

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

SANDRA A. ANDERSON,	:	
	:	
Complainant,	:	
	:	Case 26
vs.	:	No. 38586 MP-1953
	:	Decision No. 24474-G
MORAINÉ PARK FEDERATION OF	:	
TEACHERS LOCAL 3338 and	:	
MORAINÉ PARK TECHNICAL	:	
INSTITUTE,	:	
	:	
Respondents.	:	
	:	

Appearances:

Ms Sandra A. Anderson, 816 Neufeld Street, Green Bay, Wisconsin 54304, appearing on her own behalf.
Edgerton, Ondrasek, St. Peter, Petak & Massey, Attorneys at Law, by
Mr. John A. St. Peter, 10 Forest Avenue, P.O. Box 1276, Fond du Lac, Wisconsin 54936-1276, appearing on behalf of Moraine Park Technical Institute.

Mr. Alan S. Brostoff, Attorney at Law, Two Plaza East, Suite 1275, 330 East Kilbourn, Milwaukee, Wisconsin 53202, appearing on behalf of Moraine Park Federation of Teachers Local 3338.

ORDER

On May 26, 1987, Sandra A. Anderson filed a complaint with the Wisconsin Employment Relations Commission alleging that the Moraine Park Technical Institute (now the Moraine Park Technical College) had committed a prohibited practice by discharging her and that the Moraine Park Federation of Teachers, Local 3338, herein the Union, had committed prohibited practices by failing to fairly represent her in a grievance arbitration proceeding which upheld her discharge. Anderson also commenced a proceeding before the circuit court for Fond du Lac County seeking to vacate the arbitrator's award pursuant to ch. 788, Stats.

On September 1, 1987, hearing was held before Commission Examiner Lionel L. Crowley as to Anderson's complaint. During the course of the hearing, representatives of the parties reached a settlement agreement. Under the settlement agreement, Anderson's complaint would be dismissed with prejudice, and the Union agreed that it would appear and participate in Anderson's circuit court action seeking to vacate the arbitration award and would support Anderson's position in that action. Based on that settlement agreement, on September 21, 1987, Examiner Crowley issued an Order dismissing Anderson's complaint with prejudice.

On April 6, 1988, Anderson filed a Motion with the Commission asking that her complaint be reopened because of the alleged improper and/or lack of legal representation she received from her attorney when he represented her in the proceeding before Examiner Crowley. On May 6, 1988, Anderson filed an additional Motion with the Commission seeking an order setting aside the arbitrator's award and granting a new hearing because of newly discovered evidence.

In August, 1988, the circuit court denied Anderson's Motion to Vacate the arbitration award. Anderson appealed to the court of appeals.

On September 12, 1988, Anderson filed an additional Motion with the Commission asking that her prohibited practice complaint be reopened because of her attorney's failure to exercise reasonable care in providing legal services to her.

On November 4, 1988, Anderson moved to reopen her prohibited practice complaint asserting that the Union had failed to comply with the settlement agreement which was the basis for dismissal of the complaint.

On November 21, 1988, the Commission issued two Orders (Dec. Nos. 24474-D, E) which denied the Motions to reopen which Anderson had filed in April, May and September of 1988. As to Anderson's Motions to reopen her prohibited practice complaint based upon the alleged failure of her attorney to properly

represent her, a Commission majority (Commissioner Hempe dissenting) decided that the interest of finality warranted denial of said Motion, noting that Anderson could seek redress from her attorney in a malpractice action. As to Anderson's Motion asking that the arbitration award be set aside, the Commission concluded that it lacked jurisdiction because the matter was pending before the courts under ch. 788, Stats., and because the Commission generally can overturn the result reached in arbitration awards only in the context of a duty of fair representation/violation of contract complaint proceeding (such as the one filed by Anderson which had been dismissed upon the parties' agreement). Anderson sought judicial review in the circuit court for Brown County of the Commission's November 21, 1988 Orders.

