STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CELIA THOMAS, Complainant, vs. MILWAUKEE LEGAL SERVICES, INC. Respondent.	Case I No. 18844 Ce-1589 Decision No. 13367-B
LUBERTHA JACKSON, Complainant, vs. MILWAUKEE LEGAL SERVICES, INC., Respondent.	Case II No. 18845 Ce-1590 Decision No. 13368-B
PAULETTE WATFORD, Complainant, vs. MILWAUKEE LEGAL SERVICES, INC., Respondent.	Case III No. 18846 Ce-1591 Decision No. 13369-B

Appearances:

Mr. Seymour Pikofsky, Attorney at Law, appearing on behalf of the Complainants.

Mr. Alan S. Brostoff, Attorney at Law, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Celia Thomas, Lubertha Jackson and Paulette Watford each having filed a Complaint alleging that Milwaukee Legal Services, Inc. has committed unfair labor practices within the meaning of the Wisconsin Employment Peace Act (WEPA); and the Commission having authorized Marshall L. Gratz, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Orders as pro-

FINDINGS OF FACT

1. That Celia Thomas, Lubertha Jackson and Paulette Watford are each individuals, referred to herein as Complainants; that Complainant Celia Thomas resides at 6844 North Darien, Apartment 1, Milwaukee, Wisconsin; that Complainant Lubertha Jackson resides at 4728-A North 20th Street, Milwaukee, Wisconsin; and that Complainant Paulette Watford resides at 3711 North 13th Street, Milwaukee, Wisconsin.

2. That Milwaukee Legal Services, Inc., is a Wisconsin corporation organized and existing under the laws of the State of Wisconsin with its principal place of business at 211 West Kilbourn Avenue, Milwaukee, Wisconsin; that Respondent is engaged in the business of providing legal services to low income individuals in the Milwaukee area; that for purposes of the above-captioned proceedings only, Respondent is an employer.[1/]

3. That Complainants were employes of Respondent at all material times until their employment was terminated by Respondent on February 10, 1975.

4. That at all material times Respondent has maintained three offices including a Northside Office located at 2635 West Center Street, Milwaukee Wisconsin; that at all material times after July, 1974 except as noted hereinafter, Respondent staffed said Northside Office with one managing attorney, several staff attorneys, three legal secretaries and a receptionist; that from and after at least the end of July, 1974 and until their termination, Complainants' employment by Respondent was as the legal secretaries at said Northside Office.

5. That Respondent's Northside Office receptionist at all material times was Margaret Garcia; that Garcia's duties as receptionist consisted of library filing, case docketing, intake registration of clients and telephone answering.

6. That Complainants were never given written descriptions of the duties of their positions; that, instead, each was orally informed

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1/ Respondent filed a Motion for Dismissal of the instant Complaints on the grounds, inter alia, that Respondent is not an employer subject to any of the provisions of WEPA. In order to avoid extensive

that her duties consisted of the typing and filing of legal documents and the docketing and closing of cases; that at least one of the Complainants was also informed that her duties included the handling of petty cash and trust accounts; that the duties in fact performed by Complainants consisted of those specified in said oral descriptions except that, without specific supervisory identification of such as their responsibility, the Complainants, on a rotation basis arranged among themselves, also performed Garcia's duties (including telephone answering) when Garcia was absent from her workplace due to, e.g. lunch and other breaks, illness and emergencies.

7. That sometime in August, 1974, Complainants and Respondent learned that Garcia intended to be absent from work for maternity reasons beginning on or about January 1, 1975; that at about the same time, Complainants learned from Garcia that the latter intended said absence to be for approximately two months in duration.

