C. *Scheduling Order*

In the event that the parties wish to renew their dispositive motions in this case, which address the issues described above, they may do so by filing their renewed motions within 30 days from the date this Order is received. Each party shall then have 20 days to file an opposition pleading. FSM Civ. R. 6(d) (established period for opposing a motion is 10 days after service, unless the court establishes otherwise). Each party may also file a reply pleading within 10 days after the opposition pleadings are filed. FSM Civ. R. 5 (service of all pleadings shall be hand delivery or first-class mail). If no pleadings are filed by either of the parties within 30 days from the date this Order is received, then the Court will schedule a pretrial hearing, at which time the parties shall appear and offer suggested dates for trial, including the filing of pretrial statements. FSM Civ. R. 16.

D. *Conclusion*

In conclusion, and for the reasons stated above, the Court grants the Defendant's motion for summary judgment with regard to the Plaintiff's causes of action based upon fraud and a violation of Title 40 of the FSM Code. With regard to the remaining causes of actions set forth in the complaint, the Court finds that there are certain issues of material fact that remain in dispute and, as such, both of the parties' pending motions for summary judgment are hereby denied. As further explained, if the parties wish to pursue their dispositive motions further in this case, they may do so by submitting a renewed motion for summary judgment that address the unresolved issues set forth above, within the time frame established by the scheduling order set forth above. Otherwise, this case will proceed to trial, subject to the scheduling order set forth above.

* * * *

FSM SUPREME COURT TRIAL DIVISION

MARY BERMAN, Plaintiff, vs. POHNPEI STATE GOVERNMENT, HENRY SUSAIA, as EPA Director, and POHNPEI STATE ENVIRONMENTAL PROTECTION AGENCY, Defendants.	)	CIVIL ACTION NO. 2009-023

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Larry Wentworth
Associate Justice

Trial: March 2, 2021
Decided: September 16, 2021

APPEARANCES:

For the Plaintiff: Mary Berman, Esq.
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For the Defendants: Monaliza Abello-Pangelinan, Esq.
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* * * *

HEADNOTES

Civil Procedure

The court usually finds it more helpful if the parties' trial summations are made shortly after the parties have rested (and are thus oral) because that is when the witnesses' testimony and the evidence is still fresh in everyone's mind and because it also gives the court an opportunity to pose questions to counsel on any points in their closings that seem unclear. Written closings generate or encourage ever greater and further cascading delays impeding a matter's ultimate resolution. Berman v. Pohnpei, 23 FSM R. 406, 410 n.1 (Pon. 2021).

Torts – Defamation

A plaintiff alleging defamation must prove that there was: 1) a false and defamatory statement concerning the plaintiff; 2) an unprivileged publication to a third party; 3) fault amounting at least to negligence on the publisher's part; and that 4) either the statement is actionable irrespective of special harm to the plaintiff or the statement's publication causes the plaintiff special harm. Generally, defamation is a false and unprivileged publication which exposes a person to public hatred, contempt, ridicule, or obloquy; or which causes him or her to be shunned or avoided; or which has a tendency to injure him or her in his or her occupation. Berman v. Pohnpei, 23 FSM R. 406, 412 (Pon. 2021).

Torts – Defamation

When the public could not have learned of the allegedly defamatory letter, they could not have derived from the letter a reason to shun or avoid the plaintiff; nor could the letter have injured the plaintiff's trade or business by preventing or hindering her from obtaining clients, and, if it had been made public, it likely would not have prevented or hindered her from obtaining clients since lawyers are often hired to sue the government (and she was already well known for suing government agencies). Berman v. Pohnpei, 23 FSM R. 406, 412 (Pon. 2021).

Torts – Defamation

Many courts recognize an absolute privilege from defamation suits for government officials when acting in the course of their duties because they should be free to exercise their duties unembarrassed by the fear of damage suits in respect to acts done in the course of those official duties. This absolute privilege is recognized for communications by superior officers of executive departments when the publication is found to lie within the officer's authorized functions. Other courts do not recognize an absolute privilege for public officials' potentially defamatory statements while performing their official duties, but instead recognize a qualified privilege. Berman v. Pohnpei, 23 FSM R. 406, 413 (Pon. 2021).

