

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

SANDRA LEA BENEDICT, Complainant,

vs.

WAUSAU INSURANCE COMPANY, Respondent.

Case 58
No. 59329
MP-3694

Decision No. 30018-B

SANDRA LEA BENEDICT, Complainant,

vs.

**WISCONSIN EDUCATION ASSOCIATION COUNCIL (WEAC), EAU CLAIRE
ASSOCIATION OF EDUCATORS (ECAE) and EAU CLAIRE AREA SCHOOL
DISTRICT**, Respondents.

Case 59
No. 59333
MP-3696

Decision No. 30019-B

SANDRA LEA BENEDICT, Complainant,

vs.

**COREGIS INSURANCE COMPANY, HORACE MANN INSURANCE COMPANY,
MADISON NATIONAL LIFE INSURANCE COMPANY, AMERICAN FIDELITY
INSURANCE COMPANY, AMERICAN MERCURY INSURANCE COMPANY, and
AMERICAN INSURANCE GROUP (AIG)**, Respondents.

Case 60
No. 59334
MP-3697

Decision No. 30020-B

Dec. No. 30018-B
Dec. No. 30019-B
Dec. No. 30020-B

Appearances:

Ms. Sandra Lea Benedict, 3642 Livingston Lane, Eau Claire, Wisconsin 54701, appearing on her own behalf.

Law Offices of Stilp & Cotton, by **Attorney Mark A. Seifert**, 3430 Oakwood Drive, Suite 400, Eau Claire, Wisconsin 54702-1127, appearing on behalf of Wausau Insurance Company.

Palmer & Finerty, S.C., by **Attorney John D. Finerty**, 20800 Swenson Drive, Suite 425, Waukesha, Wisconsin 53186-4081, appearing on behalf of Wisconsin Education Association Council (WEAC), Eau Claire Association of Educators (ECAE), American Fidelity Insurance Company, and American Mercury Insurance Company.

Weld, Riley, Prenn & Ricci, S.C., by **Attorney James M. Ward**, 3624 Oakwood Hills Parkway, Eau Claire Wisconsin 54702-1030, appearing on behalf of Eau Claire Area School District.

Whyte Hirschboeck Dudek, S.C., by **Attorney Charles H. Bohl**, 111 E. Wisconsin Avenue, Milwaukee, Wisconsin 53202, appearing on behalf of Coregis Insurance Company.

Kravit, Gass, Hovel & Leitner, S.C., by **Attorneys Steven E. Kravit and Melissa L. Greipp**, 825 North Jefferson, Milwaukee, Wisconsin 53202, appearing on behalf of Horace Mann Insurance Company and American Insurance Group (AIG).

Mr. Mark E. Colbert, Attorney at Law, 6004 Woodland Drive, Waunakee, Wisconsin 53597, appearing on behalf of Madison National Life Insurance Company.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

1. The parties to the consolidated complaints are identified in the "Appearances" section set forth above and are incorporated by reference. Each of the respective complaints was filed on October 30, 2000. Subsequently, several of the Respondents filed motions to make the complaints more definite and certain.

2. On December 20, 2000, this Examiner issued Dec. Nos. 30018, 30019 and 30020, containing, in pertinent part, the following Order:

1. That the Complainant amend Paragraph C of her complaint to set forth . . .

a) specific facts and statutory citations establishing that the Respondents are subject to the jurisdiction of the WERC under the statutes which it administers.

b) the specific acts or omissions or course of conduct engaged in by each of the Respondents, along with the dates on which such acts, omissions or course of conduct occurred, which are alleged to be in violation of the Wisconsin Employment Peace Act, Municipal Employment Relations Act, or State Employment Labor Relations Act.

2. That the Complainant amend Paragraph D of her complaint to identify the specific sections or subsections of the Wisconsin Employment Peace Act [Sec. 11.06, Wis. Stats.], the Municipal Employment Relations Act [Sec. 111.70(3), Wis. Stats.] or the State Employment Labor Relations Act [Sec. 111.84, Wis. Stats.] which are alleged to have been respectively violated by each of the Respondents.

3. On December 26, 2000, the Complainant filed a 75 page document denominated "Amended Consolidated Retaliatory Complaint," (herein the Amended Complaint) consisting of 47 enumerated paragraphs and a number of attachments, including, apparently, her amended pleading in WERC Case Nos. 57283, 57284 and 57345, which were filed against the Respondents Eau Claire Area School District, Wisconsin Education Association Council and Eau Claire Association of Educators and which were dismissed by Examiner Richard B. McLaughlin on January 20, 2000, in Dec. Nos. 29689-C, 29690-C and 29691-C.

4. Numerous of the allegations of the Amended Complaint, allege violations of federal or state statutes outside of Ch. 111, Wis. Stats., or refer to actions of the Respondents occurring before October 31, 1999.

5. The allegations of the Amended Complaint referring to actions of the Respondents Eau Claire Area School District, Eau Claire Association of Educators and Wisconsin Education Association Council falling within the time period October 31, 1999 to October 30, 2000 and constituting alleged violations of Sec. 111.70(3)(a), Wis. Stats., are stated as follows:

. . .

6. Complainant Sandra Lea Benedict filed complaints on October 30, 2000 stating "the facts which constitute the alleged unfair labor or

prohibited practices” including the following: (a) “Unpaid leave of absence” contract; (b) No letter of ‘intent’ issued; (c) Constructive, retaliatory & unjust discharge; (d) On-going discrimination; (e) Disparage treatment, etc.

