

COURT OF APPEALS DECISION  
DATED AND RELEASED  
June 22, 1993

STATE OF WISCONSIN  
IN COURT OF APPEALS  
DISTRICT I

EDNA JOHNSON,  
Plaintiff-Appellant,

vs.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION and AFSCME COUNCIL 24,  
WISCONSIN STATE EMPLOYEES UNION,  
Defendants-Respondents.

No. 91-2324  
Decision No. 21980-E

APPEAL from a judgment of the circuit court for Milwaukee county: VICTOR MANIAN, Judge.  
Affirmed.

Before Wedemeyer, P.J., Sullivan and Fine, JJ.

PER CURIAM. Edna C. Johnson appeals from a circuit court judgment affirming an order of the Wisconsin Employment Relations Commission (the Commission). *See* sec. 227.58, Stats. The order pertained to Johnson's complaint that AFSCME Council 12, Wisconsin State Employee's Union (AFSCME) violated unspecified sections of sec. 111.84, Stats., by failing and refusing to fairly represent her in a discharge grievance proceeding. We conclude that the Commission properly dismissed Johnson's unfair representation claim because the claim was barred by the statute of limitations. Accordingly, we affirm.

On September 17, 1981, Johnson, a Payroll and Benefits Specialist IV employee of the State of Wisconsin at the University of Wisconsin-Milwaukee (UWM) for sixteen years, was discharged. Johnson disputed the termination and brought it to the attention of her union, AFSCME. AFSCME then filed a grievance against UWM on Johnson's behalf. The grievance proceeded through the three initial steps of grievance procedure to arbitration. On February 18, 1982, AFSCME sent Johnson a letter, informing her that it would not pursue her grievance to arbitration because, based on Johnson's work record, she could not prevail. AFSCME advised Johnson that she could continue the grievance procedure either with the assistance of her local union or by herself. Johnson requested Local 82, AFSCME to represent her, but it declined to do so. Subsequently, Johnson retained counsel, proceeded to arbitration at her own cost, and won reinstatement. 1/

On July 13, 1984, Johnson filed a complaint against AFSCME which became effective on August

8, 1984, upon paying the filing fee. It alleged unfair labor practices under sec. 111.84, Stats., for AFSCME's failure to fairly represent her in the discharge matter. She demanded reimbursement from AFSCME including arbitration costs and attorneys fees. Johnson again alleged these claims in an amended complaint filed December 10, 1984. 2/ The Commission subsequently agreed with the hearing examiner's conclusion that this claim must be dismissed because it was barred by the time limitation found in sec. 111.07(14), Stats. 3/ The circuit court affirmed the Commissions conclusions and Johnson now appeals to this court.

Because the relevant facts concerning Johnson's discharge claim are undisputed, the application of the statute of limitations to these facts presents a legal issue. *See Kwaterski v. LIRC*, 158 Wis.2d 112, 116, 462 N.W.2d 534, 535 (Ct. App. 1990). We grant deference, however, to the Commission's legal conclusions because of its experience in applying limitations and in evaluating this type of claim. *See sec. 227.57(10), Stats.; Monroe v. Funeral Directors & Embalmers Examining Board*, 119 Wis.2d 385, 389, 349 N.W.2d 746P 748 (Ct. App. 1984).

The violation of a duty of fair representation arises only in the event of the union's arbitrary, capricious or bad faith refusal to process the grievance. *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). A claim of failure to provide fair representation accrues when the employee discovers that the union will not take further action on a grievance. *Martin v. Youngstown Sheet & Tube Co.*, 911 F.2d 1239, 1246 (7th Cir. 1990). Under sec. 111.07(14), Stats., a claim for failure to provide fair representation must be made within "one year from the date of the specific act or unfair labor practice alleged." 4/

Johnson concedes that she received a letter from AFSCME's executive director dated February 18, 1982, informing her that AFSCME would not pursue her claim to arbitration. She admits receiving a letter to the same effect from her local union dated March 12, 1982. Therefore, her complaint, filed July 13, 1984, and made effective August 8, 1984, was tardy under the one-year limitation of sec. 111.07(14), Stats. Johnson argues, however, that her claim for unfair representation did not accrue when she was informed of AFSCME's decision, but rather when she discovered the reason for AFSCME's decision. Johnson claims that, more than one year after AFSCME informed her of their decision, she learned that AFSCME failed to review her files or interview her witnesses and then dropped her complaint, along with many others, in exchange for favorable contract terms with the State.

With regard to Johnson's claim that AFSCME made its decision without reviewing her file, Johnson's own complaint alleges that she learned this fact on February 18, 1982, the same date she learned of AFSCME's decision. As to Johnson's allegation that her grievance was dropped in exchange for favorable contract terms, we note that Johnson has failed to point to anything in the record that would support that statement other than her testimony that she discovered that her grievance was placed on an 'expedited grievance' list.

