

SEP 30 1987

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 9

DANE COUNTY

BOARD OF REGENTS OF THE
UNIVERSITY OF WISCONSIN SYSTEM,
d/b/a UNIVERSITY OF
WISCONSIN - MILWAUKEE,

Petitioner,

vs.

WISCONSIN PERSONNEL COMMISSION,
Respondent,

and

ROSANN HOLLINGER,

Cross-Petitioner.

MEMORANDUM DECISION
and ORDER

CASE No. 86CV4056

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Personnel

Commission

Rosann Hollinger and the Board of Regents separately seek review of the Wisconsin Personnel Commission's (WPC) award of back pay and attorney fees to Hollinger in a case involving the state "whistle-blower" protection statute, Secs. 230.90-230.89, Stats. Because credible and substantial evidence supports WPC's finding that Hollinger rejected a valid offer of reinstatement thereby terminating the accrual of back pay owed by the Board to her, WPC's award of back pay is affirmed. Because WPC's award of attorney fees may be based on the complainant's likelihood of success, the award of attorney fees is affirmed.

Rosann Hollinger was employed as a teacher in the University of Wisconsin - Milwaukee's High School Equivalency Program (HEP). The University did not renew her contract after the June 30, 1984 expiration date. Hollinger filed a complaint with WPC alleging that the University wrongfully failed to renew her contract because she and others had complained of irregularities in the HEP. On November 26, 1985, WPC held a hearing on the matter under Secs. 230.80 - 230.89, Stats.. Because the University by the Board of Regents answered "no contest" to the issue of liability, the hearing concerned only the issues of back pay and attorney fees owed to Hollinger.

WPC held that the "no contest" answer entitled Hollinger to reinstatement to her HEP position. WPL also held that the accrual of back pay owed to Hollinger ceased as of September 30, 1985, the effective date of a valid offer of reinstatement from the University. Hollinger was awarded \$8,930.55 in back pay. She seeks review of WPC's

determination of the cutoff date for the accrual of back pay.

WPC further held that Hollinger was entitled to an award of \$4,756.77 in costs and attorney fees. The award reflected WPC's 20% enhancement of a base reasonable attorney fee to reflect the attorney's assumption of the risk of losing the case by entering into a contingent fee agreement with Hollinger. The University, by the Board of Regents seek review of that fee enhancement.

Other facts will be described in the body of the opinion.

Section 230.87, Stats., requires that review of this decision is governed by Chap. 227, Stats.. The Court may set aside or modify WPC's action if the action is inconsistent with a correct interpretation of the law, Sec. 227.57(5), Stats.; if the action depends on findings of fact not supported by substantial evidence, Sec. 227.57(6), Stats.; or if the action was an abuse of discretion, inconsistent with agency rules or otherwise violates a constitutional or statutory provision, Sec. 227.57(8), Stats..

Cross petitioner Hollinger argues that WPC should not have terminated the accrual of back pay upon the University's offer of reinstatement. She argues that acceptance of the offer would have put her in jeopardy of a breach of contract action by the Holy Assumption School and that it would have undermined the stability of her students' education by forcing her to leave them during the school year.

Section 230.85(3)(a)1, Stats., authorizes the WPC to award backpay to employees wrongfully discharged in violation of Secs. 230.80 - 230.89, Stats.. The employee is required to mitigate damages by seeking other employment. Sec. 230.85(3)(d), Stats.. The employer has the burden of proving the employee's failure to mitigate damages. Anderson v. Labor & Industry Rev. Comm., 111 Wis. 2d 245, 258, 330 N.W. 2d 594(1983).

A valid offer of reinstatement terminates the accrual of back pay owed by the employer to the employee. Anderson, 111 Wis. 2d at 254. Anderson involves awards of back pay from employers in violation of the Wisconsin Fair Employment Act. The mitigation requirement of that statute, now Sec. 111.39(4)(c), Stats., is analogous to the mitigation requirement of Sec. 230.85(3)(d), Stats.. To be valid,

an offer of reinstatement must be unconditional. Anderson, 111 Wis. 2d at 256.