7. Complainant Sandra Lea Benedict submitted her initial letter of August 17, 2000 as well as her response to her Notice of Written Grievance To The Eau Claire Area School District, dated September 28, 2000 regarding the current status of Benedict's grievance pursuant to Step 2 of the grievance procedure and then her resubmitted REVISED Step 2 Grievance. Therefore, Benedict believes she has complied with Step 2 of the contractual grievance procedure in the contract between Eau Claire Board of Education and Eau Claire Association of Educators dated July 1, 1999 - June 30, 2001 to the best of her ability since she is merely a "DISCHARGED TEACHER" AND "NOT AN ATTORNEY."

8. Complainant Sandra Lea Benedict has presented her grievance and is questioning the proper interpretation or application of numerous specific provisions of the above mentioned Agreement, according to Article IV, Grievance Procedure, Section A, Definitions (1). A grievance is defined as a question(s) regarding the proper interpretation or application of a specific provision of this Agreement.

9. Complainant Sandra Lea Benedict has conformed to that provision by her submission of her Notice of Written Grievance To The Eau Claire Area School District by providing concise statements of the alleged grievance including the facts upon which the grievance is based, the issues involved, the specific section of the Agreement alleged to have been violated, and the relief sought which Eau Claire Area School District and Eau Claire Association of Educators refused to acknowledge in a fair way.

10. Complainant Sandra Lea Benedict is stating that Eau Claire Area School District as well as Eau Claire Association of Educators Local Labor Union breached the contract under Section B. Preface 1. The Association shall have the right to continue prosecution of a grievance once commenced by a complainant regardless of whether the complaint wants to continue. Benedict requested in a telephone conversation around August 17, 2000 with NUE Grievance Attorney Michael Burke to assist her in filing the necessary grievance based upon Benedict's grievance letter dated August 17, 2000 on her own behalf against the Eau Claire Area School District.

11. Complainant Sandra Lea Benedict soon after received a letter dated August 28, 2000 from Eau Claire Association of Educators (ECAE) Local Labor Union President, Thomas Blount stating the following regarding

Benedict's Grievance Letter of August 17, 2000 to Dr. Bill [sic] Klaus, Superintendent of Eau Claire Area School District, Jim Kling, Personnel Director of Eau Claire Area School District, NUE Grievance Attorney Michael Burke representing Eau Claire Association of Educators Local Labor Union (ECAE) and Attorney James Ward, representing Eau Claire Area School District:

Dear Ms. Benedict,

On behalf of the Eau Claire Association of Educators I have reviewed your recent request to file a grievance based on the content of the August 10, 2000 letter from Mr. Ward, Attorney for the Eau Claire Area Schools. Upon review of that letter, the contract language, and your rationale in your August 17 letter, Mr. Burke and I do not find merit for a grievance. Further, your letter does not appear to contest your status on unpaid medical leave. If that is not accurate and you wish to be reinstated when the individual contracts are issued, please advise the district and the association.

Sincerely,
(Signed)
Thomas Blount
ECAE President

cc: Mike Burke
Bruce Meredith
James Ward

12. Complainant Sandra Lea Benedict is stating that she is "CONTESTING HER UNPAID MEDICAL LEAVE OF ABSENCE" from employer Eau Claire Area School District and has filed this complaint in reference to her individual teaching contract dated September 29, 2000 of which she received immediately following that date. Benedict signed and returned the teaching contract on October 3, 2000. HOWEVER, Benedict contests and objects to the contract language [sic] stating "UNPAID MEDICAL LEAVE OF ABSENCE" since it was truly an "ABUSIVE, RETALIATORY AND UNJUST DISCHARGE" which caused Benedict "FORCED RETIREMENT." Madison National Life Insurance Company forced Benedict to apply for Social Security as well as State Teacher Retirement without resolving any of Benedict's age and disabilities claims/charges as well as disparate treatment and on-going discrimination regarding her Employment Disputes. This is a prohibited practice in violation of Sec. 111.70(3)(a)5 of the Wisconsin Statutes, Municipal Relations Act (MERA).

13. Complainant Sandra Lea Benedict is stating that Eau Claire Association of Educators (ECAE) Local Labor union has unlawfully refused to submit Benedict's previous complaints and grievances as well as her present complaint and grievance to arbitration which is arbitrary, capricious and in bad faith. As such it constitutes interference with Benedict's MERA rights and a prohibited practice violative of Sec. 111.70(3)(b)1 of the Wisconsin Statutes.

14. Complainant Sandra Lea Benedict is stating that Eau Claire Association of Educators (ECAE) Local Labor Union and its affiliate [sic] Wisconsin Education Association Council (WEAC) has represented a bargaining unit of teachers at Eau Claire Area School District. The District and the Union are parties to a series of collective bargaining agreements including the latest one covering calendar years 1999-2001. The agreement prohibits discharges of bargaining unit employees without just cause and contains a multi-step grievance procedure ending in final and binding grievance arbitration.

. . .

26. Complainant Sandra Lea Benedict, on her own behalf, submitted a written grievance according to the Contract between Eau Claire Board of Education and Eau Claire Association of Educators dated July 1, 1999 – June 30, 2001, Article IV. Grievance Procedure Section A. Definitions. 1. A grievance is defined as a question(s) regarding the proper interpretation or application of a specific provision of this Agreement.

27. Complainant Sandra Lea Benedict requested the following under Section B. Preface 1. The Association shall have the right to continue prosecution of a grievance once commenced by a complainant regardless of whether the complainant wants to continue.

