

STATE OF WISCONSIN

PERSONNEL COMMISSION

**PASTORI BALELE,**  
*Complainant,*

v.

**Secretary, DEPARTMENT OF  
ADMINISTRATION, Secretary,  
DEPARTMENT OF EMPLOYMENT  
RELATIONS, and Administrator,  
DIVISION OF MERIT RECRUITMENT  
AND SELECTION,**  
*Respondents.*

**RULING ON MOTION  
TO DISMISS  
WHISTLEBLOWER  
CLAIM  
AND  
CROSS MOTION**

Case No. 00-0104-PC-ER

The above-noted complaint was filed on August 10, 2000. Complainant alleged therein that discrimination and retaliation occurred under the Fair Employment Act (Subch. II, Ch. 111, Stats.) and that retaliation occurred under the whistleblower law (§230.80, et. seq., Stats.) with regard to a 10-day suspension. The complaint was filed with an “emergency motion” requesting a temporary injunction against the Department of Administration (DOA) imposing a disciplinary suspension. The motion was denied after hearing, as memorialized in the examiner’s letter dated August 11, 2000.

On September 6, 2000, respondents filed a motion to dismiss the claim of whistleblower retaliation. On October 30, 2000, complainant filed a cross motion for summary judgment. On November 9, 2000, the Commission received the final brief on these motions.

On November 16, 2000, a Commission hearing examiner held a telephone conference with both parties, leaving a voice-mail message requesting complainant to produce copies of the e-mail messages which he claimed as his protected disclosures. Complainant responded by e-mail the following day saying he “should be able” to bring the requested documents in the following Monday. On the same day, November 17, 2000, the hearing examiner sent the following e-mail message to complainant:

I wish to emphasize the importance of the e-mails you sent to the Governor's office. I need copies of them to resolve the motion because based on your own description of what was included in the e-mails (as noted in the "Allegations of Fact" in your complaint and as noted in your affidavit filed in *Balele v. DOA*, 00-0057-PC-ER) you forwarded to the Governor's office your prior e-mail to Secretary Lightbourn and your application for employment. I see no allegation of fact that you included in your e-mails to the Governor's office any statement that Secretary Lightbourn violated any law or failed in his ministerial duties. Rather, those are conclusions you reach in your complaint in par. 1, under the heading "Violations of Law."

On November 27, 2000, the Commission received from complainant copies of some (but not all) of the e-mail messages he sent to the Governor's office.

The findings of fact recited below are undisputed, unless specifically noted to the contrary.

#### FINDINGS OF FACT

1. The present case involves DOA's decision to suspend complainant without pay for 10 days (from August 14-25, 2000) which complainant contends was based on discrimination and retaliation. The discipline resulted from respondents' perception that complainant had falsified information on an application for a job vacancy as Director of the State Bureau of Procurement in DOA. A dispute exists as to whether complainant falsified information on his application for the position. A hearing has been scheduled for March 1 and 2, 2001, to resolve the dispute.

2. Complainant also filed a separate complaint contending that discrimination occurred when he was not hired for the vacant position noted in the prior paragraph, *Balele v. DOA, DER & DMRS*, 00-0077-PC-ER. This separate complaint is pending before the Commission.

3. The activity claimed as protected under the whistleblower law in the present case had its genesis in a third case, *Balele v. DOA*, 00-0057-PC-ER, 9/20/00, pending appeal in circuit court *Balele v. Personnel Commission and Department of Administration*, 00-CV-2876. In the third referenced case, DOA Secretary George F. Lightbourn appointed Robert G.

Cramer (white) to the vacant unclassified position of Administrator, Division of State Agency Services. The position was filled in January or February 2000, without announcement and without competition. Sometime prior to the appointment, complainant sent an e-mail message to Secretary Lightbourn expressing interest in the vacant position.

4. Complainant alleges in the present case that Secretary Lightbourn did not reply to the e-mail message referenced in the prior paragraph. He further alleges in the "Allegation of Facts" section of his complaint (pp. 4-5 of the attachment to the complaint) as follows:

[C]omplainant e-mailed Governor Thompson, Lightbourn supervisor. Balele also copied Lightbourn. The e-mail informed Thompson about the vacant position in DOA and that Balele was interested in the position. Balele attached the e-mail he had sent to Lightbourn for which Lightbourn refused to answer or consider Balele application. An automatic e-response came back stating that the Governor was away and that he would respond to Balele as soon as the Governor was back in the office. Balele never despaired. Balele sent an e-mail to Governor's chief of staff informing him that Balele had sent an application to Lightbourn and the Governor. The chief of staff responded that he was not aware that Balele had sent an application to the Governor after Lightbourn failed to answer Balele's application. The governor official's e-mailed back stating that he had not seen the application for the position. Balele later heard that Lightbourn had been angry that Balele accused him with the Governor and Governor chief of staff that Lightbourn failed to respond to Balele application. Specifically Balele heard one official stating that Lightbourn had been so angry with Balele for accusing him with the Governor's and governor's chief of staff.

