STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

UNIVERSAL FOODS CORPORATION, Complainant, vs. RANDY L. SEEMAN, Respondent.	Case 22 No. 42621 Ce-2097 Decision No. 26197-B

Appearances:

Mr. Frederick A. Muth, Jr., and John H. Zawadsky, Whyte and Hirschboeck, S.C., Suite 300, One East Main Street, P.O. Box 2996, Madison, WI 53701, appearing on behalf of the Complainant.

Ms. Marianne Goldstein Robbins, Previant, Goldberg, Uelmen, Gratz, Miller and Brueggemann, S.C., P.O. Box 92099, 788 North Jefferson Street, Milwaukee, WI 53202, appearing on behalf of the Respondent.

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

Examiner Marshall L. Gratz having issued Findings of Fact, Conclusions of Law and Order in the above matter on March 5, 1990, wherein he dismissed the complaint which alleged that Randy Seeman was committing an unfair labor practice within the meaning of Sec. 111.06(2)(c), Stats., by continuing to pursue a handicap discrimination complaint against Universal Foods Corporation; and Universal Foods Corporation having timely filed a petition with the Commission seeking review of the Examiner's decision pursuant to Sec. 111.07(5), Stats.; and the parties thereafter having filed briefs in support of and in opposition to the petition, the last of which was received on May 21, 1990; and the Commission, having reviewed the record and the positions of the parties on review and being satisfied that the Examiner's decision should be affirmed in all respects, makes and issues the following

ORDER 1/

The Examiner'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 6th day of August, 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

1/ Pursuant to Sec. 227.48(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. 227.49 and that a petition

Continued

1/ Continued

for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 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.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefore 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. 227.49, 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. 227.48. If a rehearing is requested under s. 227.49, 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. 77.59(6)(b), 182.70(6) and 182.71(5)(9). 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. 227.57 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.

UNIVERSAL FOODS CORPORATION

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

BACKGROUND AND EXAMINER'S DECISION

Section 111.06(2)(c), Stats. provides that it is an unfair labor practice for an employe:

> (c) To violate the terms of a collective bargaining agreement (including an agreement to accept an arbitration award).

The record establishes that in September, 1988, Arbitrator Zeidler issued a final and binding award dismissing two of the three grievances which employe Seeman had filed against universal Foods Corporation under a collective bargaining between the Corporation and Teamsters Local Union No. 579. Following the Zeidler Award, Seeman continued to pursue a complaint with the Equal Rights Division (ERD) of the Wisconsin Department of Industry, Labor and Human Relations alleging that the same Corporation conduct he had unsuccessfully grieved before Arbitrator Zeidler constituted handicap discrimination under the Wisconsin Fair Employment Act. The Corporation alleges that by continuing to pursue his ERD complaint, Seeman is violating Sec. 111.06(2)(c), Stats.

The Examiner dismissed the Corporation's complaint reasoning as follows:

> Claim That Seeman has Violated Sec. 111.06(2)(c), Stats.
>
> This case appears to be one of first impression under Sec. 111.06, Stats. The WERB did previously hold in Le Roi Co., Dec. No. 1465 (WERB, 11/47) that an employer does not violate Sec. 111.06(1)(g) -- the employer equivalent of 111.06(2)(c) --- by commencing proceedings in circuit court which constitute an appeal from such award because in such circumstances "no final determination has yet been made." Id. at 2. Both parties acknowledge, however, that there appear to be no prior cases in which a union's or individuals maintaining WFEA or other litigation claim has been held to be (or not to be) a violation of Sec. 111.06(2)(c), Stats.
>
> In the Examiner's opinion, the language of Sec. 111.06(2)(c), on its face, would prohibit an individual employe from failing to accept as final an arbitration award issued pursuant to a collective bargaining agreement covering his/her employment. If, for example, Seeman, after receiving and reviewing the Award, had filed additional grievances advancing claims that the same Company conduct violated the same Agreement provisions as regards the same time period and seeking the same relief as the grievances dealt with in the Award, the filing of those grievances would seem to be a violation of that Section. Similarly, an effort on Seeman's part to induce coworkers to engage in concerted action against the Company in support of his continuing claim that the Company had violated the Agreement in respects that Arbitrator Zeidler decided were not Agreement violations would also seem to be an unfair labor practice violative of that section. Such employe conduct would arguably parallel the clear-cut employer award noncompliance that was involved in the Duniphy Boat and Cirkl cases, supra, cited by the Company.
>
> Here, however, Seeman is not refusing to accept Arbitrator Zeidler's determinations that the Company did not violate the

Agreement when it paid him the 85% rate or when it refused him overtime assignments outside his department. Rather, Seeman is claiming that, independent of the collective bargaining agreement, the Company's conduct is violative of his rights under the WFEA handicap discrimination provisions.