28. Complainant Sandra Lea Benedict is stating the following according to Section B. Preface 4. The grievance procedures provided in this Agreement shall be supplementary, or cumulative to, rather than exclusive of any procedures or remedies afforded to any teacher by law. However, applications to the Wisconsin Employment Relations Commission (WERC) or to any court of law shall not be made until grievance procedures have been exhausted. These grievance procedures have been completely "DENIED" Benedict by Eau Claire Area School District as well as Eau Claire Association of Educators.

29. Complainant Sandra Lea Benedict is stating the following under Section B. Preface 5. No decision or adjustment of a grievance shall be contrary to any provision of this Agreement existing between the parties hereto.

30. Complainant Sandra Lea Benedict is stating that failure by the Association or the grievant to process the grievance to the next step within the prescribed limits shall result in the grievance being resolved in the favor of the Board. Eau Claire Association of Educators refused Benedict the grievance procedure, therefore Benedict proceeded to Step 2 on her own behalf.

31. Complainant Sandra Lea Benedict is stating that numerous specific sections of the Agreement were violated, and relief is being sought for these violations.

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6. The allegations of the Amended Complaint referring to actions of the Respondents Wausau Insurance Company, Madison National Life Insurance Company, Coregis Insurance Company, Horace Mann Insurance Company, American Fidelity Insurance Company, American Mercury Insurance Company, and American International Group (AIG) are stated as follows:

...

21. Complainant Sandra Lea Benedict is submitting this "CONSOLIDATED AMENDED RETALIATORY COMPLAINT" to include all of the listed parties in Case 58 No. 59329 MP-3694, Sandra Lea Benedict vs. Wausau Insurance Company, Case 59 No. 59333 MP-3696, Sandra Lea Benedict vs. Eau Claire Area School District, Wisconsin Education Association Council and Eau Claire Association of Educators, and Case 60 No. 59334 MP-3697, Sandra Lea Benedict vs. Madison National Life Insurance Company, Coregis Insurance Company, Horace Mann Insurance Company, American Fidelity Insurance Company, American Mercury Insurance Company and American International Group (AIG)/National Union Fire Insurance Company of The State of Pennsylvania to this proceeding.

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38. Complainant Sandra Lea Benedict clearly and concisely states that Eau Claire Area School District can not be relieved from liability for payments and/or penalties for provisions in insurance policies as a fiduciary. Accordingly, Exclusivity and Third Party Liability under Sec. 10.(a) The compensation to which an employee is entitled under the applicable State Worker's Compensation laws and the supplemental compensation, if any, to which he or she may be entitled under this Act, shall constitute the employee's exclusive

remedy against the employer, the employer's employees and any employee, officer, director, or agent of such employer, insurer, or collective-bargaining agent (while acting within the scope of his or her employment) for any illness, injury, or death arising out of and in the course of his or her employment. Benedict contends that she has been denied her rightful claims. Eau Claire Area School District has liability policies with Coregis Insurance Company, Policy No. SBD-000-355-1, Wisconsin Association of School Boards' Educators & Employment Liability Insurance as well as Wausau Workers' Compensation & Employers Liability Insurance, Policy No. 0117-03-068069, WC Claim #1998048562, Claim #M01102978, Claim #D01475043, Claim #M01105382, M = liability claim and D = Workers' Compensation claim. WEAC (Wisconsin Education Association Council) and Eau Claire Association of Educators (ECAE) have liability policies with Horace Mann Insurance Company, Contract No. 48-006048, NEA Association Liability Insurance, with American Fidelity Insurance Company, Policy No. 1361269L16, and American Mercury Insurance Company, Policy No. SBD-000355-1. It appears that BOTH EAU CLAIRE AREA SCHOOL DISTRICT AND WEAC LABOR UNION HAVE A DUAL POLICY WITH THE SAME POLICY CLAIM NO.'s (Policy No. SBD-000355-1). Why??? Also, Madison National Life Insurance Company, Policy #173, Claim #2141.

39. Complainant Sandra Lea Benedict is alleging accordingly, under SEC. 10(4) No employer, or insurer of such employer shall have any lien upon any judgment rendered in any third party liability action brought as a result of any illness, injury or death arising out of or in the course of employment with such employer, nor any right of subrogation in connection with any such third party liability action. Benedict is clearly and concisely stating that Eau Claire Area School District as Benedict's employer had no right to put liens and judgments upon Benedict in her third party liability action in Case No. 99TJ000016A Sandra Lea v. Eau Claire Public School Dist., Transcript of Judgment for the United States District Court/Western District of Wisconsin, originating case no. 99-C-007-S in the amount of \$12,150.30 which amount was relinquished by the Eau Claire County Circuit Court paid over to Attorney Joel Aberg, representing Attorney for Benedict's employer Eau Claire Area School District as well as attorney for Coregis Insurance Company which issued a group policy of liability insurance which covered Sandra Lea Benedict, and pursuant to this policy, liability benefits were not paid to Benedict.

Attorney Thomas Guelzow and Attorney George Senteney had no right to put liens and judgments upon Benedict in her third party action in Case No. 98TJ000034A John Finerty et al vs Sandra Lea Benedict, Transcript of Judgment for the United States District Court/Western District of Wisconsin,

originating case no. 98-C-0313-S; submitted by Attorney James E. Garvey; judgment for sanctions, in the amount of \$4,959.95 which amount was paid over to Attorney Christopher Seelen, representing Attorney Thomas Guelzow and Attorney George Senteney. Attorney Stephen E. Kravit, is appearing on behalf of AIG (American International Group) which is the holding company which owns numerous insurance companies, but does not issue policies of insurance and of which National Union Fire Insurance Company of the State of Pennsylvania is a parent company which issued Lawyers Professional Liability Insurance to Attorney Guelzow and Attorney Senteney which covered Sandra Lea Benedict in the client-lawyer relationship, and pursuant to this policy liability benefits were never paid to Benedict.