At the hearing, Hollinger stipulated that the University's offer of reinstatement was made in good faith (Transcript p.34). However, she argued that accepting the offer would have required Hollinger to violate her contract with Holy Assumption School and would undermine the stability of the education of her Holy Assumption students. The Holy Assumption contract required Hollinger to give 30 days notice of termination or face a \$250 penalty for liquidated damages. Hollinger argued that public policy required her to stay at her teaching position at Holy Assumption once the school term began so that the students would have continuity and stability in their education.

The University presented evidence that Hollinger filed three employment applications with other schools the day before her contract term with Holy Assumption commenced. The University also presented the testimony of Norbert Riegert, the Milwaukee Archdiocese's school personnel coordinator, who stated that the Archdiocese, which ran Holy Assumption School, did not enforce the liquidated damage clause of parochial school teacher's contracts. The WPC found no grounds for Hollinger's rejection of the valid offer of reinstatement.

WPC's finding is supported by credible and substantial evidence. The Court agrees with Hollinger's argument that an otherwise valid offer may be rejected if it requires an employee to breach a contract or it requires a teacher to leave students in the middle of a term. However, as WPC noted, in its opinion, Hollinger v. UW-Milwaukee, Case No. 84-0061-PC-ER at 11, Hollinger's

"arguments would have been entitled to substantially more weight in the absence of evidence that the appellant was willing to 'break' her contract with Holy Assumption if she had been offered a position at a public school."

Hollinger had no grounds to reject the offer of reinstatement. WPC correctly terminated the accrual of back pay as of the effective date of the offer.

The Board of Regents argues that WPC's award of attorney fees to Hollinger was unreasonable because WPC increased the award by considering the attorney's assumption of the risk of losing.

WPC is authorized to award reasonable attorney fees to prevailing complainants. Sec. 230.85(3)(a)4, Stats.. The measure of reasonable attorney fees is within the discretion of the tribunal awarding them, in this case WPC. See Kramer v. Horton, 125Wis. 2d 177, 197, 371 N.W. 2d 801(1985).

In this case, WPC calculated a base fee or lodestar by multiplying the attorney's hours worked by a reasonable rate per hour. WPC then adjusted the lodestar using factors set forth in Lindy Bros. Bldrs., of Phila. v. American R. & S. San. Corp., 487 F. 2d 161, 168-9 (3d Cir 1973). WPC considered the likelihood of success of Hollinger's complaint because her attorney entered into a contingent fee agreement with her. Because the attorney would have received nothing if he lost, he should receive an enhancement for winning, WPC reasoned. This would reflect the ordinary operation of a contingent fee agreement.

WPC adjusted the lodestar upward by 20%. It considered the likelihood of success as of the date the attorney entered the case. The uncertainty of the new law was consideration for enhancing the award. The fact that other employees filed similar complaints, that the University received negative publicity and that WPC issued a determination of probable cause prior to the attorney's entering the case, limited the enhancement to 20%.

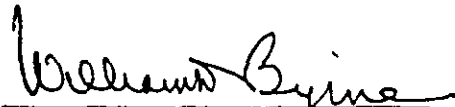
The Wisconsin Supreme Court has held the Lindy approach to be reasonable under federal Civil Rights law. Thompson v. Village of Hales Corners, 115 Wis. 2d 289, 304-308, 340 N.W. 2d 704(1983). The Board of Regents argues that Thompson was overruled by implication in Pennsylvania v. Dela. Valley Citizen's Comm., 97 L.Ed 2d 585(1987) (Pennsylvania II). To the extent that Pennsylvania II holds as unreasonable fee adjustments based on the likelihood of success in a particular case of federal Civil Rights law, Thompson would be overruled on federal law issues. However, Pennsylvania II, 97L.Ed 2d at 597, involves the interpretation of reasonableness as defined by Congressional intent. This case involves reasonableness as defined by the Wisconsin legislature. Thompson was decided in 1983 and sec. 230.85(3)(a)4, Stats was passed in 1984. Thus, the state legislature had the benefit of the Wisconsin Court's interpretation of reasonableness when the statute was passed. The Court concludes that the legislature intended to follow

this definition of reasonableness in attorney fees in the light of Pennsylvania II. This Court must follow the legislature's intent. WPC's method of calculating attorney fees was within its discretion and WPC had credible and substantial evidence to support its application of that method.

For the reasons stated above the decision of WPC is
AFFIRMED.

Dated: September 29, 1987.

By Order of the Court.