Torts – Defamation

Privileged communications in defamation actions are divided into two classes: absolute privilege and conditional or qualified privilege. Absolute privilege is recognized in cases where the public service or the

administration of justice requires complete immunity as in legislative, executive, or judicial proceedings, the occasion being not so much for those engaged as for the promotion of the public welfare. A conditional privilege is recognized in many cases where the publisher and the recipient have a common interest, and the communication is of a kind reasonably calculated to protect or further it. Frequently in such cases there is a legal, as well as a moral obligation to speak. Berman v. Pohnpei, 23 FSM R. 406, 413 (Pon. 2021).

Public Officers and Employees – Pohnpei; Torts – Defamation

When both the letter's author and its recipient had, as part of their official public service duties, the common interest (and the common legal duty) to see that the EPA legal counsel position was filled by an acceptable and suitable, qualified person, the letter's author, even if he did not have an absolute privilege when he wrote and sent the letter, he had a qualified privilege. Berman v. Pohnpei, 23 FSM R. 406, 413 (Pon. 2021).

Torts – Defamation

A qualified privilege furnishes a prima facie legal excuse to one making a communication unless additional facts are shown which alter the character of the publication. To overcome a qualified privilege [qualified immunity] defense, a plaintiff must, by clear and convincing evidence, demonstrate "express malice," or in modern terms, actual malice, which means that the statements were made with knowledge of their falsity or a reckless disregard for the truth. Berman v. Pohnpei, 23 FSM R. 406, 413-14 (Pon. 2021).

Torts – Defamation

When a letter clearly was a privileged publication, and when the plaintiff did not demonstrate that express or actual malice was present, the court does not need to decide which privilege status – absolute privilege or qualified privilege – should apply because the plaintiff is not entitled to recover anything on her defamation claim regardless of which privilege, absolute or qualified, would apply. Berman v. Pohnpei, 23 FSM R. 406, 414 (Pon. 2021).

Public Officers and Employees – Pohnpei

If a state has wrongfully failed to hire someone for a permanent public service position, the court will not award damages for the time beyond when, if hired for that permanent position, they might be retired from the state's public service system. Berman v. Pohnpei, 23 FSM R. 406, 414 (Pon. 2021).

Public Officers and Employees – Pohnpei; Torts – Damages – Mitigation of

The times the plaintiff had the short-term contracts with state agencies would be excluded from any time for a back pay award because the income that she earned then would reduce any damages award as they result from the plaintiff's duty to mitigate her damages; otherwise, the plaintiff would be paid twice by Pohnpei for the same time period, and double recovery is not permitted. Berman v. Pohnpei, 23 FSM R. 406, 414 (Pon. 2021).

Public Officers and Employees – Pohnpei

The court cannot order that a plaintiff be hired for the permanent public service position when the plaintiff is past the mandatory retirement age because, if the court did order that the plaintiff be hired then, she would only be "retired" immediately. Berman v. Pohnpei, 23 FSM R. 406, 415 (Pon. 2021).

Constitutional Law – Equal Protection; Public Officers and Employees – Pohnpei

A plaintiff is unable to prove that the state denied her employment because she was a non-citizen when none of the FSM citizens on the eligible lists were hired; when she was eventually hired on a short-term contract basis; and when she was eventually replaced by another non-FSM citizen on contract, since that does not show that the agency had a pattern of refusing to hire qualified non-citizens. Berman v. Pohnpei, 23 FSM R. 406, 415 (Pon. 2021).

Public Officers and Employees – Pohnpei

The requirement that the Director may remove the name of a person from any eligible list or refuse

to certify his or her name on any list of eligible persons if the Director finds, after giving him or her notice and an opportunity to be heard, that the person is no longer able to perform the necessary duties satisfactorily, applies to eligible lists already established and maintained for classes in which vacancies exist or are anticipated and which may remain active for one year, not for positions that had never before existed. Berman v. Pohnpei, 23 FSM R. 406, 415 (Pon. 2021).

Constitutional Law – Due Process – Procedural; Public Officers and Employees – Pohnpei

The requirement that the Director may remove the name of a person from any eligible list or refuse to certify his name on any list of eligible persons if he finds, after giving him notice and an opportunity to be heard, is directed towards someone who was once able to perform the necessary duties satisfactorily, but who, for some reason has, since being placed on the eligible list, become unable to perform those necessary duties satisfactorily. Generally, that would be someone who has suffered a deterioration of skills or an injury of some kind that now, in management's view, makes that person unable to satisfactorily perform the necessary duties of the position for which the eligible list had been established and maintained. The statute gives that person notice and an opportunity to show that he or she is still able to perform the necessary duties satisfactorily. Berman v. Pohnpei, 23 FSM R. 406, 415 (Pon. 2021).