Attorney John Finerty had no right to put liens and judgments upon Benedict in her third party action, in case no. 98TJ000034, John Finerty et al vs Sandra Lea Benedict, Transcript of Judgment for the United States-'District Court/Western District of Wisconsin, originating case no. 98-C-0313-S; submitted by Attorney James E. Garvey; judgment for sanctions, in the amount of \$2,730, which amount was paid over to Attorney John Finerty and satisfied on August 4, 2000, Attorney Finerty representing Eau Claire Association of Educators and Wisconsin Education Association Council labor union as well as attorney appearing on behalf of American Fidelity Insurance Company and American Mercury Insurance company which issued group policies of liability insurance which covered Sandra Lea Benedict and pursuant to these policies, liability benefits were never paid to Benedict.

40. Complainant Sandra Lea Benedict alleges that the Complaint does relate to Madison National Life Insurance Company, Inc. and attaches subject matter jurisdiction over Madison National Life Insurance Co., Inc. due to fact that Benedict's employer Eau Claire Area School District can not be relieved from liability for payments and/or penalties for provisions in insurance policies as a fiduciary. Accordingly, Exclusivity and Third Party Liability under Sec. 10(a) The applicable State Workers' Compensation laws and the supplemental compensation, if any, to which he or she may be entitled under this Act, shall constitute the employee's exclusive remedy against the employer, the employer's employees and any employee, officer, director, or agent of such employer, insurer, or collective-bargaining agent (while acting within the scope of his or her employment) for any illness, injury, or death arising out of and in the course of his or her employment. Benedict contends that she has been denied her rightful claims. Eau Claire Area School District has a liability policy with Madison National Life Insurance Company, Policy 173, Claim #2141. A "third party" relationship existed between Benedict and Madison National Life Insurance Company since this company issued a group policy of disability

insurance to Eau Claire Area School District [sic] which is Benedict's employer and which covered Sandra Lea Benedict as their employee, and pursuant to this policy, disability benefits were NOT paid to Benedict during December 5, 1990 to January 28, 1991 therefore leading to the conclusion that Benedict was not granted but was DENIED disability compensation benefits for that time period. Complainant Benedict alleges that payment or nonpayment of compensation during labor disputes creates a federal preemption question under the Supremacy Clause; see Nash v. Florida Industrial Commission (1967). Benedict's First Amendment Rights also pose a problem. See Frazee v. Illinois Dept. of Employment Security (1989). See Sherbert v. Verner (1963).

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44. Complainant Sandra Lea Benedict alleges that Eau Claire Association of Educators (ECAE) Local Labor Union as well as Wisconsin Education Association Council (WEAC) cannot be relieved from liability due to fact that both are entities which share equally in the contract between Eau Claire Board of Education and the Eau Claire Association of Educators. Accordingly, Exclusivity and Third Party Liability under SEC.10(a) The compensation to which an employee is entitled under the applicable State Worker's Compensation laws and the supplemental compensation, if any, to which he or she may be entitled under this Act, shall constitute the employee's exclusive remedy against the employer, the employer's employees and any employee, officer, director, or agent of such employer, insurer, or collective bargaining agent (while acting within the scope of his or her employment [sic]) for any illness, injury, or death arising out of and in the course of his or her rightful claims. WEAC (Wisconsin Education Association Council) and NEA (National Education Association) have liability insurance underwritten by American Fidelity Insurance Company and American Mercury Insurance Company as well as Horace Mann Insurance Company Which issues Wisconsin Education Association Council National Education Association Educators Employment Liability Insurance Which covered Sandra Lea Benedict, and pursuant to these policies, liability benefits were not paid to Benedict. Benedict is alleging that under the NEA Educators Employment Liability Contract, II. (K) Peer Review System regarding Benedict claims against "Constructive Discharge" due to malicious interference by coworker Donna Friedeck.

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7. The Amended Complaint contains arguments raised in anticipation of Statute of Limitations defenses as follows:

. . .

18. Complainant Sandra Lea Benedict received letter from NUE Grievance Attorney Michael Burke on April 2, 1998 stating the following refusal for Benedict requested representation in ERD (Equal Rights Division) Hearing against Eau Claire Area School District.

Dear Ms. Benedict,

This letter will confirm our conversation in which I indicated that ECAE would not represent you in your April 16, 1998 ERD Hearing. The reason for this decision is as follows:

The ERD Complaint is not a matter that arises under the terms of the collective bargaining agreement. As such, ECAE does not have legal duty to represent you in this matter. While it is true that ECAE does, on occasion, represent members in matters outside of the collective bargaining agreement, that is only true when there is a strong organizational interest in such representation. In this case, we have concluded that no such organizational [sic] interest exists. We considered the following in reaching this conclusion:

1. ECAE was not involved in the decision to file the April 1997 ERD Complaint. Given that your request for representation [sic] was received on March 30, 1998, it would not now be appropriate for ECAE to represent you on appeal given our lack of involvement in the investigatory stage;
2. Our review of the October 27, 1997 Initial Determination Of No Probable Cause indicates the possibility of success on appeal is minimal; and,
3. Your case appears to raise issues that are largely personal and not of substantial organizational benefit.