On February 23, 1989, the Commission issued an Order addressing Anderson's November 4, 1988 Motion that her prohibited practice complaint be reopened because the Union allegedly breached the settlement agreement. The Commission decided to conduct hearing as to whether the Union had complied with the settlement agreement. The Commission concluded that as to this Motion, the need for finality of administrative proceedings was not sufficient to deny Anderson the opportunity to establish that the settlement agreement had been breached. The Commission reasoned that hearing was appropriate because the settlement agreement was the underlying premise upon which the Examiner's Order was based, because the Commission was the exclusive source through which the remedy requested (i.e., reopening the case) could be received, and because if there was a failure to comply with the settlement agreement, such a failure erodes the fundamental integrity of the Commission's processes.

Hearing on the issue of compliance with the settlement agreement was conducted before Commission Examiner Peter G. Davis on April 24, 1989. During said hearing, a dispute arose as to whether Anderson could compel the testimony of the Union's attorney. On May 23, 1989, the Union filed a Motion to Quash the subpoena by which Anderson sought to compel the testimony of the Union's attorney. The parties thereafter filed argument as to said Motion.

On August 25, 1989, during the pendency of the Motion to Quash, Anderson again moved the Commission to reopen her prohibited practice complaint, this time based upon an allegation that her attorney had used cocaine during the time he was representing her and citing a federal court decision allowing a criminal suspect to make a new plea because the suspect's attorney allegedly used illegal drugs. Anderson then asked the circuit court for Brown County to postpone oral argument and decision as to her petition for review on the Commission's November 21, 1988 Orders so that the Commission could respond to her August 25, 1989 Motion and complete the hearing before Examiner Davis. On September 14, 1989, Anderson filed an additional Motion to Reopen the prohibited practice complaint based upon allegedly improper conduct by her attorney and by the Union's attorney during the proceeding before Examiner Crowley in September, 1987. The court denied Anderson's Motion to Postpone and proceeded to conduct oral argument on September 22, 1989. On October 13, 1989, the circuit court affirmed the Commission's Orders of November 21, 1988. The court declined to rule on the propriety of the Commission's February 23, 1989 Order regarding breach of the settlement agreement. The court directed that upon completion of Commission action as to that Commission Order, the Commission should file its record with the court.

On October 16, 1989, the College filed a Motion to Dismiss with the Commission alleging that the Commission lacked subject matter jurisdiction to take any further action as to Anderson's various Motions. Written argument as to said Motion was received until November 13, 1989.

On January 4, 1990, Anderson filed a Motion to amend her complaint and asking the Commission to take notice of a federal court decision. On January 12, 1990, Anderson filed a Motion asking the Commission to take notice of a Wisconsin court of appeals decision.

Having considered the record and the Motion to Dismiss, the Commission makes and issues the following

ORDER 1/

1. That the Commission's Order dated February 23, 1989 (Dec. No. 24474-F) is set aside.
2. That all Anderson's pending Motions are denied.

Given under our hands and seal at the City of
Madison, Wisconsin this 7th day of February,
1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

1/ Pursuant to the Order of the Brown County circuit court, the Commission will proceed to file the record with the court.

By

A. Henry Hempe, Chairman

Herman Torosian, Commissioner

William K. Strycker, Commissioner

MEMORANDUM ACCOMPANYING ORDER

BACKGROUND

The lengthy history of this case was recited in the preface to our Order. Suffice it to say we are now confronted with the Motion to Dismiss filed by Moraine Park Technical College.

The College contends that under Wacho Mfg. Co. v. Industrial Commission, 223 Wis. 312 (1936), the time within which the Commission may exercise its power to set aside Examiner Crowley's Order is limited by Sec. 111.07(6), Stats., to a period of 20 days after the issuance of said Order. Thus, the College argues that the Commission no longer had subject matter jurisdiction over Case 26, MP-1953 at the time Anderson filed her various Motions and cannot grant the relief Anderson seeks either pursuant to Dec. No. 24474-F or pursuant to Anderson's various Motions presently pending before the Commission.

