STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

AUDREY METHU, Complainant,

vs.

STATE OF WISCONSIN (DEPARTMENT OF EMPLOYMENT RELATIONS) and DISTRICT 1199W, UPQHC, SEIU, Respondent.

Case 377
No. 51508
PP(S)-226

Decision No. 30808-A

Appearances:

Linda Harfst, Cullen, Weston, Pines & Bach, Attorneys at Law, 122 West Washington Avenue, Suite 900, Madison, WI 53703, appearing on behalf of District 1199W.

David Vergeront, Department of Administration, Office of State Employment Relations, P.O. Box 7855, Madison, WI 53707-7855, appearing on behalf of the State of Wisconsin.

Raymond M. Dall'Osto, Gimbel, Reilly, Guerin & Brown, 330 East Kilbourn Avenue, Suite 330, Milwaukee, WI 53202, appearing on behalf of the Complainant, Audrey Methu.

ORDER DISMISSING COMPLAINT

Daniel J. Nielsen, Examiner: On September 9, 1994, Audrey Methu filed a complaint of unfair labor practices against District 1199W/United Professional for Quality Health Care, asserting that the Union had failed to represent her in several grievances and disputes at her workplace, the Southern Wisconsin Center in Union Grove. While the State of Wisconsin was not specifically named, the complaint alleged misconduct by supervisors and sought relief from the State. The complaint as filed complained of acts of harassment by other employees. It also mentioned actions by management employees. Although the Complainant was terminated from her State employment in October of 1994, no amendment mentioning the discharge was filed until 2004.

The original complaint set forth the case as follows:

Subject: COMPLAINT AGAINST UNITED PROFESSIONALS UNION[1]

1. For the past three years I have received inadequate representation and continuous harassment from members of the United Professionals Union For Quality Health Care and its officials. This stimulated from complaints made by another union member (Robert Esenbart) at my worksite. Throughout the period I served as a member of the bargaining team, the board of directors and the leadership team at Southern Wisconsin Center. I was being informed by union officials that Mr. Esenbart continued to call into the union office with complaints about me while refusing to discuss his concerns.

2. Finally, Mr. Esenbart began calling me at home and at work while in the presence of other union members, harassing me and telling me that because I was not a nurse that I should not represent the nurses. I agreed to not represent them, but asked why he was making such a request when he had told me he was tired of doing union activities, and wanted more time to spend with his child.

3. Later, I was approached by the union president (Ann Louise T.) who took me aside and stated that Bob had called the office again and complained that I was a member of a committee which consisted of management staff. She went on to tell me that Bob stated that I was "In bed with Management." She explained how other reps had experienced a similar situation in the past and how I should not worry about it, but try to work with Bob. When I arranged the next labor management meeting, I did call Bob. After the meeting he began expressing his anger to other union members. He shouted at me as I walked down the hall about Why I had no right to be a rep. for the union.

4. Some months later, I observed an employee who is a member of my union physically abusing a client. I reported it. I later learned that the abuser was a personal friend of Bob's. The police department came in and interviewed me. Prior to interviewing me he had talked with my supervisor who was the former union president and a nurse (James LaBelle). The officer asked questions about what happened, when I began to share what happened, my boss tried to deny my story. I was then asked to leave the room. I later received a phone call from the officer informing me that the abuse was dismissed as never occurring.

[1] The paragraph numbers do not appear in the original complaint. They are included here, as they were in the parties' arguments, for clarity and ease of reference.

Shortly thereafter, I was informed by Bob that I should never turn in a union member. I then began to receive memos from the union's Executive Director (Ruth Robart). The memos were sent to the Director of Southern Wisconsin Center (James Hutchinson).

5. The memo asked that I be removed from the leadership teams as the union rep. and replaced with Bob Esenbart and one other peer (Gerry Heijnen) who is also a nurse. I never received any explanation for the change or a memo thanking me for my service. Instead, I received copies of the memos sent to and from the director requesting my removal and announcing my replacement. I also received a copy of another memo informing the members at my worksite that I was a trader and therefore should be removed.

6. Later, Gerry informed me that he had been contacted by Ruth Robarts and was asked to coordinate all union information previously handled by me. He was informed that he would be compensated for this task at an hourly rate of 15.00/hour. This concerned me greatly because I was never paid for any of the work completed at the Work site.

7. Meanwhile, my boss (James Labelle) who was the former union president's hostility increased. He began to treat me unfairly by applying restrictions and rules that did not apply to other staff in my classification and unit. I was even asked not to use certain bathrooms in my work area because the nurses complained that they had to use the same toilet. I was ordered during a general staff meeting to use other toileting facilities even though the ladies room was across the hall from my office.

8. My boss began to use general staff meetings to condemn and humiliate me in front of other staff. I became very uncomfortable attending staff meetings and discontinued my attendance. He then listed this in my performance evaluation as a problem. The performance evaluation was later rewritten with the assistance of the AA officer and an expert in conflict resolution who came from the Department of Administration.

9. The process of humiliation became a daily event. This later became the trend in almost every meeting I attended. It was standard practice to insult and belittle me during client staffings, wing meetings, general staff meetings and leadership meetings. Simple statements resulted in continuous harassment and insults from certain administrators and others.

10. Eventually, my unit secretary was even allowed to refuse to type my work and I was being asked to type my own memos while the work of other professionals was being typed by the unit secretary. Once I had a memo returned by the lead secretary with corrections. It had been corrected by two individuals in the secretary pool and returned. I was highly offended.

11. Had they addressed the problem with the unit secretary, I would never of listed staff on the bottom of the memo out of order. When my unit secretary was asked to take minutes for a meeting, she would deliberately exclude my comments even though I arranged and chaired the meetings. During this period, I filed several complaints of harassment with each resulting in some form of penalty shortly after. I contacted the union office on several occasions requesting adequate representation because the only union rep at the center was Bob Esenbart and the person reported for client abuse.

12. I contacted a union rep named Margo at the union office and continued to insist that I receive adequate representation. The Union sent my grievance to Bob anyway and he represented me poorly. We continued this process until I decided not to request a union rep. because each time Bob represented me, he sided with management and I received numerous penalties as a result.

13. He later began to stay in the office with management after grievance hearings. This concerned me because I felt that if he was representing me that he should have been meeting with me after the meeting. I knew then that Bob was working with Kitty Jergens (who was a food service worker who was administratively promoted intro a personnel management position) to get me fired. Ms. Jergens appeared to take great pride in the number of minorities she fired at the center, and frequently bragged and boasted about the number fired in meetings. This became more prevalent as the center continued to downsize and layoffs became necessary.

14. Using the disciplinary process and informal rules that continued to change, I was cheated out of thousands of dollars as a result of payment cuts caused by so called violations. This occurred even when I had legitimate medical excuses and time to cover. I even had a check held back on Christmas. This caused unnecessary hardship for me and my family. The money was later restored when it was discovered by Ms. Jergens that the violation did not occur. I received no apology for the error or the hardship that it caused me and my family.