5. Complainant drew the following conclusions in the "Violation of Laws" section of the present complaint (p. 7 of the attachment to the complaint):

Respondents retaliated against complainant under Whistleblower Act because he sent the Governor an e-mail accusing Lightbourn of failing to do his ministerial duty of giving Balele equal consideration for the position of administrator-state agency services.

6. Sometime prior to 8:27 a.m., on March 9, 2000, complainant sent an e-mail message to Governor Thompson informing him that a position was vacant at DOA in which complainant was interested in being hired. Complainant included as an attachment the e-mail

message he previously had sent to Secretary Lightbourn expressing interest in the position. Complainant has not provided a copy of these e-mail messages.

7 On March 9, 2000, complainant sent the following e-mail message to the Governor's office:

Honorable Governor Thompson:

Please let me know if you received my e-mail attaching my application for the position of Administrator, Department of Administration/Division of State Agency Services. My e-mail also attached my resume for the same. Sometimes these e-mail do not work. Thanks.

8. The Governor's office sent an instantaneous "Out of Office AutoReply" the text of which is shown below (grammatical errors appear in the original document):

Thank you for contact me via electronic mail. I am pleased your are taking advantage of this technology, and appreciate the time you took to share your comments and concerns.

As Governor, I receive a tremendous amount of correspondence. Because your views are important to me, I have assigned specific people on my staff to help me cover the many issues of concern. If you requested additional information or assistance, you will be contacted again by someone in the Governor's Office.

If you were writing to share an opinion or suggestion, please be assured your input has been noted. Again, thank you for contacting my office.

9. On April 26, 2000, Lisa Hardt sent the following e-mail message to complainant:

Thank you for taking the time to contact the Office of the Governor. Governor Thompson has asked me to look into your inquiry.

The position for Administrator of the Division of State Agency Services was filled on March 15, 2000 by Mr Rob Cramer. Your interest in this position is appreciate (sic).

Thank you again for taking the time to contact the Office of the Governor.

10. On April 27, 2000, complainant sent the following e-mail message to Secretary Lightbourn:

Sorry I forgot to give you a copy of my response to the Governor's Office. I thanked him for his e-mail.

11 Complainant did not allege in his e-mail messages to the Governor's office that Secretary Lightbourn refused to do his ministerial duty of giving equal consideration for the position or that Secretary Lightbourn acted inappropriately in any other way.

### CONCLUSIONS OF LAW

1. The Commission has jurisdiction in this case pursuant to §230.45(1)(b) & (gm), Stats.
2. Respondents have the burden to establish entitlement to summary judgment on the whistleblower claims. Respondents have met their burden.
3. Complainant has the burden to establish that he should prevail on his cross motion for summary judgment. He has failed to meet this burden.

### OPINION

The use of summary judgment procedures in this administrative forum has been affirmed by the Court of Appeals, *Balele v. Wis. Personnel Comm., DER, DMRS, DOT & DHSS*, 223 Wis.2d 739, 589 N.W.2d 418 (Ct. App. 1998).

The Commission reviews motions for summary judgment using the following standard:

On summary judgment the moving party has the burden to establish the absence of a genuine, that is, disputed, issue as to any material fact. On summary judgment the court does not decide the issue of fact; it decides whether there is a genuine issue of fact. A summary judgment should not be granted unless the moving party demonstrates a right to a judgment with such clarity as to leave no room for controversy; some courts have said that summary judgment must be denied unless the moving party demonstrates his entitlement to it beyond a reasonable doubt. Doubts as to the existence of a genuine issue of material fact should be resolved against the party moving for summary judgment.

The papers filed by the moving party are carefully scrutinized. The inferences to be drawn from the underlying facts contained in the moving party's material should be viewed in the light most favorable to the party opposing the motion. If the movant's papers before the court fail to establish clearly that there is no genuine issue as to any material fact, the motion will be denied. If the material presented on the motion is subject to conflicting interpretations or reasonable people might differ as to its significance, it would be improper to grant summary judgment.

Certain factors must be kept in mind in evaluating such a motion in a case of this nature. First, this case involves a claim under the Fair Employment Act with respect to which complainant has the burden of proving that a hiring decision, which typically has a multi-faceted decisional basis, was motivated by an unlawfully discriminatory intent. Second, complainant is unrepresented by counsel who presumably would be versed in the sometimes intricate procedural or evidentiary matters that can arise on such a motion. Third, this type of administrative proceeding involves a less rigorous procedural framework than a judicial proceeding. Therefore particular care must be taken in evaluating each party's showing on the motion to ensure that complainant's right to be heard is not unfairly eroded by engrafting a summary judgment process designed for a judicial proceeding.

