

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RICHARD M. DeSPEARS,

Complainant,

vs.

MILWAUKEE COUNTY,

Respondent.

Case 333

No. 47748 MP-2623

Decision No. 28951-A

Appearances:

Mr. Richard DeSpears, Complainant, 3028 North 56th Street, Milwaukee, Wisconsin 53210, appearing pro se.

Mr. Timothy Schoewe, Deputy Corporation Counsel, Milwaukee County, Room 303, Courthouse, 901 North 9th Street, Milwaukee, Wisconsin 53233, appearing on behalf of the Respondent, Milwaukee County.

ORDER DENYING MOTION TO DISMISS

Daniel J. Nielsen, Examiner: Richard M. DeSpears (hereinafter referred to as the Complainant) filed a complaint with the Wisconsin Employment Relations Commission on July 14, 1992, alleging that Milwaukee County (hereinafter referred to as either the Respondent or the County) had discriminated against him by suspending him pending discharge for lacking a valid drivers license. The complaint alleged that this action constituted interference with protected rights and discrimination on the basis of activity on behalf of a labor organization, in violation of Section 111.70(3)(a)1 and 3, Stats.

After conciliation efforts by a member of the Commission's staff, the matter was assigned to the Examiner, and dates were offered to the parties. The Complainant requested that the matter be held in abeyance pending the outcome of related litigation. In October of 1993, the Examiner wrote to the parties asking if the complaint could be dismissed. The Complainant requested that the matter continued to be held in abeyance, and on December 8, 1993 a letter confirming this was sent to the Complainant and counsel for the Respondent. In May of 1996, the Complainant asked that the contents of the Examiner's file be shared with representatives of his Union, and the materials were forwarded via facsimile. In October, the Complainant again contacted the Examiner and asked that a hearing be scheduled. A letter offering hearing dates was sent to the parties on October 31st.

On November 4th the County filed a Motion to Dismiss, asserting that the Complainant should be precluded from proceeding with his complaint based on (1) the equitable doctrine of laches owing to the passage of time, (2) failure to exhaust his contractual remedies in that he failed to file a grievance, and (3) claim and issue preclusion in that he pursued the same complaint in other forums and failed to appeal the adverse decisions rendered against him. The Complainant responded, asserting that the complaint should not be dismissed.

Having considered the arguments of the parties and the relevant statutory provisions, and being satisfied that the Motion should be denied,

Now, therefore, it is

ORDERED

The Respondent's Motion to Dismiss is denied.

Dated at Racine, Wisconsin this 17th day of December, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Daniel Nielsen /s/  
Daniel Nielsen, Examiner

Milwaukee County

MEMORANDUM ACCOMPANYING ORDER DENYING MOTION TO DISMISS

The County asserts that the passage of time since the filing of the complaint, the failure of the Complainant to pursue a grievance over the proposed discipline, and the litigation of these issues in other forums should all lead to dismissal of the complaint. None of these arguments requires dismissal.

LACHES

The assertion that the passage of time bars the complaint is not persuasive, since the basis for holding the complaint in abeyance was known to the Respondent and, if the Respondent wished to proceed with a hearing, it could have invoked its rights to a prompt hearing under Section 111.07(2)(a):

The commission shall fix a time for a hearing on such complaint, which shall be not less than 10 nor more than 40 days after the filing of such complaint . . .

Either party may at any time assert the right to a speedy hearing, as was noted in the General Counsel's July 15, 1992 letter to the Chairman of the Milwaukee County Board forwarding a copy of the complaint and inviting the parties to participate in conciliation efforts. In 1992 and 1993, the Respondent was notified of the Complainant's intention to keep the prohibited practice complaint alive before the Commission, and to defer prosecution of the claim pending the outcome of his other cases.

FAILURE TO EXHAUST CONTRACTUAL REMEDIES

The County asserts that the Complainant may not pursue his discrimination claim before the Commission unless he has first exhausted his avenues for redress under the collective bargaining agreement. Even though the discrimination claim may overlap to an extent with the claims available under a just cause standard, it is rooted in the statute and not in the contract. The Commission has long held that it has the authority to make determinations and order relief in cases involving non-contractual unfair labor practices, even despite, contrary to, or concurrently with the arbitration of the same matters. 1/ An employee can pursue grievance arbitration alleging a

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1/ Manitowoc County, Dec. No. 26665-A (Levitan, 4/8/91) citing Milwaukee Elks, Dec. No. 7753 (WERC, 10/66).

contractual violation by the employer while contemporaneously citing the same employer action as the basis for a finding of an unfair labor practice by the Commission. 2/ Given that the claims may be pursued independently, it follows that failure to file a grievance will not preclude the filing of a complaint.

ISSUE AND CLAIMS PRECLUSION

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2/ Manitowoc County, *supra*, citing Universal Foods, Dec. No. 26197-B (WERC, 8/90).

Issue and claim preclusion require an identity of issues and parties. The claim in this case is that the County sought to interfere with the Complainant's exercise of protected rights, and to discriminate against him on the basis of his membership or activity in a labor organization. Under Wisconsin law, an otherwise valid action may still be found violative of MERA if it is motivated in part by Union animus. 3/ The elements of a successful claim under Section 111.70(3)(a)3 include:

- (1) that the employe has engaged in protected, concerted activity;
- (2) that the employer was aware of such activity;
- (3) that the employer was hostile to such activity; and
- (4) that the employer's complained of conduct was motivated at least in part by such hostility. 4/

The conclusion of the Personnel Review Board that the grievant violated Rule VIII, Section 4(1) and (t) of the Civil Service Rules of Milwaukee County does not answer the question of whether, as alleged, the County's decision to enforce the rule against the Complainant was motivated "at least in part" by hostility towards him for protected activity. Likewise, the conclusion that the Complainant was not discriminated against on the basis of some handicap or membership in a suspect classification does not settle the question of possible Union animus.

Based upon the foregoing analysis, I have concluded that the Motion to Dismiss should be denied and the complaint should be set for hearing.

Dated at Racine, Wisconsin this 17th day of December, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Daniel Nielsen /s/  
Daniel Nielsen, Examiner

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3/ Muskego-Norway C.S.J.S.D. No. 9 v. WERB, 35 Wis.2d 540 (1967); Rock County, Dec. No. 28494-A (Jones, 1/18/96).

4/ Cedar Grove-Belgium Area School District, Dec. No. 25849-A (WERC, 5/9/91), citing Muskego-Norway, *supra*.

