

Case I  
No. 31843 Ce-1982  
Decision No. 20882-C

Mr. Mark A. Silverman, Attorney at Law, 610 North Water Street, Suite 110, Milwaukee, WI 53202, on behalf of the Complainant.

Mr. Robert W. Mulcahy, Mulcahy & Wherry, S.C., Attorneys and Counselors at Law, 815 East Mason Street, Suite 1600, Milwaukee, WI 53202-4080, on behalf of the Respondent.

On March 19, 1984, Examiner Robert M. McCormick, a member of the Commission's staff, issued Findings of Fact, Conclusions of Law and Order in the above-entitled matter wherein he dismissed a complaint filed by Patrick M. Gonyo which alleged that Trucker's & Traveler's Restaurant had engaged in certain unfair labor practices when it terminated Gonyo. The Examiner based his dismissal of the complaint upon a conclusion that the National Labor Relations Board had exercised its jurisdiction over matters relating to the discharge of Complainant Patrick M. Gonyo, and thus that the Commission was preempted from asserting its jurisdiction to regulate the conduct in question. On April 9, 1984, Complainant Patrick M. Gonyo filed a Petition with the Commission which stated:

Patrick M. Gonyo, by his Attorney, Mark A. Silverman, hereby petitions the Wisconsin Employment Relations Commission for review of the Order by Robert M. McCormick dated March 18, 1984.

Complainant Gonyo did not choose to supplement this Petition with a supportive brief and Respondent Trucker's & Traveler's Restaurant did not file a brief in opposition to said Petition. Having considered the record and the Examiner's decision, the Commission makes and issues the following

That Examiner Robert M. McCormick's Findings of Fact, Conclusions of Law and Order are hereby affirmed.

Given under our hands and seal at the City of  
Madison, Wisconsin this 10th day of October, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

- 1/ Pursuant to Sec. 227.11(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.12(1) and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.16(1)(a), Stats.

227.12 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025 (3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.12, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.11. If a rehearing is requested under s. 227.12, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.20 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

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

BACKGROUND

Complainant Patrick M. Gonyo's June 28, 1983, complaint names Trucker's & Traveler's Restaurant as the Respondent who "engaged in unfair labor practices and discriminatory acts when it terminated Patrick M. Gonyo as a dishwasher on January 28, 1983." The complaint identifies certain "members of the company" who engaged in unfair labor practices, including Jeffrey Limbach, whose title is listed in the complaint as Respondent's Manager. The complaint then states: that Patrick M. Gonyo was terminated for allegedly sexually harassing a waitress; that the waitress, who had been sexually harassing Gonyo, was not terminated; and that Gonyo was not given a chance to rebut the waitress' allegations of sexual harassment. The complaint, as it relates to Patrick M. Gonyo, 2/ then proceeds to state:

B) I believe the Trucker's & Traveler's Restaurant, acting through Limbach, violated my legal rights under Wisconsin Statutes for discriminating acts and unfair labor practice when he discharged me. (emphasis added)

DISCUSSION

While the complaint of Patrick M. Gonyo does not specify which statutory provision or provisions administered by this Commission were allegedly violated, it is clear from the content of the complaint that Trucker's & Traveler's Restaurant is the named Respondent in its capacity as Gonyo's employer. It is also clear that it is the act of discharge which is being complained of. Under these circumstances, it must be concluded that Gonyo was proceeding under Sec. 111.06(1) Stats., which prohibits certain types of employer conduct. 3/

When dismissing Patrick M. Gonyo's complaint, Examiner McCormick found that Gonyo had submitted "substantially identical . . . allegations" to the National Labor Relations Board. The Examiner concluded that the Board's exercise of its jurisdiction over said allegations, which involved activity arguably protected or prohibited by the National Labor Relations Act, operated to preempt this Commission from asserting its jurisdiction to regulate Respondent's conduct.