15. I was later investigated by Ms. Martha DeGraw who claimed that I did not do my job, this followed yet a second investigation that was completed by another complaint investigator a few weeks later. Each indicating that I was ineffective in my role as the chairperson of the treatment team.

16. Ms. DeGraw found it necessary to investigate me each time I applied for a promotional opportunity and continues to exclude me from meetings concerning community placement for people with developmental disabilities. This procedure was used four (4) years ago when I applied for the treatment director position and again when I applied for the lead QMRP position that was later given to an employee with limited experience in the QMRP classification who was later promoted to my boss the following year. I was denied both promotions and excluded from all committees including the child care center that was funded through a grant received as a result of my work.

17. I currently do not serve on any committees at Southern Wisconsin Center despite my involvement in the development of the Center's Five Year plan and the formation of goals and objectives for community placement of clients.

18. On June 8, 1993, I left to seek treatment for depression. During this time, I continued to receive penalties for work rule violations while on leave. If I returned a form one day late, this was listed as a work rule violation. When paperwork was submitted, I was being asked to resubmit the same information over and over again until my doctors refused to cooperate. When my doctors did respond, the information would be denied again and this would have a negative impact on my treatment. I finally had to find another doctor.

19. I was also being asked to come in for administrative and pretermination hearings which were conducted as a result of my contacting my boss and informing him that I would be leaving to seek treatment. By this time, I was in constant tears and I had already received several suspensions which resulted from my need to seek treatment for my illness.

20. When I returned from my leave, I was penalized again as promised by Ms. Jergens for seeking treatment for my severe depression. I was first given a three day suspension and a five day suspension followed shortly after. I was suspended for failing to return a medical form. The form was one day late and I had called the health nurse and placed it under her door.

21. I finally hired an attorney because of the lack of support received from the very union that I represented. I was told throughout this period that I would not be represented by the union. This information came from the Executive Director who has continued to ignore the issue.

22. Since my return to work, I have continued to experience much hostility from union members who are currently in the DD Specialist classification. Most of these members refuse to speak or interact with me. When they do speak it is always in a hostile tone of voice. They continue to share their anger stimulated by my sudden departure and return and continue to work together as a group to keep me from obtaining items required to do my job properly.

RELIEF SOUGHT FROM MY UNION

23. The relief sought is that I receive payment for my work completed prior to Gerry Heijnen being hired by the union at a rate of 15.00/hr to replace me.

24. I am also requesting payment for all attorney fees, adequate representation at my work site in the future, and reimbursement for all union dues paid to the United Professionals Union for Quality Health Care.

25. Moreover, I would like the union to make an honest effort to discourage rather than encourage fellow union members from harassing other union members for completing duties related to employment.

RELIEF SOUGHT FROM MY EMPLOYER

26. In addition to this, I want my employer to rescind all work rule violations given without adequate representation from the United Professionals Union for Quality Health Care prior to and while seeking treatment for depression and Sickle Cell Anemia. Moreover, 1 would like my employer to recognize that I have a serious medical condition which is race related and has been ignored, and I would like to know what documentation is needed to substantiate my medical claim.

27. Consequently, I would like to request a revision in the current attendance policy at. Southern Wisconsin Center which demonstrates recognition of the Americans with Disabilities Act and accommodates employees who have become disabled and suffer from chronic medical conditions.

28. Finally, I would like some provisions drafted in the Center's current policies that prevent discrimination and retaliation against employees who file complaints against their supervisors and peers.

An Examiner was appointed from the Commission's staff. There were sporadic settlement discussions among the parties. In May of 1998, the Union's grievance committee voted to pursue arbitration of the discharge case. The Examiner assigned to this complaint case made several inquiries about the status of the case without response from the Complainant. In March and July of 2001, the Examiner received copies of letters from the Union's Executive Director, seeking information from Ms. Methu and attempting to set up a meeting to discuss her case. On August 7, 2001 District 1199W sent the Department of Employment Relations a letter, advising them that the grievance over Ms. Methu's termination was being withdrawn from arbitration as a result of her "failure to cooperate in the preparation and planning for hearing." The Examiner assigned to the case wrote to the parties in September and November, and asked how they wished to proceed. The Complainant did not respond. At the end of 2001, the prior Examiner recused himself from the case, and the undersigned was appointed as Examiner in his place.

On January 14, 2002, this Examiner wrote to the parties, attempting to schedule a hearing. April 17, 2002 was agreed to by the Examiner, the Union and the State. The Complainant agreed to that date, but the hearing was then postponed because the Complainant decided to secure legal representation. On March 20, 2002, the Examiner instructed the Complainant to contact him as soon as she obtained legal counsel.

Nothing further was heard from the Complainant over the course of the next twenty months. On December 10, 2003, the Examiner wrote to the parties, advising them that he would dismiss the complaint on his own motion unless the Complainant took some steps to have a hearing conducted:

. . .

> This complaint was filed in 1994. It alleges prohibited practices over a period of time beginning in 1991 or so, through 1994. So far as I can tell from the file, the last substantive action regarding this matter was in early August of 2001, when District 1199/W withdrew the request for arbitration of Ms. Methu's termination with the statement that this was "as a result of the grievant's failure to cooperate in the preparation and planning for a hearing."
>
> Approximately 23 months ago, I initiated efforts to schedule a hearing. A hearing date in mid-April, 2002 was established, but was postponed because Ms. Methu needed to secure legal counsel. Ms. Methu has not been in contact since that time.

> I am concerned that we are at or are reaching a point where it may be nearly impossible to fairly litigate a case where the disputed facts occurred a decade or more in the past. Ms. Methu should contact me by the end of business (4:30 p.m.) on December 30th to indicate whether she wants to proceed to hearing on this matter. She may contact me by telephone, mail, fax or e-mail. If Ms. Methu advises me that she wishes to proceed to hearing, I will offer hearing dates in March or April of 2004, which will allow all parties sufficient time to prepare for hearing. If Ms. Methu does not contact me by December 30th, or if she advises me that she has decided not to proceed to hearing, I will dismiss the case on my own motion.
>
> . . .

On December 27th, the Complainant contacted the Examiner, and advised him that she wished to proceed to hearing. A hearing date was established for late March, 2004.

In January, 2004, the State sought clarification of its role, as it had never been specifically named as a Respondent. The Examiner wrote back, indicating that he interpreted the complaint as being a charge against both the Union and the State as Respondents:

> . . .
>
> My file does not indicate any amendment to the original complaint from September of 1994. Although the cover page is styled as a complaint only against the Union, it alleges various acts by management representatives – Labelle, Jergens, DeGraw – as part of the unfair labor practices and requests various remedies from management. The September 9, 1994 service letter from WERC General Counsel Peter Davis is addressed to both the Union and the State, and advises them that the complaint asserts unfair labor practices by both parties.
>
> From this, I gather that the hearing will concern only the allegations in the September 1994 complaint, that those allegations are directed at both the Union and the State as Respondents, and that the Complainant seeks a remedial order directed at both the Union and the State.
>
> . . .

