STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LYNN KRANZ and LORRIE SCHULTZ, Complainants,

vs.

CITY OF NEW LISBON, Respondent.

Case 14
No. 58584
MP-3611

Decision No. 29885-D

Appearances:

Axley Brynelson, LLP, by **Attorney Leslie A. Fiskey,** Manchester Place, Suite 200, 2 East Mifflin Street, P.O. Box 1767, Madison, Wisconsin 53701-1767, appearing on behalf of the City of New Lisbon.

Attorney Sally A. Stix, 1800 Parmenter Street, Suite 204, Middleton, Wisconsin 53562, appearing on behalf of Lynn Kranz and Lorrie Schultz.

ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT AND AFFIRMING IN PART AND REVERSING IN PART EXAMINER'S CONCLUSIONS OF LAW AND ORDER

On July 20, 2001, Examiner Dennis P. McGilligan issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above matter wherein he concluded: (1) Complainant Schultz was not a "municipal employee" and therefore Respondent could not have committed prohibited practices by its conduct toward her; and (2) Respondent committed prohibited practices within the meaning of Secs. 111.70(3)(a)1 and 3, Stats., by terminating the employment of Complainant Kranz. In light of these conclusions, the Examiner dismissed the complaint allegations as to Complainant Schultz but ordered Respondent to reinstate Complainant Kranz, make her whole for any losses, post a notice to employees, and cease and desist from engaging in such conduct in the future.

Both Complainant Schultz and Respondent thereafter timely filed petitions with the Wisconsin Employment Relations Commission seeking review of the Examiner's decision pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats.

Complainant Schultz subsequently advised the Commission that she had reached a settlement of her claims against Respondent and wished to withdraw her petition for review.

The parties thereafter filed written argument in support of and opposition to Respondent's petition for review – the last of which was received October 12, 2000.

On December 14, 2000, the Commission met with Examiner McGilligan to hear his impressions as to the demeanor of the witnesses who testified at hearing before him.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

ORDER

A. The Examiner's Findings of Fact are affirmed.

B. The Examiner's Conclusions of Law 1 – 3 are affirmed.

C. The Examiner's Conclusions of Law 4 – 5 are reversed to read:

> 4. Respondent's February 2, 2000 action as to Complainant Kranz's employment was not based in whole or in part on hostility toward the exercise of any Sec. 111.70(2), Stats., rights by Kranz and therefore Respondent did not thereby commit prohibited practices within the meaning of Secs. 111.70(3)(a)3 or derivatively (3)(a)1, Stats.
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> 5. Respondent's February 2, 2000 action as to Complainant Kranz's employment did not have a reasonable tendency to interfere with the exercise of Sec. 111.70(2), rights and therefore Respondent did not thereby commit an independent prohibited practice within the meaning of Sec. 111.70(3)(a)1, Stats.

D. The Examiner's Conclusion of Law 6 is affirmed.

E. The Examiner's Order is affirmed in part and reversed in part and modified to read:

The complaint is dismissed in its entirety.

Given under our hands and seal at the City of Madison, Wisconsin, this 23rd day of July, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

Chairperson Steven R. Sorenson did not participate.

MEMORANDUM ACCOMPANYING ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT AND AFFIRMING IN PART AND REVERSING IN PART EXAMINER'S CONCLUSIONS OF LAW AND ORDER

THE EXAMINER'S DECISION

Complainant Schultz

The Examiner dismissed all complaint allegations as to Complainant Clerk/Treasurer Schultz because he concluded she was a "confidential employee" and thus not a "municipal employee" with rights under Sec. 111.70(2), Stats. He based his conclusion on Schultz's role in the preparation of the City's budget, her service as the Mayor's clerical support, and her attendance at closed City Council meetings where wage issues were discussed.

Complainant Kranz

The Examiner determined that Respondent City of New Lisbon terminated Complainant Utility Clerk Kranz because of hostility toward her efforts to improve working conditions and thereby violated Secs. 111.70(3)(a)1 and 3, Stats.