The differences between the grievances and Award on the one hand and the amended ERD complaint on the other appears clear to the Examiner.

The grievances and Award spoke exclusively in terms of alleged violations of the Agreement. The parties' and the Arbitrator all framed the issues in terms of whether the Company violated the Agreement in various respects. The Arbitrator's concluding AWARD section makes no reference to the WFEA or to any other external law, but rather addresses itself to whether the Company violated the Agreement in various respects. Indeed, the only reference to external law in the Award was with regard to a Union reference to Worker's Compensation, as to which the Company argued that the Arbitrator was limited to interpreting and applying the terms of the collective bargaining agreement. See Finding of Fact 6, supra. Agreement Sec. 6:02 prohibited the Arbitrator from supplementing or amending the Agreement, and Sec. 6:01 defines grievances as "any dispute or misunderstanding relative to the provisions of this Agreement." There is no contention that the Arbitrator exceeded those limitations. In sum, the grievances and the Award dealt solely with whether the Agreement permitted the Company conduct in question.

In contrast, the amended ERD complaint makes no reference to the Agreement at all, and Seeman's ERD exhibit list and testimony describing the first day of ERD proceedings reflects Seeman's intention not to rely upon that Agreement in pursuing his claim, although references to the Agreement are coming into the record during questioning by the Company's attorney. Indeed, it appears that Seeman is claiming in that proceeding that, regardless of what the Agreement permits, the Company conduct in question constitutes handicap discrimination proscribed by the WFEA.

For those reasons, alone, the Examiner would conclude that Seeman is not refusing to accept Arbitrator Zeidler's determinations concerning the proper meaning and application of the Agreement when he pursues the separate and distinct claim that the same Company conduct violated state law regarding handicap discrimination.

Seeman's citations of federal and state employment discrimination case law lend further and quite authoritative support to the general proposition that final and binding collective bargaining agreement grievance arbitrations agreements on the one hand and employment discrimination complaints on the other are separate and distinct in nature and independently maintainable.

Thus, in Gardner-Denver, supra the U.S. Supreme Court concluded that an employes statutory right to a trial de novo under the Equal Employment provisions of the Civil Rights Act is not foreclosed by prior submission of the claim to final and binding arbitration, even where the collective bargaining agreement in effect contains a nondiscrimination clause. Then, in Krueger, supra, LIRC found the Gardner-Denver rationale persuasive and applicable to a WFEA discrimination complaint proceeding, as well.

The Gardner-Denver reasoning expressly adopted by the LIRC was summarized in Krueger as follows:

> (1) the doctrine of election of remedies is inapplicable in this context which involves statutory rights distinctly separate from the employes contractual rights under a collective bargaining agreement, regardless of the fact that violation of both rights may have resulted from the same factual occurrence; (2) by merely resorting to the arbitral forum the petitioner has not waived his cause of action under the fair employment law, because the rights conferred thereby cannot be prospectively waived and form no part of the collective bargaining process; (3) an arbitrator's authority is confined to resolution of questions of contractual rights, regardless of whether they resemble the rights conferred by the fair employment statute; (4) in instituting an equal rights action, the employe is not seeking review of the arbitrator's decision but is asserting a right independent of the arbitration process based on the fair employment law; (5) a policy of deferral by the court or agency to arbitral decision would lead to an undue emphasis on the law of the shop rather than the law of the land.

Krueger, supra, at 17. Such federal case law reasoning was also found persuasive by the Circuit Court reviewing a WFEA discrimination complaint case in Nielson, supra, at 3, where Judge Wilbershide stated,

> . . . the reasoning in the federal authority is persuasive on the issue now to be decided. Oliver in proceeding to arbitration, was acting under rights spelled out by the employment contract with the petitioner. In proceeding under the Fair Employment Act he seeks vindication in a dispute arising under protections afforded him by the statutes of this state, rather than that contract. These are two separate issues, and the arbitration award cannot be considered as having controlled the issue raised under the Wisconsin Fair Employment Act . . . .