The State sought further clarification, and on January 20th the Examiner directed the Complainant to clearly identify her allegations against the State:

. . .

Mr. Vergeront's letter makes various arguments concerning what he views as the proper reading of the complaint, as it regards the involvement of State management. Rather than guessing at Ms. Methu's intention, I would ask her to state what violations of the State Employment Labor Relations Act she believes have been committed by the State, as opposed to the Union. Ms. Methu should respond in writing and send copies of her response to me, and to Mr. Vergeront and Ms. Harfst. In responding to my inquiry, I would remind Ms. Methu of several items:

First, the complaint filed in 1994 has not been amended, and there is a one year statute of limitations for SELRA complaints. Thus she should limit her response to the complaint as written, and not include any matters that are not raised in the complaint as written;

Second, the Wisconsin Employment Relations Commission is an administrative agency with limited jurisdiction. The WERC does not have any authority to hear complaints about violations of the Americans with Disabilities Act, the Family and Medical Leave Act, the various Fair Employment Acts, etc. For State employees, we are limited to hearing complaints about alleged violation of the State Employment Labor Relations Act. I am enclosing a copy of Section 111.84 of the statute with this letter. Sec. 111.84(1) lists the Employer unfair labor practices. Sec. 111.84(2) lists the Union unfair labor practices.

. . .

No response was received from Ms. Methu. On February 17th, the Examiner wrote to her and advised her that she must submit the requested information by February 27th, or he would enter an Order Dismissing the Complaint against the State. He also set a hearing date of March 26th. Ms. Methu submitted a clarification of her charges against the State on February 23rd:

Subject: VIOLATIONS BY THE STATE

1. MANAGEMENT FAILED TO PROVIDE A HARASSMENT FREE ENVIRONMENT.

2. MANAGEMENT FAILED TO ACCOMMODATE MY DISABILITY FORCING ME TO TRAVEL ON THE HIGHWAY TO AND FROM MY JOB WHILE ON HIGH DOSAGES OF MEDICATION NEEDED DUE TO MY DETERIORATING MEDICAL CONDITION M -F.

3. MANAGEMENT FAILED TO APPLY ITS RULES AND REGULATIONS CONSISTENTLY AND ACCORDING TO JOB DUTY REQUIREMENTS, FEDERAL REGULATIONS AND THE UNION CONTACT.

4. MANAGEMENT FAILED TO RESPOND COMPLAINTS OF UNFAIR TREATMENT AND HARASSMENT FROM MANAGEMENT AND UNION EMPLOYEES IN THE WORKPLACE.

5. MANAGEMENT RETALIATED AGAINST ME AS A RESULT OF COMPLAINTS.

6. MANAGEMENT DISCRIMINATED AGAINST ME WHEN THEY FAILED TO PROVIDE ME WITH THE NECESSARY EQUIPMENT AND SUPPORTS NEEDED TO COMPLETE MY JOB WHILE PROVIDING OTHER UNION EMPLOYEES IN MY POSITION WITH NEW COMPUTERS, PRINTERS, TRAINING AND A SECRETARY TO TYPE THEIR WORK.

7. FAILURE TO ENSURE THAT ADEQUATE REPRESENTATION WAS PROVIDED DURING ALL DISCIPLINARY HEARINGS.

8. FAILURE TO INTERVENE WHEN UNION OTHER EMPLOYEES BECAME HOSTILE IN THE WORK PLACE.

9. FAILURE TO PROVIDE A SAFE WORKING ENVIRONMENT ACCORDING TO OSHA REGULATIONS AND THE UNION CONTRACT.

On receipt of this clarification, the State filed an Answer, denying each and every allegation, stating as affirmative defenses that the Complainant had not exhausted her administrative and contractual remedies, and that the clarified complaint did not identify any violation of SELRA. The State moved for dismissal on those grounds. In early March, District 1199W also answered the Complaint, denying any inadequate representation or harassment by Union officials, and denying Methu's claim to have served on the bargaining team, board of directors or leadership teams at Southern Wisconsin Center during the three year period from 1992 through 1994. The Union broadly denied the other allegations of misconduct, and asserted that it lacked sufficient information to form a belief about many of her allegations. The Union also raised as affirmative defenses: (1) failure to comply with the statute of limitations; (2) failure to mitigate damages, if any; (3) failure to cooperate with the Respondent in attempts to represent her, thus failing to exhaust administrative and contractual

remedies; (4) failure to provide a clear and concise statement of the case, such that the Respondent could identify when events occurred; and (5) failure to state claims under SELRA; (5) requests for relief not available under SELRA. This Answer was followed a short time later by the Union's Motion to Make More Definite and Certain and Motion to Dismiss.

Prior to the March 26th hearing date, Ms. Methu secured legal counsel, who requested a postponement of the hearing so that he might familiarize himself with the case. The hearing was postponed and a telephone conference call was held with counsel for the parties. In the course of the call, it was agreed that the Examiner would provide copies of all documents in his file to the parties, and the Respondents also agreed to provide Complainant's counsel with relevant documents in their possession. Counsel for the Complainant agreed that he would prepare an Amended Complaint, more specifically identifying the dates of events and the conduct complained of, and which specific individuals were alleged to have engaged in the conduct.

On June 1st, an amended complaint was filed:

AMENDED COMPLAINT

. . .

1. Methu hereby realleges and incorporates by reference as if fully set forth herein each and every fact and allegation contained in her previously filed pro se complaint dated September 9, 1994, which is attached and incorporated hereto as Exhibit 1.

2. Methu was an employee of the State of Wisconsin at the Southern Wisconsin Center for the Developmentally Disabled (SWC) from 1991 to October 26, 1994.

3. Respondent SEIU/District 1199W, United Professionals for Quality Health Care, AFL-CIO (SEIU) is a labor organization duly organized and existing under the laws of the State of Wisconsin, which provided union representation to Methu during the period of her employment at SWC.

4. On October 26, 1994, Methu was involuntarily terminated from her position at SWC and as a state employee. At the time of her termination, Methu generally worked 40 hours per week.

5. Methu is afflicted with sickle cell anemia, a disabling disease that causes "crisis" episodes of severe pain throughout the body, leg ulcers, and

increased susceptibility to bacterial and other infections. Methu informed her superiors at SWC of her disability in 1992, and of the need to accommodate her medical situation.

6. Throughout the time of her employment, Methu's disability caused her to be absent from work on occasion, and at times, for multiple days in a row. This was due to sickle cell crises she suffered from, related illnesses and their sequelae.

7. Methu's disability and correlating absences were documented with medical diagnoses and valid doctor's excuses throughout the time of her employment at SWC.

8. On February 1, 1993, the Division of Care and Treatment Facilities, which oversees SWC, instituted a new attendance policy.