Both the National Labor Relations Act and the Wisconsin Employment Peace Act, under which the instant complaint was presumably filed, protect employes from being discharged for having exercised rights which those statutes establish. The Regional Director of Region 30 of the National Labor Relations Board in this instance refused to issue a complaint with respect to Patrick M. Gonyo's discharge

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2/ Patrick M. Gonyo also alleged certain retaliatory acts were taken against his brother. Jeffery Gonyo, Patrick M. Gonyo's brother, filed a separate complaint with the Commission regarding said acts. That complaint was also dismissed by Examiner McCormick. No appeal was taken from that decision.

3/ For instance Secs. 111.06(1)(a) and (c), Stats., state:

(1) It shall be an unfair labor practice for an employer individually or in concert with others:

(a) To interfere with, restrain or coerce his employes in the exercise of the rights guaranteed in s. 111.04.

. . .

(c) 1. To encourage or discourage membership in any labor organization, employe agency, committee, association or representation plan by discrimination in regard to hiring, tenure or other terms or conditions of employment. . . .

because "it does not appear that he was discharged because he had made complaints about working conditions or engaged in any other protected concerted or union activities." The Examiner correctly concluded that the foregoing refusal to issue a complaint represented an exercise of federal jurisdiction over alleged conduct protected by or prohibited by the National Labor Relations Act which serves to preempt assertion of state jurisdiction over the same conduct in this case under Sec. 111.06(1) of the Wisconsin Employment Peace Act. Thus to the extent that the instant complaint can fairly be read as claiming the Respondent violated Sec. 111.06(1), Stats., by discharging Gonyo because he was exercising rights protected by Sec. 111.06, Stats., the Examiner was correct when he dismissed the complaint.

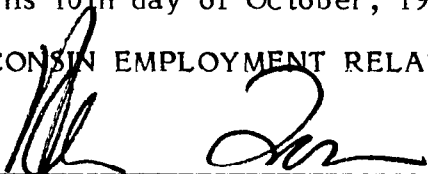
The complaint itself could also be interpreted as claiming that Respondent had engaged in sex discrimination by discharging Gonyo. Under such an interpretation, Gonyo's complaint would be subject to dismissal, not for lack of jurisdiction due to federal preemption, but because the Wisconsin Employment Peace Act does not prohibit such actions. 4/

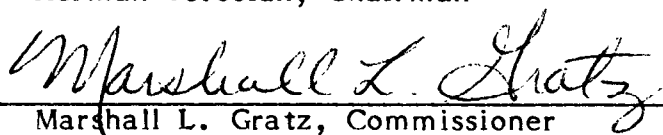
In argument to Examiner McCormick, Gonyo suggests that his complaint is against Limbach, who, as an employee, breached Gonyo's legal right to be free from sexual harassment and thus violated Sec. 111.06(2)(a), Stats. 5/ As set forth earlier herein, the complaint names only Trucker's & Traveler's as the Respondent, mentions Limbach only as an agent of the employer, and focuses on the act of termination, not upon any alleged failure of Limbach to protect Gonyo from sexual harassment by a fellow employee. Thus, we do not view Gonyo's above-noted argument to the Examiner as a basis for reversing the Examiner's dismissal of the complaint.

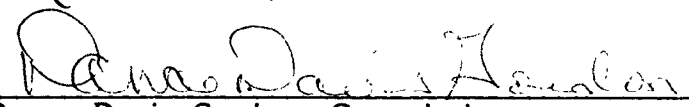
Dated at Madison, Wisconsin this 10th day of October, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

  
Herman Torosian, Chairman

  
Marshall L. Gratz, Commissioner

  
Danae Davis Gordon, Commissioner

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4/ Sec. 111.31, Stats., does prohibit sex discrimination in employment and we note that Gonyo filed a complaint under that statute with the Wisconsin Department of Industry, Labor and Human Relations which administers that statutory provision.

5/ Sec. 111.06(2), Stats., regulates certain employee conduct such as:

(2) It shall be an unfair labor practice for an employee individually or in concert with others:

(a) To coerce or intimidate an employee in the enjoyment of his legal rights, including those guaranteed in s. 111.04, or to intimidate his family, picket his domicile, or injure the person or property of such employee or his family.

(b) To coerce, intimidate or induce any employer to interfere with any of his employees in the enjoyment of their legal rights, including those guaranteed in s. 111.04, . . .