STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOIS L. NOVAK, Complainant,

v.

SERVICE EMPLOYEES' INTERNATIONAL UNION LOCAL 150, DEBBIE TIMKO and CARMEN DICKINSON, Respondents.

Case 74
No. 62762
MP-3978

Decision No. 30871-A

Appearances:

Charles W. Jones and Associates, by **Charles W. Jones**, 250 West Coventry Court, Suite 108, Milwaukee, WI 53217, appearing on behalf of Lois L. Novak.

Previant, Goldberg, Uelman, Gratz, Miller & Brueggeman, S.C., by **Matthew Robbins** and **Timothy C. Hall**, P.O. Box 12993, Milwaukee, WI 53212, appearing on behalf of SEIU Local 150, Debbie Timko and Carmen Dickinson.

ORDER CONDITIONALLY DENYING MOTION TO DISQUALIFY COUNSEL AND GRANTING MOTION TO DISMISS RESPONDENTS TIMKO AND DICKINSON

Daniel Nielsen, Examiner: On October 2, 2003, the above-named Complainant, Lois L. Novak, filed with the Commission a complaint, alleging that the above-named Respondents, SEIU Local 150, Debbie Timko and Carmen Dickinson, violated the provisions of Ch. 111.70, MERA, by failing to represent her on outstanding grievances, failing to promptly respond to inquiries, removing her a Chief Steward without an election, refusing to assist her in securing workers' compensation benefits, and refusing to assist her in securing accommodations for her learning disabilities from her employer, the Muskego-Norway School District. The Commission appointed Daniel Nielsen, an examiner on its staff, to conduct a hearing and to make and issue appropriate Findings, Conclusions and Orders. A hearing was scheduled for January 22, 2004. Prior to that hearing, the Complainant filed a Motion to Disqualify the firm of Previant, Goldberg, Uelman, Gratz, Miller & Brueggeman, S.C. as counsel for the Respondents, on the grounds that the firm had formed a lawyer-client

relationship with the Complainant related to her attempt to appeal a workers' compensation denial and thus had a conflict of interests in appearing against her in this matter. The law firm and the Respondents denied the existence of any conflict of interests and opposed the Motion. The parties agreed that all proceedings should be stayed pending resolution of the Motion. The parties filed briefs and reply briefs in support of and opposition to the Motion, the last of which was received by the Examiner on February 16. On February 19, the Respondent SEIU Local 150 moved to Dismiss Timko and Dickinson as Respondents, on the grounds that any actions taken by them were taken in their capacity as agents of the Local and thus they did not bear individual liability. The Complainant responded in writing that it did not object to the Motion.

Now, having considered the Motions, the affidavits filed in support and opposition to the Motions, the arguments of the parties and the record as a whole, the Examiner makes and issues the following

ORDER

It is ORDERED that:

1. The Respondent Union shall notify the Examiner within seven (7) days of the date of this Order whether it waives any argument that its decision not to pursue the Complainant's Workers Compensation claims was based in whole or in part upon an assessment of the merits of the claim or of the Complainant's injuries and/or medical condition.

2. If the Respondent Union waives any argument that its decision not to pursue the Complainant's Workers Compensation claims was based in whole or in part upon an assessment of the merits of the claim or of the Complainant's injuries and/or medical condition, the Motion to Disqualify Union Counsel is denied.

3. If the Respondent Union declines to waive any argument that its decision not to pursue the Complainant's Workers Compensation claims was based in whole or in part upon an assessment of the merits of the claim or of the Complainant's injuries and/or medical condition, or if the Respondent Union fails to respond within seven (7) days of the date of this Order, the Motion to Disqualify Union Counsel is granted.

4. The Motion to Dismiss Respondents Debbie Timko and Carmen Dickinson is granted, and the complaint is dismissed as to those two individuals.

Dated at Racine, Wisconsin, this 1st day of April, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel Nielsen /s/
Daniel Nielsen, Examiner

MUSKEGO-NORWAY SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING ORDER CONDITIONALLY DENYING MOTION TO DISQUALIFY COUNSEL AND GRANTING MOTION TO DISMISS RESPONDENTS TIMKO AND DICKINSON

The Motion to Disqualify Counsel

The Complainant was employed by the Muskego-Norway School District in a bargaining unit represented by SEIU Local 150. According to the Motion to Disqualify Counsel, the collective bargaining agreement between the District and Local 150 included Article XX, which provided both that employees covered by the Agreement would be entitled to workers' compensation, and that employees absent due to an injury or illness caused in the course of their duties would be entitled to up to three months of pay, so long as they turned their workers' compensation checks over to the District.

The Motion alleges that the Complainant injured her shoulder and arm at work on October 28, 2002, but received neither workers compensation benefits nor payment for lost time under Article XX. She contacted Union Representative Carmen Dickinson for assistance, but Dickinson declined to represent her and instead referred her to the attorneys for the Union, Previant, Goldberg, Uelman, Gratz, Miller and Brueggeman (hereinafter referred to as the Union's law firm), to secure advice. The Complainant contacted the firm and was told to forward her medical records and other relevant materials to the firm.

