

FILED

IN THE CIRCUIT COURT OF COLE COUNTY, MISSOURI

SEP 09 2009

HENRY T. HERSCHEL, )  
MATTHEW W. MURPHY, and )  
JOHN A. TACKES, )

Plaintiffs )

v. )

JEREMIAH W. NIXON, )  
JOHN R. WATSON, )  
LAWRENCE G. REBMAN, )  
PETER LYSKOWSKI, )  
THE DIVISION OF WORKERS' )  
COMPENSATION OF THE )  
DEPARTMENT OF LABOR AND )  
INDUSTRIAL RELATIONS OF THE )  
STATE OF MISSOURI, and )  
THE OFFICE OF ADMINISTRATION, )  
STATE OF MISSOURI )

Defendants. )

BRENDA A. UMSTATTD  
CLERK CIRCUIT COURT  
COLE COUNTY, MISSOURI

Case No. 09AC-CC00325

Division I

**JUDGMENT**

The Court enters its judgment, having conducted the trial on the merits. On August 26, 2009, Plaintiffs appeared in person and by counsel, John Comerford. Defendant Lawrence G. Rebman appeared in person and by counsel, Ronald Holliger, who also appeared for the other defendants.

The Court makes the following findings of fact:

1. Plaintiff Henry T. Herschel was duly appointed as an Administrative Law Judge <sup>1</sup> (ALJ) in the Missouri Division of Workers' Compensation ("Division") on December 5, 2007.

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<sup>1</sup> While there are numerous administrative law judges appointed within the State of Missouri, as used in this judgment, the term is limited to a person appointed under the provisions of the Workers Compensation Act, more specifically § 287.610 RSMo 2008 Cum Supp.

2. Plaintiff Matthew W. Murphy was duly appointed as an Administrative Law Judge in the Division on December 4, 2008.
3. Plaintiff John A. Tackes was duly appointed as an Administrative Law Judge in the Division on December 1, 2008.
4. Each of the three Plaintiffs received a letter from the Acting Director of the Division, Peter Lyskowski, on June 15, 2009 which informed them that their service as an Administrative Law Judge would end on June 30, 2009.
5. The text of the June 15, 2009 letter written by Peter Lyskowski and received by each Plaintiff read: "In light of reductions in the Division's fiscal year 2010 budget, I have determined that the Division must operate with fewer administrative law judges. It is with regret that I must inform you that effective June 30, 2009, at the close of the business day, your service as an administrative law judge will end. This action in no way reflects on the quality of your services with the Division of Workers' Compensation."
6. None of the Plaintiffs had any issues with their conduct, performance, or productivity while serving as ALJs in the Division.
7. The four ALJs who received the June 15, 2009 termination letters, including Plaintiffs, were in the bottom four positions when the current roster of the Division's ALJs was sorted by time served as an ALJ within the Division.
8. The ALJ review committee that is established in § 287.610 RSMo<sup>2</sup> had no role in the decision to terminate Plaintiffs' employment as ALJs.

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<sup>2</sup> All references to the Revised Statutes of Missouri refer to the Cumulative Supplement - 2008 unless otherwise indicated.

9. The Fiscal Year 2010 budget for the Division is contained in the Truly Agreed To and Finally Passed version of House Bill No. 7 of the 95th General Assembly, 2009 (“House Bill No. 7”).
10. Section 7.840 of House Bill No. 7 appropriates \$9,086,363 to the Division “for the purpose of funding Administration[,] Personal Service[,] and/or Expense and Equipment, provided that not more than twenty-five percent (25%) flexibility is allowed between Personal Service and Expense and Equipment.” This sum was a reduction from \$9,591,557 appropriated for FY 2009.
11. Section 7.840 of House Bill No. 7 appropriates a total of \$9,141,363 to the Division, with the instruction that the Division is “Not to exceed 150.25 F.T.E.” This is a reduction from 159.25 FTE authorized for FY 2010.
12. The express language of House Bill No.7 does not contain nor does it delineate a reduction of the number of authorized administrative law judges.
13. All funding for the Division, including Plaintiffs’ salaries, is from the Workers’ Compensation Administrative Fund and does not come from General Revenue or from federal funds.
14. Monies in the Fund may not be spent without appropriation by the General Assembly.
15. Employers finance the Workers’ Compensation Administrative Fund by paying an annual tax of up to two percent on net workers’ compensation insurance premiums. The premium tax for calendar year 2009 is 0.5%
16. The Division has appointed 40 administrative law judges, including the Plaintiffs.