Public Officers and Employees – Pohnpei

The statute for filling public service system vacancies does not require notice and an opportunity to be heard when the management official rejects, in writing, everyone on the eligibles list or after the Director finds that the reasons for rejection are adequate. Berman v. Pohnpei, 23 FSM R. 406, 416 (Pon. 2021).

Public Officers and Employees – Pohnpei

Whether being a frequent litigator against the state is an adequate reason to find someone is not an acceptable hire, is a matter left for the particular circumstances of each case. Berman v. Pohnpei, 23 FSM R. 406, 416 (Pon. 2021).

Administrative Law – Judicial Review; Public Officers and Employees – Pohnpei

The court must give some deference to the responsible administrative officials about what constitutes an adequate reason for a potential hire on the eligible list to be unacceptable. Berman v. Pohnpei, 23 FSM R. 406, 416 (Pon. 2021).

Public Officers and Employees – Pohnpei

Every Pohnpei "permanent" public employee must serve a probationary period, which lasts from six months to one year, during which the probationary employee whose services seem unsatisfactory may be dismissed without the right of appeal. Berman v. Pohnpei, 23 FSM R. 406, 417 (Pon. 2021).

Civil Procedure – Parties – Official Capacity; Judgments

A money judgment will be entered only against the state when it is the entity (and defendant) that would pay any money judgment against the other two defendants, a person sued in his official capacity as an agency director, and the state agency. Berman v. Pohnpei, 23 FSM R. 406, 417 (Pon. 2021).

Judgments; Public Officers and Employees – Pohnpei; Torts – Damages

The usual income tax and social security contributions will be deducted from a judgment for back pay. Berman v. Pohnpei, 23 FSM R. 406, 417 (Pon. 2021).

* * * *

COURT'S OPINION

LARRY WENTWORTH, Associate Justice:

This case was tried before the court on March 2, 2021. At the parties' joint request, the court allowed

them to file post-trial briefs or supplemental written closing arguments. The plaintiff, Mary Berman, filed her post-trial brief on March 16, 2021. The defendants had until March 30, 2021, to file their own post-trial brief, but did not do so. The matter was then deemed submitted for decision.[1]

During trial, the court heard the testimony of Jennifer Saimon and of Mary Berman. Based on their testimony and the exhibits and evidence admitted, the court makes the following

FINDINGS OF FACT.

1. Mary Berman, a U.S. citizen married to a Pohnpei citizen, lawfully resides on Pohnpei. She is a lawyer by trade. Berman held a Pohnpei foreign investment permit to engage in the general practice of law, Ex. Q, and she was available to be hired for any Pohnpei government attorney position.

2. In April 2007, the Pohnpei Environmental Protection Agency ("EPA") advertised for a newly-created, permanent legal counsel (Attorney I) position, with a base salary of $456.92 biweekly. *See* Exs. M & 1. Berman applied.

3. Berman was certified as the only qualified applicant on the June 7, 2007 eligible list. Memo. from Dir. Dep't Treasury & Admin. to Acting Exec. Officer EPA (June 7, 2007) [Ex. A]. No qualified FSM citizen had applied. *Id.*

4. Berman was not offered the position. Instead, the then Acting EPA Director Etiny Hadley asked that the position be readvertised so that the EPA could "have a wider application pool from which to make a selection." Letter from Acting EPA Exec. Officer Etiny Hadley to Finley S. Perman, Dir. Dep't Treasury & Admin. (June 19, 2007) [Ex. 3].

5. On a previous occasion when a non-FSM citizen resident of Pohnpei had been the only person to make the eligible list for a position as a dentist in the Department of Education, the Acting Pohnpei Attorney General had advised that that person should be hired. Memo. from Pohnpei Att'y Gen. to Dir. Dep't of Educ. (Oct. 28, 2005) [Ex. P].

6. The Director of the Pohnpei Department of Finance and Administration informed Hadley that, pursuant to Part 2.13 of the Pohnpei Public Service System Regulations, the reasons for rejecting everyone on the eligible list (Berman) had to be put in writing, and, if the Director found the reasons adequate, a new list would be submitted (that is, the position would be readvertised so that there could be a new list), and if the Director did not find the reasons adequate, then the old list would be resubmitted and the appointment had to be made therefrom. Memo. from Dir. Dep't Treasury & Admin. to Acting Exec. Officer EPA (July 3, 2007) [Ex. C].