If you have questions regarding this matter, please contact me at your convenience.

18. [sic] Complainant Sandra Lea Benedict in her previous Amended Complaint to WERC asserted the inapplicability of statutes [sic] of limitations in a number of claims and therefore included the DEFENSE OF LACHES in suits for Specific Performance wholly independent of the Statute of Limitations including the following:

a.) That since the STATUTE OF LIMITATIONS has run on Complainant Benedict's previous claims, Benedict will show in an amended complaint that the new claims relate back to the date of the original complaints to the ERD and EEOC.

b.) That Complainant Sandra Lea Benedict is alleging that an amendment relates back to the date of the original pleading if "relation back is permitted by the law that provides the statute of limitations applicable to the action."

c.) That the DEFENSE OF LACHES in a suit for specific performance is to be considered wholly independent of the Statutes of Limitations.

d.) That LACHES begins to run from the time Complainant Sandra Lea Benedict has the knowledge that one of her rights has been infringed upon and there are no precise rules governing its application and each case is determined upon its own circumstances.

e.) That Complainant Sandra Lea Benedict has recently become aware that her rights had been infringed upon but was totally unaware of WERC complaint process until her recent filing with WERC since she is "NOT AN ATTORNEY BUT MERELY A DISCHARGED TEACHER."

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22. Complainant Sandra Lea Benedict is stating that if the prohibited practice complaints are considered time barred under the applicable statute of limitations, then Benedict is requesting that these claims be remedied under Tort Law through a Defense of Laches in a suit for [sic]

...

8. The Amended Complaint culminates with the following request for relief:

WHEREFORE, Complainant Sandra Lea Benedict prays for and demands judgment in her favor and against all Respondents together with disbursements for liabilities and damages as well as reasonable attorneys' fees, and for such other and further relief as the Commission may deem just and equitable in the premises under the liabilities in regards to Benedict's "AMENDED RETALIATORY COMPLAINT."

9. On or before January 22, 2001, all Respondents with the exception of Coregis Insurance Company filed Motions to Dismiss the Amended Complaint claiming either that the Complainant's claims are barred by the Statute of Limitations or that the Commission does not have jurisdiction over the parties under Ch. 111, Wis. Stats. On December 14, 2000, Coregis Insurance Company had filed a response to the original Complaint, as follows:

. . .

Please be advised that Coregis insurance provided excess Educators Legal Liability insurance which expired 7/1/99. We have no direct contractual agreement with Ms. Benedict and are not in a position to make any offer.

Should you have any questions please fee free to contact me. Thank you for your attention to this matter.

. . .

10. On February 9, 2001, the Complainant filed a document denominated "Petitioner Sandra Lea Benedict's Response to Her 'Amended Complaint' In Opposition to Motion to Dismiss By Respondents . . ." comprising 78 pages of argument largely to the effect that the Respondent insurance companies are under a duty to indemnify the Complainant for judgments taken against her in previous litigation and approximately 100 pages of attachments including copies of the policies of insurance issued by the various Respondents and documents relating to judgments taken against the Complainant and the satisfactions thereof in previous litigation. The Complainant also filed a two volume "Brief on Merits in Opposition to Motion to Dismiss . . ." comprising 189 pages, which appears to be largely a copy of legal arguments filed in previous litigation before various tribunals citing to a wide variety of federal and state case precedents, statutes and administrative rules.

11. On March 1, 2001, the Complainant filed a Notice of Motion and Motion for Discovery and a Notice of Motion and Motion to Compel Production of Documents, both pursuant to Ch. 804, Wisconsin Rules of Civil Procedure, seeking copies of policies of insurance issued by the Respondent insurance companies to either the District or the Union, and also seeking information regarding a liability insurance program purportedly underwritten by the National Education Association and known as the Kate Frank-Du Shane Unified Legal Services Program Insurance Policy.

12. On April 10, 2001, Respondent Coregis Insurance Company filed a copy of its policy of insurance with the Eau Claire Area School District, providing coverage for Educators Legal Liability for the policy period July 1, 1998 to July 1, 1999. In the cover letter attached thereto, Coregis further moved for dismissal of the claims against it due to lack of jurisdiction

and tolling of the Statute of Limitations. Complainant responded on May 7, 2001, with an Objection of 119 pages, recapitulating her dealings with the various Respondents since 1989, citing numerous state and federal statutes she alleges the Respondents to have violated and citing a panoply of civil causes of action, including discriminatory treatment in a number of instances, failure to defend her in litigation with other parties during the 1990s, failure to indemnify her for judgments taken against her in said litigation, and vicarious liability against the Respondent insurance companies for indemnification for the same judgment damages.

13. On September 4, 2001, Complainant's Motions for Discovery and Production of Documents were dismissed in Dec. Nos. 30018-A, 30019-A and 30020-A. On September 17, 2001, the Complainant filed an Objection to the Order dismissing her discovery motions. Treating the Objection as a request for reconsideration, this Examiner issued a letter on September 27, 2001 denying the request and affirming the Order.

14. The acts alleged in the Amended complaint do not constitute prohibited practices under Sec. 111.70 occurring within one year prior to the filing of the consolidated complaints.

CONCLUSIONS OF LAW

1. For the purposes of this proceeding, the Complainant constitutes a municipal employee as defined in Sec. 111.70(1)(i), Wis. Stats.

2. For the purposes of this proceeding, the District constitutes a municipal employer as defined in Sec. 111.70(1)(j), Wis. Stats.

3. For the purposes of this proceeding, the ECAE and WEAC constitute a labor organization as defined in Sec. 111.70(1)(h), Wis. Stats.

4. For the purposes of this proceeding, Wausau Insurance Company, Coregis Insurance Company, Horace Mann Insurance Company, Madison National Life Insurance Company, American Fidelity Insurance Company, American Mercury Insurance Company and American Insurance Group (AIG) do not constitute municipal employers as defined in Sec. 111.70(1)(j), Wis. Stats., labor organizations as defined in Sec. 111.70(1)(h), Wis. Stats., or persons acting on behalf of or in the interest of a municipal employer as set forth in Sec. 111.70(3)(c), Wis. Stats.

5. The Commission lacks jurisdiction over those allegations of the Amended Complaint citing violations of law other than sub. ch. IV of Ch. 111, Wis. Stats.

6. The Respondents Eau Claire Association of Educators and Wisconsin Education Association Council did not violate their duty of fair representation to the Complainant.

7. Complainant's other claims constituting violations falling within sub. ch. IV of Ch. 111, Wis. Stats. are barred by Sec. 111.07(14) and 111.70(4)(a), Wis. Stats.

ORDER

The Amended Complaint is dismissed as to all Respondents and causes of action.

Dated at Madison, Wisconsin, this 20th day of September, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

John R. Emery /s/

John R. Emery, Examiner

EAU CLAIRE SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

BACKGROUND

On January 20, 2000, in EAU CLAIRE ASSOCIATION OF EDUCATORS, ET AL, DEC. NOS. 29689-C, 29690-C and 29691-C, Examiner Richard B. McLaughlin dismissed a consolidated complaint filed by the Complainant herein against the Eau Claire Association of Educators, the Wisconsin Education Association Council and the Eau Claire Area School District, all Respondents herein on the grounds that, to the extent the Complainants claims were arguably covered by the Municipal Employment Relations Act (MERA), they were barred by the statute of limitations. The dismissal was affirmed by the Commission on April 19, 2000 in DEC. NOS. 29689-D, 29690-D and 29691-D.

The Complainant filed the original complaints herein on October 30, 2000, alleging violations of numerous state and federal laws on the part of the Respondents, which include, again, the Eau Claire Area School District, the Eau Claire Association of Educators, the Wisconsin Education Association Council and no fewer than seven different insurance companies. In an effort to focus the complaints on parties and claims over which the Commission has jurisdiction, I issued an Order on December 20, 2000, requiring the Complainant to make her complaint more definite and certain and therein specifically directed her to confine her allegations to parties subject to MERA and claims falling within that act, as well as the applicable one year statute of limitations set forth in Secs. 111.07(14) and 111.70(4)(a), Wis. Stats. The resulting Amended Complaint, likewise, alleges numerous acts by the Respondents not covered by MERA covering a period of time at least as far back as 1989, but also alleging acts arguably covered by MERA. Specifically, paragraphs 12 and 13 allege violations of Sec. 111.70(3)(a)5 and 111.70(3)(b)1, Wis. Stats., by the Respondents Eau Claire Area School District and Eau Claire Association of Educators, respectively.

Controlling Law

The Commission has dismissed contested proceedings prior to hearing and has authorized examiners to do so. See: LOCAL UNION NO. 849, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA AND FOX RIVER VALLEY DISTRICT COUNCIL OF UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, DEC. NO. 5502 (WERC, 6/60); MORAINÉ PARK TECHNICAL COLLEGE, ET AL, DEC. NO. 25747-D (WERC, 1/90). However, the issuance of an Order of Dismissal at this stage is an extraordinary act inasmuch as it precludes a hearing on the merits. Nonetheless, the Wisconsin courts have approved agency

dismissal of administrative proceedings where there is no genuine issue of fact or law. *BALELE V. WIS. PERSONNEL COMMISSION* (CT. APP., 1998). When considering a prehearing motion to dismiss, the Commission has adopted the following standard:

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. *UNIFIED SCHOOL DISTRICT NO. 1 OF RACINE COUNTY, WISCONSIN, DEC. NO. 15915-B (HOORNSTRA, WITH FINAL AUTHORITY FOR WERC, 12/77)*.

The Commission's authority is limited to "those powers which are expressly or impliedly conferred upon it by statute." *BROWNE V. MILWAUKEE BOARD OF SCHOOL DIRECTORS*, 83 Wis.2d 316, 333 (1978). In this case, therefore, the allegations of the complaint must fall within the parameters of MERA (111.70 et seq, Wis. Stats.) in order to raise enforceable claims. To the extent that the Amended Complaint alleges violations of legal authority other than MERA, such are not enforceable by the Commission. Additionally, the parties to the complaint must be subject to MERA in order to be subject to the Commission's jurisdiction, which is to say they must be municipal employers (Secs. 111.70(1)(j) and 111.70(3)(a), Wis. Stats.), municipal employees (Secs. 111.70(1)(i) and 111.70(3)(b), Wis. Stats.), labor organizations (Sec. 111.70(1)(h), Wis. Stats.) or third parties committing prohibited practices for the benefit or in the interest of municipal employers or employees (Sec. 111.70(3)(c), Wis. Stats. Finally, it is necessary that the acts complained of have been committed within one year prior to the filing of the Complaint, otherwise they are time barred. Secs. 111.07(14) and 111.70(4)(a), Wis. Stats.

In this case, the Complainant has alleged conduct on the part of some of the Respondents, which, although occurring within in the limitation period, relates back to events which occurred prior to October 30, 1999. In *EAU CLAIRE ASSOCIATION OF EDUCATORS, ET AL, DEC. NOS. 29689-D, 29690-D and 29691-D (WERC, 4/00)*, the Commission affirmed an order of dismissal previously issued by Examiner Richard B. McLaughlin involving complaints by the Complainant herein against many of the same Respondents, and ultimately arising out of the same course of conduct. Relevant to this point, the Commission adopted, in pertinent part, the Examiner's rationale wherein he stated:

Sec. 111.07(14), Stats., which is applicable to MERA under Sec. 111.70(4)(a), Stats., governs timeliness issues, and states: "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." Because the Amended Complaint refers to events outside of the one year limitations period, its timeliness is governed by the principles of *Local Lodge No. 1424 v. National Labor Relations Board*

(Bryan Mfg. Co.), 362 US 411, 45 LRRM 3212 (1960). In that case, the United States Supreme Court posited two situations that pose the relevant considerations here:

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 Sec. 10(b) 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 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. 45 LRRM at 3214-3215.

The Commission approved the Bryan analysis in CESA No. 4 et. al., Dec. No. 13100-G (WERC, 5/79), and applied it in Dec. No. 25747-D (WERC, 1/90). This 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. DEC. NO. 29689-C AT 16, 17.

Thus, as to those matters, it will be necessary to determine whether they could constitute prohibited practices on their own and independent of events occurring beyond the limitation period.

Determination

Claims against Respondents Wausau Insurance Company, Coregis Insurance Company, Madison National Life Insurance Company, Horace Mann, Insurance Company, American Fidelity Insurance Company, American Mercury Insurance Company, and American International Group (AIG)

Complainant's allegations regarding Wausau Insurance Company are confined to Paragraph 38 of the Amended Complaint, wherein she appears to contend that she was denied relief regarding a past worker's compensation claim, Wausau having been the District's worker's compensation insurance carrier at the time. It appears from the attachments to the

pleadings that the Complainant has in the past filed applications for hearing with the Worker's Compensation Division of the Department of Workforce Development arising out of injuries received in an automobile accident in 1986. These applications were dismissed with prejudice and the dismissals were upheld on review by the Labor and Industry Review Commission in WC #1998048562 (LIRC, 1999 & 2000). It appears that the Complainant pursued her worker's compensation claims through the appropriate forum, but was dissatisfied with the result and so now seeks parallel recourse from the WERC. The Commission's jurisdiction, however, is confined to claims arising under MERA and it has no authority with respect to worker's compensation claims. Furthermore, Wausau is not a municipal employer, or labor organization, as those terms are defined in Sec. 111.70, Wis. Stats., nor do the pleadings allege prohibited acts by Wausau on behalf or in the interest of any of the above, pursuant to Sec. 111.70(3)(c), Wis. Stats. Since the claims against Wausau Insurance Company are beyond the jurisdiction of the Commission, therefore, they are dismissed.

Likewise, in Paragraphs 38 and 39, the Complainant asserts liability on the part of Coregis Insurance Company, by virtue of a policy of liability insurance it issued to the District. Similarly, she asserts liability on the parts of Horace Mann Insurance Company, American Fidelity Insurance Company and American Mercury Insurance Company, by virtue of policies of insurance they issued to the Eau Claire Association of Educators. Although the crux of the matter is not easily derived from the pleadings, it appears that over the past several years the Complainant has unsuccessfully pursued numerous legal actions in state court, federal court and a variety of administrative fora, each of which resulted in dismissals of her claims and, frequently, judgments against her for costs and attorneys fees. The Complainant appears to assert that under the policies issued by the insurers, she was entitled to indemnification on these judgments, which she has not received, for which she seeks redress. Here, again, the Respondent insurance companies are not municipal employers, or labor organizations, as those terms are defined in Sec. 111.70, Wis. Stats., nor do the pleadings allege acts committed by them on behalf or in the interest of either the District or the Respondent labor organizations, which could arguably constitute violations of MERA. Accordingly, the claims against Coregis, Horace Mann, American Fidelity and American Mercury Insurance Companies must be dismissed.

Complainant's allegations against Madison National Life Insurance Company are found in Paragraph 40 of the Amended Complaint. She asserts that Madison National issued a group policy of disability insurance to the District under which she was covered and that benefits to which she was entitled thereunder were denied her between December 5, 1990 and January 28, 1991. As with the other insurers referenced above, and for the same reasons, Madison National is not subject to the jurisdiction of the Commission. Furthermore, the acts complained of occurred well prior to the one year period of limitation set forth in Sec. 111.07(14), Wis. Stats., and are time barred. The claims against Madison National Life Insurance Company are, therefore, dismissed.

The sole reference in the Amended Complaint to American Insurance Group (AIG) is contained in Paragraph 39, wherein she alleges that AIG is a holding company, the parent company of which is National Union Fire Insurance Company, and that National Union also issued policies of professional liability insurance to Attorneys Thomas Guelzow and George Senteney, who previously represented the Complainant in other litigation. By no construction can this single reference be construed to raise a claim cognizable under MERA and, therefore, the claim against AIG is dismissed.

Claims against Respondents Eau Claire Association of Educators and Wisconsin Education Association Council.