8. That after learning of Garcia's aforesaid intentions, Complainants at various times throughout the ensuing months before their February, 1975 termination collectively and concertedly met and discussed among themselves their concerns about the impact on their terms and conditions of employment of Garcia's anticipated absence, formulated a proposal to be presented to Respondent concerning same (to the effect that the Respondent should hire a replacement receptionist during said absence) and decided upon concerted actions to be taken in the event their demand was not met by Respondent, (to wit, that Complainants would perform all of Garcia's duties during her maternity leave except that they would refuse to perform assigned telephone answering duties); and that at various times during said period Complainants also met (at Complainants' request) individually with Larry Farris, the Northside Office managing attorney, and as a group with Farris and with Steven Steinglass, Respondent's Director and chief administrative officer, at which meetings Complainants expressed the aforesaid concerns, presented the aforesaid proposal, suggested the name of a possible replacement, and, on some occasions, threatened to engage in the aforesaid concerted refusal unless Respondent granted their proposal.

9. That Garcia was first absent for maternity reasons on January 17, 1975; that at no material time on or after that date did Respondent hire a replacement for Garcia; that Complainants allocated Garcia's duties (including telephone answering) among themselves and performed same in addition to their other duties during the period January 17-23, 1975 while continuing their attempts to convince Respondent to hire a

replacement.

10. That, however, on January 24, 1975, and at all material times thereafter, each of the Complainants refused to perform said telephone answering duties despite Complainants' receipt of:

a. direct oral orders from Farris and Steinglass on January 24, 1975 that they perform same;

b. a January 27, 1975 direct written order from Farris that they do so;

c. an oral warning from Steinglass on January 28, 1975 that if such refusals continued, Respondent would impose a disciplinary suspension;

d. oral assurances from Steinglass on January 24 and 28, 1975 that if the performance of Garcia's duties became too great a burden on Complainants then Respondent would provide Complainants with back up help as to their duties other than telephone answering by transferring typing projects to secretaries in other of Respondent's offices on an "as needed" basis; and

e. the urgings of Steinglass (orally on January 24, 1975) and of Farris (in writing on January 27, 1975) that Complainants comply with the disputed work assignments and challenge the propriety thereof through the grievance and final and binding arbitration procedure provided by Respondent in its written personnel policies, which procedure Steinglass offered on January 24, 1975 to expedite.

11. That as a result of Complainants' refusals noted in Finding No. 10 above, Garcia's telephone answering duties were performed by the Northside Office staff attorneys during the period January 24, 1975 through at least February 10, 1975; and that during said period, said staff attorneys spent substantially more time on telephone answering activities than would have been the case had Complainants' not engaged in said refusals.

12. That late in the morning of January 28, 1975, Steinglass presented to each of the Complainants a written notice stating that effective at noon on that day, each would be suspended without pay until they agreed to perform the telephone answering duties in question and that unless they so agreed within one week's time, their employment would be terminated; that said written notice included the following statement:

"The reasons for this suspension are: (a) your failure to obey written and oral orders of the Northside Managing

February 8, 1975 special meeting of Respondent's Board of Directors was called by Respondent's Board President, David A. Melnick; that the Complainants' maximum suspension period was extended to February 10, 1975 in order to accommodate said February 8, 1975 meeting date; that at said February 8 meeting, Complainants and their legal counsel were afforded the opportunity to be heard in an adversary, evidentiary hearing concerning the propriety of the disputed work orders and of the suspensions received by Complainants; that Respondent's Board then deliberated on the matter in closed session and issued a written determination providing for reimbursement of Complainants for three and one-half days pay on account of the delay in scheduling the Board meeting and also providing as follows:

1. All MLS employees must perform duties and grieve if they disagree with the orders of their supervisors.
2. The employees who filed the grievance should be offered reinstatement with directions to do the work the [sic] have been assigned, including the answering of the telephones; if they refuse, they are to be terminated.
3. If the resulting workload is too heavy, Larry Farris and Steve Steinglass should seek alternatives in consultation with the secretaries.
4. Job descriptions should be made available for legal secretarial positions which include phone answering, if assigned.