In reaching this determination, he concluded that Kranz's efforts to improve working conditions were not purely individual and constituted the exercise of Sec. 111.70(2), Stats., rights. He found that the City's February 2, 2000 acceptance of Kranz's resignation was a pretextual explanation for the City's true retaliatory motive because the City knew that Kranz wished to return to work and a Council member had advised her that a return to work was acceptable prior to February 2, 2000.

The Examiner also found an independent violation of Sec. 111.70(3)(a)1, Stats., because he concluded that Respondent City's constructive termination of Kranz's employment had a reasonable tendency to interfere with the exercise of Sec. 111.70(2), Stats., rights.

The Examiner dismissed as unproven the complaint allegation that conduct by Respondent City's attorney had violated Sec. 111.70(3)(c), Stats.

To remedy the prohibited practices found as to Kranz, the Examiner ordered the City to reinstate Kranz and make her whole, to post a notice to employees and to cease and desist from committing the prohibited practices in question.

POSITIONS OF THE PARTIES ON REVIEW

Respondent City

Respondent contends the Examiner erred by concluding that it committed prohibited practices as to Kranz. Respondent asks that the Examiner be reversed in this respect.

As to the violation of Sec. 111.70(3)(a)3, Stats., found by the Examiner, Respondent argues that the Examiner incorrectly concluded that Kranz's actions were lawful concerted activity entitled to protection under the Municipal Employment Relations Act. Respondent points to the absence of any other "municipal employee" and asserts that Kranz therefore was pursuing strictly individual concerns. Respondent further contends that the Examiner erred by at least tacitly concluding that Kranz's one day strike on January 26, 2000 was protected activity. Respondent also urges rejection of any claim that Kranz was engaged in protected activity when she left work on January 27, 2000 and thereby quit her employment.

If the Commission concludes that Kranz was engaged in lawful concerted activity, Respondent contends there is no evidence that the City Council was hostile toward that activity or that the Council acted out of hostility when it accepted Kranz's resignation. Respondent asserts that it acted based on legitimate business reasons and had no obligation to allow (and did not in fact allow) Kranz to rescind her resignation.

As to the independent violation of Sec. 111.70(3)(a)1, Stats., found by the Examiner, Respondent contends that the Examiner should be reversed because Respondent did not constructively discharge Kranz out of improper hostility. Further, even if it is concluded that Respondent's conduct had a reasonable tendency to interfere with the exercise of Sec. 111.70(2), Stats., rights, Respondent argues that a finding of no violation is appropriate because it had valid business reasons for its action – it did not wish to employ an individual who had no true interest in retaining her job.

Should the Commission conclude that violations of the Municipal Employment Relations Act occurred, Respondent urges the Commission to exercise its discretion to modify the Examiner's remedial order to eliminate the requirement that Kranz be reinstated. Respondent asserts that reinstatement is not appropriate where, as here, Kranz abandoned her employment.

Complainant Kranz

Complainant Kranz contends that the Examiner should be affirmed as to the prohibited practices found and the remedy ordered.

Kranz argues that the Examiner correctly concluded that she was exercising Sec. 111.70(2), Stats., rights when she took various actions as to working conditions. She asserts that hostility toward her exercise of those rights was explicit in the rationale expressed by the City Council when it accepted her "resignation" and constructively discharged her – the Respondent did not want an employee who was willing to engage in lawful, concerted activity.

Therefore, Complainant Kranz asks that the Examiner be affirmed.

Discrimination Against Complainant Kranz

As reflected in his Conclusion of Law 4, the Examiner concluded that Respondent City terminated Complainant Kranz's employment on February 2, 2000 in whole or in part out of hostility toward her exercise of Sec. 111.70(2), Stats., rights, and thereby committed a prohibited practice within the meaning of Sec. 111.70(3)(a)3, Stats.

As recited by the Examiner, to establish a violation of Sec. 111.70(3)(a)3, Stats., Complainant Kranz must establish by a clear and satisfactory preponderance of the evidence (See Secs. 111.07(3) and 111.70(4)(a), Stats.), that:

1. Complainant exercised Sec. 111.70(2), Stats., rights;

2. Respondent City was aware of Complainant's exercise of these rights;

3. Respondent City was hostile toward the exercise of these rights; and

4. Respondent City's action regarding Complainant on February 2, 2000 was based in whole or in part on its hostility toward the exercise of those rights.