Respondents contend the whistleblower claim should be dismissed because complainant did not disclose "information," which is a prerequisite to protection against retaliation under the whistleblower law as noted in §230.81, Stats.<sup>1</sup> The pertinent, related statutory sections are shown below:

§230.80(5) "Information" means information gained by the employee which the employee reasonably believes demonstrates:

- (a) A violation of any state or federal law, rule or regulation.
- (b) Mismanagement or abuse of authority in state or local government, a substantial waste of public funds or a danger to public health and safety.

§230.80(7) "Mismanagement" means a pattern of incompetent management actions which are wrongful, negligent or arbitrary and capricious and which

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<sup>1</sup> Respondents also argue that complainant's e-mail messages to the Governor do not constitute a disclosure to his supervisor, within the meaning of §230.81(1)(a), Stats., or to a governmental unit designated by the Commission within the meaning of §230.81(1)(b), Stats. It was unnecessary to resolve these additional arguments.

adversely affect the efficient accomplishment of an agency function. “Mismanagement” does not mean the mere failure to act in accordance with a particular opinion regarding management techniques.

§230.80(1) “Abuse of authority” means an arbitrary or capricious exercise of power.

§230.80(9) “Substantial waste of public funds” means an unnecessary expenditure of a substantial amount of money or a series of unnecessary expenditures of smaller amounts of money.

Complainant, in his e-mail messages to the Governor, did not disclose “information” within the meaning of §230.80(5), Stats. He did not allege in the e-mail messages to the Governor that respondents did anything wrong. Rather, he merely expressed interest in a vacant position at DOA. Respondents are entitled to summary judgment on the whistleblower claim. The Commission orders that a copy of this ruling be placed in Mr Balele’s personnel file, pursuant to §230.85(3)(b), Stats.

The Commission has noted difficulties in prior cases in relying on Mr Balele’s representations. He incorrectly represented the content of testimony in *Balele v. DOC, DER & DMRS*, 97-0012-PC-ER, 10/9/98 and in *Oriedo v. ECB, DER & DMRS*, 98-0113-PC-ER, 7/20/99 (a case in which the complainant was represented by Mr. Balele). His answers to discovery requests have been found to have been evasive and made in bad faith, and some of his pleadings have been found to have been made in bad faith, *Balele v. DER & DMRS*, 98-0145-PC-ER, 12/3/99 (for which his case was dismissed and he was ordered to pay fees and costs, *Balele v. DER & DMRS*, 98-0145-PC-ER, 2/28/00).

Mr. Balele’s conduct here appears to be a continuation of the pattern discussed in the prior paragraph. Specifically, he knew that he did not allege any wrongdoing on the part of respondents in his e-mail messages to the Governor’s office. Yet he claimed that by virtue of those e-mail messages he was protected under the whistleblower law “because he sent the Governor an e-mail accusing Lightbourn of failing to do his ministerial duty of giving Balele equal consideration for the position of administrator-state agency services.” (See ¶5 of the findings of fact.) Furthermore, although respondents made it clear in their brief that they were presuming, for purposes of argument only, the truth of complainant’s statement, Mr Balele

proceeded to argue that respondents had conceded that he "reported Mr Lightbourn to the Governor." (Complainant's brief dated 10/30/00, p. 3.) This Commission has repeatedly informed Mr. Balele that a respondent's failure to specifically deny a pleading does not amount to a concession. *Balele v. DHFS*, 99-0002-PC-ER, 5/31/00; *Balele v. DOR*, 98-0002-PC-ER, 2/24/99, *Balele v. DOC et al.*, 97-0012-PC-ER, 10/9/98 and *Balele v. DOA, DER & DMRS*, 99-0001, 0026-PC-ER, 8/20/00.

The Commission cannot tolerate such repeated conduct from a party. Accordingly, the Commission retains jurisdiction over the whistleblower claim to consider imposition of sanctions under §230.85(3)(b), Stats., the text of which is noted below in pertinent part:

(b) . . . If the commission finds by unanimous vote that the employee filed a frivolous complaint it may order payment of the respondent's reasonable actual attorney fees and actual costs. Payment may be assessed against either the employee or the employee's attorney, or assessed so that the employee and the employee's attorney each pay a portion. To find a complaint frivolous the commission must find that either §814.025(3)(a) or (b) applies or that both §814.025(3)(a) and (b) apply.

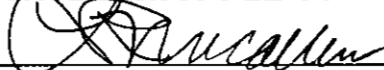
The parties will be notified by separate mailing of the briefing schedule on the question of whether Mr. Balele filed a frivolous complaint.

ORDER

Respondent's motion to dismiss the whistleblower portion of this case is granted and complainant's counter motion is denied. Respondent Department of Administration shall place a copy of this ruling in Mr. Balele's personnel file. The Commission retains jurisdiction to consider the potential of sanctions.

Dated: December 1, 2000.

STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

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JUDY M. ROGERS, Commissioner