14. That copies of said written determination were hand delivered to each Complainant on February 9, 1975 along with notice of Complainants' right to submit the matter to arbitration pursuant to the provisions of the Respondent's personnel policies and notice that if they did not return to work and agree by 5:00 p.m. on February 10, 1975 to share in the answering of the telephones, they would be considered terminated; that none of the Complainants met the conditions for reinstatement set forth in said notice, and each was sent a written notice of termination effective February 10, 1975; and that the instant matters were not submitted to the aforesaid arbitration procedure by any of the Complainants.

15. That Respondent's above-noted warnings of suspension and termination of the Complainants were imposed exclusively on account of, and motivated in whole by Complainants' refusal to carry out Respondent's telephone answering work orders; that said suspension and termination actions were in no way motivated by animus on the part of Respondent concerning employe exercise of rights guaranteed by WEPA; and that said suspension and termination actions cannot be reasonably said to be likely to interfere with, restrain or coerce Complainant or any employes

in the exercise of their rights under WEPA.

On the basis of the foregoing Findings of Fact, the Examiner makes and issues the following

CONCLUSIONS OF LAW

1. That the concerted activities of Complainants Celia Thomas, Lubertha Jackson and Paulette Watford of refusing to perform a portion of the duties assigned to them by Respondent Milwaukee Legal Services, Inc. while continuing to perform the balance of the duties assigned to said Complainants by said Respondent, are outside the scope of the Sec. 111.04 rights of employes to engage in lawful concerted activities for purposes of collective bargaining and other mutual aid or protection for the reason that said activities by Complainants were not lawful.

2. That Respondent Milwaukee Legal Services, Inc., by its above-noted warnings, suspension and termination of the employment of Complainants Celia Thomas, Lubertha Jackson and Paulette Watford did not interfere with, restrain or coerce said Complainants or any other employes in the exercise of the rights guaranteed such persons in Sec. 111.04 of WEPA; and that, therefore, said Respondent did not, by such warnings, suspension and termination of said Complainants commit an unfair labor practice in violation of Sec. 111.06(1)(a) of WEPA.

On the basis of the foregoing Findings of Fact, and Conclusions of Law, the Examiner makes and issues the following

ORDER

IT IS HEREBY ORDERED that the Complaints filed in the above-captioned matters be, and each of the same hereby is, dismissed.

Dated at Milwaukee, Wisconsin this 19th day of December, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marshall L. Gratz

Marshall L. Gratz
Examiner

MILWAUKEE LEGAL SERVICES, INC. - Case I Decision No. 13367-B
- Case II Decision No. 13368-B
- Case III Decision No. 13369-B

MEMORANDUM ACCOMPANYING FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER

History of the Proceeding

The respective Complainants, in three separate Complaints filed on February 17, 1975, alleged that Respondent had committed"an unfair labor practice contrary to Chapter 111 of the Wisconsin Statutes" in that Respondent imposed a one week suspension without pay and subsequently discharged each of the Complainants "as a result of" certain "concerted action" theretofore undertaken by the Complainants "for the mutual benefit and protection" of themselves as legal secretaries and of fellow employes. The "concerted action" referred to in the Complaints was described therein as refusals "to assume additional duties of answering the telephone" during the absence of a co-worker, the office receptionist, on maternity leave.

The Examiner was appointed with respect to each of the three cases and consolidated same for the purposes of hearing. On March 31, 1975, Respondent filed its Answer, wherein Respondent denied that its suspension and termination of the Complainants constituted an unfair labor practice and alleged the affirmative defense that said actions were taken "for cause". Also on March 31, 1975 Respondent filed two Motions. Respondent's first Motion requested an Order that Complainants make their complaints more definite and certain. Respondent's second Motion requested an Order of Dismissal of the Complaints on the following grounds: 1) that there is pending a civil law suit apparently for damages for "wrongful termination of Complainant's employment" which involves substantially identical ultimate questions as are raised in the Complaints herein such that the continued pendency of the instant proceeding is inappropriate; 2) that Respondent is not an employer with respect to which the WERC may exercise unfair labor practice jurisdiction because Respondent is a federally funded and federally controlle instrumentality of the federal government and/or because Respondent is an agency administered and operated by either an officer of the United States or an agency of the United States or a person acting under such ants have failed to utilize and exhaust the final and binding arbitrati

