

STATE OF WISCONSIN  
CIRCUIT COURT  
MILWAUKEE COUNTY  
BRANCH 13

EDNA C. JOHNSON,  
Petitioner,

vs.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION, AND AFSCME COUNCIL 24,  
WISCONSIN STATE EMPLOYEES UNION,  
Respondent,

Case No. 90-CV-016842

Decision No. 21980-E

DECISION

This case is before the court on a judicial review of a Wisconsin Employment Relations Commission (WERC) decision dismissing the petitioner, Edna C. Johnson's complaint based on the one year statutory time limitation of Sec. 111.07(14) Wis. Stats.

In September of 1981, Mrs. Johnson was discharged from her position as a Payroll and Benefits Specialist for the University of Wisconsin - Milwaukee (UWM). She disputed the termination and brought it to the attention of her union, AFSCME Council 24, Wisconsin State Employees Union (WSEU). They then brought a grievance on behalf of Mrs. Johnson against UWM. At the third step of the grievance procedure, WSEU declined to represent or aid Mrs. Johnson any further.

In March of 1982, Mrs. Johnson wrote to the WSEU inquiring as to whether "the refusal to take [her] discharge to arbitration mean (sic) that [her] mandatory remedies under the contract have been exhausted." At no time did Mrs. Johnson receive a reply to this inquiry and she, therefore, proceeded to arbitration on her own and at her own cost.

Mrs. Johnson was successful at the arbitration hearing. Apparently UWM appealed the arbitrator's award to the circuit court which upheld the arbitrator. This decision was subsequently upheld by the court of appeals. Prior to the court of appeals decision, Mrs. Johnson filed a prohibited practice complaint against the WSEU alleging that their refusal to represent her was in violation of sec. 111.84, Wis. Stats.

After being reinstated to her same position, Mrs. Johnson filed a new grievance alleging harassment and discrimination by her supervisors. She made her first complaint to the WERC on July 13, 1984. This, complaint was not effectively commenced until August 8, 1984, when Mrs. Johnson properly paid the filing fee. After some discussion between WSEU's Assistant Director and a Field Representative, the WSEU decided not to represent Mrs. Johnson at arbitration primarily because they believed that the problems she had faced were now alleviated.

Mrs. Johnson subsequently amended her complaint to add a claim that WSEU's refusal to pay costs was a prohibited practice.

At the hearing stage, the examiner specifically found the date of the alleged unfair labor practices occurred on February 19th or 20th of 1982, and that the latest date that Mrs. Johnson conceivably could claim that they occurred would be March 12 when she received WSEU's letter informing her that they would not be taking her case to arbitration. The examiner also found that the failure of the union to respond to the March 27, 1982 letter from Mrs. Johnson did not toll the statute of limitations because it was reasonable for Johnson to assume that she had exhausted any union appeal procedure. The filing of the initial complaint on July 13, 1984 was more than one year from the date of the alleged unfair labor practice and therefore, the complaint was untimely pursuant to Sec. 111.84(4) and Sec. 111.07(14) of the Wis. Stats.

Johnson then appealed the examiner's decision to the WERC. WERC affirmed the examiner's findings of fact and conclusions of law relating to any alleged unfair labor practices that occurred more than one year from the August 8, 1984, effective date of filing. However, WERC overruled the examiner on the October 10, 1984 complaint concerning the failure of the union to take Mrs. Johnson's grievance of harassment to arbitration. WERC ruled that the harassment grievance was a separate issue of fair representation and as such should not have been dismissed. The effect was to remand that part of the decision to the examiner.

After a new hearing, the examiner found that no unfair labor practice had been committed by WSEU's failure to take Mrs. Johnson's case to arbitration. That decision was subsequently appealed to and upheld by WERC. Mrs. Johnson now appeals to this court pursuant to Sec. 227.53, Wis. Stats., for judicial review of the WERC decision.

A reviewing court does not substitute its judgment for that of an agency as to the

weight or credibility of a disputed finding of fact as long as there is substantial evidence to support it in the record. Sec. 227.57(6), Wis. Stats.; Davis v. Psychology Examining Board, 146 Wis. 2d 595, 599, 431 N.W.2d 730 (1988). The court is also not bound by the agency's conclusions of law but will uphold them if they are reasonable. Cuna Mutual Insurance Soc. v. Wis. Dept. of Revenue, 120 Wis. 2d 445, 450, 355 N.W.2d 541 (1984).

Mrs. Johnson alleged that WSEU violated Sec. 111.84, Wis. Stats., in its failure to represent her at the arbitration hearing concerning her discharge. There is a one year limitation period for controversies submitted to WERC. Sec. 111.07(14), Wis. Stats., White v. Ruditys, 117 Wis. 2d 130, 136, 343 N.W.2d 421 (1983).

On March 12, 1982, Mrs. Johnson was clearly informed that the union would no longer represent her in her discharge grievance. She did not file her complaint with WERC until July 13, 1984. A claim for a union's failure to represent accrues when the employee is aware that the union will not take further action on the grievance. Martin v. Youngstown Sheet and Tube Co., 911 F.2d 1239 (7th Cir. 1990). Mrs. Johnson's claim accrued on March 12, 1982, and she had one year from that date to act. The letter from Mrs. Johnson to which the Union never responded is not enough to toll the statute of limitations. The complaint filed by Mrs. Johnson was filed in July of 1984 nearly two years after she was unambiguously informed that the union would no longer act for her benefit. Based on the foregoing reasons the WERC decision dismissing Mrs. Johnson's discharge grievance is affirmed.

WERC did initially reverse the examiner's dismissal regarding Mrs. Johnson's claim for harassment. Upon review, the examiner found no unfair labor practice by the union.

"A union has considerable latitude in deciding whether to pursue a grievance through arbitration." Mahnke v. WERC, 66 Wis. 2d 524, 531, 225 N.W.2d 617 (1975). A breach of the statutory duty of fair representation occurs only when the union's conduct is arbitrary, discriminatory or in bad faith. Vaca v. Sipes, 386 U.S. 171 (1967).

In this case, the examiner found no evidence that the union's conduct was arbitrary, discriminatory or in bad faith; Mrs. Johnson failed to meet her burden of proof relating to this matter. In fact, the union decided not to pursue Mrs. Johnson's harassment charge to arbitration because after speaking with her it appeared that many of her complaints had been resolved, especially her complaints about her phone and the adequacy of her office space.

Based upon the foregoing, this court affirms the findings and decision of WERC dismissing Mrs. Johnson's discharge grievance and its decision finding no unfair labor practice on the part of the union in refusing to represent her at arbitration on her charges of harassment.

Dated this 5th of June, 1991, at Milwaukee, Wisconsin.

By the Court:

/s/ Victor Manian

Victor Manian

Circuit Court Judge