The Commission concluded that even if Johnson could prove her allegations, the mere fact that she had only recently discovered the motivation for the unions decision was insufficient to toll the statute of limitations. To do so, the Commission believed, would undermine the policy of "encouraging rapid and final resolution of labor disputes." (Citation omitted.)

Under these circumstances, we affirm the legal findings of the Commission that no reason exists to allow an enlargement of the time limit of sec. 111.07(14), Stats. Johnson learned of AFSCME's decision not to pursue her grievance more than two years before she filed her complaint, and thus, her claim was barred by the statutory time limit.

Johnson also argues that she delayed filing her unfair representation claim because she had not exhausted the arbitration process. She reasons that she had two valid claims, one against AFSCME for unfair representation and the other against the State for wrongful discharge. She argues that she could not independently proceed against AFSCME without first concluding her claim against the State. Thus, she concludes, the time limits of sec. 111.07(14), Stats., tolled until she completed the arbitration against her employer.

We reject Johnson's argument. The United States Supreme Court has held that a plaintiff in an unfair representation suit against a union has a separate action against the employer. *Breininger v. Sheet. Metal Workers Int'l Assn. Local Union No. 6*, 493 U.S. 67 (1989). The Court noted that an employee's right to fair representation by the union does not depend upon a concomitant right against the employer for breach of the collective bargaining contract. *Id.* at 80.

Johnson's initial suit against her employer did not name AFSCME. Her complaint against AFSCME did not name her employer. The Commission concluded, in accordance with its own prior decisions, that the "merits of the grievant's contract claim against the employer becomes immaterial to the determination of the issues presented in the [present] complaint, making exhaustion of grievance remedy unnecessary and hence, no justification for tolling the statute of limitation." Here, the alleged "wrong" committed by the union was its failure to proceed to arbitration. The Commission explained that because a union's decision to not proceed to arbitration must be made based on *its evaluation of the chances* of prevailing at arbitration, *see Mahnke v. WERC*, 66 Wis.2d 524, 534-35, 225 N.W.2d 617, 623-24 (1975), the actual outcome of the subsequent arbitration is immaterial.

We believe that the legal conclusions reached by the Commission were reasonable. Johnson's discharge arbitration suit against her employer did not and could not resolve her dispute against AFSCME. *See DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 164-65 (1983) (fair representation suit by employee against union may be brought "notwithstanding the outcome" of arbitration). We affirm the determination that the doctrine of exhaustion of remedies is inapplicable to this case and did not toll the time limits of sec. 111.07(14), Stats.

As a final attack on the Commission's decision, Johnson argues that the Commission erred in failing to note "[t]he fact that the [unfair representation] complaint... was paralleled by a violation claim against the employer. As we have noted, these claims, as brought by Johnson, are separate and discrete. Because the employer was not joined in the complaint against AFSCME, the Commission explained that the merits of Johnson's contract claim against the State were immaterial.

In summary, we conclude that Johnson's claim of unfair representation against AFSCME arising from her discharge claim accrued more than one year before she filed her complaint and therefore her claim is barred by the statute of limitations.

By the Court.--Judgment affirmed.

This opinion will not be published. Rule 809.23(1)(b)5, Stats.

#### Endnotes

1/ On August 20, 1984, this court affirmed Johnson's reinstatement and directed the Commission to compute her back pay and deductions.

2/ The amended complaint included a claim that the union had failed to fairly represent her in her subsequent harassment claim. The alleged harassment occurred upon Johnson's reinstatement to her original position at UWM.

3/ The Commission, however, vacated the portion of the hearing examiner's findings that also dismissed Johnson's subsequent claim as to an alleged unfair labor practice committed October 10, 1984. That claim, alleged in the amended complaint, arose from the failure of the Union to take Johnson's harassment grievance to arbitration.

The hearing examiner subsequently filed supplemental findings for that claim on November 15, 1990. The examiner found that after Johnson had been reinstated to her former position, she filed a new grievance alleging harassment and discrimination by her supervisors. After some discussion between AFSCME's Assistant Director and a field representative, AFSCME decided not to represent Johnson at arbitration primarily because it believed the problems she had faced had been alleviated. The examiner concluded that AFSCME did not commit an unfair labor practice in violation of sec. 111.84(2)(a), Stats. The Commission adopted the examiner's conclusions. See Section 111.07(5), Stats.

Although Johnson raised the issue of breach of fair representation as to the harassment grievance before the circuit court, she has not presented or briefed this issue in her appellate brief. Thus, we deem it abandoned. *See Reiman Associates v. R/A Advertising*, 102 Wis.2d 305, 306 n. 1, 306 N. W. 2d 292, 294 n. 1 (Ct. App. 1981).

4/ Section 111.84(4), Stats., provides: 'Any controversy concerning unfair labor practices may be submitted to the commission as provided in s. 111.07....'

Section 111.07(14), Stats., provides: 'The right of any person to proceed under this section [prevention of unfair labor practices] shall not extend beyond one year from the date of the specific act or unfair labor practice alleged.'