0020-PC-ER, 6/2/1994 --- § 724

RULING ON DISCOVERY REQUEST – Found that DMRS had provided a basis for denying the requested discovery until an issue for hearing was set, however, DMRS failed to identify any reason to justify delaying the discovery until a hearing date had also been established. Thus, discovery was stayed until the issue for hearing was set.

22. *Balele v. DILHR et al.*, No. 95-0063-PC-ER, 10/16/1995 --- §§ 103.21(1), 702.90

RULING ON JURISDICTIONAL OBJECTION – Respondent raised an objection to Balele’s proposed issue that alleged Respondents were engaged in *racketeering*. The Commission rejected that issue for lack of jurisdiction, but stated the hearing could proceed on the issue previously agreed to at the 7/3/1995 conference.

23. *Balele v. DNR*, No. 98-0046-PC-ER, 1/25/2000

RULING ON CROSS-MOTION TO DISMISS – Balele’s motion for summary judgment was denied, but the DNR’s motion was also denied. That was based on the fact that it should be decided at hearing if the alleged direct evidence of discrimination was relevant to the question of whether discriminatory motive played a part in the decision to hire someone other than Balele for the position.

24. *Balele v. DNR*, No. 00-0087-PC-ER, 11/19/01

RULING ON MOTIONS – [1] DNR’s motion for summary judgment was granted. [2] Balele’s cross-motion for summary judgment was denied. [3] The complaint was dismissed. This is the case currently before the court.

25. *Balele v. DNR et al.*, No. 95-0029-PC-ER, 6/22/1995 --- §§ 522.10, 710, 713.3, .9, 732

RULINGS ON MOTIONS – [1] DER/DMRS motion to dismiss this complaint for failure to state claim is granted, and DNR was left as the sole Respondent. [2] Balele’s motion for sanctions was denied. [3] Balele’s motion for preliminary injunction, “to stop the harassment of blacks at the DNR,” was denied.

26. *Balele v. DOA & DMRS*, No. 88-0190-PC-ER, 1/24/1992 --- §§ 770.02(2), 780.02(2), .10, 784.02(2), .10, 796.15

ORDER – The Commission found there was no probable cause to believe that Balele was discriminated against as alleged. This complaint was dismissed. A Motion to Strike, filed by both parties, was granted in part and denied in part in accordance with the opinion.

27. *Balele v. DOA*, No. 94-0090-PC-ER, 2/20/1995 --- § 717.3

RULING ON MOTION TO STRIKE ELEMENTS OF COMPLAINT – The disputed portions of the complaint were stricken, but Balele was allowed to assert the factual material alleged therein to as evidentiary support fro his claim relative to the classification of his position. Not precluded by the doctrine of collateral estoppel from receiving consideration. Also redefined the proposed issue for the hearing.

28. *Balele v. DOA*, No. 00-0057-PC-ER, 9/20/2000

RULING ON MOTION FOR SUMMARY JUDGEMENT – Respondent’s motion for summary judgment was granted. Balele’s cross-motion for summary judgment was denied. This case was dismissed.

29. *Balele v. DOA et al.*, No. 93-0144-PC-ER, 3/26/1997; affirmed by the Dane County Circuit Court, *Balele v. Wis. Pers. Comm. et al.*, 97-CV-1389, 10/30/1997 --- §§ 714.1, 717.3

RULING ON RESPONDENTS' MOTION TO DISMISS & RULING ON COMPLAINANTS' MOTION FOR DIRECTED VERDICT - Respondent's motion to dismiss was granted. The case was dismissed under the doctrine of issue preclusion.

30. *Balele v. DOA et al.*, No. 96-0156-PC-ER, 6/4/1997; affirmed by Dane County Circuit Court, *Balele v. Wis. Pers. Comm. et al.*, 97-CV-1927, 2/13/1998; affirmed by Court of Appeals, 98-0687, 11/19/1998 (unpublished) --- §§ 702.01, .07

RULING ON RESPONDENTS' MOTION TO DISMISS - Respondent's motion was granted, and the case was dismissed.

31. *Balele v. DOA et al.*, No. 99-0001, 0026-PC-ER, 8/28/2000

DECISION & ORDER - All matters were dismissed.

32. *Balele v. DOA et al.*, No. 99-0001, 0026-PC-ER, 9/7/1999

RULING ON REQUEST TO CALL WITNESS - Balele's request for a letter requiring Governor Thompson to testify at the hearing in the above matter, either in person or via recorded testimony, was denied.