As noted, the Examiner would conclude that Seeman did not violate Sec. 111.06(2)(c) without even considering the employment discrimination cases noted above. Hence, if Krueger is distinguishable as the Company contends, that would not be outcome determinative herein. It can be noted in that regard, however, that the applicability of Denver-Gardner and related federal cases to Seeman's WFEA complaint is clearly a matter for the ERD ALJ and LIRC to decide. The relief sought herein by the Company would have the WERC preclude Seeman from proceeding further under the WFEA and would thereby preclude the ERD from making those judgments and from determining the weight, if any, to be given to the Award in adjudicating Seeman's WFEA complaint.

For all of those reasons, the Examiner is persuaded that Seeman has not failed to accept the Award and, hence, has not violated the Agreement provision that grievance awards are final and binding in violation of Sec. 111.06(2)(c), Stats. This case therefore presents no conflict between WEPA and WFEA for anyone to resolve. Moreover, since he is not attempting to overturn

Arbitrator Zeidler's determinations as to his and the Company's rights under the Agreement, it would not be appropriate to require Seeman to attempt to do so before permitting him to pursue his independent claim under the WFEA. None of the other authorities and policy arguments advanced by the Company lead the Examiner to conclude otherwise.

However, the Examiner denied Seeman's request for attorney's fees and costs reasoning that because the case is one of first impression, he could not conclude that the complaint was "wholly without legal basis".

POSITIONS OF THE PARTIES ON REVIEW

The Corporation urges the Commission to reverse the Examiner. The Corporation asserts Seeman is not "accepting" the Zeidler Award within the meaning of Sec. 111.06(2)(c), Stats. because Seeman is pursuing collateral litigation before the ERD which, if successful, will have the effect of overturning the Zeidler Award. It argues that by using the word "accept", the Legislature intended to prohibit any and all conduct at variance with the final nature of arbitration awards. By taking action before the ERD which seeks the same remedy denied by the Arbitrator, the Corporation claims that Seeman is necessarily refusing to "accept" the Zeidler Award.

The Corporation contends that the Examiner's use of decisions interpreting federal law as well as the Wisconsin Fair Employment Act was inappropriate because the Commission lacks authority and jurisdiction to construe ancillary federal and state statutes and because the interplay between Title VII and federal labor policy is irrelevant to the legality of Seeman's actions under Sec. 111.06(2)(c), Stats.

Seeman contends that pursuit of his ERD claim is not inconsistent with the final and binding nature of the Zeidler Award. He asserts his claim before the ERD is that, regardless of the Corporation's compliance with the labor agreement, the Corporation discriminated against him by reason of handicap. Seeman further argues that the Examiner's consideration of external state and federal law was appropriate and persuasive. Thus, Seeman urges affirmance of the Examiner's decision except for that portion thereof which denied Seeman's request for attorney's fees and costs.

DISCUSSION

As a general matter, litigation over the portions of Sec. 111.06(2)(c), Stats., and its employer counterpart, Sec. 111.06(1)(f), Stats., 2/ which relate to arbitration awards, has involved instances in which a party refuses to comply with an arbitrator's award. Pure Milk Association, Dec. No. 6584 (WERC, 12/63), aff'd Cir. Ct. Dane, 10/64; Kiekhafer Aeromarine Motors, Dec. No. 2319 (WERC, 2/50); aff'd Cir. Ct. Fond du Lac, 12/50; Sheboygan Dairyman's Coop Association, Dec. No. 1014 (WERC, 7/46), aff'd Cir. Ct. Sheboygan, 10/46. Here, there is no claim that Seeman has failed to comply with any Portion of the Zeidler Award. Seeman has accepted the dismissal of two of his three grievances. Thus, the focal point of this case is not over Seeman's failure to comply with the Zeidler Award but rather over his alleged failure to comply with Sec. 111.06(2)(c), Stats.

We have affirmed the Examiner's well-reasoned decision because we are satisfied that Sec. 111.06(2)(c), Stats. does not preclude Seeman from litigating his ERD claim after his contractual attack on the Corporation's

2/ Section 111.06(1)(f), Stats. provides that it is an unfair labor practice for an employer "To violate the terms of a collective bargaining agreement (including an agreement to accept an arbitration award.)" (Emphasis added.)

conduct failed. The Corporation asks that Sec. 111.06(2)(c), Stats. be interpreted as precluding an employe who unsuccessfully attacks employer conduct on a contractual theory before a grievance arbitrator from thereafter attacking the same employer conduct in any other forum under any other theory. It argues that when the Legislature used the term "accept" in Sec. 111.06(2)(c), Stats., the Legislature intended to insulate the employer whose conduct is found to be consistent with a collective bargaining agreement from any further litigation arising out of the same conduct. we do not find the Corporation's interpretation of Sec. 111.06(2)(c), Stats. to be persuasive.

