STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

HAROLD MAHNKE,

Complainant,

vs.

LOUIS ALLIS COMPANY,

Respondent.

Case III
No. 15639 Ce-1428
Decision No. 11017-B

ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The examiner having, on October 13, 1976, made and issued his Findings of Fact, Conclusion of Law and Order and accompanying Memorandum in this matter, the complainant having thereafter timely petitioned the commission to review the same, and the commission having reviewed the record and the arguments of the parties,

IT IS ORDERED that the examiner's findings of fact, conclusion of law and order be, and the same hereby are, affirmed.

Given under our hands and seal at the City of Madison, Wisconsin this 17th day of January, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney, Chairman

Herman Torosian, Commissioner

MEMORANDUM ACCOMPANYING ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

This is a discharge case in which the complainant employe urges the commission to conclude that the discharge violated the collective bargaining agreement. In order to enable the commission to determine the merits of the contract question, complainant has sought to prove that his collective bargaining representative, the union, breached its duty of fair representation.

On October 13, 1976, examiner George Fleischli entered his decision. He dismissed the complaint for failure of the complainant to prove that the union breached its duty of fair representation. Complainant timely petitioned the commission for review of the examiner's decision. Both parties have filed briefs.

THE EXAMINER'S DECISION SUMMARIZED

The examiner did not reach the merits of the contract question as to whether the employer justifiably discharged complainant, since he concluded that the union had not breached its duty of fair representation. In respect to the fair representation issue, the examiner concluded that the union's decision not to arbitrate the issue was not based on the cost to the union of such arbitration proceedings. Rather, the examiner found the union based its decision on its opinion that the grievance was without merit. In this regard, the examiner further noted that the union had consistently agreed with the employer that the collective bargaining agreement does not protect employes who are discharged for absenteeism in circumstances substantially similar to complainant's.

ARGUMENT OF THE COMPLAINANT

In his petition for review, complainant asserts that the examiner made an error in paragraph 14 of the findings of fact, wherein he found that the union's decision not to arbitrate was not arbitrary, since the union relied on the advice of an attorney who was unaware that complainant suffered a handicap. Further, complainant asserts that the examiner committed an error of law in that the collective bargaining agreement, if it is held to provide that discharges for such absenteeism regardless of the legitimacy of medical excuse, is invalid. Finally, complainant asserts the examiner committed an error of law in that complainant should not be denied a remedy because his union representatives rightfully or wrongfully refused to pursue the grievance to arbitration.

Complainant's brief rests on the proposition that the union and the employer have discriminated against him on the basis of his medical handicap which caused his absenteeism, and that such discrimination violates the Fair Employment Act (FEA), secs. 111.31 Stats. et seq. He argues that the employer's discharge decision failed to consider

> "any medical evidence which might have justified the Complainant's deviation from scheduled working hours. Therefore, the [employer's] decision to terminate Complainant's employment was made without giving consideration to the employee's physical disabilities." 1/

1/ Complainant's brief to the commission, p. 3.

There was no evidence, complainant argues, that the attorney on whose advice the union relied

> "... was ever apprised of any facts upon which he could independently evaluate the legitimacy of the Complainant's medical excuses or decide whether the Complainant was suffering from a disabling handicap which could not alone be a valid reason for the [employer's] discharge of the Complainant." 2/

It follows, complainant says, that the attorney's recommendation not to arbitrate the grievance because it was not winnable was arbitrary, and that such arbitrariness tainted the decision of the union's executive board and its membership who concurred in the advice.

Complainant also argues that the collective bargaining agreement, to the extent it permits this discharge, is void as contrary to the public policy declared in the FEA. Since the union has exclusive power to proceed to arbitration, complainant is left powerless to challenge the employer's discriminatory conduct. 3/ Complainant concludes:

> "... that if the Commission here upholds and enforces the exclusive grievance procedure provision . . . this act by a state agency would be absolutely inimical to the public policy expressed in the Fair Employment Act and would destroy the effect of other laws passed by the Legislature for the purpose of prohibited unlawful discrimination." 4/

Finally, complainant argues that a collective bargaining agreement cannot divest complainant of his rights against discrimination prohibited by the FEA, and that if the employer prevails here,

> "... the Commission is enforcing a contractual obligation which in essence permits unlawful discrimination to go unchallenged." 5/

From the foregoing discussion, complainant's argument can be summarized as making these points:

1. The union and the employer have discriminated against complainant in violation of the FEA. This discrimination occurred by their failure to consider the legitimacy of the medical excuses which caused his absenteeism.