See MUSKEGO-NORWAY C.S.J.S.D. NO. 9 V. WERB, 35 WIS.2D 540 (1967); EMPLOYMENT RELATIONS DEPARTMENT V. WERC, 122 WIS.2D 132 (1985).

As to the first component of Complainant's burden, the Examiner concluded that Kranz exercised Sec. 111.70(2), Stats., rights when discussing conditions of employment with Council members and Mayor Southworth. In reaching this conclusion, he concluded that Kranz's actions "were not purely individual" and "her efforts to improve working conditions in City Hall would have benefited all such employees, not just herself."

As to the second component of Complainant's burden, the Examiner made no explicit determination – presumably because the activity in question involved direct interaction with Respondent.

As to the third and fourth components of Complainant's burden, the Examiner concluded the following:

> Hence, it is only necessary to determine why Respondent terminated Kranz's employment on February 2, 2000, after she informed City officials on January 30, 2000, that she wanted to return to work, after Bennett told her on January 31, 2000, that she could return to work on the next day, and after she had agreed to do so. In other words, what truly motivated Respondent's City Council to do what it did?
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> Respondent offers no plausible answer, as it instead only claims that it had decided to accept Kranz's earlier resignation. But that cannot be true since Kranz effectively rescinded her earlier resignation on January 30, 2000, and since Bennett told Kranz on January 31, 2000, that she could return to work the next day, which she agreed to do. The facts here thus are similar to other cases where it was determined that a resignation had been effectively rescinded. See TRITON COLLEGE, 107 LA 796 (Greco, 1996); SAN FRANCISCO NEWSPAPER PUBLISHERS' ASSN., 27 LA 11 (Miller, 1956); AMERICAN BAKERIES CO., 34 LA 361 (Sembower, 1960); INGALLS SHIPBUILDING CORP., 38 LA 81 (Herbert, 1961); JEWISH CHRONIC DISEASE HOSPITAL, 45 LA 590 (Yagoda, 1968); MUTER CO., 47 LA 332 (DiLeone, 1966); ATLANTIC SOUTHWEST AIRLINES, 102 LA 657 (Feigenbaum, 1994); MINNESOTA POLLUTION CONTROL AGENCY, 97 LA 389 (Daley, 1991). The underlying principle in those cases is applicable here because Respondent here has no posted rules or regulations preventing an employee from rescinding his/her resignation before it is formally accepted by the City Council and because Respondent did not suffer any detriment when Kranz first submitted her resignation and then rescinded it – with Bennett's blessing.
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> It is true that Mayor Southworth and Chief Dunsford testified that they thought Kranz quit her employment on January 27, 2000. However, there is no claim by Respondent that they did not know that Kranz had rescinded her resignation and that she agreed to return to work on February 1, 2000, when it voted to terminate her on February 2, 2000. Therefore, I find that Respondent's professed explanation is pretextual in nature, and that it has been advanced to hide Respondent's true motivation, i.e. to retaliate against Kranz because she had been trying to improve working conditions.

> Based on all of the foregoing, as well as the totality of the circumstances, the Examiner finds that the evidence shows that Respondent's actions toward Complainant Kranz were motivated by hostility and that Respondent's termination of her employment on February 2, 2000, violated Section 111.70(3)(a)3, Stats. Inasmuch as there is a Sec. 111.70(3)(a)3, Stats., violation, there is a derivative Sec. 111.70(3)(a)1, Stats., violation.

We reverse the Examiner. Assuming arguendo that Complainant Kranz exercised rights created by Sec. 111.70(2), Stats., we are satisfied that Complainant nonetheless did not meet her burden of proof as to both the third (hostility) or fourth (motivation) elements of a Sec. 111.70(3)(a)3, Stats., violation. We reach this conclusion for the following reasons.

