

\* \* \* \* \*  
 \*  
 ROSANN HOLLINGER, \*  
 \*  
                   Complainant, \*  
 \*  
 v. \*  
 \*  
 Chancellor, UNIVERSITY OF \*  
 WISCONSIN-MILWAUKEE, \*  
 \*  
                   Respondent. \*  
 \*  
 Case No. 84-0061-PC-ER \*  
 \*  
 \* \* \* \* \*

INTERIM  
 DECISION  
 AND  
 ORDER

In a decision dated October 14, 1985, the Commission denied complainant's motion to amend her complaint. The complainant had sought to amend her complaint "by adding an allegation that the respondent's offer of settlement dated September 13, 1985, constituted a 'further attempt. . .to penalize' her for her prior whistleblower activities." The Commission held that complainant was not an employe as defined in s.230.80(3), Stats., and, therefore, did not fall within the protection from retaliation granted employes in s. 230.83(1), Stats.

On October 29, 1985, complainant filed a motion for the Commission to reconsider its October 14th decision. The motion stated in part:

It is true, of course, that at the time of the complained acts Ms. Hollinger was not on the payroll nor was she performing services for Respondent. She was not because Respondent had purportedly nonrenewed her lawfully. If, however, as her original complaint alleges this nonrenewal was unlawful and, therefore, void, Ms. Hollinger has continued to be an employee of Respondent. Thus, the question whether Ms. Hollinger is or is not an employee of Respondent has not yet been determined. Upholding her contention that she is an employee would require this Commission to determine the validity of the amendments set forth in her motion.

The term employe is defined in s. 230.80(3), Stats., as "any person

employed by any governmental unit. . ." The operative language in Subch  
III, Ch. 230, Stats., is similar to the language used in §704 of Title VII,  
Civil Rights Act of 1964. There, the protection from retaliation reads:

It shall be an unlawful employment practice for an employer to  
discriminate against any of his employees or applicants for  
employment. . .because he has opposed any practice made an  
unlawful employment practice by this subchapter, or because he  
has made a charge, testified, assisted, or participated in any  
manner in an investigation, proceeding, or hearing under this  
subchapter. 42 U.S.C. §2000e-3(a)

Title VII defines an "employee" as "an individual employed by an employer."  
42 U.S.C. §2000e(f). In Bilka v. Pepe's Inc., 38 FEP Cases 1655 (1985), the  
U.S. District Court for the Northern District of Illinois held that a former  
employee who alleged his employer was giving negative employment references  
had stated a claim under Title VII even though the employment relationship  
had ended:

Section 704 was plainly written to protect employees who  
assert Title VII rights. If an employee asserts her rights  
after the relationship is over, her assertion nevertheless  
grows out of that relationship. "[T]he statute prohibits  
discrimination related to or arising out of an employment  
relationship, whether or not the person discriminated against  
is an employee at the time of the discriminatory conduct."  
Pantchenko, 581 F. 2d at 1055. If Pepe's narrow reading of  
the statute were correct, employers could easily retaliate  
against former employees against whom they have discriminated.  
Section 704(a) was obviously written to prevent employers from  
chilling employees' assertions of Title VII rights, and the  
section should be read broadly to protect former employees as  
well as current employees. 38 FEP Cases 1655, 1658.

Based upon the same reasoning expressed in Bilka, the definition of  
employee in s.230.80(3), Stats, should also be liberally construed so as to  
permit claims that arise from an earlier employment relationship even if the  
alleged retaliation occurred after the complainant has stopped working for  
the employer. See s.230.02, Stats.

Nevertheless, the Commission will still deny the complainant's motion to  
reconsider given the subject matter of the proposed amendment to her

complaint. The settlement offer that generated appellant's motion to amend read in part as follows:

The above terms are offered on the condition that acceptance settles all contemplated proceedings arising out of Ms. Hollinger's previous employment with the University. It is also a condition of settlement that the Complainant keep in confidence all settlement negotiations, as well as the final outcome, referring any requests for information to her attorney or to the University, and, thus, ultimately covenant to not disclose the terms of the settlement to any third party.

The University is prepared to remove from Ms. Hollinger's personnel file such documents as may be agreed upon pursuant to further negotiations. Such materials will be maintained confidential in litigation files of the University and cannot be destroyed due to the pendency of other legal matters.

Appellant's motion to amend read, in part:

2. The "offer", aside from its monetary inadequacy, constitutes a further attempt by UWM to penalize Ms. Hollinger because of her role in alerting the appropriate authorities to its wrongdoing, seeks to penalize her by:

(a) Demanding, as a condition of settlement, that she refrain from telling the truth about the circumstances giving rise to her return to her teaching position while UWM retains the power to characterize that settlement in any terms it wishes;

(b) Demanding, as a condition of settlement, that it retain the right to present in other litigation information in her files detrimental to her that UWM knows or should know is false and that is inconsistent with its motion to expedite the hearing for it concedes liability--that is, it concedes it non-renewed her unlawfully because of her exercise of free speech.

The prohibition against retaliation under the "Whistleblower Law" states that:

No appointing authority. . .may initiate or administer, or threaten to initiate or administer, any retaliatory action against an employe. S.230.83, Stats.

In the present case, the complainant contends that the various conditions of settlement proposed by the respondent are retaliatory. However, respondent's conditions of settlement require acceptance by the complainant before they can go into effect. Absent complainant's acceptance, they are merely an

offer and do not fall within the prohibition in s.230.83, Stats.

Respondent's conditions for settlement do not effectuate retaliation against the complainant, nor has the respondent threatened retaliation by proposing the settlement terms. According to Webster's Third New International

Dictionary:


- Threaten applies to the probable visitation of some evil or affliction; it may be used of attempts to dissuade by promising punishment or retribution. (Emphasis added)

Here, the respondent's offer was made in the context of an ongoing administrative review of an employment decision. The status quo at the time of the offer of settlement (which was maintained by complainant's decision not to accept the offer) was the processing of a pending complaint of retaliation.

This set of facts may be distinguished from the situation where an employer gives an employe two choices, both of which are penalties and allegedly retaliatory. Under those circumstances, acceptance of either option would be undesirable and would provide a basis for filing a complaint of illegal retaliation or the amendment of an existing charge. The complainant in the present case was not presented with such a choice and given the circumstances of this case, in which a hearing on damage/relief arising from the original complaint is to be held within the week, no amendment will be permitted.

Dated: November 21, 1985

STATE PERSONNEL COMMISSION

  
DENNIS P. MCGILLIGAN, Chairperson

  
DONALD R. MURPHY, Commissioner

  
LAURIE R. MCCALLUM, Commissioner vic

Hollinger v. UW-Milwaukee  
Case No. 84-0061-PC-ER  
Page 5

Parties

Rosann Hollinger  
3729 S. Packard Avenue  
Milwaukee, WI 53207

Frank E. Horton  
Chancellor, UW-Milwaukee  
Chapman Hall  
Milwaukee, WI 53201