2. The commission cannot lend its weight to this discrimination by precluding complainant from proceeding here on the ground that the union has exclusive power to decide whether to proceed to arbitration on complainant's grievance, and complainant has no other remedy to challenge the employer's discriminatory conduct.

2/ Id., p. 4.

3/ Id., p. 7.

4/ Id.

5/ Id., p. 9.

DISCUSSION

The issue whether the commission has power to make a ruling under the Fair Employment Act.

As to the complainant's allegation that the union and the employer have discriminated against him on the basis of handicap in violation of the FEA, the threshold question is whether this commission has power to determine whether the FEA has been violated.

Section 111.325, FEA, proscribes discrimination by an employer or a labor organization. No argument is made that the employer and the union are not covered by the FEA. Discrimination is defined as discrimination because of age, race, color, handicap, sex, creed national origin, ancestry or arrest or conviction record. Section 111.32(5)(a), FEA, ch. 125 Laws of 1977. It is discrimination because of handicap

> "For an employer [or] labor organization . . . . to refuse to hire, employ, admit or license, or to bar or to terminate from employment, membership or licensure any individual, or to discriminate against any individual in promotion, compensation or in terms, conditions or privileges of employment unless such handicap is reasonably related to the individual's ability adequately to undertake the job-related responsibilities of that individual's employment, membership or licensure." 6/

This law is administered by the Department of Industry, Labor and Human Relations (DILHR).

In Emporium Capwell 7/ the United States Supreme Court addressed the relationship between the federal labor relations law (NLRA) and the federal fair employment act (Title VII), and the responsibility of the National Labor Relations Board (NLRB) in respect thereto. There, blacks by-passed the contractual grievance procedures and the exclusive collective bargaining representative in order to bargain directly with the employer over matters relating exclusively to problems of the blacks. These employes picketed the employer's place of business, and distributed leaflets urging customers to boycott the employer's business. The employer discharged the employes. The employes proceeded under sec. 8(a)(1) of the NLRA for reinstatement and backpay.

The Court made certain material points. First, it emphasized that the blacks had sought to bargain directly with the employer. 8/

6/ Section 111.32(5)(f)1., FEA.

7/ Emporium Capwell Co. v. WACO, 420 U.S. 50, 88 LRRM 2660 (1975).

8/ "Before turning to the central questions . . ., it is important to have firmly in mind the character of the underlying conduct . . . . As stated, . . . the employees were discharged for attempting to bargain with the Company over the terms and conditions of employment as they affected racial minorities." 88 LRRM at 2664.

Second, it underscored the importance of the exclusivity and majority rule principles to the NLRA. 9/ Third, the Court recognized the union's duty of fair representation as a constraint on the majoritarian process, saying: "Congress implicitly imposed upon [unions] a duty fairly and in good faith to represent the interests of minorities within the unit." 10/ Fourth, the Court recognized that the NLRA and Title VII must be construed together as a harmonious whole, 11/ and favorably noted that the NLRB had done so: 12/

> "And the Board has taken the position that a union's refusal to process grievances against racial discrimination, in violation of that duty [of fair representation], is an unfair labor practice *** Indeed, the Board has ordered a union implicated by a collective bargaining agreement in discrimination with an employer to propose specific contractual provisions to prohibit racial discrimination."

Thus, the principal of exclusive representative "[is] tempered by safeguards for the protection of minority interests." 13/

Nevertheless, the Court denied the 8(a)(1) claim on the basis of the NLRA principles of majoritarian rule and exclusive representation. Having denied the claim under the NLRA, the Court left open the viability of a Title VII action. Assuming arguendo that the employer's conduct, although permissible under the NLRA, was violative of Title VII, 14/ the Court said:

> "If the discharges in this case are violative of sec. 704(a) of Title VII, the remedial provisions of that title provide the means by which Hollins and Hawkins may recover their jobs with back pay." 15/
>
> "Respondent objects that reliance on the remedies provided by Title VII is inadequate effectively to secure the rights conferred by Title VII. * * *
>
> "Whatever its factual merit, this argument is properly addressed to the Congress and not to this Court or the NLRB." 16/ (Emphasis added.)