9. That policy constituted a "progressive discipline" program, wherein disciplinary actions taken against an employee moved up a "stepladder" of reprimands and suspensions until the employee reached the "sixth step" and was eligible for termination.

10. Prior to 1993, Methu had not been disciplined because of her illness and disability that caused her to miss some work.

11. During her employment after February 1, 1993, Methu was disciplined on six occasions for absences related to her medical disability and depression related to that disability, which led to her termination on October 26, 1994.

12. SWC failed to reasonably accommodate Methu's medical disability and condition and her need for more flexible hours and scheduling, and contrary to state policy and procedures and Methu's rights under the prevailing collective bargaining agreement, SWC's actions in disciplining Methu were discriminatory both in procedure and effect.

13. During a period of time at her employment at SWC, Methu was a member of the SEIU bargaining team, a related board, and the leadership team.

14. During the time of her employment, Methu received harassing telephone calls at her residence from Mr. Bob Esenbart, a fellow employee and the SEIU Designated Union Representative.

15. Esenbart made statements to Methu both by telephone and at SWC accusing her of being "in bed with management" and pressuring her to give up her SEIU position, which Methu eventually did under pressure.

16. Methu was further harassed when she reported the physical abuse of a patient by an SEIU member. Esenbart informed Methu that she should never "turn in a union member."

17. Esenbart and a member of the personnel management team at SWC, Ms. Kitty Jergens, worked together to pursue disciplinary action against Methu for her absences resulting from her disability. This occurred despite the fact that Esenbart was the Designated Union Representative assigned to fairly and properly represent, protect, and defend Methu in any disciplinary or other unfair actions taken against her.

18. Methu was discriminated against and blackballed by members of SEIU, including, but not limited to, Esenbart. That discrimination created further disharmony in Methu's employment situation, and exacerbated her problems relating to work absences resulting from her disability and depression.

19. Management saw Methu as an easy target that could be gotten rid of without union interference or objection.

20. In 1993-1994, Methu requested SEIU representation for most, if not all, of the disciplinary meetings and hearings resulting from her absences from work.

21. Methu timely requested SEIU representation for her in the grievance process to appeal her termination from SWC on October 26, 1994.

22. Methu timely filed a pro se complaint (attached hereto as Exhibit 1) with the Wisconsin Employment Relations Commission (WERC) on September 9, 1994, alleging that SEIU and the State of Wisconsin and SWC has committed unfair labor practices within the meaning of the State Employment Labor Relations Act (SELRA), and that SEIU was not providing good faith representation of her in the disciplinary and impending termination process.

23. On December 6, 1996, more than two years after the filing of Methu's complaint, a mediation between Methu and SEIU representatives occurred. The grievance was not resolved.

24. On January 17, 1997, a second mediation between Methu and SEIU representatives occurred. The grievance was not resolved.

25. On May 13, 1998, nearly four years after the filing of Methu's complaint with the WERC and the appeal of her termination, SEIU's Grievance Committee met to review Methu's complaint. Correspondence dated that same day indicates that the Grievance Committee found Methu's complaint "meritable" and directed that a hearing be scheduled between the parties.

26. In correspondence dated July 27, 1999, WERC requested the status of Methu's complaint from SEIU.

27. In correspondence dated March 5, 2001, WERC again requested the status of Methu's complaint from the WERC Hearing Examiner.

28. In correspondence dated July 2, 2001, SEIU informed Methu that she would have to personally take over her termination grievance and complaint in the WERC proceedings. Methu did not respond to this correspondence, as she believed that under the terms of the collective bargaining agreement, SEIU had been and continued to be responsible for representing her in the grievance over her termination.

29. In correspondence dated August 7, 2001, SEIU informed the WERC Hearing Examiner that it was withdrawing from its representation of Methu in the grievance.

30. No substantive action was taken by SEIU on Methu's grievance, complaint, and appeal of her involuntary termination from SWC and state service after 1994, despite it contractual obligations to Methu, who was a union.

31. In correspondence dated December 10, 2003, the WERC Hearing Examiner informed SEIU and Methu that unless a hearing date was set by December 30, 2003, her complaint would be dismissed.

32. On December 27, 2003, Methu indicated her desire to have a hearing regarding her claims against SEIU and the state.

33. In correspondence dated January 16, 2004, WERC raised objections to Methu's complaint, arguing that the conduct alleged by Methu does not fall within SELRA, and therefore does not implicate the State of Wisconsin.

34. On February 23, 2004, Methu filed a pro se response at the request of the WERC Hearing Examiner and provided a list of nine (9) violations of the SELRA by the State of Wisconsin. A copy of her submission is attached and incorporated hereto as Exhibit 2.

35. Methu subsequently retained legal counsel and this amended complaint is filed pursuant to the request of the WERC hearing examiner in March 2004.

FIRST CLAIM FOR RELIEF
Union Failure to Adequately Represent (Methu Against SEIU)

36. Methu hereby realleges and incorporates by reference as if fully set forth herein each and every allegation contained with paragraph numbers 1 through 35 of this Amended Complaint.

37. Methu expended her time and labor in working for SWC and was a SEIU member prior to her termination on October 26, 1994, and was therefore eligible for union contractual rights and benefits including fair representation of her in the discipline and grievance process and in her termination appeal.

38. At all times relevant to this complaint, Methu believed that she would be properly represented by SEIU in her grievance and termination appeal and assumed SEIU was fairly and adequately representing her and her interests.

39. Upon information and belief, SEIU did not fairly and adequately represent Methu during the time of Methu's employment, from 1991 to October 26, 1994, nor during the period thereafter wherein Methu pursued her available grievance and termination appeal procedures, in violation of the terms of the collective bargaining agreement and Methu's rights thereunder, and in violation of section 111.84(1), Wis. Stats.

40. Methu is therefore entitled to damages, costs, and reasonable attorney's fees in an amount to be determined at hearing on this issue.

SECOND CLAIM FOR RELIEF
Union Discrimination (Methu Against SEIU)

41. Methu hereby realleges and incorporates by reference as if fully set forth herein each and every allegation contained with paragraph numbers 1 through 40 of this Amended Complaint.

42. Upon information and belief, during the time of Methu's employment, from 1991 to October 26, 1994, and continuing into the period thereafter wherein Methu pursued her available grievance and termination appeal, the actions of SEIU agents violated her rights under the collective bargaining agreement, especially as to the SEIU designated representative and others blackballing Methu, working in conjunction with and not resisting management efforts to terminate her in violation of sections 111.322(1), 111.34(1), and 111.84(1) Wis. Stats.

43. Methu is therefore entitled to damages, costs, and reasonable attorney's fees in an amount to be determined at hearing on the issue.

THIRD CLAIM FOR RELIEF
Improper Discipline and Termination (Methu Against SWC/State of Wisconsin)

44. Methu hereby realleges and incorporates by reference as if fully set forth herein each and every allegation contained in paragraph numbers 1 through 43 of this amended complaint.