7. Hadley wrote that Berman was an unsuitable hire because she "has sued the Pohnpei EPA in the past, as well as other state and national government agencies[, and w]hile she has worked for Pohnpei executive agencies and the Pohnpei Legislature previously, her contracts have never been renewed." Letter from Etiny Hadley to Andrew Joseph, Acting Dir. Dep't Treasury & Admin. (July 30, 2007) [Ex. D].

8. Berman had not sued Pohnpei EPA, but she had filed numerous lawsuits against other Pohnpei state agencies (as well as against national government agencies), many of which did involve environmental

[1] The court usually finds it more helpful if the parties' trial summations are made shortly after the parties have rested (and are thus oral) because that is when the witnesses' testimony and the evidence is still fresh in everyone's mind. It also gives the court an opportunity to pose questions to counsel on any points in their closings that seem unclear. The court's general experience is that written closings generate or encourage ever greater and further cascading delays impeding a matter's ultimate resolution.

issues. By the time of her 2007 EPA job application, Berman already had a lawsuit pending against the Chief of the Personnel Division over his alleged maladministration of Pohnpei personnel law when Berman had earlier applied for other Pohnpei state employment.

9. Berman testified that she had previously had a contract with the Pohnpei Land Department that was followed by a second one and she had had a contract with the Pohnpei Legislature followed by two others.

10. Berman also testified that she believed that Hadley's true reason for asking that the attorney position be readvertised was so that the EPA could hire Hadley's uncle for that position. Although plausible, this speculative belief was not proven. No evidence was introduced on this point.

11. The Finance and Administration Director found the EPA's reasons for rejecting Berman to be adequate, and readvertised the EPA legal counsel position. Berman reapplied. The September 6, 2007 eligible list consisted of two FSM citizens, one of whom was Hadley's uncle. Memo. from Acting Dir. Dep't Treasury & Admin. to Exec. Officer EPA (Sept. 6, 2007) [Ex. N]. Berman was not on the list, possibly because she had been on the recently rejected list, and so would have been rejected again. For various reasons, neither of the two FSM citizens was hired, and the list expired.

12. Still needing a legal counsel, the EPA asked repeatedly that the position be readvertised. *See* Exs. 7, 8, & 9. It eventually was. Berman again applied. Hadley's uncle and Mary Berman (misspelled "Perman") were the only two persons on the November 18, 2008 eligible list. Memo. from Chief, Div. of Personnel, Labor & Manpower Dev. to Exec. Officer EPA (Nov. 18, 2008) [Ex. O-1]. No one was hired. It is not known why. No evidence was introduced on this point. And no evidence indicated that the EPA had rejected, in writing, everyone (or anyone) on this eligible list. Berman was still available to be hired.

13. Berman also testified that she applied for other permanent state government attorney positions as they were advertised, but was not hired.

14. On June 18, 2009, Berman filed this lawsuit against the Pohnpei state government, Acting EPA Director Etiny Hadley,[2] and the Pohnpei Environmental Protection Agency. In her complaint, Berman alleged that Acting Director Hadley's (and thus the EPA's) refusal to hire her had violated her fundamental liberty interest in an employment opportunity; her right to equal treatment under the law; her right to free speech; and her right to petition the government for redress. She further alleged that Hadley's statement was false and libelous and that it defamed her and caused damages by the state not hiring her.

15. On July 27, 2009, the EPA hired Berman as legal counsel on a short-term contract that ended September 30, 2009. Ex. 12. Her duties consisted of reviewing and drafting regulations. Berman was paid $1,153.84 biweekly ($5,774.42 total). *Id.* A second contract started October 29, 2009 and ended January 16, 2010. It also paid $1,153.84 biweekly ($7,499.96 total). Ex. 21.

16. On November 10, 2009, the defendants filed their answer. They conceded that Berman had not previously sued the EPA. But they raised the affirmative defenses of failure to state a claim upon which relief could be granted; the statute of limitations; qualified immunity; and the failure to mitigate damages.

17. Right after the EPA contract ended in January 2010, Berman had a three-month employment contract with the Pohnpei Department of Land and Natural Resources. It also paid $1,153.84 biweekly. *See* Ex. 22.

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[2] Acting EPA Director Etiny Hadley was, of course, sued in his official capacity. Thus, he has been automatically replaced by the current officeholder. FSM Civ. R. 25(d)(1).

18. On April 13, 2010, Berman became 60 years old, the official retirement age for Pohnpei public servants, 9 Pon. C. § 2-107(1). After that date, she received no further offers of state employment.

