STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JULIE K. SMITH, Appellant,

vs.

STATE OF WISCONSIN, DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0064
Case Type: PA

DECISION NO. 35748-B

Appearance:

William R. Rettko, Rettko Law Offices, S.C., 15460 W. Capitol Drive, Suite 150, Brookfield, Wisconsin, appearing on behalf of Julie K. Smith.

Amesia N. Xiong, Department of Administration, 101 E. Wilson Street, 10th Floor, P.O. Box 7864, Madison, Wisconsin, appearing on behalf of the State of Wisconsin Department of Corrections.

DECISION AND ORDER ON FEES AND COSTS

Our ability to award attorney fees and costs in Chapter 230 discipline cases is limited by the provisions of § 227.485, Stats. A qualified prevailing party is entitled to costs unless the examiner "finds that the state agency which is the losing party was substantially justified in taking its position or that special circumstances exist that would make the award unjust."

To establish that its position was substantially justified, the state must demonstrate:

(1) a reasonable basis in truth for the facts alleged;
(2) a reasonable basis in law for the theory propounded; and
(3) a reasonable connection between the facts alleged and the legal theory advanced.

Sheely v. Wisconsin Department of Health & Social Services, 150 Wis.2d 320, 337, 442 N.W.2d 1 (1989). In evaluating the agency's position, it is appropriate to look at "the

underlying government conduct at issue and the totality of the circumstances present before and during litigation." *Bracegirdle v. Department of Regulation and Licensing*, 159 Wis.2d 402, 425, 464 N.W.2d 111 (Ct. App. 1990). The case itself must have "sufficient merit to negate an inference that the government was coming down on its small opponent in a careless and oppressive fashion." *U.S. v. Thouvenot, Wade and Moerschen, Inc.*, 596 F.3d 378, 381-2 (7th Cir. 2010).[1]

I. IS A FEE AWARD WARRANTED?

Here, DOC found two separate grounds for its decision to terminate Smith. She was accused of violating "AODA Social Worker confidentiality agreements." The allegation included DOC's own confidentiality rules. As the decision on the merits reflects these purported rule violations were entirely bogus. Inmate Watson was passing on the fact that a member of management had interviewed him in connection with a potential disciplinary matter involving another correctional officer. Watson relayed that he felt like he was in a difficult position risking the wrath of either management or the correctional officer staff depending upon whose position he "supported." Watson was telling everyone who would listen about the issue. The revelation had nothing to do with anything related to alcohol or drug abuse or any counseling Watson was going through. The fact that Smith heard Watson make his comments during an AODA session did not magically cloak the comments with a veil of privacy. I conclude there was no basis, factually or legally, for this conduct to support a discharge.

The alternative basis for the discharge of Smith was a claim that she failed to provide "truthful and accurate information." Clearly, DOC had a suspicion that Smith had provided a coworker with some written information regarding the statement made by the inmate to her. The inquiries by DOC prior to the Birkholz hearing were questions about whether Smith had given her clinical "notes" to either Birkholz or the "union."[2] Smith did not give Birkholz her notes but rather a handwritten statement. DOC did not, prior to the Birkholz hearing, specifically ask about anything other than the notes. Smith simply did not lie. There is no factual basis for supporting DOC's allegation that Smith failed to provide "truthful and accurate information." DOC's quasi law enforcement approach to conducting interviews of employees is clearly not designed to encourage employees to volunteer information. If anything the interrogation format would encourage careful guarded responses. More importantly, in this case, the failure to disclose a hearsay written statement (even if intentional) was of no consequence. The document, discoverable through other means, likely would have had no impact on the efforts to litigate the discharge of Birkholz.

It is also noteworthy that under § 111.82, Stats., employees have the right to engage in "lawful concerted activities" for the purpose of "mutual aid or protection." That right is not

[1] The statute itself is modeled after the Federal Equal Access to Justice Act and is read in conjunction with § 814.245, Stats. *Sheely* at 335.

[2] There is no certified union representing employees at KMCI. On an informal basis the former union representative provides representation to some employees.

limited to employees who are formally represented by a labor organization. One could conclude that the repeated interrogations by DOC were designed to deter Smith from helping Birkholz and others exercising their statutory rights to an appeal hearing. If that were the case, DOC's conduct would have been unlawful. Given the fact that the witness statement was of no use at the Birkholz hearing and that the document could have been discovered with reasonable diligence, I am left to conclude that there is no basis in law or fact for the conclusion that Smith intentionally misled the DOC. At best this was an effort to deter employees from assisting coworkers in their efforts to challenge disciplinary actions.

II. FEE AMOUNTS.

As the prevailing party who has satisfied the standard under § 227.485(3), Stats., Smith is entitled to fees and costs per § 814.245, Stats. Smith has requested an award of $20,100.00 in attorney and paralegal fees and $542.48 in costs for a total of $20,642.48. The attorney fee rate is $250.00 per hour which in my judgment is actually low given the skill of counsel. Furthermore, the time spent as reflected in the submission is reasonable. I am however somewhat constrained in terms of the ability to enter an award by the provisions of § 814.245(5)(a)2, Stats. Fee awards under the state version of the Equal Access to Justice Act are limited to $150.00 per hour unless a higher amount is justified by "an increase in the cost of living or a special factor." The statute recites "limited availability of qualified attorneys" as one such special factor. The state acknowledges that increases in the cost of living would support an award of an hourly rate of $188.00. It also argues that there is no limit of available employment law attorneys who could have handled a matter such as this. While I agree that there are numerous competent labor and employment lawyers in the metropolitan Milwaukee and Madison areas, the number who are willing to take on § 230.44, Stats., matters is small. Unlike most employment discrimination and federal civil rights causes of action, civil service disputes under ch. 230, Stats., contain no guarantee of a fee award to the prevailing party. Most individuals who have been discharged are limited in their ability to "take on" the state in their pursuit of vindication. Even a prevailing party must meet the lack of substantial justification standard to obtain a fee award. Attorneys willing to represent a discharged civil servant with no guarantee that they will be fully compensated even if they win should be encouraged. That willingness to face long odds of success in my judgment is a special factor warranting an award of the full amount requested.

CONCLUSIONS OF LAW

1. That the position of the Department of Corrections in this matter was not substantially justified as that term is defined in § 227.485(2)f, Stats.

2. That the amount of $20,642.48 in fees and expenses is reasonable and appropriate based upon the prevailing market rates and the special factors identified herein.

ORDER

That the State of Wisconsin, Department of Corrections shall pay Julie K. Smith the sum of $20,642.48.

Signed at the City of Madison, Wisconsin, this 11th day of May 2016.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman