

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-C

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-C

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-C

Dec. No. 30018-C
Dec. No. 30019-C
Dec. No. 30020-C

Appearances:

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

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

John D. Finerty, Palmer & Finerty, S.C., 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.

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

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

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

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

**ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT,
AFFIRMING IN PART AND MODIFYING IN PART EXAMINER'S
CONCLUSIONS OF LAW, AND AFFIRMING EXAMINER'S ORDER**

On October 30, 2000, Sandra Lea Benedict (Ms. Benedict) filed three Complaints alleging various actions against her on the part of the Respondents named in the caption, above. The Commission consolidated the Complaints for hearing and appointed John R. Emery as examiner. On December 26, 2000, Ms. Benedict filed an Amended Complaint in the consolidated cases. On or before January 22, 2001, the Respondents filed respective Motions to Dismiss the amended complaint on jurisdictional and/or timeliness grounds.

On September 20, 2002, Examiner John R. Emery issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above matters, dismissing the three captioned complaints on the grounds that: (1) portions of the complaints alleged violations of law over which the Wisconsin Employment Relations Commission

(Commission) lacks jurisdiction; (2) certain Respondents were not municipal employers, labor organizations or persons as those terms are defined in Sec. 111.70, Stats. (MERA), nor had they committed acts which could arguably constitute violations of MERA; (3) those claims that fell within the Commission's jurisdiction were time barred; and (4) the Respondents Eau Claire Association of Educators (ECAE) and Wisconsin Education Association Council (WEAC) did not breach their duty of fair representation toward Ms. Benedict and therefore he did not have jurisdiction to reach the underlying breach of contract claim against the Respondent Eau Claire Area School District (School District).

Ms. Benedict filed a timely petition with the Commission seeking review of the Examiner's decision pursuant to Secs. 111.70(4)(a) and 111.07(5), Stats. The parties submitted written arguments in support of their respective positions, the last of which was filed on January 9, 2003. The parties' arguments in connection with the petition for review are addressed in the Memorandum, below.

Having considered the matter 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 Conclusion of Law 4 is modified as follows:

4. The allegations regarding Respondents 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 do not relate to conduct that is prohibited under sub. Ch. IV of Ch. 111, Stats., and hence do not fall within the Commission's jurisdiction.

- D. The Examiner's Conclusion of Law 5 is affirmed.

E. The Examiner's Conclusion of Law 7 is renumbered Conclusion of Law 6 and modified as follows:

6. Other than the allegations regarding the Respondent Eau Claire Area School District's letter of intent regarding Benedict's 2000-2001 individual teacher contract and the Respondents Eau Claire Association of Educators and Wisconsin Education Association Council's response to Benedict's grievance regarding said letter, none of the allegations in the Amended Complaint regarding said Respondents refer to conduct that is both potentially actionable under the Municipal Employment Relations Act and falls within the one year prior to the date Benedict filed her original complaints.

Accordingly, other than the allegations regarding the Respondent Eau Claire Area School District's letter of intent and the Respondents Eau Claire Association of Educators and Wisconsin Education Association Council's response to Benedict's grievance regarding said letter, all such allegations are time barred pursuant to Secs. 111.07(14) and 111.70(4)(a), Stats.

F. The Examiner's Conclusion of Law 6 is renumbered Conclusion of Law 7 and modified as follows:

7. The Respondent Eau Claire Area School District's letter of intent to issue Benedict a 2000-2001 individual teacher contract was not an actionable incident or event, but rather a ministerial action that maintained Benedict's employment status without change. Therefore, the School District did not thereby commit any prohibited practices within the meaning of Sec. 111.70(3)(a), Stats.

G. Conclusion of Law 8 is made:

8. Because Respondent Eau Claire Area School District's letter of intent to issue Benedict a 2000-2001 individual teacher contract was not an actionable incident or event, there

was also no grievable incident or event giving rise to a duty of fair representation by the Eau Claire Association of Educators and Wisconsin Education Association Council. Therefore, the Respondents Eau Claire Association of Educators and Wisconsin Education Association Council could not have breached their duty of fair representation to Benedict and did not commit a prohibited practice within the meaning of Sec. 111.70(3)(b)1, Stats.

H. The Examiner's Order dismissing the amended complaint is affirmed.

Given under our hands and seal at the City of Madison, Wisconsin, this 17th day of October, 2003.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

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

As noted in our Order, above, the Commission has affirmed the Examiner's Findings of Fact, which, together with the facts found in the prior Commission decisions (EAU CLAIRE AREA SCHOOL DISTRICT, DEC. NO. 29689-D, 29690-D, AND 29691-D (WERC, 4/00)) involving Ms. Benedict may be summarized in relevant part as follows.