45. Upon information and belief, during the time of Methu's employment, from 1991 to October 26, 1994, SWC and the state's actions in disciplining and terminating her violated her due process rights, her rights under the collective bargaining agreement and under policies, laws, and procedures applicable to state employees, in violation of sections 111.322(1), 111.34(1), and 111.84, Wis. Stat.

46. Methu is therefore entitled to damages, costs, and reasonable attorney's fees in an amount to be determined at hearing on the issue.

FOURTH CLAIM FOR RELIEF
Disability Discrimination in Violation of Collective Bargaining Agreement
(Methu Against SWC State of Wisconsin)

47. Methu hereby realleges and incorporates by reference as if fully set forth herein each and every allegation contained in paragraph numbers 1 through 46 of this amended complaint.

48. Upon information and belief, during the time of Methu's employment, from 1991 to October 26,1994, SWC and the state's actions regarding her medical condition and disability violated her rights under the collective bargaining agreement and under policies, laws, and procedures applicable to state employees, in violation of sections 111.322(l), 111.34(l), and 111.84, Wis. Stat.

49. Methu is therefore entitled to damages, costs, and reasonable attorney's fees in an amount to be determined at hearing on the issue.

WHEREFORE, complainant Audrey Methu seeks the following relief:

A. Judgment rescinding all work rule violations and discipline placed on Methu's personnel record during times wherein Methu lacked fair and adequate representation and was unfairly disciplined and terminated because of her medical condition;

B. Judgment reinstating Methu to state service with full back pay and benefits from October 1994 to date; or alternatively, a money judgment compensating her in an amount totaling all back pay, benefits, sick days, holidays, personal days, vacation, for insurance and disability benefits, employer and employee pension contributions to the WRS, etc.;

C. Methu's costs, disbursements, attorney fees and any further relief the Wisconsin Employment Relations Committee deems just and equitable.

. . .

After receipt of the Amended Complaint, the Respondents objected to its inclusion of matters not raised in the original complaint, and repeated some of the objections raised earlier. In a conference call with the parties, the Examiner directed the Respondents to reduce their objections and arguments in favor of their Motions to Dismiss to writing and set a schedule for the Complainant's response.

Additional facts, as necessary, are set forth below.

Respondent State's Arguments in Favor of Dismissal

The Respondent State argues that the Complainant has not been diligent in pursuing this action, waiting for ten years until a hearing was set, and only then because the Examiner threatened to dismiss the case. Her original complaint was vague as to what was alleged to have happened and when. Her amended complaint continues to be devoid of specifics. It is not possible for the State to prepare a defense to these charges, and as a matter of affording the Respondents due process, this case should be dismissed.

Beyond the fact of unreasonable delay in prosecuting the complaint, the State also objects to the effort to amend the complaint to raise issues and events that took place outside of the one year statutory period from September 10, 1993, through the filing on September 9,

1994. Specifically, the State objects to the effort to raise the issue of the Complainant's termination in October of 1994. While she plainly understood that she had rights to challenge this termination and brought suit in several forums including federal court, she never amended her complaint to include the discharge. Even in her clarification of the charges against the State in February of 2004, there was no mention of the discharge. The one year statute of limitations in SELRA serves to bar her effort to litigate this long stale claim.

As noted, the Complainant also brought other actions regarding the alleged harassment and her termination. She filed an action with EEOC, which resulted in a finding of no probable cause for her claims that she was discriminated against during her employment, and in her termination, from the Southern Wisconsin Center. She then filed suit in Federal Court on the same grounds. That suit was dismissed. Inasmuch as the same issues were raised in those actions, and were dismissed, the Examiner must conclude that she is barred from proceeding here on the basis of issue preclusion, collateral estoppel and/or res judicata.

Respondent Union's Arguments in Favor of Dismissal

The Respondent Union submits that the complaint must be dismissed in its entirety. The Complainant's allegations against the Union in the amended complaint largely concern her claim to have been discriminated against because of her illness and her race. Those claims were raised in her complaint to the EEOC and her subsequent Federal Court action. The court action was dismissed by Judge Clevert for a failure to prosecute the claim. In his Order of Dismissal, the Judge ruled that "The issues have been decided and a decision has been rendered." That judgment is conclusive of her discrimination claims. The parties are the same, the causes of action are the same, and the dismissal constitutes a judgment on the merits. This satisfies the criteria for claim preclusion. The same transactions underlie both the discrimination case and the SELRA claim. The same proof would be required in both cases. The judge's dismissal operates as a final judgment, and the Examiner must defer to that ruling.

In addition to being precluded by her EEOC action, most of the Complainant's allegations of wrongdoing should be found to fail to state a claim, in that there is no specificity in any version of the complaint that allows the Respondents or the Examiner to determine whether actions took place within or without the one year statute of limitations. She generally alleges a course of conduct from 1991 to 1994. This fails to meet the requirement of the rules that a complaint be specific. The Union cannot be required to guess what happened or when, particularly not after ten years have passed. Granting that the Complainant filed as a pro se litigant, she now has the assistance of able counsel, and even with that assistance she cannot identify when events took place.

The Union also objects to the attempt in the amended complaint to raise matters that occurred after the initial filing of the complaint. There is a one year statute of limitations. The May 2004 amendment raises, for the first time, events after September 9, 1994. These

allegations are plainly barred. There can be no serious argument that they can relate back to the original filing, since that doctrine is generally available for adding a previously unknown party or correcting the identity of a party. It is not a device for resuscitating long dead claims, or adding distinct events that occurred after the initial filing. The very last event she alleges as a violation in the amended complaint was the Union's decision to withdraw her grievance from arbitration. That took place three years before the amended complaint was filed. There is no logical basis on which the new claims in the amended complaint can be entertained by the Commission.

Finally, the Union raises the equitable doctrine of laches, asserting its three elements are clearly present. Laches applies where there is (1) an unreasonable delay; (2) lack of knowledge on the part of the party asserting the defense that the other party would assert the right on which the suit is based; and (3) prejudice to the party asserting the defense if the suit is maintained. Clearly the Complainant is guilty of unreasonable delay. She showed no interest in pursuing the case for ten years. Just as clearly, the Union could not have known that she would suddenly assert the raft of new claims included in her amended complaint. She had ample opportunity to raise these matters before and never did so. Finally, there is obvious prejudice to the Union in trying to reconstruct the events of ten years ago, in order to mount a defense to the vague claims of misconduct. Accordingly, the Complainant should be barred from asserting her claim at this late date by the doctrine of laches.

The Complainant's Arguments Against Dismissal of the Claim

The Complainant opposes the Motions to Dismiss. First, the Complainant notes that the continuing course of discrimination against Methu during her employment with Southern Center constitutes a continuing violation of her rights. The policies applied against her were expressly discriminatory, in that they failed to account for her medical condition, or offer any reasonable accommodation of that condition. Thus they represented a continuing violation by the State. Moreover, the Union's course of conduct towards her during and after her employment, represents a form of covert discrimination in which the State is implicated. A challenge to such covert action is timely against both parties if it is timely against one of the them.