17. The term F.T.E refers to Full Time Equivalents does not directly translate into the number of employees. For example, 2 half-time workers constitute 1 F.T.E., but constitute 2 employees.
18. The position of Administrative Law Judge is a unique position.
  - a. It confers the title of judge.
  - b. It requires one to comport his or her self with nearly identical canons of conduct to that of state court judges
  - c. It requires one to conduct hearings, make findings of fact and conclusions of law in the area of workers compensation, an area currently removed from circuit court jurisdiction, essentially performing the same function as a state court trial judge in the limited area of workers compensation.
19. The salary for an administrative law judge is set by statute.
20. There is no evidence that the General Assembly, Governor or any other of the individual defendants targeted any of the Plaintiffs for political reasons nor that they acted in a malicious or corrupt manner.
21. There is no evidence that the Division engaged in the political party balancing required by §287.615.5 RSMo in determining which appointees would be terminated.
22. Plaintiffs incurred reasonable and necessary legal fees and expenses of \$ 39,514.11 in prosecuting this action.
23. Plaintiff Matthew W. Murphy suffered damages of \$ 2,000.00 as the proximate result of Defendant Peter Lyskowski's decision to terminate his appointment.

24. Defendant Peter Lyskowski's decision to terminate Plaintiffs specifically as opposed to any other ALJ's was a discretionary decision and was not made with a corrupt or malicious purpose.

25. Administrative Law Judges are not re-appointed with each budget cycle nor are they required to be re-appointed upon a change in the governor.

The Court makes the following conclusions of law:

1. The Court has jurisdiction over the subject matter and the parties to the litigation.
2. Venue is proper in Cole County, Missouri.
3. Section 287.610 RSMo sets forth the statutory scheme for the appointment, performance review and retention of administrative law judges.
4. The term of each Plaintiff's appointment shall end on August 28, 2016 unless they are retained by a vote of the Administrative Law Judge Review Committee (the "Committee") as described in § 287.610.9(2) RSMo.
5. Once appointed and assuming they remain otherwise qualified to serve<sup>3</sup>, an administrative law judge appointed pursuant to § 287.610 RSMo may be removed only by the Governor after for two or more votes of no confidence by the Committee or by a vote of non-retention taken at the end of their term.
6. The Division lacks the authority to terminate an administrative law judge except as set forth in § 287.610 RSMo.

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<sup>3</sup> For example, should an Administrative Law Judge ceased to be a licensed attorney, he or she could presumably be removed by a writ of *quo warranto* or similar action. A lack of qualification to serve is not at issue in this cause.

7. The phrase “Appropriations shall be based upon necessity, measured by the requirements and needs of each division office” occurring in § 287.610 RSMo is a directive to the General Assembly from the General Assembly and presumably was considered by the General Assembly when it appropriated funds for the Division.
8. The phrase “Appropriations shall be based upon necessity, measured by the requirements and needs of each division office” occurring in § 287.610 RSMo does not modify the authority of the Division to appoint additional administrative law judges up to a total of forty. Unlike the prior versions of this statute, this phrase is no longer tied to the number of ALJ appointments authorized to be made by the Division.
9. The Missouri General Assembly, by adopting House Bill No. 7, did not reduce the number of administrative law judges authorized to be appointed by the Division when it reduced the Division’s total appropriation in the FY 2010 budget.
10. Even if House Bill No. 7 expressly dealt with appropriations for administrative law judges, declining to fund five Administrative Law Judge positions is not the same as abolishing five Administrative Law Judge positions.
11. Nothing in House Bill No. 7 precludes the Division from retaining Plaintiffs at the expense of sufficient other at-will employees to equal the salary expense attributable to the Plaintiffs without exceeding their appropriation.
12. Because the General Assembly did not reduce the Division’s authority to appoint administrative law judges up to a maximum of forty, the Division could choose to hire different administrative law judges, particularly if they obtained a supplemental appropriation in this or in subsequent budget year.

13. The General Assembly, when it enacted Section 287.610 RSMo, set up a statutory scheme which insulates and protects administrative law judges from budgetary pressures and other inappropriate influences.
14. Given the unique and special nature of the position of administrative law judge under Missouri's Workers' Compensation Law, Plaintiffs have no adequate remedy at law.
15. The public interest favors adjudication of workers' compensation claims by an independent administrative judiciary.
16. Section 287.610 RSMo does not create a private cause of action for non-compliance with its terms.
17. The public policy exception to the employment at will doctrine does not apply to the instant action.
18. The statutory scheme for the appointment, performance review and retention of administrative law judges creates a property interest held by the appointee during his term of office.
19. The termination of one's appointment as an administrative law judge, prior to the expiration of his term and without reliance upon the statutory process violates one's right to procedural due process arising under the 5<sup>th</sup> Amendment of the United States Constitution made applicable to the states by the 14<sup>th</sup> Amendment as well as Article I, Section 10 of the Missouri Constitution of 1945 as amended.
20. Title 42 U.S.C. § 1983 does not create a private cause of action for violations of state constitutional law.