Ms. Benedict, a Title I teacher, last worked in the School District on March 21, 1997. Subsequent to that date, Ms. Benedict initiated several legal actions in several forums against several respondents and defendants, as described generally in the Examiner's decision and prior Commission decisions. Among those legal actions was a prohibited practice complaint Ms. Benedict filed at the Commission on March 1, 1999, alleging that the School District constructively discharged her on March 21, 1997 and that the ECAE and WEAC violated their duty of fair representation by failing to challenge the constructive discharge. The Commission dismissed that claim on April 19, 2000, for being outside the Commission's one-year limitations period set forth in Sec. 111.07 (14) and 111.70(4)(a), Stats., EAU CLAIRE, SUPRA.

Ms. Benedict maintains that she was constructively discharged on March 21, 1997. The School District, on the other hand, views Ms. Benedict as a teacher on a medical leave of absence without pay. Accordingly, the School District, through its attorney's letter dated August 10, 2000, informed Ms. Benedict that she would receive an individual contract for the 2000-01 school year at the same time that contracts were sent to other staff members, that the contract would continue her status as on an unpaid medical leave of absence, and that the District had no plans to terminate her employment. Ms. Benedict responded by her letter dated August 17, 2000, addressed to the School District, the ECAE, and WEAC, stating that she wished to grieve the School District's August 10, 2000 notice of intent to issue her individual contract, essentially because she would characterize her status as "constructive discharge" rather than "unpaid medical leave of absence." The ECAE responded to Ms. Benedict's grievance by letter dated August 28, 2000, stating, *inter alia*, ". . . [Y]our 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." The amended complaint and associated documents do not indicate that Ms. Benedict responded to the ECAE's letter or otherwise expressed an interest in reinstatement, severance from employment, or other change in her situation. In fact, Ms. Benedict signed the individual contract on October 3, 2000, crossing off the phrase "unpaid medical leave of absence" and writing in "(Contested) Constructive Discharged [sic] of March 21, 1997."

A few weeks later, Ms. Benedict filed the instant complaints, alleging, *inter alia*, that the School District's letter of intent violated the collective bargaining agreement and that ECAE and WEAC violated their duty of fair representation by not assisting her in grieving

the School District's letter of intent. Both the District and the unions contend, *inter alia*, that Ms. Benedict's claims are merely an attempt to revive her challenge to the 1997 "constructive discharge," a charge that had been dismissed as untimely more than three years ago in EAU CLAIRE AREA SCHOOL DISTRICT, SUPRA. They moved to dismiss her claims prior to hearing, and the Examiner so ordered. We affirm, but with somewhat different reasoning. 1/

1/ The Examiner also dismissed all claims in the amended complaint against all other Respondents on the ground that actions by those entities toward Ms. Benedict are outside the Commission's jurisdiction. We affirm the Examiner's dismissal of these claims but have modified the applicable Conclusion of Law to better reflect the basis for the dismissal.

The Commission has often expressed its reluctance to dismiss complaints prior to an evidentiary 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. UNIFIED SCHOOL DISTRICT NO. 1 OF RACINE COUNTY, WISCONSIN, DEC. NO. 15915-B (HOORNSTRA, WITH FINAL AUTHORITY FOR WERC, 12/77) AT 3.

The Commission approved this standard in MORaine PARK, DEC. NO. 25747-D (WERC, 1/90). Hence, we have reviewed Ms. Benedict's amended complaint and accompanying documents under this demanding standard. We find them insufficient to require an evidentiary hearing.

The amended complaint encompasses various actions taken against Ms. Benedict by her employer, the Eau Claire School District, and her collective bargaining representative, the ECAE and its affiliate, WEAC. Taken on their face and liberally construed, these allegations state cognizable prohibited practices by those Respondents. 2/ The School District is alleged to have violated the collective bargaining agreement applicable to Ms. Benedict, in violation of Sec. 111.70(3)(a)5 of MERA. The ECAE and WEAC are alleged to have breached their duty of fair representation by failing to assist Ms. Benedict in connection with her grievances and other issues, in violation of Sec. 111.70(3)(b)(1) of MERA. However, the threshold issue before us is whether any of the alleged violations occurred within the one-year limitations period established by Secs. 111.07(14) and 111.70(4)(a), Stats.

2/ Ms. Benedict raises numerous claims that fall outside the Commission's jurisdiction such as certain state tort claims, claims of retaliation for filing EEOC and/or FEA complaints, claims that various insurance policies have been unlawfully implemented and constitutional claims. Because we lack jurisdiction over these claims, they have been dismissed.