19. Later in 2010, the EPA, for its legal counsel position, hired a different non-FSM citizen on one short-term contract followed by two successive one-year contracts, and he was paid at the same rate Berman had been – $1,153.84 biweekly. Exs. T-1, T-2, & T-3.

20. On October 31, 2019, the court granted the defendants partial summary judgment and dismissed Berman's claims for defamation per se, for attorney's fees, and for punitive damages. Berman v. Pohnpei, 22 FSM R. 377, 382-83 (Pon. 2019).

21. On September 1, 2020, the court denied Berman's reconsideration motion, ruling that whether someone having frequently sued the state was a legally adequate reason not to hire that person depended on the case's particular circumstances. Berman v. Pohnpei, 23 FSM R. 17, 20-21 (Pon. 2020).

22. Berman made one further attempt to obtain summary judgment in her favor. She moved for a judgment that none of Hadley's stated reasons for finding her an unsuitable hire and thus for wanting the EPA attorney position readvertised in 2007 were legally adequate reasons not to hire someone from an eligible list. The court denied that motion and set the matter for trial.

23. Berman's remaining claims were for defamation, denial of equal protection under the law, denial of the right to free speech, denial of the right to petition the government for redress, and denial of due process in not hiring her.

Based on these findings of fact, the court makes the following

CONCLUSIONS OF LAW.

A. *Defamation*

1. *Generally*

A plaintiff alleging defamation must prove that there was: 1) a false and defamatory statement concerning the plaintiff; 2) an unprivileged publication to a third party; 3) fault amounting at least to negligence on the publisher's part; and that 4) either the statement is actionable irrespective of special harm to the plaintiff or the statement's publication causes the plaintiff special harm. Zacchini v. Hainrick, 19 FSM R. 403, 412 (Pon. 2014). Generally, defamation is a false and unprivileged publication which exposes a person to (public) hatred, contempt, ridicule, or obloquy; or which causes him or her to be shunned or avoided; or which has a tendency to injure him or her in his or her occupation. George v. Palsis, 19 FSM R. 558, 567 (Kos. 2014); Zacchini, 19 FSM R. at 411 n.1, 413; FSM Dev. Bank v. Abello, 18 FSM R. 192, 197 (Pon. 2012); Pohl v. Chuuk Public Utility Corp., 13 FSM R. 550, 557 (Chk. 2005).

The statement that Berman had previously sued the EPA was false at the time it was made, but it does not appear to be defamatory. The gist of the entire statement was basically true – Berman had often sued Pohnpei state agencies and national government agencies and she had not stayed long at Pohnpei state jobs that she had had. The July 30, 2007 letter was not released to the public.

Since the public could not have learned of the letter, they could not have derived from the letter a reason to shun or avoid Berman; nor could the letter have injured Berman's trade or business by preventing or hindering her from obtaining clients, and, if it had been made public, it likely would not have prevented or hindered Berman from obtaining clients since lawyers are often hired to sue the government (and Berman was already well known for suing government agencies). *See* Smith v. Nimea, 18 FSM R. 36, 47 (Pon. 2011). But Berman's claim is that the letter's false statement(s) prevented her from being hired as EPA legal

counsel.

2. *Privileged Publication*

But, more importantly, the Acting EPA Director's July 30, 2007 letter to the Acting Director of the Pohnpei Department of Treasury and Administration about why Berman was an unsuitable hire was, for the reasons discussed below, a privileged publication or communication. The defendants are thus immune to a defamation suit based on the July 30, 2007 letter, even if it was defamatory. Since Berman is legally unable to prove this essential element of her defamation claim – an unprivileged publication (to a third party) – her defamation claim must fail.

a. *Absolute Privilege*

Many courts recognize an absolute privilege from defamation suits for government officials when acting in the course of their duties because they "should be free to exercise their duties unembarrassed by the fear of damage suits in respect to acts done in the course of those [official] duties." Barr v. Matteo, 360 U.S. 564, 571, 79 S. Ct. 1335, 1339, 3 L. Ed. 2d 1434, 1441, *reh'g denied*, 361 U.S. 855, 80 S. Ct. 41, 4 L. Ed. 2d 93 (1959). This absolute privilege is recognized for communications by superior officers of executive departments when the publication is found to lie within the officer's authorized functions. PROSSER AND KEETON ON TORTS § 114, at 821-23 (5th ed. 1984).