33. *Balele v. DOA et al.*, No. 99-0001, 0026-PC-ER, 5/10/1999

RULING ON MOTION OT DISMISS - Motion to dismiss was granted to the office of the governor. Granted in part to DMRS in relation to 2 of 4 issues. Granted to DER in relations to issue 1(a). Balele's complaint against DER/DMRS remained intact as to the rest of his complaint.

34. *Balele v. DOA et al.*, No. 00-0077-PC-ER, 1/25/2001

RULING - Commission defined the statement of issues.

35. *Balele v. DOA et al.*, No. 00-0077-PC-ER, 10/18/2000

RULING - DOA's motion requesting placement of the Commissions 8/2/2000 ruling in Balele's personnel file and the awarding of attorney's fees is denied. Balele's cross-motion for damages was denied.

36. *Balele v. DOA et al.*, No. 00-0077-PC-ER, 8/2/2000

RULING - The record developed at the 7/31/2000 hearing does not support the Complaints version of events. Therefore, the injunction imposed by the Commission, by Ruling dated 7/19/2000, is lifted.

37. *Balele v. DOA et al.*, No. 00-0077-PC-ER, 7/19/2000

RULING ON MOTION FOR PRELIMINARY INJUNCTION - Pending the issuance of a final decision by the Commission, the Respondents are enjoined for a period of 90 days from making a permanent appointment to

the subject position. If either of the parties fails to cooperate fully in the effort to complete the proceedings in this matter within 90 days, the terms of this temporary injunction shall be subject to further review and modification by the commission.

38. *Balele v. DOA et al.*, No. 00-0104, 0077-PC-ER, 3/21/2001

RULING ON MOTIONS – (Found against Balele: stayed all of his other pending cases) The hearing on the merits of these cases is stayed unless and until Balele fulfills the Commission's order requiring the payment of \$257.42 in attorney fees within 30 days. If Balele did not pay, the Commission would then issue an order to show cause why the remaining cases should not just be dismissed.

39. *Balele v. DOA et al.*, No. 00-0104-PC-ER, 2/23/2001

RULING ON MOTIONS – (Found against Balele: frivolous reply) Balele's request for reconsideration is denied, as was his request for costs. Respondent's request for attorney's fees was granted. Thus, Balele was ordered to pay sum of \$257.42 to the Department of Justice within 30 calendar days of this order.

40. *Balele v. DOA et al.*, No. 00-0104-PC-ER, 2/8/2001

RULING ON COMPLAINANT'S REQUEST FOR SUBSTITUTION OF HEARING EXAMINERS – Balele's request for substitution of Commissioner Rogers as the hearing examiner was denied.

41. *Balele v. DOA et al.*, No. 00-0104-PC-ER, 12/1/2000

RULING ON MOTION TO DISMISS WHISTLEBLOWER CLAIM & CROSS-MOTION – Respondent's motion to dismiss the "whistleblower" portion of this case was granted. Balele's counter-motion was denied. Respondent DOT was ordered to place a copy of this ruling in Balele's personnel file. The Commission also retained its jurisdiction to consider the potential for sanctions.

42. *Balele v. DOA et al.*, No. 01-0067-PC-ER, 7/16/2001 (Ruling by examiner)

PROTECTIVE ORDER – Balele would be allowed to view certain confidential hiring records, but was subject to the conditions of this order when utilizing them.

43. *Balele v. DOC*, No. 00-0007-PC-ER, 7/13/2001

FINAL DECISION & ORDER – This complaint was dismissed.

44. *Balele v. DOC*, No. 00-0034-PC-ER, 6/13/2001

FINAL DECISION & ORDER – (Found against Balele: (1) validity of selective checking, (2) explains why NOT adverse impact) Matter was dismissed.

45. *Balele v. DOC et al.*, No. 97-0012-PC-ER, 10/9/1998 (appeal pending) --- §§ 506.03, 508.9, 510.06, 511.02, 517.01, 721.01, 724, 728.3, .9, 730, 742, 784.03(2), .04, .10, 786.03(2), 796.15.

FINAL DECISION & ORDER – This complaint was dismissed.

46. *Balele v. DOR*, No. 98-0002-PC-ER, 2/24/1999 --- §§ 511.02, 515.2, 732

RULING ON COMPLAINANT'S MOTION FOR DEFAULT JUDGEMENT – Complainant's motion was denied.

47. *Balele v. DOR et al.*, No. 98-0002-PC-ER, 7/7/1998 --- §§ 506.03, 724

RULING ON MOTIONS RELATING TO COMPLAINANT'S 1ST SET OF DISCOVERY TO DOR – Complainant's motion to compel is granted in part. Except for the information that was granted a protective order.

48. *Balele v. DOR*, No. 99-0202-PC-ER, 1/25/2002

49. *Balele v. DOT*, No. 98-0104-PC-ER, 9/22/1999

DECISION & ORDER – This complaint was dismissed.

