

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 18, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 01-3325
STATE OF WISCONSIN**

Cir. Ct. No. 00-CV-2776

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

PASTORI M. BALELE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County:
PAUL B. HIGGINBOTHAM, Judge. *Affirmed.*

Before Dykman, Roggensack and Deininger, JJ.

¶1 PER CURIAM. Pastori Balele appeals a judgment ordering him to pay the State of Wisconsin \$1,114.91. For the reasons discussed below, we affirm the judgment of the trial court.

¶2 Balele brought a complaint before the Wisconsin Personnel Commission alleging employment discrimination against the Department of Employment Relations and the Division of Merit Recruitment and Selection. During the administrative proceeding, the commission found that Balele had failed to adequately respond to certain interrogatories, and it ordered Balele to pay the respondent agencies \$398.11 toward their attorney fees as a discovery sanction. Balele did not seek judicial review of the discovery sanction, nor did he pay within sixty days as ordered.

¶3 An attorney employed by the department warned Balele by letter that the department would take further measures if Balele refused to pay the full amount or work out a payment schedule. An assistant attorney general also sent Balele a letter demanding payment and informing him that if he did not pay promptly, the State would file a collection action and would ask for interest and reimbursement of costs and any allowable attorney fees in addition to the original sanction amount.

¶4 When Balele still did not pay, the State filed the present lawsuit. Balele's answer to the complaint asserted that the commission lacked authority to impose the discovery sanction. After some procedural events not relevant here, Balele also filed a counterclaim under 42 U.S.C. § 1983 against the State, the commission, the department's counsel and two assistant attorneys general, alleging that they had maliciously initiated the collection action, which they should have known was frivolous, to harass him because of his race and in retaliation for his assertion of rights under the Wisconsin Fair Employment Act.

¶5 The State moved for summary judgment on its claim and to dismiss the counterclaim. The trial court granted both motions. Balele moved to vacate

that decision and to enter a default judgment in his favor on the counterclaim, on the grounds that the State had never filed an answer. The trial court denied Balele's motion to vacate, and further found that his counterclaim was frivolous. The trial court then entered judgment against Balele in the amount of \$1,114.91, including \$398.11 for the unpaid sanction, \$216.80 to compensate the State for its statutory costs in filing the collection action, and a \$500 contribution to the State's attorney fees for responding to the frivolous counterclaim. Balele appeals the judgment.

¶6 Balele does not dispute the amount of the judgment or the fact that he did not pay the initial discovery sanction.¹ Balele first contends that the discovery sanction against him was void because the commission lacked the authority to impose it. However, WIS. STAT. § 227.45(7) (1999-2000)² provides that discovery may be had in administrative proceedings according to the evidentiary rules set forth in chapter 804 of the Wisconsin Statutes or rules made by the agency. WISCONSIN STAT. § 804.12(1)(c) authorizes a monetary award to compensate a party for expenses incurred in compelling discovery. In addition, WIS. ADMIN. CODE § PC 4.03 authorizes the commission to issue orders to protect parties from undue burdens or to compel discovery.

¹ Balele does argue that a sanction compensating the department for attorney fees was inappropriate because, by relying on the services of an attorney already within its employment, the agency was in essence proceeding pro se and did not incur any additional fees for counsel's services. We are not persuaded. The fact that counsel is permanently employed by an entity does not mean that a reasonable amount of compensation for the time counsel spent on one particular matter cannot be fairly calculated for purposes of a discovery violation sanction.

² All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

¶7 Balele relies on *DOT v. WPC*, 176 Wis. 2d 731, 500 N.W.2d 664 (1993) for the proposition that monetary sanctions cannot be imposed against him because he was acting in the public interest as a private attorney general. The court's holding in the cited case, however, was that costs could not be taxed against the State or a state agency in an administrative proceeding absent express statutory authority. *Id.* at 736. Balele is not the State or a state agency. We are therefore satisfied that the commission had the authority to impose the discovery sanction against Balele, and the trial court properly entered judgment on the unpaid debt.

¶8 Balele next argues that he was entitled to default judgment on his counterclaim because the State never filed an answer to it. Ordinarily, an answer to a counterclaim must be filed within forty-five days after service of the pleading. WIS. STAT. § 802.06(1). However, the rules of civil procedure permit certain defenses, including failure to state a claim upon which relief can be granted, to be raised by motion prior to filing a defensive pleading. WIS. STAT. § 802.06(2)(a)6. The motion tolls the time to file the answer. Section 802.06(1). Here, the State properly filed a motion to dismiss, which was granted, and the trial court properly denied Balele's motion for default judgment.

¶9 Finally, Balele challenges the trial court's determination that his counterclaim was frivolous. However, it is well established that the State, state agencies, and state agents acting in their official capacities are not subject to suit under 42 U.S.C. § 1983. See *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989); *Lindas v. Cady*, 150 Wis. 2d 421, 431, 441 N.W.2d 705 (1989). The attorneys named here were acting in their official capacities when they pursued the collection action against Balele. Therefore, they, as well as the State and the commission, were all immune from suit. Moreover, because the collection action

was meritorious as discussed above, Balele's allegations failed to establish that the attorneys involved acted improperly in pursuing the action. Because Balele had previously attempted unsuccessfully to sue attorneys who brought actions to collect costs from him, it was reasonable for the trial court to find that Balele should have known that his counterclaim was frivolous within the meaning of WIS. STAT. § 814.025(1).

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