Hadley, as acting EPA Director, was an executive department's superior officer, and his July 30, 2007 letter lay was an authorized function since the Public Service Regulations part 2.13 and Pohnpei Code Title 9, Section 2-113 required him to send such a letter if he did not find anyone on the eligible list acceptable.

b. *Qualified Privilege*

Other courts do not recognize an absolute privilege for public officials' potentially defamatory statements while performing their official duties, but instead recognize a qualified privilege.

> Privileged communications in defamation actions are divided into two classes: absolute privilege and conditional or qualified privilege. . . . [A]bsolute privilege is recognized in cases where the public service or the administration of justice requires complete immunity as in legislative, executive, or judicial proceedings, the occasion being not so much for those engaged as for the promotion of the public welfare.

Bradford v. Mahan, 548 P.2d 1223, 1228 (Kan. 1976) (police officers' reports made in exercise of their official duties subject only to qualified privilege). "A conditional privilege is recognized in many cases where the publisher and the recipient have a common interest, and the communication is of a kind reasonably calculated to protect or further it. Frequently in such cases there is a legal, as well as a moral obligation to speak." PROSSER AND KEETON ON TORTS § 115, at 828 (5th ed. 1984).

Here, Acting Director Hadley had a legal obligation, 9 Pon. C. § 2-113; Pon. Public Serv. Sys. Reg. pt. 2.13, to explain why he considered Berman to be an unsuitable hire. Both Hadley and the letter's recipient had, as part of their official public service duties, the common interest (and the common legal duty) to see that the EPA legal counsel position was filled by an acceptable and suitable, qualified person. Thus, even if Hadley did not have an absolute privilege when he wrote and sent the July 30, 2007 letter, he had a qualified privilege, and, as noted above, para. 16, the defendants pled qualified immunity [privilege] as an affirmative defense.

c. *Privilege Prevails*

"A qualified privilege furnishes a prima facie legal excuse to one making a communication unless

additional facts are shown which alter the character of the publication." Bradford, 548 P.2d at 1229 (privilege covers communications made in good faith, without actual malice and with reasonable grounds to believe the statement is true). To overcome a qualified privilege [qualified immunity] defense, a plaintiff must, by clear and convincing evidence, demonstrate "express malice," or in modern terms, actual malice, which means that the statements were made with knowledge of their falsity or a reckless disregard for the truth. Zacchini, 19 FSM R. at 414. Berman did not demonstrate that.

Since the July 30, 2007 letter clearly was a privileged publication, and since Berman did not demonstrate that express or actual malice was present, the court does not need to decide which privilege status – absolute privilege or qualified privilege – should apply.[3] Berman is not entitled to recover anything on her defamation claim regardless of which privilege, absolute or qualified, would apply.

B. *Possible Remedies*

The court now turns to the possible remedies available to Berman if she were to prevail on any of her other claims.

1. *Damages Time Frames*

The court has previously ruled that when 60 years old is the state's official retirement age, the court will not include the time beyond that age in a damages award for a state employee's wrongful termination. *See* Kimeuo v. Simina, 15 FSM R. 664, 666 (Chk. 2008), *aff'd*, 16 FSM R. 616, 622 (App. 2009). Likewise, if a state has wrongfully failed to hire someone for a permanent public service position, the court will not award damages for the time beyond when, if hired for that permanent position, they might be retired from the state's public service system.

Consequently, the only times for which the court could award Berman damages, if she proves her case, would be the times between July 2007 and April 2010. The times Berman had the short-term contracts she had with the EPA in 2009 and her three-month contract with the Pohnpei Land and Natural Resources Department at the start of 2010 would be excluded because the income that she earned then would reduce any damages award as they are the result of Berman's duty to mitigate her damages. *See* Iriarte v. Individual Assurance Co., 18 FSM R. 340, 361 (App. 2012). Otherwise, Berman would be paid twice by Pohnpei for the same time period, and double recovery is not permitted.[4] *E.g.*, *id.* at 360; M/V Kyowa Violet v. People of Rull ex rel. Mafel, 16 FSM R. 49, 63 (App. 2008); Pohnpei v. M/V Ping Da 7, 20 FSM R. 75, 79 (Pon. 2015); Ihara v. Vitt, 18 FSM R. 516, 531 (Pon. 2013); AHPW, Inc. v. FSM, 12 FSM R. 544, 556 (Pon. 2004).

Berman briefly argued that another person over the retirement age of 60 had been hired on contract for a state legal counsel position although no evidence was introduced to that effect. Regardless, Berman filed this civil action before she had reached the age of 60 and the only relief she sought was an order that the EPA hire her "at a salary commensurate with her experience and education" for the EPA legal counsel position and that she be paid the damages (presumably back pay) required by law. Compl. at [misnumbered] 5 (June 18, 2009).