In my Order of December 20, 2000, I instructed the Complainant to make her Complaint more definite and certain, with a view to making it easier for the Respondents and the Examiner to determine what her claims were and which of them, if any, were within the Commission's purview. To that end, I instructed her to identify the dates of any alleged prohibited acts and the specific statutory sections alleged to be violated in order to determine the applicability of MERA to her claims. With respect to the Respondent labor organizations, those sections of the Amended Complaint which allege acts occurring within the one-year statute of limitations set forth in Sec. 111.07(14), Wis. Stats., are found in Paragraphs 7 through 13. Therein, the Complainant alleges that in August, 2000, she filed a grievance with the District apparently objecting to a letter received from the District's counsel characterizing her employment status as being on "unpaid medical leave," rather than as the victim of an "abusive, retaliatory and unjust discharge," which she believed more accurately described her status. Paragraphs 15 and 32 reveal that the Complainant's perception of her status is based upon occurrences that allegedly took place in March, 1997. The Complainant subsequently contacted Michael Burke, Executive Director of Northwest United Educators (NUE), a WEAC affiliated UniServ which represents the Eau Claire Association of Educators, and requested that NUE assist her in advancing her grievance. On or about August 28, 2000, the Complainant received a letter from ECAE President Thomas Blount advising her that the Union did not find merit in her grievance and would not pursue it, but also requesting to be contacted if the Complainant sought to be reinstated to paid status. As far as can be determined from the Amended Complaint, the Complainant did not reply, but instead, on October 3, 2000, signed and returned the 2000-2001 teaching contract issued to her by the District, which again indicated her status as being on "unpaid medical leave." Complainant then filed the original complaints herein on October 30, 2000.

The Complainant has, in effect, alleged that the Respondent labor organizations violated a duty of fair representation owed by them to her as her exclusive bargaining representative. A union's duty of fair representation does not require that it pursue a grievant's claims in all instances, or that it succeed when it does so. All that is required is that the union act toward

its members with honesty and good faith, without hostility or discrimination, and without arbitrariness. 1/ To establish a breach of the duty, therefore, the Complainant must prove that the Respondent's actions were arbitrary, discriminatory or taken in bad faith.

1/ VACA v. SIPES, 386 US 171 (1967); MAHNKE v. WERC, 66 Wis2D 524 (1975).

In this case, the Complainant's employment status, whatever it may be, was established in March, 1997, when she was placed on unpaid medical leave. Her contention that this action was a constructive discharge in violation of her employment rights was the basis of previous litigation before the WERC, wherein her complaint was dismissed as untimely. See: EAU CLAIRE ASSOCIATION OF EDUCATORS, ET AL, DEC. NOS. 29689-D, 29690-D and 29691-D (WERC, 4/00), AFFIRMING EAU CLAIRE ASSOCIATION OF EDUCATORS, ET AL, DEC. NOS. 29689-C, 29690-C and 29691-C (McLAUGHLIN, 1/00). The Complainant's grievance letter of August 17, 2000 appears to take issue with the District's continued characterization of her status as being on "unpaid medical leave," but does not indicate in what way this is a violation of the collective bargaining agreement, nor does it specify a desired remedy. Blount's August 28, 2000 letter, while clearly informing the Complainant that the Union did not believe the grievance to be meritorious, nevertheless invited the Complainant to clarify her grievance and provide additional information, which she declined to do. She did not respond to the Blount letter, nor to further inquiries from the District's counsel, but filed the instant actions, instead.

It is clear from all the facts and circumstances, as well as the voluminous documentation on file, that the Complainant remains determined to litigate her alleged "constructive discharge" from March 1997. Mindful of the time bar which foreclosed her action before Examiner McLaughlin, she has resorted to the novel stratagem of alleging, in effect, the occurrence of a new violation each time the District issues a new contract to her under the same terms. This is reflected in the wording of paragraphs 12 and 13 of the Amended Complaint, which are set forth in Finding of Fact #5, above.

The Complainant's claims regarding the change in her status in 1997, ruled untimely in the previous prohibited practice case, remain time barred. Her objections to the reference to her status in Attorney Ward's August 10, 2000 letter do no more than reassert her belief in the unlawful nature of the District's original action in instituting that change. Although the Union declined to pursue her grievance based on the information it had at the time, it also afforded the Complainant an opportunity to provide additional rationale or information to support her claim, an opportunity that she declined by instead filing the instant action. Under the circumstances, therefore, the Union's actions cannot be regarded as a failure of its duty of fair representation. Thus, while the Blount letter does fall within the one-year statute of

limitations, there is nothing in the letter which, on its face, could constitute a prohibited practice under Sec. 111.70(3)(b)1. The Complainant, therefore, is left to assert that the Blount letter, while not constituting a prohibited practice in and of itself, opens the door for her to revisit the District's allegedly prohibited conduct in 1997. Under BRYAN, SUPRA, however, the events of 1997 may not be raised unless the acts complained of *occurring within the limitation period*, would independently constitute prohibited conduct, if proved. Thus, I conclude that the Complainant's claims against the Respondents Wisconsin Education Association Council and Eau Claire Association of Educators must be dismissed.

Claims against Respondent Eau Claire School District.

Having determined that the Union did not violate its duty of fair representation to the Complainant in refusing to advance her grievance to arbitration, I have no jurisdiction to rule on the Complainant's underlying contractual claims and they are, accordingly, dismissed. 2/

2/ MAHNKE v. WERC, 66 Wis.2d 524 (1974).

Dated at Madison, Wisconsin, this 20th day of September, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

John R. Emery /s/

John R. Emery, Examiner