The Federation urges us to grant the College's Motion.

Anderson opposes the Motion asserting that the Commission has jurisdiction because of the newly discovered evidence regarding her lawyer's conduct. Anderson cites Sec. 893.93 (1)(b), Stats., 2/ and argues by analogy that the 20 day limitation upon Commission jurisdiction contained in Sec. 111.07(6), Stats., should begin to run only from her discovery of her lawyer's fraudulent conduct. Anderson contends that she filed her first Motion to Reopen within 20 days of her discovery of fraud.

DISCUSSION

Anderson's prohibited practice complaint was filed pursuant to the provisions of the Municipal Employment Relations Act (MERA). Section 111.70(4)(a) of MERA specifies that Sec. 111.07, Stats, governs the procedure in all MERA prohibited practice cases. The College's Motion focuses on the provisions of Sec. 111.07(6), Stats., which state:

- (6) The commission shall have the power to remove or transfer the proceedings pending before a commissioner or examiner. It may also, on its own motion, set aside, modify or change any order, findings or award (whether made by an individual commissioner, an examiner, or by the commission as a body) at any time within 20 days from the date thereof if it shall discover any mistake therein, or upon the grounds of newly discovered evidence.

In Wacho, when interpreting an identical statute applicable to the then Industrial Commission, the Wisconsin Supreme Court held that the power to set aside, modify or change a decision could only be exercised within the 20-day period following the decision. In that case, the Court therefore affirmed a circuit court ruling that the passage of more than 20 days had deprived the Industrial Commission of jurisdiction to issue an order which had set aside a decision and scheduled additional hearing on the grounds of mistake and newly discovered evidence.

2/ 893.93 **Miscellaneous actions.** (1) The following actions shall be commenced within 6 years after the cause of action accrues or be barred:

. . .

- (b) An action for relief on the ground of fraud. The cause of action in such case is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud.

. . .

In Dec. No. 24474-F, issued before Wacho was brought to our attention, we concluded that we possessed inherent equitable power to reopen complaint proceedings under appropriate circumstances. Having reviewed Wacho and its application in other cases 3/, we are now persuaded that our jurisdiction to reopen complaint proceedings is limited to the 20 day period set forth in Sec. 111.07(6), Stats. Our Supreme Court has held that this statute reflects a legislative judgment that finality of administrative decisions is the paramount value even where equitable consideration might produce a change in a decision.

See Wacho at 317. Section 893.93(1)(b), Stats., cited by Anderson, establishes when the applicable statute of limitations will commence for civil actions alleging fraud. This statute does not provide a persuasive basis for concluding that, despite the holding in Wacho, Sec. 111.07(6), Stats., should be interpreted as allowing the Commission, an administrative agency, to reassert jurisdiction after 20 days have passed if fraudulent conduct by an attorney is alleged to exist. Given our conclusion, we have granted the College's Motion to Dismiss. As we have no present jurisdiction over this case, Anderson's Motions filed January 4 and January 12, 1990 have also been denied.

Dated at Madison, Wisconsin this 7th day of February, 1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairman

Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner

3/ See General A.F. & L. Assur. Corp. v. Industrial Comm., 223 Wis. 635 (1937); Amberg v. Deaton, 223 Wis. 653 (1937); Milwaukee County v. Industrial Comm., 224 Wis. 302 (1937); State ex rel. Walter v. Industrial Comm., 233 Wis. 48 (1939); and Wacker v. Industrial Comm., 248 Wis. 315 (1946).

Amberg v. Deaton is particularly persuasive as it arose in a context of a claim in circuit court that a decision of the Industrial Commission had been obtained through fraudulent conduct which did not become apparent until after the Commission proceedings had been concluded. The court noted that under the doctrine of Wacho, the Commission had lost jurisdiction of the matter. The court proceeded to discuss the equity jurisdiction of a circuit court to enjoin enforcement of a fraudulently obtained judgment. We express no opinion on whether the Amberg discussion in this regard has any application to Anderson's rights in circuit court.