William D. Byrde
Circuit Judge - Branch 9

JOHN A. LAWTON
RICHARD L. CATES
JOHN H. BOWERS
GEORGE E. AUMOCK
JOHN C. CARLSON
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X

November 12, 1987

RECEIVED

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NOV 13 1987

Personnel
Commission

HAND DELIVERED

Ms. Cynthia Fokakis
Clerk of Circuit Courts
Dane County Courthouse
Madison, Wisconsin 53709

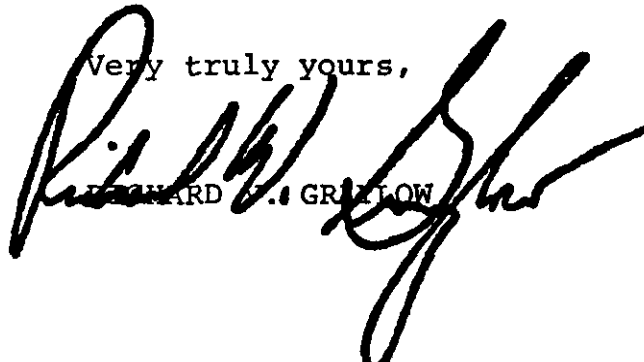
Re: Hollinger, et al. vs. UW-Milwaukee
Case No. 86-CV-4056

Dear Clerk Fokakis:

Enclosed please find original "NOTICE OF ENTRY OF
JUDGMENT", which I ask you to receive and file this
day.

Opposing counsel has been served this day via U.S.
Mail.

Very truly yours,



RICHARD V. GRAYLOW

RVG/mec

Enclosure

cc: Hon. William D. Byrne
Charles D. Hoornstra
John Williamson
Tony Theodore

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 9

DANE COUNTY

BOARD OF REGENTS OF THE
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Respondent,

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and

ROSANN HOLLINGER,

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Commission

Cross-Petitioner.

NOTICE OF ENTRY OF JUDGMENT

TO: Charles D. Hoornstra
Assistant Attorney General
Department of Justice
P. O. Box 7857
Madison, WI 53707-7857

John Williamson
Herrling, Swain & Dyer, S.C.
120 N. Morrison Street
Appleton, WI 54911

ATTORNEYS AND FELLOW MEMBERS OF THE BAR:

PLEASE TAKE NOTICE that a certain "JUDGMENT", a true and correct copy of which is attached hereto and made a part hereof, was filed and entered by the Clerk of the Circuit Court for Dane County, Wisconsin on the 2nd day of November, 1987.

Dated, signed and filed in Madison, Wisconsin this 12th day
of November, 1987.

LAWTON & CATES, S.C.

BY: 

RICHARD V. GRAYLOW
214 West Mifflin Street
Madison, Wisconsin 53703-2594
(608) 256-9031

Attorneys for Respondent

BOARD OF REGENTS OF THE
UNIVERSITY OF WISCONSIN SYSTEM,
d/b/a UNIVERSITY OF
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Petitioner,

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ROSANN HOLLINGER,

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JUDGMENT

The Court having considered this Chapter 227 Review on the record with the help and able assistance of Briefs filed by all parties;

The Court having filed its "MEMORANDUM DECISION AND ORDER" dated September 29, 1987, the terms of which are expressly incorporated by reference herein.

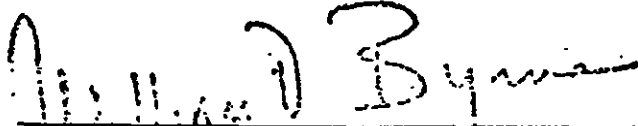
The Court having specifically found that no errors of fact or law were made by the Commission and being further satisfied that no other statutory grounds for reversal or remand exist;

NOW THEREFORE on Motion of the Wisconsin Personnel Commission by its attorneys Lawton & Cates, S.C. by Richard V. Graylow, IT IS ORDERED AND ADJUDGED that the Decision and Order

of the Personnel Commission from which appeal was taken herein be, and the same is affirmed in all respects.

Dated, signed and entered in Madison, Dane County, Wisconsin this 27 day of October, 1987.

BY THE COURT:

A handwritten signature in cursive script, appearing to read "William D. Byrne", written over a horizontal line.

HON. WILLIAM D. BYRNE
Circuit Court Judge, Branch 9