The conduct being contested by Complainant is the February 2, 2000 action by the City Council. As reflected by the absence of any such Examiner Findings of Fact, there is no direct evidence that any of the Council members were hostile toward Complainant Kranz's conduct regarding conditions of employment. Indeed, as pointed out by Respondent, at a special meeting conducted in the evening of the same day (January 26, 2000) Kranz and Schultz elected not to come to work to protest their working conditions, Respondent nonetheless retroactively approved a wage increase for Kranz – a wage increase with a very clouded origin no less. Further, following Kranz's one day walkout and her subsequent departure from work the very next day, individual Council members contacted her to discuss her concerns. Thus, the record amply establishes that the Council engaged in behavior that demonstrates their sympathy and concern for Kranz – not their hostility.

The Examiner inferred that hostility was present because there was "no plausible answer" to the question of why Respondent did not allow Kranz to return to work. Contrary to the Examiner, we find that the record contains a more than plausible answer to the Examiner's question of "what truly motivated Respondent's City Council to do what it did?"

As reflected in the Examiner's Finding of Fact 53, "Council members basically expressed the sentiment that while Kranz had been a good employee of the City for a number of years that by walking off the job as she did, this had undermined their confidence in her ability to continue working for the City. They felt they could not have an employee they could not count on." We find this to be the sole motivation of the Council.

The formal motion passed by the Council is consistent with this entirely legal motivation:

> . . . a motion to consider the actions and words of Lynn Kranz on Thursday, January 27, 2000, as quitting and terminating her employment with the City.

Contrary to the arguments of Complainant Kranz, we find the Council's action does not reflect hostility toward an employee who has exercised protected rights but rather reflects formal acceptance of a voluntary quit.

The Examiner's discussion of the Council's motivation includes his determination that Kranz "effectively rescinded her resignation on January 30, 2000 prior to the February 2, 2000 meeting. To the extent this determination does no more than acknowledge that Kranz had made the City aware of her interest in returning to work, we do not disagree. To a large extent, we view this issue as a "red herring" because, as articulated by the Examiner, the key question is whether the City was improperly motivated when it decided not to allow Kranz to return to work. However, to the extent this determination reflects some tacit conclusion that Kranz was entitled to return to work, we do disagree with the Examiner. Notably absent from the Examiner's discussion of this issue is an acknowledgement that on January 28, 2000, Respondent Mayor wrote Kranz the following letter which she received January 29, 2000:

> This confirms our conversation of yesterday morning that you quit your employment with the City, effective that day. We wish you the best of luck in whatever future employment endeavors you pursue.

The Mayor was authorized to accept a resignation as an agent of the City. Thus, prior to any alleged rescission by Kranz on January 30, 2000, the Respondent City had accepted Kranz's resignation. It is also noteworthy that Kranz's offer to return was hardly unconditional but was instead contingent on having the right to tape record all conversations in City Hall and to have little if any contact with her supervisor – the Mayor.

Given all of the foregoing, we conclude that Respondent did not violate Sec. 111.70(3)(a)3, Stats.

Interference

The Examiner's finding of a violation of Sec. 111.70(3)(a)1, Stats., was premised on his determination that Respondent constructively terminated Kranz because she exercised Sec. 111.70(2), Stats., rights. Because we have reversed the Examiner's determination in this regard, we now reverse his finding of a violation of Sec. 111.70(3)(a)1, Stats., as well.

Complaint Allegations as to Complainant Schultz

As indicated earlier herein, Complainant Schultz and the Respondent City have entered into a settlement of claims which led Complainant Schultz to withdraw her petition for review. However, in the context of the petition filed as to Complainant Kranz, we are nonetheless obligated to review all portions of the Examiner's decision and we have done so. See CENTRAL HIGH SCHOOL DISTRICT OF WESTOSHA, DEC. NO. 29671-C (WERC, 8/2000). While we view Complainant Schultz's status as a "confidential employee" to be a close question, we are satisfied that the Examiner correctly resolved this issue and then dismissed Schultz's complaint allegations. Therefore, we have affirmed the Examiner in this regard.

Dated at Madison, Wisconsin, this 23rd day of July, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

Chairperson Steven R. Sorenson did not participate.

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