Implementation of the Corporation's interpretation of Sec. 111.06(2)(c), Stats. would result in waiver of all Seeman's statutory and common law causes of action arising out of the Corporation conduct litigated before the Arbitrator. Although the Examiner correctly concluded that we have not previously been confronted with the precise notion being advanced by the Corporation herein, we have previously concluded that an employe can pursue grievance arbitration alleging a contractual violation by the employer while contemporaneously citing the same employer action as a basis for a finding of an unfair labor practice by the Commission. In that instance, we held:

> It is not unusual for contracts providing for arbitration to also forbid conduct which is likewise proscribed by "unfair labor practice" statutes. In fact, discrimination based upon union activity and unilateral employer action are two types of conduct often so doubly prohibited.
>
> There can be no doubt that this Board has the authority to make determinations and order relief in cases involving noncontractual unfair labor practices, even despite, contrary to, or concurrently with the arbitration of the same matters. The possibility of full relief through arbitration does not preclude this Board from fully adjudicating alleged noncontractual violations of the statutes which it enforces. 3/

Thus, we are not persuaded the Legislature intended to deprive litigants of the opportunity to pursue statutory or common law rights before administrative agencies or courts merely because the propriety of the conduct in question has already been litigated in a contractual forum. 4/ No argument has been presented which would warrant the conclusion that the Legislature in effect found it appropriate to clothe contractual grievance arbitrators with authority to definitively determine statutory rights.

The Corporation correctly argued that, as a general rule, the doctrine of res judicata is applicable to final arbitration awards. Denhart v. Waukesha Brewing Co., 21 Wis.2d 583 (1963). If Respondent Seeman was seeking to relitigate in another forum the question of whether the Corporation's conduct violated Sections 4.02 and 12.02 of the parties' contract, the Corporation's argument would be persuasive. The Respondent, however, is pursuing a separate and distinct theory of recovery from that urged before the Arbitrator, even though each theory of recovery is based on the same alleged factual underpinnings. Nowhere has the Corporation been able to cite any Wisconsin precedent for the proposition that the doctrine of res judicata prevents an employe from pursuing a statutory handicap discrimination claim before an

---

3/ Milwaukee Elks, Dec. No. 7753 (WERC, 10/66).

4/ While the Examiner correctly concluded that Seeman's contractual theory before Arbitrator Zeidler was not based on any contractual provision prohibiting handicap discrimination, we would find no violation of Sec. 111.06(2)(c), even if Seeman's contractual theory had not been based on such a provision. In our view, Sec. 111.06(2)(c), Stats. only precludes efforts to relitigate the question of whether contractual rights have been violated.

administrative agency after his contractual claim alleging the same set of facts-conduct has been rejected by an arbitrator.

Our conclusion is consistent with that reached by the United States Supreme Court in Alexander v. Gardner-Denver, 415 U.S. 36 (1974) as to the relationship between Title VII rights and grievance arbitration and with the Krueger and Nielson decisions cited by the Examiner as to the relationship between the Wisconsin Fair Employment Act and grievance arbitration. While the Corporation correctly argues that these decisions involve statutes as to which we have no particular interpretative expertise, and which, unlike Sec. 111.06(2)(c), Stats., do not prohibit a refusal to "accept" an arbitration award, we find the policy determinations underlying those decisions and quoted by the Examiner to be persuasive and applicable to the dispute. while Sec. 111.06(2)(c), Stats. could be interpreted in the manner asserted by the Corporation, none of the arguments advanced by the Corporation persuade us that the Legislature intended such a result.

Although not specifically pursued in its petition for review, we nonetheless also affirm the Examiner's denial of the Corporation's motion for default judgment. We also affirm the Examiner's denial of Seeman's request for attorney's fees and costs as we do not find the corporation's position in this litigation to have been taken frivolously. 5/

Dated at Madison, Wisconsin this 6th day of August, 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

5/ Hayward Community Schools, Dec. No. 24259-B (WERC, 3/88); Madison Schools, Dec. No. 16471-D (WERC, 5/81), Torosian dissent.