

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

AFSCME, LOCAL UNION	:	
NO. 778-D, AFL-CIO,	:	
	:	
Complainant,	:	Case 114
	:	No. 49043 MP-2715
vs.	:	Decision No. 27706-A
	:	
COUNTY OF OCONTO and	:	
GEMINI EMPLOYEE LEASING	:	
(GEMINI),	:	
	:	
Respondents.	:	
	:	

ORDER DENYING RESPONDENT GEMINI'S MOTION TO DISMISS FOR LACK OF JURISDICTION

AFSCME, Local Union No. 778-D, AFL-CIO, hereinafter the Union, filed a complaint with the Wisconsin Employment Relations Commission on March 31, 1993, alleging that the termination of Kathleen Johnson's employment by Oconto County constituted prohibited practices in violation of Secs. 111.70(3)(a)1 and 3, Stats. The County filed an answer to the complaint on October 8, 1993. On November 1, 1993, the Union filed an amended complaint joining Gemini Employee Leasing, Inc., as a Co-Respondent under Sec. 111.02(7) and/or Sec. 111.70(1)(j). The amended complaint alleged that Gemini acted either individually or in concert with Oconto County in firing Johnson for participating in union activities. The Union alleged that by this action, the County committed prohibited practices within the meaning of the Municipal Employment Relations Act (MERA) and that Gemini committed unfair labor practices within the meaning of the Wisconsin Employment Peace Act (WEPA) or prohibited practices under MERA. Gemini filed an answer to the amended complaint on December 29, 1993. In that answer, Gemini raised several affirmative defenses, one of which was that the Wisconsin Employment Relations Commission (WERC) lacked jurisdiction over Gemini. AFSCME and Gemini then filed briefs on the issue of the WERC's jurisdiction over Gemini, the last of which was received March 22, 1994. The Commission appointed Raleigh Jones, a member of its staff, as Examiner to make and issue Findings of Fact, Conclusions of Law and Order in the matter. Hearing on the complaint has been scheduled and postponed four times. Having considered Gemini's Motion to Dismiss and being satisfied that it should be denied, the Examiner issues the following

ORDER

Gemini's Motion to Dismiss for lack of jurisdiction is denied.

Dated at Madison, Wisconsin, this 13th day of April, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Raleigh Jones /s/
Raleigh Jones, Examiner

OCONTO COUNTY

MEMORANDUM ACCOMPANYING
ORDER DENYING RESPONDENT GEMINI'S MOTION TO DISMISS
FOR LACK OF JURISDICTION

The complaint and amended complaint raise a cause of action against both the County and Gemini for allegedly firing Kathleen Johnson for participating in protected union activities. The Union contends the County violated MERA by

its actions and that Gemini violated either MERA and/or WEPA.

Based on the pleadings and submissions in this matter, it appears that Gemini is a corporation engaged in leasing employes to both private and public entities through contractual relationships. It further appears that Gemini has such a leasing relationship with Oconto County that involved Johnson.

Gemini argues that the WERC lacks jurisdiction over it because it is not a municipal employer and because the underlying dispute involves a subject over which the National Labor Relations Board (NLRB) has exclusive jurisdiction. Gemini contends that the National Labor Relations Act preempts the WERC from asserting jurisdiction over it. The Union acknowledges that Gemini is not a municipal employer, but insists the WERC nevertheless has jurisdiction over Gemini.

In San Diego Building Trades Council v. Garmon, 359 U.S. 236, 244 (1959), the U.S. Supreme Court articulated the following general rule of preemption:

When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by Sec. 7 of the National Labor Relations Act, or constitute an unfair labor practice under Sec. 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law.

The Court went on to state:

When an activity is arguably subject to Sec. 7 or Sec. 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.

In Local 248 v. WERC, 11 Wis.2d 277 (1960), cert. denied 365 U.S. 878 (1961), our Supreme Court held that the Commission is preempted from exercising its jurisdiction under WEPA where the conduct at issue arguably falls within the scope of the Labor Management Relations Act (LMRA) administered by the National Labor Relations Board (NLRB). See also Moreland Corp. v. Retail Store Employees Union, 16 Wis.2d 499 (1962); Markham v. American Motors Corp., 22 Wis.2d 680 (1964); Hanna Mining Co. v. District 2, etc., Asso., 23 Wis.2d 433 (1965); Klotz v. Wathen, 31 Wis.2d 19 (1966); and Arena v. Lincoln Lutheran of Racine, 149 Wis.2d 35 (1989). Given the Court's holding, the Commission has consistently concluded that it has no jurisdiction over unfair labor practice complaints involving conduct and parties as to which the NLRB would exercise its jurisdiction. 1/

Had the complaint against Gemini alleged just a violation of WEPA, it is clear from the foregoing case law that the WERC would be preempted from exercising jurisdiction over Gemini because the NLRB has jurisdiction. This is because the conduct at issue here (i.e. allegedly discharging an employe for participating in protected union activities) constitutes a violation of both WEPA and the LMRA.