9/ "Central to the policy of fostering collective bargaining . . . is the principle of majority rule . . . in full awareness that the superior strength of some individuals or groups might be subordinated to the interest of the majority." 88 LRRM at 2665.

"The potential for conflict . . . is manifest. With each group able to enforce its conflicting demands . . . the probability of strife and deadlock is high . . . ." 88 LRRM at 2668.

10/ 88 LRRM at 2666.

11/ ". . . [W]e must construe the NLRA in light of the broad national labor policy of which it is a part." 88 LRRM at 2667.

12/ 88 LRRM at 2666.

13/ 88 LRRM at 2666.

14/ 88 LRRM at 2669.

15/ Id.

16/ Id.

On the basis of the foregoing, we construe the federal law to require the NLRB and this commission, when bound to apply federal law, to harmonize the labor relations law and fair employment law. Therefore, in determining whether a union has breached its duty of fair representation the commission has the duty and the power to determine whether the union violated the proscriptions of the fair employment law.

The employer underscores the importance of adherence to the federal substantive law because it is in interstate commerce and governed by the NLRA, and under Tecumseh Products 17/ the commission has the jurisdiction and duty to apply only federal substantive law. However, Title VII law does not protect against discrimination on the basis of handicap. Nevertheless, Wisconsin's FEA does so protect, and as a state agency the commission must harmonize the administration of its laws with other state enactments such as the FEA. 18/

The issue of DILHR's primary jurisdiction

This case presents an issue not discussed in Emporium, viz., under what circumstances must an employe utilize one agency rather than another when both agencies have subject matter jurisdiction over the question. Although Emporium appears to implicitly hold that the NLRB had power to decide a Title VII question, although the Equal Employment Opportunity Commission (EEOC) has primary jurisdiction over those questions, the facts of that case prevent it from being precedent that the NLRB or the commission should decide any and all Title VII or FEA questions with which it is presented. There, the employes sought directly to avoid the principle of exclusive representation by the union, a matter which goes to the core of the NLRB's responsibility. Here, on the other hand, there is no question but that a union may not discriminate on the basis of handicap; rather, the question is which agency should decide whether the employer's or the union's conduct constitutes discrimination by reason of handicap.

The doctrine of primary jurisdiction is well ensconced in Wisconsin law. Speaking to the role of the courts in respect to the primary jurisdiction of administrative agencies, the court has said:

> "The trial court should exercise its discretion with an understanding that the legislature has created the agency in order to afford a systematic method of fact-finding and policy-making and that the agency's jurisdiction should be given priority in the absence of a valid reason for judicial intervention. 19/

Unquestionably the commission must respect the primary jurisdiction of DILHR as much as should the courts. While in certain circumstances an FEA allegation may be only one element among many advanced as a reason why the union breached its duty of fair representation, in which case deferral to DILHR would be less compelling, here the sole

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17/ Tecumseh Products Co. v. Wisconsin E.R. Board, 23 Wis. 2d 118, 128, 126 N.W. 2d 520 (1964).

18/ See Board of Education v. WERC, 52 Wis. 2d 625, 640, 191 N.W. 2d 242 (1971).

19/ Wisconsin Collectors Asso. v. Thorp Finance Corp., 32 Wis. 2d 145 N.W. 2d 33 (1966).

allegation against the employer and the union is that they have discriminated on the basis of handicap in violation of the FEA. In this circumstance, we believe the commission should defer to DILHR which has primary jurisdiction over the question presented.

In arriving at this conclusion, we note that the question presented is not merely a fact question going to the basis of the conduct of the union and the employer. In addition, there is the issue of what constitutes discrimination by reason of handicap within the meaning of the FEA, and the primary jurisdiction doctrine relates to policy-making as well as to fact-finding.

Accordingly, we believe the legislative policy is best served by requiring a person claiming union and employer discrimination solely on the basis of handicap to proceed before DILHR rather than here.

The issue whether the commission should make an exception to the primary jurisdiction of DILHR on the facts of this case.