The Complainant further argues that constitutional due process demands that the complaint be heard on its merits. It is fundamental that a claimant is entitled to a fair opportunity to have her case heard. It is also well established that unreasonable administrative delay cannot defeat a party's due process rights. Citing LOGAN V. ZIMMERMAN BRUSH CO., 455 U.S. 422 (1982), the Complainant notes that the Supreme Court expressly held that the failure of an administrative agency to meet the timelines in a statute cannot be allowed to deprive a claimant of her property right to a hearing. There, a state agency failed to timely convene a hearing on a discrimination case, and the employee's complaint was dismissed. The Court found that it was the agency's failure, not the claimant's, and that dismissal could not be

reconciled with the Fourteenth Amendment: "To put is as plainly as possible, the State may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement." LOGAN, as 434. Here, the WERC's inaction in failing to hold a timely hearing cannot be permitted to extinguish Ms. Methu's property interest in her job, without her ever having had a hearing on her claims.

For much these same reasons, the Examiner must dismiss the laches arguments raised by the Respondents. It is not fair to blame her for the inaction of the WERC, the Union and the State over the years. Due process requires that she be given a hearing on her claims. For all of these reasons, the Complainant argues that the complaint should be heard in full and adjudicated on its merits.

DISCUSSION

There are two categories of claims to be considered in deciding these Motions: the claims raised by the initial complaint filed in September of 1994, and those raised for the first time in the Amended complaint in May of 2004. The initial complaint set forth a series of problems which, according to the Complainant, occurred "For the past three years" – presumably the course of her employment at Southern Wisconsin Center from 1991 through September of 1994. These included conflicts between the Complainant and another local union member named Esenbart, removal of her from her union duties, retaliation against her for reporting another employee for patient abuse, attempts to isolate her from the members of the nursing staff, efforts by her boss to humiliate her, removal of clerical support, inadequate union representation on grievances, an effort by the union and management to have her fired, and denial of promotions. None of these items, listed in paragraphs 1 through 17 of the complaint, have any identifying dates associated with them. A date is offered in paragraph 18, which speaks to a leave for treatment of depression:

> 18. On June 8, 1993, I left to seek treatment for depression. During this time, I continued to receive penalties for work rule violations while on leave. If I returned a form one day late, this was listed as a work rule violation. When paperwork was submitted, I was being asked to resubmit the same information over and over again until my doctors refused to cooperate. When my doctors did respond, the information would be denied again and this would have a negative impact on my treatment. I finally had to find another doctor.

The events alleged in paragraph 19 appear to occur simultaneously with those described in paragraph 18, while paragraphs 20 through 22 apparently occurred after June of 1993:

> 19. I was also being asked to come in for administrative and pretermination hearings which were conducted as a result of my contacting my boss and

informing him that I would be leaving to seek treatment. By this time, I was in constant tears and I had already received several suspensions which resulted from my need to seek treatment for my illness.

20. When I returned from my leave, I was penalized again as promised by Ms. Jergens for seeking treatment for my severe depression. I was first given a three day suspension and a five day suspension followed shortly after. I was suspended for failing to return a medical form. The form was one day late and I had called the health nurse and placed it under her door.

21. I finally hired an attorney because of the lack of support received from the very union that I represented. I was told throughout this period that I would not be represented by the union. This information came from the Executive Director who has continued to ignore the issue.

22. Since my return to work, I have continued to experience much hostility from union members who are currently in the DD Specialist classification. Most of these members refuse to speak or interact with me. When they do speak it is always in a hostile tone of voice. They continue to share their anger stimulated by my sudden departure and return and continue to work together as a group to keep me from obtaining items required to do my job properly.

The amended complaint does not provide any more specificity as to the timing of the events alleged in the initial complaint, other than to identifying February 1, 1993, as the point at which a new attendance policy, featuring progressive discipline, was instituted, and to allege that it was the institution of this policy which led to six acts of discipline against the Complainant, culminating in her termination in October of 1994. It appears from paragraphs 19 and 20 that there were suspensions prior to June 1993, and that two suspensions occurred sometime after June 1993, and before September of 1994.

The amended complaint makes specific the Complainant's theory that the discipline and animosity towards her by management was due primarily to her depression and Sickle cell anemia. The motives for the alleged hostility of the Union are identified as her physical disabilities, her reporting of another employee for abuse, and the belief that she was in bed with management. The amended complaint also adds allegations that are neither raised nor fairly implied on the face of the original complaint, principally that the Complainant was terminated in October of 1994 because of the absences caused by her illnesses, and that the Union failed to properly represent her in the subsequent processing of her grievance over the termination.

Preclusion

The Respondents allege that the Complainant should be precluded from litigating her claims of discrimination by reason of the dismissal of her action by the Federal District Court.

The Complainant brought an action before the EEOC against James Hutchinson, James LaBelle, James Henkes, Kitty Gergens, the Department of Health and Social Services Southern Wisconsin Center, Robert Esenbart, Beverly Sewel, Kathy Fredericks, Cathy Kirt and John Wolter. The claims in her EEOC complaint were substantively identical to the claims in her SELRA complaint, but included the fact of her termination.[2] After investigating her claim, the EEOC advised her that it was not able to conclude that there was a violation of the statute, and issued her a right to sue letter. That letter was issued on March 26, 1998.

On June 26, 1998, she filed suit on the same claims against the same defendants in the United States District Court for the Eastern District of Wisconsin. She did not pursue the claim, and Judge Clevert issued his judgment on December 18, 1998:

> The judgment came before the court. The issues have been decided and a decision has been rendered.
>
> IT IS ORDERED AND ADJUDGED that this case is dismissed.

Preclusion applies where a final judgment has been entered between the same parties as to matters which were or could have been litigated in a prior proceeding. There are three elements to preclusion: (1) identity of the parties; (2) identity between the causes of action; and (3) a final judgment on the merits by a court of competent jurisdiction. Northern States Power Co. v. Bugher, 189 Wis. 2d 541, 550 (1995). The Defendants named in the Complainant's federal action encompassed all of the principal actors for both the State and the Union mentioned in her SELRA complaint, allowing for some variations in spelling. While the Union is not specifically named, its local representatives are, and the substance of the discrimination complaint makes it clear that the Union is one of the targets of Ms. Methu's suit. Had the matter ever been tried, the Union would have been compelled to defend itself and its officials. For purposes of preclusion, I conclude that there is an identity of parties between the SELRA complaint and the federal action.

I have already observed that the substance of the federal complaint is identical to the original SELRA complaint, and that it also includes the Complainant's termination from the Southern Wisconsin Center. The complaint lays out the same allegations of harassment, discrimination and poor union representation that are set forth in the SELRA complaint, and identifies the same individuals as having taken the adverse actions against her. Thus I conclude that there is an identity between the two causes of action.