50. *Balele v. DOT*, No. 99-0103-PC-ER, 11/15/2000

RULING ON CROSS-MOTION FOR SUMMARY JUDGEMENT – (Found against Balele: Analysis of desperate impact) Respondents motion for summary judgment is granted, and this case was dismissed.

51. *Balele v. DOT*, No. 99-0103-PC-ER, 11/19/1999

RULING ON MOTION TO DISMISS – DOT's motion to dismiss filed 8/11/1999 was granted as to all appointment transactions that occurred more than 300 days prior to 8/11/ 99, and the complaint was dismissed as to all such appointments.

52. *Balele v. DOT*, No. 00-0044-PC-ER, 10/23/2001

RULING ON MOTIONS FOR SUMMARY JUDGEMENT & FINAL ORDER -- (Found against Balele: initial explanation of the Commissions' new summary judgment analysis) Balele's cross-motion for summary judgment was denied. Respondents' motion for summary judgment was granted. This complaint was dismissed.

53. *Balele v. DOT*, No. 00-0088-PC-ER, 11/16/2001

RULING ON CROSS-MOTIONS FOR SUMMARY JUDGEMENT – (Found against Balele: [1] Good synopsis of the new summary judgment, [2] untruthful in his representations, [3] new prima facie discrimination, [4] issue of pretext, & [5] analysis of acceptable statistics) Balele's cross-motion for summary judgment was denied. Respondents' motion for summary judgment was granted. This case was dismissed.

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63. *Balele v. Wis. Pers. Comm. et al.*, Court of Appeals, case No. 98-1432, 12/23/1998 --- §§ 506.70, 511.01, .02, .08, 710, 732

APPEAL FROM AN ORDER OF THE CIRCUIT COURT FOR DANE COUNTY – Balele’s complaint alleged that discrimination and retaliation occurred in the interviewing and selection process after he was certified as qualified by the DMRS for the positions he sought at the DOT & DHSS. Ruled that Balele proved his claims, he would have been entitled to full relief from the DOT & DHSS. However, the Commission had reasonably interpreted the provision of ch.230 of Wis. Stats., when it concluded that the DER and the DMRS had no authority to control the appointment process after certification. Thus, the Commission properly dismissed the DER & DMRS as parties, and the order of the Circuit Court is affirmed.

64. *Balele v. Wis. Pers. Comm. et al.*, Dane County Circuit Court, case No. 98-CV-0257, 8/10/1998 --- §§ 510.50, 717.3

DANE COUNTY CIRCUIT COURT – Although the Commission may not have expressed flawless reasoning in ONLY applying the claim preclusion doctrine, the court found that the Commission decision to bar Re-litigation of the discrimination and retaliation issue to be correct. The WFEA claim, although not definitely barred by the claim preclusion doctrine, IS barred by the judgment of the Federal District Court in *Pastori Balele v. James Klauser et al.*, case No. 92-CV-00041, and the more narrow doctrine of issue preclusion. The decision of the Wisconsin Personnel Commission was affirmed.

65. *Balele v. WTSB et al.*, see *Balele v. DER & DMRS*, No. 98-0145-PC-ER, and *Balele v. DER et al.*, No. 97-0087-PC-ER .

The court was astounded by the sheer quantity of the claims filed and appealed by Balele. While the court understands how frustration can occur when a person is not hired for a position, based on numerous previous rulings Balele knows it is not the State’s policy to hire a minority simply because he/she has applied for a position. Therefore, this demonstrates yet another example of Balele willingness to pursue frivolous law suits.

Based upon its findings the court will invite the parties to a hearing addressing sanctions, imposed against Balele, for what the court has determined to be an abuse of process at both the circuit court level and the administrative review level.

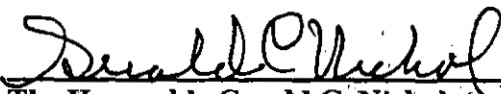
CONCLUSION

For all of the reasons set forth above, the court AFFIRMS the Commission's decision, and accordingly DISMISSES Balele's petition. The court further extends the Commission's ruling and finds Balele's petition frivolous pursuant to Wis. Stat. § 814.025(3)(b). Finally, the court hereby INVITES the parties to address it on what are the proper sanctions to be imposed against Balele for abuse of process, on the circuit court level and on the administrative level. The hearing will be held on August 8, 2002, at 9:45am, in the Branch 9 court room.

IT IS SO ORDERED.

Dated this 29 day of July, 2002.

BY THE COURT:



The Honorable Gerald C. Nichol
Dane County Circuit Court Judge - Branch 9