Briefs were then submitted by both counsel with respect to Respondent's Motion to Dismiss. In their Brief in Opposition to Respondent's Motion to Dismiss, Complainants made their Complaints more definite and certain by specifically alleging that by the conduct alleged in the Complaints Respondent violated ". . . Section 111.06(1)(a) Wis. Stats. in that respondent interfered with complainants' rights to engage in lawful concerted activities for the purpose of mutual aid and protection as given to them by Section 111.04 Wis. Stats." Complainants specified the remedy sought by them as an order that Respondent cease and desist from the unfair labor practices set forth in the Complaint and for reinstatement of the Complainants with back pay.

POSITIONS OF THE PARTIES

Complainants, in their brief admit that Complainants refused to perform assigned duties and that their suspension and termination were on account of such refusal. Complainants argue, however, that Respondent's issuance of the work assignments in question constituted an unlawful unilateral change in Complainants' working conditions at a time when the parties had been negotiating about same and when Complainants were prepared to continue negotiating about same; and that, in Folding Furniture Works [2/], the Wisconsin Supreme Court held that the imposition of discipline on account of employes' refusals to accede to such an unlawful unilateral change in working conditions constituted interferenc with employe rights to bargain collectively and to engage in protected concerted activities. Complainant further argues that Complainants' concerted activity herein was lawful and protected under Sec. 111.04 of WEPA and that the Respondent cannot defeat the statutory protection simply by fashioning a management directive contrary to same and claiming that Complainants continuation of such activity in the face of such directive is insubordination. Finally, Complainants note that a line of federal cases holds that whether what an employe "says or does in the course of bargaining" is a valid defense to a charge of interference in response to employer discipline depends upon the outcome of a balancing of the need to protect employe rights from interference and the employer's need to maintain order and respect; and that when the "impulsive" actions of Complainants are taken into such balance, the results should favor Complainants. For the foregoing reasons, Com-

Respondent argues that Complainants' references in its brief to unlawful unilateral changes in working conditions should be stricken as immaterial to the matters raised in the pleadings; and that, in any event, Respondent was under no duty to bargain in the absence of a recognized bargaining agent and that the Complainants, rather than Respondents, were imposing the unilateral change since previously the Complainants had always performed Garcia's duties in her absence; Complainants' concerted refusal to perform assigned duties is indefensibly disloyal, and therefore neither lawful nor protected by Sec. 111.04, citing by analogy, NLRB v. Washington Aluminum Co. 370 U.S. 9, 50 LRRM 2235,2239 (1962); that where, as here, Complainants admit that their insubordination is the true reason for the imposition of discipline and discharge, and not merely a pretext for retaliation against protected activity, a complaint charging interference must fail per se; and that, in any event, the Record shows an absence of animus, disciplinary action taken proximate in time only with insubordination and not with prior open protected activities, and a disciplinary action of a reasonable and progressive nature such that Complainants have clearly failed to meet their burden of proving a violation of Sec. 111.06(1)(a). For the foregoing reasons, Respondent requests that each of the Complaints be dismissed.

DISCUSSION

The Complainants specified that the sole violation intended to be alleged by them herein was ". . . of Section 111.06(1)(a) Wis. Stats. in that respondent interferred with complainants' rights to engage in lawful concerted activities for the purpose of mutual aid and protection as given to them by Section 111.04 Wis. Stats." [3/] Based on that specification, Respondent requests that Complainants' references in its brief to allegedly unlawful unilateral changes in terms and conditions of employment be disregarded and stricken from the Record as matters neither alleged nor litigated. The Examiner understands said references by Complainant to be arguments supporting the assertions in its post-hearing brief that Respondent has interfered with Complainants' Sec. 111.04 [4/] rights "to bargain collectively through representatives of their own choosing". While such assertions might technically fall out-

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3/ Complainants' Brief in Response to . . . Motion to Make Complaints More Definite and Certain, at 5.