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[3] *But see* Helgenberger v. Helgenberger, 22 FSM R. 244, 249-51 (Pon. 2019) (counsel and parties have absolute privilege for statements made in the course of judicial proceedings irrespective of the motive with which they are made as long as such statements are material and pertinent to the questions involved).

[4] No evidence was introduced that during this time Berman had any other employment income, either through other salaried positions or from representing private clients, but if Berman had had such employment which she would have been unable to pursue if hired by the EPA, that income would also need to be deducted from any award to Berman.

2. *Other Considerations*

Nor can the court now order that Berman be hired for the permanent EPA legal counsel position. Kimeuo, 15 FSM R. at 666 (court could not reinstate a terminated employee in his former position when he is past the mandatory retirement age; court can only award him back pay for time before his retirement date). If the court did order that the EPA hire Berman now, she would only be "retired" immediately.

C. *Equal Protection*

Berman's claim that her equal protection rights were violated is based on her supposition that the EPA did not hire her because she was not an FSM citizen (rather than it did not hire her because she frequently sued government agencies). Of the three relevant eligible lists for the EPA legal counsel position, Berman appeared on two. The EPA did not hire anyone from any of the three lists as a "permanent" employee. But Berman was, in 2009, hired on a short-term contract basis. The EPA never hired any of the three other eligible applicants, all of whom were FSM citizens.

Furthermore, since she was eventually replaced by another non-FSM citizen on contract, that does not show that the EPA had a pattern of refusing to hire qualified non-citizens. Berman is thus unable to prove that the EPA denied her employment because she was a non-citizen. Her equal protection claim fails.

D. *Due Process*

1. *Subsection 2-112(2)*

Berman contends that the defendants violated her due process rights when she was not hired for the EPA legal counsel position. In her view, the first instance of this was when she was, after the July 30, 2007 letter, removed from the June 7, 2007 eligible list without her knowledge (although there was no evidence that Berman knew then that she had made the eligible list), and the EPA legal counsel position was readvertised. To support this position, Berman directs the court's attention to Pohnpei Code, Title 9, Subsection 2-112(2), which reads:

> The Director may remove the name of a person from any eligible list or refuse to certify his name on any list of eligible persons if he finds, after giving him notice and an opportunity to be heard, that the person is no longer able to perform the necessary duties satisfactorily.

9 Pon. C. § 2-112(2). This subsection, however, does not apply to Berman's situation.

First, Section 2-112, as a whole, applies to eligible lists already established and maintained "for classes in which vacancies exist or are anticipated" and which may remain active for one year. 9 Pon. C. § 2-112(1). The EPA legal counsel position was neither an existing nor an anticipated vacancy because that position had never before existed.

Second, Section 2-112(2) is directed towards someone who was once able to perform the necessary duties satisfactorily, but who, for some reason has, since being placed on the eligible list, become unable to perform those necessary duties satisfactorily. Generally, that would be someone who has suffered a deterioration of skills or an injury of some kind that now, in management's view, makes that person unable to satisfactorily perform the necessary duties of the position for which the eligible list had been established and maintained. Subsection 2-112(2) gives that person notice and an opportunity to show that he or she is still able to perform the necessary duties satisfactorily.

In Berman's case, no one disputes that her ability to perform the necessary duties satisfactorily (or unsatisfactorily) was exactly the same before she was placed on the June 7, 2007 eligible list as it was after

she was removed from that list. Berman was not removed from that list because anyone thought she "[wa]s no longer able to perform the necessary duties satisfactorily." She was rejected from the list because the Director of the Department of Finance and Administration found the reasons stated in EPA Acting Director Hadley's July 30, 2007 letter, *supra* para. 8, to be adequate. Subsection 2-112(2) therefore does not apply to this situation.

2. *Section 2-113*

The statute for filling vacancies is therefore the applicable one. It reads, in pertinent part:

> The highest management official of the department, or of the office or agency . . . shall make the appointment from the list of eligibles submitted to him unless he finds no person available and acceptable to him on the list, in which case he will ask the Director [of the Department of Finance and Administration] to certify a new list, stating in writing his reasons for rejecting each of the eligibles on the list previously submitted to him. If the Director finds such reasons adequate, he shall then submit a new list of not more than five eligibles . . . from which said management official shall make an appointment. If the Director does not find the reason adequate, he shall resubmit the list and the appointment shall be made therefrom.

