STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MARK J. BENZING, Complainant,

vs.

BLACKHAWK TECHNICAL COLLEGE, Respondent.

Case 67
No. 55361
MP-3321

Decision No. 28598-A

(complaint filed on 7-11-97)

Appearances

Mr. Mark J. Benzing, 2022 Dewey Avenue, Beloit, Wisconsin 53511, appearing on his own behalf.

Mr. Peter Albrecht, Godfrey & Kahn, Attorneys at Law, 131 West Wilson Street, Suite 202, P.O. Box 1110, Madison, Wisconsin 53701-1110, appearing on behalf of Blackhawk Technical College.

EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING PRE-HEARING MOTION TO DISMISS

On July 11, 1997, the above-named Complainant filed a complaint with the Wisconsin Employment Relations Commission (WERC) alleging that the above-named Respondent had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1 and 3, Stats., of the Municipal Employment Relations Act (MERA). On August 13, 1997, the Commission appointed the undersigned Marshall L. Gratz, a member of its staff, to act as Examiner to make and issue Findings of Fact, Conclusions of Law and Order pursuant to Sec. 111.07(5), Stats. On August 15, 1997, Respondent District filed a motion to dismiss the complaint without conducting a hearing. The Examiner thereafter sought and obtained various written clarifications of the Complaint,
an answer from Respondent to the Complaint, and written statements of the parties' positions regarding the motion to dismiss, the last of which was received by the Examiner on October 3, 1997.

Based on the pleadings and arguments submitted, the Examiner issues the following Findings of Fact, Conclusions of Law and Order Granting Motion to Dismiss.

FINDINGS OF FACT

1. The Complainant, Mark J. Benzing is a person who resides at 2022 Dewey Avenue, Beloit, Wisconsin.

2. The Respondent, Blackhawk Technical College (also referred to herein as the District), is a municipal employer with offices at 6004 Prairie Road, County Trunk G, Janesville, Wisconsin.

3. On July 11, 1997, Complainant filed with the WERC a complaint alleging that the Respondent committed prohibited practices within the meaning of Secs. "111.70(3)1 and 3", Stats., [which the Examiner interprets to have been intended to be Secs. 111.70(3)(a)1 and 3, Stats.] based on the following alleged facts:

a. That on July 11, 1996, Respondent issued Complainant an evaluation containing untrue statements that Complainant "spoke obscene when I referred to [Respondent's Facilities Manager/Supervisor Jeff Amundson] and other administrative staff members. And also that I become argumentative and upset often."

b. That Respondent issued that evaluation "Primarily to retaliate and harass me for prior complaints, and grievances that I filed against the respondent, in which . . . Amundson, was one of the ones whose actions were complained of." And,

c. "[T]hat another member of the same department . . . has been known to use obscene and vulgar language when speaking to . . . Amundson, and never received any statement mentioning this fact on her evaluation/assessment."

4. The evaluation referred to in the complaint was, in fact, issued to and received by Complainant on June 11, 1996, not July 11, 1996.

5. As of June 11, 1996, Complainant had reason to know both the contents of the evaluation which he received on that date, and the nature of any grievances and complaints that he had filed prior to that date.

6. The complaint was filed more than one year from the date of the prohibited practices alleged in the instant complaint that were based on the facts noted in Finding of Fact 3.a. and 3.b., above.

CONCLUSIONS OF LAW

1. Viewing the complaint in the light most favorable to Complainant, the prohibited practices alleged in the instant complaint based on the facts noted in Finding of Fact 3.a. and 3.b., above, are time-barred by the one-year statute of limitations contained in Sec. 111.07(14), Stats.

2. Viewing the complaint in the light most favorable to Complainant, the complaint allegations referred to in Finding of Fact 3.c., above, do not, in and of themselves, constitute a prohibited practice within the meaning of Sec. 111.70(3), Stats.

3. Under no interpretation of the facts alleged in the instant complaint would the Complainant be entitled to relief from WERC.

4. The WERC therefore lacks jurisdiction of the instant complaint.

ORDER

1. Respondent's motion to dismiss is granted.

2. The Case 67 Complaint filed on July 11, 1997 is dismissed.

Dated at Shorewood, Wisconsin, this 16th day of December, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Marshall L. Gratz /s/

Marshall L. Gratz, Examiner

BLACKHAWK TECHNICAL COLLEGE

MEMORANDUM ACCOMPANYING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING PRE-HEARING MOTION TO DISMISS

PROCEDURAL BACKGROUND AND POSITIONS OF THE PARTIES

The Case 67 complaint was filed on 7-11-97. In it, Complainant Benzing alleged the following:

> During the afternoon of July 11, 1996 I was given evaluation/assessment from Facilities Manager/Supervisor, in which allegations were made by the Supervisor, that I spoke obscene when I referred to him and other administrative staff members. And also that I become argumentative and upset often. Both allegations are untrue and were incorporated into my yearly evaluation/assessment; primarily to retaliate and harass me for prior complaints, and grievances that I filed against the respondent, in which the Facilities Manager/Dept. Supervisor Jeff Amundson, was one of the ones whose actions were complained of.
>
> The Sections of the statutes I believe have been violated are, 111.70(3)[a]1 and 3, of the Wisconsin Statutes.
>
> Also, I want to add the fact/allegation, that another member of the same department that the complainant is in has been know to use obscene and vulgar language when speaking to the Facilities Manager/Supervisor, Jeff Amundson, and never received any statement mentioning this fact on her evaluation/assessment. The remedy complainant seeks is whatever the Commission and/or their appointee deems reasonable.
>
> Be advised that the twenty-five dollar filing fee accompanied this complaint.

In correspondence dated 7-15-97, and again in a formal motion filed on 8-15-97, Respondent District requested that the Case 67 be dismissed as on the grounds that the complaint was not filed within the applicable one-year statute of limitations. More specifically, the District asserted that the evaluation/assessment referenced in the Case 67 complaint was, in fact, issued to Complainant Benzing on 6-13-96, such that the Case 67 complaint was filed 13 months after the act or occurrence alleged in the complaint. The District attached to its correspondence and motion a copy of what purports to be an

assessment bearing signatures purporting to be those of Complainant Benzing and of his evaluator, Facilities Manager Jeff Amundson, both with handwritten dates of "6-11-96."

On 8-17-97, the Examiner issued a notice of hearing in the above matter along with a letter inquiring of Complainant Benzing, in pertinent part, as follows:

> I have received Mr. Albrecht's motion to dismiss Case 67 on the grounds that the complaint was not filed within the one year statute of limitations for initiating a prohibited practice complaint.
>
> Before ruling on that motion . . . I want to give Mr. Benzing an opportunity to state his position on those matters.
>
> Specifically, I would like to know Mr. Benzing's answers to the following questions:
>
> 1. Does Mr. Benzing dispute Mr. Albrecht's contention that the performance evaluation was issued to Mr. Benzing on June 11, 1996?
>
> 2. If Mr. Benzing does not dispute that the performance evaluation was issued to him on June 11, 1996, then
>
> a. is there any reason why the complaint in Case 67 should not be dismissed on the grounds that it was filed after the one year statute of limitations had run on prohibited practice allegations based on that performance evaluation; . . . .
>
> I respectfully request that Mr. Benzing put his responses to the above in writing and in the mail to Mr. Albrecht and to me as soon as possible . . . That way I will hopefully be in a position to rule on these matters well enough in advance of the hearing to provide the parties with reasonable notice as to what matters will be the proper subject for the September 23 and (if necessary) 24 hearing.
>
> . . .

The Examiner subsequently wrote the parties on 9-5-97, as follows:

> This is to confirm the status of the above cases following our recent telephone communications. Due to mail delivery delays, Mr. Benzing has requested until September 14, 1997, to respond in writing to the questions

> set forth in my letters of August 17 and 21. Mr. Albrecht does not object to

that request. I have granted Mr. Benzing's request.

However, to provide time for Mr. Albrecht to submit any reply the District may have to Mr. Benzing's response, and to provide time for me to rule on the motions to dismiss, I am canceling the hearing previously scheduled in these matters for September 23-24, 1997.

. . .

By letter dated 9-15-97 and received by the Examiner on 9-18-97, Complainant Benzing responded to the Examiner's above inquiries as follows:

I will first reply to the questions you ask in your letter dated August 17, 1997.

First question: I don't dispute the fact that the performance evaluation was issued to me, the complainant, on June 11, 1996.

Second question: (a) yes, because of the fact that the complainant, was not aware of the allegations stated in his amended complaint, and in his amended complaint until November or December of 1996. Since the complainant was informed personally by the custodial department's lead person (who has been known for past the or more years by most members of the custodial department to use vulgar language, mostly on a daily basis and in the presence of the department Supervisor/Facilities Manager, J. Amundson) that she didn't have any statements or complaints on her performance evaluation, regarding, her use of vulgar language.

. . .

The District responded by letter dated 10-2-97 and received on 10-3-97:

Case 67 - The Performance Evaluation Case

In his response, the Complainant concedes that the performance evaluation was issued in June, as opposed to July of 1996. He asserts, however, that he was not aware of the disparate treatment until November or December of 1996. That is when the Complainant, allegedly, became aware that a similarly situated co-worker did not receive a poor evaluation even though she also allegedly used vulgar language. This information is irrelevant and does not defeat the Motion to Dismiss.

The Complaint alleged retaliation and harassment. Specifically, the Complainant alleged that the poor evaluation was issued to "retaliate and harass" him for bringing prior complaints. This is not a discrimination case.

> Accordingly the date that the Complainant may have become aware of more favorable treatment given to a similarly situated co-worker is irrelevant to the issue of when the statute of limitations began to run. (While the treatment of a co-worker could, arguably, be used as evidence to support a retaliation claim, it has no impact on the date that the statute of limitations should have begun to run.) When the Complainant received a performance evaluation that he believed was unjustifiably poor, he knew or should have known, as of the date that he received the evaluation, the facts sufficient to file his retaliation claim. Because he received that evaluation approximately thirteen months before filing his Complaint, the College believes that the Complaint was not timely filed.
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> . . .

DISCUSSION

Respondent District seeks dismissal of the complaint without a hearing. "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 the complainant be entitled to relief." E.G., UNIFIED SCHOOL DISTRICT NO. 1 OF RACINE COUNTY, WISCONSIN, DEC. NO. 15915-B (HOORNSTRA WITH FINAL AUTHORITY FOR WERC, 12/77), AT 3.

Here, Respondent District seeks dismissal of the complaint on the grounds that the Commission lacks jurisdiction of its subject matter because the prohibited practices alleged in the complaint are time-barred by the applicable one-year statute of limitations set forth in Sec. 111.07(14), Stats.

That Section reads, "The right of any person to proceed under this section shall not extend beyond one year from the date of the specific act or unfair labor practice alleged." It has been strictly construed by the Commission and by reviewing Courts in the sense that a complaint filed 366 days after the act complained of was dismissed as untimely. CITY OF MADISON, DEC. NO. 15725-B (WERC, 6/79), AFF'D, DEC. NO. 79-CV-3327 (CIRCT DANE, 6/80).

In determining when the statute begins to run, the Commission has applied what it has characterized as "our general holdings that the statute of limitations begins to run once a complainant has knowledge of the act alleged to violate the Statute. [citations

omitted]." STATE OF WISCONSIN, DEC. NO. 26676-B AT 5 (WERC, 11/91). However, in that same decision, the Commission reaffirmed its decision in (JOHNSON V.) AFSCME COUNCIL 24, DEC. NO. 21980-C (WERC, 2/90) in which it had rejected a complainant's contentions that she was not obligated to file her complaint within one year of the act alleged (February and March 1982 Union notifications that it decided not to arbitrate her

grievance) because she did not discover the allegedly arbitrary nature of that act until 1984. STATE OF WISCONSIN, DEC. NO. 26676-B, SUPRA, AT 5.