---

[2] See Attachment B to the SEIU's brief and Exhibit 5 of the State's brief.

As to the question of a final determination on the merits by a court of competent jurisdiction, the District Court's dismissal was premised upon the Complainant's failure to prosecute her case. It was not based upon a hearing on the merits of the case. Nonetheless, it is clear from the Court's ruling that it is conclusive as to her right to maintain a discrimination claim against these parties: "The issues have been decided and a decision has been rendered." While there is latitude extended to pro se litigants, it is not unlimited, and the danger in proceeding pro se is that the litigant may not understand the implications of what she does or does not do. Here, she filed but did not pursue a federal action on the same discrimination claims that underlay her SELRA claim. It is probable that she did not understand that neglecting her federal claim and allowing judgment to be entered against her would preclude her litigation of those claims in the SELRA action. The misconception that there would be no collateral effect does not change the Respondent's rights to be free from defending themselves from the same claim in multiple forums, nor the justice system's interest in avoiding serial litigation.

I conclude that the Complainant's claims rooted in allegations of discrimination based on her disability, race, or membership in other protected classes, are precluded by the judgment of the District Court.

The Statute of Limitations

Unfair labor practice proceedings under SELRA are governed by the procedural provisions of Sec. 111.07, WEPA. Section 111.07(14) establishes a one year statute of limitations for the bringing of an action:

> **111.07 Prevention of unfair labor practices.**
>
> . . .
>
> **(14)** 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.

The one year statute of limitations is implicated in two ways by the complaint and the amended complaint. First, the original complaint was filed on September 9, 1994. It alleges various actions occurring in 1991, 1992, 1993 and 1994. The statute of limitations would serve to limit the scope of the complaint to the actions taken after September 9, 1993. Second, the original complaint does not allege the Complainant's termination, since that took place in October, after the complaint was filed. The amended complaint was filed in May of 2004, and it does allege the termination, as well as a failure of the duty of fair representation in connection with the termination and the Union's decision in 2001 to withdraw her grievance from arbitration. The effort to amend the complaint in 2004 to include actions taken between October of 1994 and August of 2001, also raises questions of the statute of limitations.

With respect to the allegations in the original complaint falling outside of the one year statute, it is very nearly impossible to state with complete certainty when any of the alleged events took place. From the wording and flow of the complaint, it appears that the allegations are in chronological order, as the events build on one another, and relate back to occurrences mentioned in preceding paragraphs. I find that this is the most reasonable interpretation of the pleadings, and I conclude that all of the events in paragraphs 1 through 17 took place between 1991 and June of 1993, since paragraph 18 contains the only date in the original complaint, and alleges a leave of absence beginning on June 8, 1993.

The Complainant alleges that the actions of the State and the Union represent continuing violations under federal discrimination law, and that the September 1994, filing is therefore timely as to all of the alleged conduct that was discriminatory. Specifically, the Complainant asserts that the attendance policy instituted in February of 1993 was, by reason of its lack of accommodation for the Complainant's physical disabilities, expressly discriminatory and thus open to attack at any time after its promulgation. As to the Union, the Complainant asserts that its conduct in not protecting the Complainant from discipline and harassment based on her disability was a covert means of discriminating against the Complainant and denying her her contractual rights. Covert acts of discrimination can be treated as a single transaction, and a complaint against them is timely if the course of action continues within the period of the statute.

With respect to the attendance policy itself, I would agree that if the policy violated the statutory rights of the Complainant, its validity would continue to be open to attack even after the one year statute of limitations, measured from its promulgation, had expired. The enforcement of the policy would represent a continuing violation. That does not mean, however, that the specific disciplinary actions taken pursuant to the policy more than one year prior to the filing of the complaint would themselves be considered continuing violations. They would be admissible to show a pattern of conduct, but would not be subject to any remedy. The separate acts of discipline are discrete events, and the statute of limitations runs from the date of the allegedly illegal act.

Turning to the assertion that the Union was engaged in covert discrimination against the Complainant, this is simply an assertion. Much of what the Union is alleged to have done was supposedly motivated by the antipathy of Esenbart and others to her based on her not being a nurse, her turning in another bargaining unit member for abuse, and their belief that she was in bed with management. None of that has anything to do with the allegedly discriminatory attendance policy which, according to the amended complaint, came into effect in February of 1993. The only allegations that can be directly tied to some form of cooperation with the alleged discrimination by the State would be the acts of discipline described in paragraphs 18, 19 and 20, and the hostility described in paragraph 22. Thus, even if I were to accept the Complainant's theory that the allegations against the Union make out a conspiracy to engage in covert discrimination, that theory would only affect the allegations in paragraphs 18 through 22, as they are the only matters arising after the institution of the attendance policy in February

of 2003. A fair reading of the complaint and the amended complaint leads me to conclude that the allegations contained in paragraphs 1 though 17 all occurred more than one year prior to the filing of the complaint, and are unrelated to any claim of disability discrimination. It follows that they are not properly before the Examiner, and must be dismissed.

The second aspect of the statute of limitations issued has to do with the termination of the Complainant, the Union's processing of her grievance, and the ultimate withdrawal of that grievance from arbitration. The termination took place in October 1994, and the withdrawal of the grievance from arbitration took place in August, 2001. None of this was pled until the amendment of the complaint in May, 2004. Section 111.07(2)(a) provides that complaints "may be amended in the discretion of the Commission at any time prior to the issuance of a final order based thereon." The discretion to allow amendments does not extend to writing the statute of limitations out of Chapter 111.

As of August, 2001, the Complainant knew that the Union had withdrawn her grievance and that she no longer had any contractual venue for challenging her termination. In September of 2001, Examiner McGilligan wrote to her and asked her how she wished to proceed in light of the Union's decision. She did not respond. He wrote again two months later, and received no response.

This Examiner was assigned in December of 2001 and attempted to schedule a hearing. The Complainant did not respond to these efforts for a month, until the Examiner sent her a stamped, self-addressed envelope to use in replying. She then provided the name of an attorney she thought might be representing her, and this Examiner sent that attorney, Ms. Methu and both Respondents copies of all of the pleadings and all of the correspondence in his file. In March, 2002, the attorney advised the Examiner and Ms. Methu that his other commitments would not allow him to accept the case, and the Examiner directed Ms Methu to contact him as soon as she had another attorney. Nothing further occurred until December of 2003, when the Examiner threatened to dismiss the case unless the Complainant took some action to bring it to hearing.

To summarize the sequence of events, in August of 2001, the Complainant knew that her grievance had been withdrawn from arbitration. She was twice invited by the predecessor Examiner to advise the Commission how she wished to proceed, and made no response. In March of 2002, she was provided with a complete copy of the Commission's file on her case. That file contained no amendment of the pleadings after the initial filing in 1994. It should have been amply clear to her that she needed to do something if she wanted to pursue the issue of her termination. She took no further action until forced to by the Examiner's ultimatum in late 2003.