9 Pon. C. § 2-113. This statute does not require notice and an opportunity to be heard when the management official rejects, in writing, everyone on the eligibles list or after the Director finds that the reasons for rejection are adequate.

The court is not persuaded that a frequent litigator against the state is, as a matter of law, not an adequate reason to find someone to be an unacceptable hire. The defendants may have feared that if they hired Berman, the EPA would be defending Berman's next lawsuit against the state, and did not wish to involve the EPA in such distractions. Or they may have been concerned that Berman would use the position to gain some advantage in her other lawsuits against the state. As the court previously ruled, whether being a frequent litigator against the state is an adequate reason to find someone is not an acceptable hire, is a matter left for the particular circumstances of each case.

The court must give some deference to the responsible administrative officials about what constitutes an adequate reason for a potential hire to be unacceptable. *Cf.* Paulus v. Pohnpei, 3 FSM R. 208, 217 (Pon. S. Ct. Tr. 1987) (right to Pohnpei government employment is not a constitutionally-protected, fundamental right, requiring a strict scrutiny test; but Pohnpei cannot exercise its discretion arbitrarily); *cf. also* Berman v. Lambert, 17 FSM R. 442, 450 (App. 2011) (right to work for the Pohnpei state government is not a constitutionally protected right). Berman has not shown, by a preponderance of the evidence, that the Finance Director's decision, that found adequate Hadley's reasons why Berman was an unacceptable hire, was arbitrary and capricious.

3. *2007 Eligible Lists*

The Finance Director found that the EPA Acting Director's reasons to be adequate. Berman was already suing the Finance Director in another case. Berman did not prove by a preponderance of the evidence that those reasons (at least just the truthful ones) were not adequate reasons. She therefore did not prove by a preponderance of the evidence that she should have been hired from the June 7, 2007 eligible list.

Berman did not appear on the next eligible list, that of September 6, 2007. If she had, she would likely have been rejected then just as she had been rejected only a couple months before.

4. *2008 Eligible List*

Berman did, however, make the November 18, 2008 eligible list. She was not rejected from that list. The EPA apparently abandoned its objection to Berman being a frequent litigator against the state. Berman was thus on the eligible list and available to be hired. Hadley's uncle was also on the eligible list, but apparently, was either unavailable or unacceptable to be hired because eventually, Berman was hired on short-term contract in late July 2009.

The court estimates that, with the general formalities that must be observed and the intervening Christmas and New Years' holidays, the earliest someone would have been hired off the November 18, 2008 eligible list would have been late January or early February 2009. That means that if Berman had been hired for the "permanent" position, she probably would have been on the EPA payroll for about twelve more pay periods than she was (including the gap between her two short-term EPA contracts). The court also notes that every Pohnpei "permanent" public employee must serve a probationary period, 9 Pon. C. § 2-116(1), which lasts from six months to one year, 9 Pon. C. § 2-103(14), during which the probationary employee whose services seem unsatisfactory may be dismissed without the right of appeal, 9 Pon. C. § 2-116(1). The court has no way of determining whether Berman would have survived this probationary period.

E. *Rights to Free Speech and to Petition Government for Redress*

Berman also contends that being rejected for the EPA legal counsel position merely because she had sued Pohnpei state agencies, in effect, penalizes her for having exercised her constitutional right to seek redress from the Pohnpei state government (by filing suit against it) and her right to free speech. It is unnecessary to address this claim since Berman will, as just discussed, recover under her due process claim, of which this might be considered a part. Thus, any further recovery here would only be double recovery.

F. *Award*

Since the court has determined that Berman would or should have been hired late January or early February 2009 or thereabouts, that leaves in 2009 for which Berman was not on the EPA payroll. The court will therefore award as damages that Berman be paid for those twelve pay periods at the established rate of $1,153.84 per biweekly pay period. This totals $13,846.08. The usual income and social security taxes shall be deducted from this amount and remitted to the appropriate authorities. This money judgment will be entered only against the State of Pohnpei because that is the entity (and defendant) that would pay any money judgment against the other two defendants, Henry Susaia, in his official capacity as the EPA Director, and the Pohnpei State Environmental Protection Agency. *Cf.* Alexander v. Pohnpei, 18 FSM R. 392, 400 (Pon. 2012) (suit against someone in their official capacity is a suit against the entity that employees that person).

CONCLUSION

Accordingly, the clerk shall enter judgment in Mary Berman's favor and against the State of Pohnpei for $13,846.08, with the usual income tax and social security contributions to be deducted therefrom.

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