Based on Complainant Benzing's response to the Examiner's inquiries, it is undisputed that the evaluation/assessment referred to in the Complaint was issued more than one year before Complainant filed the instant complaint. Complainant had reason to know the contents of the evaluation when he received it on 6-11-96, and he was aware on that date of whatever grievances and complaints he had filed prior to that date.

However, Complainant Benzing argues that his complaint is nonetheless timely because he first became aware within the one-year limitations period preceding its filing, that the District did not criticize a fellow employe in her evaluation/assessment for using obscene language when speaking to Amundson.

When the Commission has been presented with such contentions in other cases, it has applied the reasoning developed by the United States Supreme Court in LOCAL LODGE NO. 1424 V. NATIONAL LABOR RELATIONS BOARD (BRYAN MFG. CO.), 362 US 411 (1960), 45 LRRM 3212 for addressing the significance of events outside of a statutory limitations period. SEE, E.G., CESA NO. 4, DEC. NO. 13100-E (YAFFE, 12/77), AFF'D DEC. NO. 13100-G (WERC, 5/79), AFF'D DEC. NO. 79CV316 (CIRCT BARRON COUNTY, 3/81). SEE ALSO, SCHOOL DISTRICT OF CLAYTON, DEC. NO. 20477-B (MCLAUGHLIN, 10/83), AFF'D BY OPERATION OF LAW, -C (WERC, 11/83); MORAINE PARK TECHNICAL COLLEGE, DEC. NO. 25747-B,C (MCLAUGHLIN, 3/89), AFF'D -D (WERC, 1/90), AFF'D SUB NOM. ANDERSON V. WERC, 163 WIS.2D 966 (CTAPP III, 1991)(PER CURIAM, UNPUBLISHED).

In the BRYAN case, the United States Supreme Court addressed two basic situations which pose the central questions, as follows:

> . . . The first is one where occurrences within the . . . limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose (the statute of limitations) ordinarily does not bar such evidentiary use of anterior events. The second situation is that where conduct occurring within the limitations period can be charged to be an unfair labor practice

> only through reliance on an earlier unfair labor practice. There the use of the earlier unfair labor practice is not merely "evidentiary," since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is timebarred, to permit the event itself to be so used in effect results in reviving a legally defunct unfair labor practice.

BRYAN, SUPRA, 362 U.S. AT 416-17, 45 LRRM AT 3214-3215. In MORAINE PARK TECHNICAL COLLEGE, DEC. NO. 25747-C, SUPRA, AT 5, Examiner McLaughlin described the BRYAN analysis under MERA as follows:

> The BRYAN analysis, read in light of the provisions of Secs. 111.70(4)(a) and 111.07(14), Stats., requires two determinations. The first is to isolate the "specific act alleged" to constitute the prohibited practice. The second is to determine whether that act "in and of (itself) may constitute, as a substantive matter" a prohibited practice.

In the instant case -- viewing the facts in the light most favorable to the Complainant -- the specific act alleged is the District's non-criticism of Complainant's fellow employe for that employe's alleged use of obscene language when speaking to her supervisor, Amundson. Clearly, that alleged act (of non-criticism) would not, in and of itself, constitute a prohibited practice under MERA.

Therefore, based on both the JOHNSON case and on the BRYAN analysis, above, all of the prohibited practices alleged in the instant complaint are time-barred by the Sec. 111.07(14), Stats., statute of limitations; under no interpretation of the facts alleged would the complainant be entitled to relief; and the Commission lacks jurisdiction of the entire Complaint.

Accordingly, the Examiner has granted the District's pre-hearing motion to dismiss the Case 67 Complaint.

Dated at Shorewood, Wisconsin this 16th day of December, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Marshall L. Gratz /s/
Marshall L. Gratz, Examiner

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