The last possible date for an amendment to the pleadings within the statute of limitations was in early August of 2002. The Complainant has offered no explanation, other than the LOGAN argument discussed below, for the failure to file another complaint or amend

the existing complaint within the one year period. Very likely the failure occurred because she did not realize the statute of limitations existed. That is unfortunate, but her ignorance of the law does not extinguish the Respondents' right to rely upon the statute and to be free from stale claims.[3]

In summary on the statute of limitations, there is no plausible reading of the complaints that would bring the allegations in paragraphs 1-17 of the original complaint, nor the allegations in the amended complaint dealing with the Complainant's termination and the Union's handling of her termination case, within the one year statute of limitations for actions under SELRA. Those aspects of the complaint must therefore be dismissed. All that potentially remains are portions of paragraphs 18 through 22. Most of the allegations in paragraphs 18 and 19 appear to have occurred in or around June 1993, at the time of her leave of absence, and are likely untimely. The allegations in paragraph 20 may or may not be untimely, depending upon how long the leave of absence was, and when the two suspensions described therein were imposed. A fair reading of paragraphs 21 and 22 is that these events occurred within the one year statute.[4]

Due Process

All three parties appeal to due process. Both Respondents object to the lack of specificity in the complaint, asserting that it violates the requirement of a "clear and concise" statement, detailing the who, what, when and where needed for them to prepare a defense. They complain that this defect is magnified by the passage of ten years since the events at issue, and effectively denies them an opportunity to know what they are charged with, and which of the charges may be timely. To an extent, this is overstated, since the State would, for example, presumably know when disciplinary actions were taken against the Complainant, and the reasons for those actions. That said, the Complainant's career ended some ten years ago, and the Southern Wisconsin Center itself has been closed for a substantial portion of that time. Its former employees are likely dispersed. Faced with a complaint that, even in its amended form, includes time frames for events described as "During a period of time at her employment at SWC" and "During the time of her employment", and general conclusory statements such as "Methu was discriminated against and blackballed by members of SEIU" and "Management saw Methu as an easy target that could be gotten rid of without union interference or objection" the Respondents have a justifiable concern that they lack the information to understand the precise charges against them, at least in some areas of the complaint.[5]

---

[3] Given my conclusion on the statute of limitations, I have not found it necessary to address the Respondents' claims that laches should apply to the effort to litigate the termination.

[4] The claims in these paragraphs all relate to the discrimination theory, and are therefore subject to preclusion, as discussed in Section B, supra.

[5] Given that the generalities cited are contained in the amended complaint, which was filed in response to a motion to make the original complaint more definite and certain, it is a fair inference that the Complainant herself no longer knows the details of when and how many of these events took place.

The Respondents have legitimate grounds for concern about defending against many of these vague charges a decade after the events took place. Nonetheless, it would be possible to provide them with a fair hearing through a combination of steps short of dismissing the complaint in its entirety. Dismissal on due process grounds would, at least until the practical difficulties of mounting a defense are more concretely defined, be premature.

The Complainant also relies upon due process. The only argument made in support of the appropriateness of the late amendment to the complaint, and in general opposition to any dismissal of the complaint prior to hearing, is the Complainant's argument that she should not be denied her property interests in her job without a hearing, and that the agency and Respondents' failure to provide a timely hearing cannot be allowed to extinguish her rights. In support of this line of argument, the Complainant cites LOGAN V. ZIMMERMAN BRUSH CO., SUPRA.

In LOGAN, the plaintiff brought a discrimination claim under a statute that required the state agency to conduct a fact finding conference within 120 days. The agency inadvertently scheduled the conference for the 125th day after the filing. When the conference was convened, the defendant demanded dismissal because of the agency's failure to abide by the statutory timeline. The agency declined to dismiss, but the Illinois Supreme Court concluded that compliance with the timeline was jurisdictional, and that the matter must therefore be dismissed. The U.S. Supreme Court found that the plaintiff's right to pursue his claim was a property right, which could not be taken without due process of law. The termination of his suit by reason of the agency's procedural error was, in the Court's view, arbitrary, and violated his general due process right to have some sort of a hearing on his claim. However, the Court also noted that there was no absolute guarantee of a hearing on every claim:

> Obviously, nothing we have said entitles every civil litigant to a hearing on the merits in every case. The State may hay erect reasonable procedural requirements for triggering the right to an adjudication, be they statutes of limitations, [...] or in an appropriate case, filing fees. And the State certainly accords *due* process when it terminates a claim for failure to comply with a reasonable procedural or evidentiary rule ...
> LOGAN, at 1158, citations omitted.

LOGAN is not particularly on point to this dispute, either legally or factually, except to the extent that it expressly permits dismissal of claims that fail to satisfy reasonable rules, such as a statute of limitations. In this case, as distinct from LOGAN, the inability of the Complainant to challenge her termination is not due to the inaction of anyone other than the Complainant herself. Nor has the conduct of any party, other than the Complainant, generated the availability of other defenses, such as laches. It should be evident from the chronology of events that it is not the Wisconsin Employment Relations Commission, nor the Respondents, that have delayed in providing a hearing to the Complainant. The Complainant had the right,

at any time, to request a prompt hearing. The Complainant also had the right, at any time prior to August of 2002, to file an amendment to her complaint. To the extent that she failed to exercise any of these rights to her detriment, that is her responsibility. As observed by the Court, dismissal of a claim for failure to meet reasonable procedural requirements is every bit as much an expression of due process as is granting a hearing to those who do meet the requirements.

Summary of Findings

The complaint and the amended complaint raise allegations falling into three broad categories: (1) mistreatment and harassment by management and the Union unrelated to any claims of illegal disability discrimination; (2) mistreatment and harassment by management and the Union related to the Complainant's depression and Sickle Cell anemia, including the promulgation and enforcement of a new attendance policy in February 1993; and (3) the Complainant's termination in October of 1994 and the Union's subsequent processing and eventual withdrawal of her grievance over the termination. The first two are fairly raised by the initial complaint, and the third is set forth in the amended complaint.

The claims related to illegal discrimination, including the termination of her employment, have been finally adjudicated by the U.S. District Court, and further litigation of these claims is precluded as a matter of law. The claims related to harassment and mistreatment on grounds other than illegal discrimination arose more than one year prior to the filing of the complaint, and are barred by the statute of limitations. The challenge to her termination and to the Union's handling of her grievance over the termination all were first lodged in May of 2004, more than one year after the last possible date for a timely challenge, and are therefore barred by the statute of limitations. As there is no claim raised by the complaint or the amended complaint that is not barred by either the ruling of the U.S. District Court or the statute of limitations, the complaint is dismissed in its entirety.

On the basis of the above and foregoing, and the record as a whole, the Examiner makes and issues the following

ORDER

It is ORDERED that:

The instant complaint be, and the same hereby is, dismissed in its entirety.

Dated at Racine, Wisconsin, this 13th day of September, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel Nielsen /s/
Daniel Nielsen, Examiner

DN/dag
30808-A.doc