Having said that, the preemption doctrine noted above is inapplicable here because the complaint also alleges Gemini violated MERA. That statute regulates municipal employers, municipal employes and labor organizations representing municipal employes in the context of employment relations. The Union asserts that Johnson is, or was, a municipal employe. The Union acknowledges that Gemini is not a "municipal employer" within the meaning of MERA. However, Oconto County clearly is. The Union alleges that Gemini acted on behalf of, or in concert with, the County when it discharged Johnson.

Section 111.70(3)(c) of MERA provides as follows:

(c) It is a prohibited practice for any person to do or cause to be done on behalf of or in the interest of municipal employers or municipal employes, or in connection with or to influence the outcome of any controversy as to employment relations, any action prohibited by par. (a) or (b). (Emphasis added)

This section recognizes that prohibited practices can be committed by parties other than the municipal employer of employes. Thus, persons other than a

1/ Local 244, Bakery Workers', Dec. No. 5743 (WERC, 5/61); Nopak, Inc., Dec. No. 5708-B (WERC, 7/61); Local 200, Teamsters, Dec. No. 6375 (WERC, 6/63); Local 444, Meat Cutters, Dec. No. 6791 (WERC, 7/64); Portage Stop N. Shop, Inc., Dec. No. 7037 (WERC, 2/65); Napiwocki Construction, Inc., Dec. No. 11941-B (WERC, 3/76); Trucker's and Traveler's Restaurant, Dec. No. 20882-C (WERC, 10/84); and Pember Excavating, Inc., Dec. No. 26672-A (WERC, 2/91).

municipal employer are proscribed from committing acts, in concert with or on behalf of a municipal employer, that the municipal employer itself may not commit.

The WERC has previously held there are three (3) requirements for stating a claim under Sec. 111.70(3)(c). 2/ First, the act complained of must have been done or caused to have been done by a "person." Section 111.70(1)(k), Stats., defines "person" as "one or more individuals, labor organizations, associations, corporations, or legal representatives." (Emphasis added) By its own admission, Gemini is a corporation. As such, it is a "person" for purposes of Sec. 111.70(3)(c), Stats.

Second, the act complained of must also be prohibited by Sec. 111.70(3)(a) or (b). Section 111.70(3)(a)3, Stats., makes it a prohibited practice for a municipal employer to encourage or discourage membership in a labor organization by discrimination in regard to hiring, tenure or other terms or conditions of employment. By its explicit reference to "other terms or conditions of employment," Sec. (3)(a)3 covers disciplinary action. Thus, taking disciplinary action against an employe because of his or her union activity falls within this proscription. Here, the Union alleges Johnson was fired for engaging in protected union activity, an act which is prohibited by Sec. 111.70(3)(a)3.

Third, any one of the following criteria must be met:

- a) the act was done or caused to have been done on behalf of municipal employers or employes; b) the act was done or caused to have been done in the interest of municipal employers or employes; c) the act was done or caused to have been done in connection with any controversy as to employment relations; or d) the act was done or caused to have been done to influence the outcome of any controversy as to employment relations. 3/

The Union cites the criteria above and alleges that Johnson's discharge from her position of chemical dependency counselor was in connection with, and was to influence "the outcome of (a) controversy as to employment relations." According to the Union, the "controversy as to employment relations" involved here was Johnson's status, specifically whether she was included in the bargaining unit represented by the Union. The Examiner finds this allegation sufficient to state a claim against Gemini under Sec. 111.70(3)(c). It is therefore held that the WERC has jurisdiction over Gemini. Accordingly, Gemini's Motion to Dismiss for lack of jurisdiction is denied.

2/ Burdick v. Beatty, Knudson, Michalski, Brown and Local 150, SEIU, Dec. No. 16277-C (WERC, 10/80), at 23.

3/ Ibid.

Gemini argues that the Union has provided no evidence thus far to support its theory that Gemini acted in concert with the County when it discharged Johnson. While that may ultimately be found to be the case, no such determination can be made on the basis of the pleadings alone. Because of the drastic consequences of denying an evidentiary hearing, on a motion to dismiss the complaint must be liberally construed in favor of the complainant and the motion should be granted only if under no interpretation of the facts alleged would complainant be entitled to relief. 4/ Here, the Union arguably could present proof of its theory at an evidentiary hearing. As a result, a hearing is necessary to determine whether Gemini acted in concert with the County when it discharged Johnson.

Dated at Madison, Wisconsin, this 13th day of April, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Raleigh Jones /s/
Raleigh Jones, Examiner

4/ Unified School District No. 1 of Racine County, Dec. No. 15915-A
(Hornstra with final authority for the Commission, 12/77) at p. 3.