As noted, the primary jurisdiction doctrine is not an absolute but requires the exercise of discretion. The question becomes whether the commission should make an exception to deferral to DILHR's primary jurisdiction in the circumstances of this case.

Complainant was discharged in 1971. The case proceeded to the supreme court on the question whether complainant fairly had alleged a breach of the duty of fair representation. To dismiss the complaint would require complainant to commence a new proceeding in which the parties would be required to undertake a full hearing, absent their ability to stipulate to the record here. If there were nothing more to consider, the commission might proceed to determine the FEA question, even though it might entail making policy in that area and notwithstanding DILHR's primary jurisdiction. There is something more, however. Complainant did not raise the discrimination by reason of handicap argument at any time before examiner Bellman or the commission in 1972; before the circuit court in 1973; before the supreme court in 1974 or 1975; or before examiner Fleischli in 1975 or 1976. The argument is raised here for the first time. We also note that complainant argued in supreme court that the union's breach of duty lay in deciding not to proceed to arbitration because of the cost involved. After full hearing, the examiner has found that cost was not a factor in the union's decision, and that the union in good faith decided the question on the basis of its opinion of the merits of the grievance. Complainant fails to make any argument here that cost was a factor in the union's decision, or that the examiner's findings in any other way are in error, except for its now introduced theory of handicap discrimination. It appears to us that, being totally unable to find fault with the examiner's findings of fact and conclusion of law, complainant injects a new theory of the case under FEA to overcome the soundness of the examiner's decision.

Accordingly, under these circumstances, the commission will comply with the primary jurisdiction doctrine by holding that complainant should have proceeded on his discrimination by reason of handicap theory before DILHR and not here. Since the complainant's petition for review and brief hinge completely on his handicap theory, it offers no other basis for reversing the examiner. The commission has reviewed the record, and cannot on its own discover any other basis for reversing or modifying the examiner's decision.

Accordingly, the complaint is dismissed on the ground that the record supports the findings, conclusion and order of examiner; the commission adopts the examiner's rationale as its own; and the

commission declines to rule on the discrimination by handicap theory because the legislature has chosen another agency to be primarily responsible for finding the facts and developing the law in that area.

Comments regarding complainant's discrimination by reason of handicap theory.

It is conceivable that a court might rule that the commission should rule on the FEA question. A further remand would be necessary, the commission again would have to familiarize itself with a lengthy record, and this 1971 discharge might not become resolved for some time. Therefore, the commission herein sets forth how it would rule on the alleged discrimination by reason of handicap theory were it properly here for decision. By presenting our views, a court on review will be in a better position to decide whether a further remand is necessary or desirable.

In our view, the complainant's theory of discrimination by reason of handicap under FEA is without merit. The union in its arguments to the employer during the processing of the grievance urged the employer not to discharge the employe because of his health problems. The employer's decision to discharge assumed that complainant might have legitimate health problems, but decided its interests in regular attendance required the discharge anyway.

Complainant's argument confuses the cause of his poor attendance record with the fact of such record. He was not discharged because he frequently was ill. He was discharged because of frequent nonattendance. The fact that illness may have caused much or most of the nonattendance is not dispositive. On complainant's argument, an employer could not discharge, or refuse to hire, a paraplegic for a job requiring the use of both legs, because paralegia was the cause of the loss of the use of the legs. The legislature did not contemplate such a result, as evidenced by the provision in sec. 111.32 (5)(f)1, FEA, that there is no handicap discrimination where the handicap is reasonably related to the individual's ability adequately to undertake the job-related responsibilities. Complainant not only has failed to show that despite the handicap of frequent illness he could show up for work with reasonable regularity, but the record demonstrates the contrary.

The union acted reasonably within the scope of its discretion in concluding that the grievance was without merit on either of two grounds. First, it reasonably could have concluded that no arbitrator would believe that the employer discharged grievant because of handicap as opposed to his poor attendance record. Second, it reasonably could have concluded that, even if the employer had based its decision on grievant's frequent illnesses, an arbitrator would find the employer properly discharged the grievant anyway because of the consequent inability of grievant to perform his job efficiently. The union's judgement was reasonable and untainted by caprice, arbitrariness or bad faith.

Dated at Madison, Wisconsin this 17th day of January, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Chairman

Herman Torosian, Commissioner