21. Plaintiffs are entitled to a judgment declaring that their appointments are statutorily protected from termination during their term absent compliance with the provisions of § 287.610 RSMo or a judicial determination that they are not otherwise qualified to serve.
22. Plaintiffs are not entitled to automatic retention, but must survive a retention vote as provided for in § 287.610 RSMo in order to serve an additional term.
23. Plaintiffs are entitled to a permanent injunction against the Defendants, prohibiting them from terminating Plaintiffs except in strict compliance with § 287.610 RSMo and otherwise retaliating against them for the duration of their term.
24. Claims for damages asserted against individual defendants in their official capacity are in essence claims against the State and are barred by the doctrine of sovereign immunity.
25. Defendant Peter Lyskowski is protected by the official duty doctrine from any liability for damages for his decision to terminate the Plaintiffs.
26. Claims for damages asserted on the basis of *respondeat superior* pursuant to 42 U.S.C. § 1983 do not lie the remaining defendants in their individual capacities.
27. Having prevailed under 42 U.S.C. § 1983, Plaintiff are entitled to an award of their reasonable costs and attorneys fees pursuant to 42 U.S.C. § 1988.
28. The doctrine of separation of powers is not offended by requiring an agency of the State of Missouri to expend its general appropriation in accordance with the law.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiffs Henry T. Herschel, Matthew W. Murphy and John A. Tackes, so long as they are otherwise qualified to serve, may not be terminated as Administrative Law Judges by the Division of Workers' Compensation during their term except in strict compliance with the provisions of § 287.610 RSMo;



IT IS THEREFORE NEXT ORDERED, ADJUDGED AND DECREED that Defendants are enjoined from so terminating the Plaintiffs or retaliating against them as provided for in a separate order of permanent injunction, attached hereto and incorporated by reference.

IT IS ALSO THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiffs shall recover their legal fees and expenses from the State of Missouri, in the amount of \$39,514.11,

IT IS FINALLY ORDERED, ADJUDGED AND DECREED that all claims for relief not expressly granted herein are denied.

SO ORDERED this 9<sup>th</sup> day of September, 2009.



STATE OF MISSOURI }  
COUNTY OF COLE } SS  
I, BRENDA A. UMSTATTD, Clerk of the Circuit Court of Cole County, Missouri, hereby certify that the above and foregoing is a full true and correct copy of  
*Judgment*  
as fully as the same remains of record in my said office.  
IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of my said office this 9 day of Sept 2009  
BRENDA A. UMSTATTD, Clerk  
*Brenda Umstatted*  
Deputy Clerk  
Circuit Court of Cole County, Missouri

BEFORE THE CIRCUIT COURT OF COLE COUNTY, MISSOURI

FILED

SEP 09 2009

BRENDA A. UMSTATTD  
CLERK CIRCUIT COURT  
COLE COUNTY, MISSOURI

HENRY T. HERSCHEL, et al., )  
Plaintiffs, )  
vs. )  
JEREMIAH W. NIXON, )  
Defendants. )

Case No. 09AC-CC00325

PERMANENT INJUNCTION

Defendants (including Defendant's agents, servants, employees, attorneys and those persons in active concert or participation with Defendants) are hereby enjoined from (1) terminating Plaintiffs' service as Administrative Law Judges, except as provided for below, and (2) engaging in any retaliatory actions against Plaintiffs, including but not limited to moving Plaintiffs from their current office locations; diminishing their access to support staff and court reporters; diminishing their access to computers, computer e-mail accounts or office supplies; or otherwise interfering with their rights and privileges and salaries as Administrative Law Judges during the remainder of their current term as Administrative Law Judges and so long as they remain otherwise qualified to serve as Administrative Law Judges.

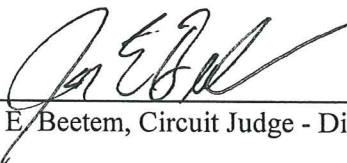
Notwithstanding the above, nothing shall preclude review of the performance of the Plaintiffs by the Administrative Law Judge Review Committee, established and defined in § 287.610 RSMo Cumm Supp 2008, nor any adverse action to be taken against Plaintiffs so long as such action is in compliance with the procedures set forth in said § 287.610.

Also notwithstanding the above, nothing shall preclude the temporary re-assignment of the Plaintiffs to other branch offices of the Division as contemplated by § 287.610.7 RSMo Cumm Supp 2008, so long as such re-assignment is consistent with prior re-assignment practices and/or not unduly burdensome upon Plaintiffs when compared to other administrative law judges from the same branch office.

SO ORDERED this 9<sup>th</sup> day of September, 2009.

STATE OF MISSOURI }  
COUNTY OF COLE } SS

I, BRENDA A. UMSTATTD, Clerk of the Circuit Court of Cole County, Missouri hereby certify that the above and foregoing is a full true and correct copy of

  
Jon E. Beetem, Circuit Judge - Division I

*Permanent Injunction*  
as fully as the same remains of record in my said office.  
IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of my said office this 9 day of Sept 2009  
BRENDA A. UMSTATTD, Clerk

Deputy Clerk  
Circuit Court of Cole County, Missouri