4/ This and all other Section references are to provisions of WEPA unless otherwise specifically noted.

side of that portion of the above specification beginning "in that...", the Examiner finds that said specification nevertheless put Respondent on notice that such contentions might be raised herein since such contentions fall within the purview of an alleged violation of Sec. 111.06 (1)(a). Therefore, all of Complainant's arguments have been considered herein by the Examiner.

Complainants admittedly refused to perform telephone answering duties in the face of direct supervisory orders that they do so. Complainants admit such refusals but assert that their right to do so is established in Secs. 111.04 and 111.06(1)(a). Respondents, motivated solely by said refusals of Complainants threatened to and, in fact, did suspend and ultimately discharge Complainants for said refusals. Complainants assert that by so doing Respondent violated Sec. 111.06(1)(a). The Examiner has concluded otherwise for the following reasons.

First, the Complainants' refusals to perform telephone answering duties in the face of direct supervisory orders that they do so does not constitute conduct protected by Secs. 111.04 or 111.06(1)(a). For said refusals by Complainants appear to be conduct that is expressly prohibited by Sec. 111.06(s)(h) which, inter alia, makes it an unfair labor practice for employes ". . . to engage in any concerted effort to interfere with production except by leaving the premises in an orderly manner for the purposes of going on strike." 5/ Moreover, even if they do not constitute conduct prohibited by WEPA, Complainants' refusals do constitute the sort of concerted effort by employes to impose terms and conditions of employment of their own choosing on their employer by means other than a complete stoppage of work that has been held to be outside the scope of statutory employe protections not

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5/ In Kearney & Treacher Corp., Dec. Nos. 11083-A, 11083-B (4/73), aff'd, 67 Wis. 2d 13 (1975), Cert. granted, (as to preemption only) U.S. (1975), the Commission held that a concerted refusal by employes to work scheduled overtime, which refusal interfered with production, constituted a violation of Sec. 111.06(2)(h). In the instant case, Complainants' refusal appears to have had the foreseeable result of interfering with Respondent's production (the provision of legal services) when, for a period of several days at least, Northside Office staff attorneys spent substantially more of their time than usual performing telephone answering duties. See, Finding No. 11, above.

materially different from those set forth in Secs. 111.04 and 111.06 (1)(a) of WEPA.[6/]

Even if it were assumed arguendo, that, as Complainant argues, Respondent committed an unlawful unilateral change in the Complainants' terms and conditions of employment by issuing the instant work orders [7/], a refusal by Complainants to perform same would still not fall within the protections of Secs. 111.04 and 111.06(1)(a). For a while employes would be statutorily protected from discipline for concertedly leaving the employer's premises and refusing all work rather than acceding to the employer's unilateral imposition of his terms and conditions of employment [8/], such employes would not, for the reasons noted above,