In the circumstances present here, we conclude that no actionable incident or event regarding Ms. Benedict took place within the one year period prior to the filing of her complaint. The School District's action regarding Ms. Benedict's individual contract simply maintained the status quo, i.e., continued Ms. Benedict's employment relationship with the District in the form of a leave of absence without pay. The offer of an individual contract was a ministerial action that effectuated no change whatsoever in Ms. Benedict's status or her wages, hours, and working conditions. The dispute about whether to call that status a "constructive discharge," as Ms. Benedict would have it, or a "medical leave without pay," in the District's preferred parlance, is a dispute about labels, not a substantive dispute about her circumstances.

Ms. Benedict's principal contention is that her "constructive discharge" is a continuing violation that is perpetrated anew each time the School District issues her another annual contract mislabeled "medical leave without pay." This argument presupposes that the District's issuance of a new annual contract is a cognizably distinct action in a series or course of unlawful conduct that began outside the limitations period. Since we view the individual contract as a ministerial act that merely perpetuated the longstanding status quo, we do not see it as a distinct incident in itself, much less a recurring incident of unlawful conduct within the scope of the "continuing violation" doctrine. 3/

3/ Moreover, even if the individual contract were a cognizable incident or event, it would not fall within the parameters of the continuing violation doctrine. As the Examiner noted, we have applied that doctrine within the framework enunciated by the U.S. Supreme Court in MACHINISTS LOCAL LODGE NO. 1424 (BRYAN MFG. CO.) V. NLRB, 362 U.S. 411, 416-418 (1960). SEE MORAINÉ PARK TECHNICAL COLLEGE, DEC. NO. 25747-D (WERC, 1990), AFF'D SUB NOM. ANDERSON V. WERC, WIS. APP. CT. CASE NO. 9—2490 (PER CURIAM 1991). In both BRYAN and MORAINÉ PARK, the pivotal factor was that the complaints were based upon conduct within the limitations period that was in itself perfectly lawful – in BRYAN the monthly dues deduction and in MORAINÉ PARK a refusal to process the grievance of a non-bargaining unit member. In each case, the conduct within the limitations period could only be viewed as unlawful by reference to and proof of misconduct outside the limitations period. Hence, both the Supreme Court and the WERC refused to find benign conduct a "continuing violation." In Ms. Benedict's case, as in BRYAN and MORAINÉ PARK, the conduct within the limitations period (a letter of intent to issue an individual teacher's contract continuing her leave of absence) is facially benign. It could only be found unlawful if the leave of absence was itself initiated unlawfully in March 1997, a claim that is far outside the limitations period.

In short, the relationship between the District and Ms. Benedict has been static since March 1997. As the Commission held in *EAU CLAIRE SCHOOL DISTRICT, SUPRA*, Ms. Benedict lost her opportunity to challenge the events of March 1997 at the Commission by failing to file a prohibited practice charge within one year of that date. We agree with the Examiner that Ms. Benedict cannot circumvent MERA's limitations period by "alleging, in effect, the occurrence of a new violation each time the District issues a new contract to her under the same terms." (Examiner's Decision at 22).

Because we conclude that the District's letter of intent to issue Ms. Benedict her individual contract for 2000-2001 was not a legally cognizable incident or event regarding her employment status, it follows that there was no grievable event under the collective bargaining agreement. Hence neither the ECAE nor WEAC had a duty to assist Ms. Benedict in grieving the issuance of that individual contract under the circumstances present here. 4/ We therefore dismiss the amended complaint in its entirety.

4/ The amended complaint alleges in substance that the ECAE and WEAC breached their duty of fair representation because they acted in bad faith and for discriminatory motives. The Examiner concluded in his Conclusion of Law 6 that the ECAE and WEAC "did not violate their duty of fair representation to the Complainant." Later he stated, "Under the circumstances, therefore, the Union's actions cannot be regarded as a failure of its duty of fair representation." (Examiner's Decision at 22)

To the extent the Examiner premised his analysis upon affirmative findings that the unions' actions were sufficient to meet their duty, we do not endorse his Conclusion of Law and we have revised it in our Order. Our reasoning as expressed in the text, above, does not depend upon a factual analysis of the unions' conduct. Rather, we reason that, because there is nothing in the amended complaint upon which to base a viable contract violation, it follows that the unions had no duty of fair representation as a matter of law. We make no findings or conclusions about whether the unions' actions recited in the amended complaint would have been sufficient to satisfy their duty if a legal duty had existed.

Dated at Madison, Wisconsin, this 17th day of October, 2003.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

rb

30020-C