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6/ See, Elk Lumber Co, 91 NLRB 333, 26 LRRM 1493 (1950) (held, concerted slowdown by employes in effort to convince employer to reinstate the higher-paying piecework system unilaterally abandoned by the employer was an activity outside the scope of protected activities defined in the National Labor Relations Act); Valley City Furniture Co, 110 NLRB 1589, 35 LRRM 1265 (1954), enf'd 20 F.2d 947, 37 LRRM 2740 (CA 6, 1956); Kenosha Unified School District No. 1, Dec. No. 10752-A (7/72) (in concluding that concerted employe refusal to perform some duties that by practice were not purely voluntary while continuing to perform other duties was not protected activity under Municipal Employment Relations Act, Examiner issued dictum that same result would obtain under private sector labor law, citing Valley City Furniture above, and noted that in the private sector "[i]t is reasoned that partial strikes should not be protected because by that means a labor organization may bring about conditions that are neither strike nor work and thereby dictate the terms and conditions of employment; or in other words, engage in unilateral determinations of wages, hours and working conditions such as are disallowed to unions, as well as to employers."); cf. International Union, UAW v. WERB, 336 U.S. 245, 23 LRRM 2361 (1949) (the "Briggs-Stratton" case wherein a series of short walkouts by employes for unannounced union meetings during working hours was held not protected conduct under Sec. 7 of the National Labor Relations Act, Id. at 23 LRRM 2365); NLRB v. Insurance Agents' International Union, 361 U.S. 477, 45 LRRM 2705 (1960) (Court expressly assumed that Section 7 of the National Labor Relations Act does not protect insurance sales employes' conduct of refusing to solicit new business, refusing to comply with the employer's reporting procedures and absenting themselves from special business conferences arranged by the company while continuing to perform some of their assigned duties, Id. at 45 LRRM at 2706, n.6, 2710-11, nn. 22-23, citing Briggs-Stratton above.)

7/ That assumption is a doubtful one since it assumes the existence of a "representative of a majority of [Respondent's] employes in [a] collective bargaining unit" within the meaning of Secs. 111.06(1)(d) and 111.02(6) and it further assumes that Respondent was not attempting to implement its last-offered position following a bona fide impasse in collective bargaining with such representative.

8/ Such was the case in the Folding Furniture Works case, note 2 above heavily relied upon by Complainants. That case is inapposite herein because it was decided before the enactment of a provision comparable to Sec. 111.06(1)(h) of WEPA and because the refusal to accede involved therein did not involve an employe effort to continue working on terms of their own choosing.

enjoy such statutory protection if their refusal to accede took the form of a refusal to perform some work while continuing to perform the balance. 9/

Finally, Respondent's imposition of the instant warnings, suspensions and discharges herein was neither unlawfully motivated nor likely, under the circumstances here present, to interfere with, restrain or coerce employes in the exercise of any Sec. 111.04 rights. During the months of open concerted activities of meetings and discussions by Complainants among themselves and with supervision concerning the impact of Garcia's anticipated leave on Complainants' workload, Respondent took no disciplinary actions 10/ and showed no animus whatever. Only when Complainants attempted to establish their own terms and conditions of employment by refusing to comply with direct orders to perform certain duties did Respondent impose discipline 11/ , and then only after reasonable warning and in a progressive fashion, affording Complainants full opportunity to be heard before Respondent's Board of Directors prior to imposition of the ultimate measure, discharge. From the manner of Respondent's responses to Complainants' concerted activities, protected and unprotected, Complainants and all other employes could only conclude that Respondent objected to and took action against only Complainants' unprotected refusals to perform certain assigned duties.

For the foregoing reasons, each of the instant Complaints has been dismissed.

Dated at Milwaukee, Wisconsin this 19th day of December, 1975.

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By Marshall L. Gratz
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Examiner

9/ Partial strikes, even when provoked by employer unfair labor practices, are not protected under the National Labor Relations Act. Valley City Furniture Co., note 6 above.

10/ For that reason, the line of federal cases cited by Respondent (e.g. Bettcher Mfg. Co., 76 NLRB 526, 21 LRRM 1222 [1948] and Crown Central Petroleum Corp. v. NLRB, 430 F.2d 724 [CA 5, 1970]) are clearly distinguishable from the instant case. Unlike the Complainants, the employes in those cases were disciplined for the "insubordinate" tone and content of their verbal expressions to employer representatives during their presentation to the employer of employe positions on bargaining or grievance matters.

11/ Complainants' citation of Bob Henry Dodge, Inc., 203 NLRB 78 [No. 1], 83 LRRM 1077 (1973) is inapposite, for in that case the Board expressly found that the unlawfully disciplined employe had not disobeyed any management order. Id. at 1078.