On August 19, 2003, Attorney Steven Kluender of the Union's law firm wrote to the Complainant, declining to take the case:

> Dear Ms. Novak:
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> I reviewed a package of materials which you forwarded to my paralegal, Cindy Diesch, by letter dated August 12, 2003. Based upon the amount of compensation at issue, the economic potential of your claim does not warrant the considerable time and expense required for our law firm to become involved. The workers' compensation hearing process is designed so that an individual can effectively pursue claims like yours in which it would not be economically prudent to retain legal counsel. I recommend that you contact the Workers' Compensation Division at 608/266-1340 to request the necessary documents to pursue your claim further.
>
> I am returning the documents you forwarded to my paralegal. Please be advised that the statute of limitations in your workers' compensation case is 12 years, which means that you must either settle your case or file a Hearing Application

> with the Department of Workforce Development, Workers' Compensation Division, within 12 years of the date of injury, or all rights to recover benefits are lost through the expiration of time. Because your injuries occurred on October 28, 2002, you have until October 28, 2014 within which to either settle your case or file a Hearing Application. If you do not settle your case or file a Hearing Application by that time, all rights to make a claim are lost through the expiration of time.
>
> If you have any questions, please telephone me.
>
> . . .

The Motion alleges that the Complainant understood that she was referred to the Union's law firm for legal representation, and in asking for and reviewing her records they were providing such representation to her, and that in assessing her claim and informing her of her options, they were providing her with legal advice.

The Complainant argues that the Union's law firm formed a lawyer-client relationship with respect to her workers' compensation claim. The test in Wisconsin is whether a "substantial relationship" existed. This two-pronged test requires that (1) an attorney-client relationship existed; and (2) that there is a substantial relationship between the former representation and the current matter. The attorney-client relationship exists because the firm held itself out as providing legal services in the field of personal injury and workers' compensation, and the Complainant sought them out for those services.

As to the second prong, there is a substantial relationship between the workers' compensation claim she consulted the Union's law firm about, and the WERC claim against Local 150. The claim against Local 150 is largely concerned with the Union's failure to assist her in pursuing the workers' compensation claim. Clearly the factual contexts of the two are closely related. Moreover, the Complainant provided the firm with confidential medical and other information that could potentially be relevant to the WERC claim. Even if no confidence is actually breached, it is the potential for obtaining relevant confidential information that the rules regarding disqualification address. The Complainant notes that Wisconsin law demands that doubts about any conflict of interest be decided in favor of disqualification. As the Complainant consulted with the Union's law firm concerning legal representation, and shared potentially relevant confidential information with them, the Examiner must find that a substantial relationship exists between the former representation and the current case, and should order the Union's law firm disqualified.

The Respondent's Arguments in Opposition to the Motion

The Respondent argues that it has a basic right to be represented by counsel of its choosing and that this right should not be lightly abridged. In this case, the Respondent asserts that there has never been an attorney-client relationship between the Complainant and the Union's law firm, and that there is no substantial relationship between her workers' compensation claim and the complaint against the Union. Thus, there is no basis for the Examiner to interfere with the Respondent's choice of counsel.

The Supreme Court Rules require that attorneys and law firms avoid the conflicts inherent in representing interests adverse to a former client in a substantially related matter. However, the Respondent alleges that the rules are inapplicable, since there was never any attorney-client relationship between the Union's law firm and the Complainant. The Complainant inquired of the firm and the firm declined to represent her. The intent of both parties to form an attorney-client relationship is critical to the establishment of such a relationship, and here the evidence is clear that the Union's law firm had no such intent. The only contact between the Complainant and the firm is a single letter in which the firm expressly declined to represent her.

Even if there had been an attorney-client relationship formed between the Complainant and the Union's law firm with respect to her workers' compensation claim against the School District, that matter is not substantially related to the complaint she filed with the WERC. The complaint case alleges a failure of the Union's duty of fair representation, which flows from its status as the exclusive bargaining representative. The Union has no right to claim exclusive representation of employees in workers' compensation matters. Moreover, the possibility that the Union's law firm had access to confidential information concerning her workers' compensation claim has no bearing on the WERC complaint. Such information would be irrelevant to the complaint. Dickinson advised the Complainant that the Union does not represent members in workers' compensation matters. She did not say that the claim was without merit, merely that the Union would not handle it. Thus, whether the Complainant's medical information supports her claim or undercuts her claim will not matter in assessing the propriety of the Union's decision.

The minimal contact between the Complainant and the Union's law firm was utterly unrelated to the WERC complaint. No attorney-client relationship was formed, and no relevant confidential information was disclosed. Accordingly, the Examiner should deny the Motion.

The Complainant's Response

In reply to the Respondent, the Complainant notes that both her claim for workers' compensation benefits and her claim for benefits under Article XX of the contract arise from the same incident and involve the same medical condition as the basis for the claims. While

the Union claims it has no duty of fair representation on the workers compensation claim, it clearly has such a duty on her claim under the contract. The Union's law firm held itself out as available for workers compensation claims. It directed her to submit her confidential medical information, reviewed that information, evaluated her injury and gave her a case assessment and legal advice on the how to proceed. There is no question that there was an attorney-client relationship, an implied professional relationship and/or a fiduciary obligation between the law firm and the Complainant. However it is characterized, the relationship creates a duty of loyalty to the Complainant that should prevent the law firm from now switching sides to appear against the Complainant.

As to whether the two claims are substantially related, there can be no question that they are. In considering whether to prosecute a grievance, a Union is required to investigate, assess the value of the claim and the effect on the employee of a decision not to pursue the claims, and make a good faith judgment about the likelihood of success in pursuing the claim. The law firm here clearly made an assessment of the value of the claim and the likelihood of success, and did so as the attorney for the Complainant. It cannot now litigate those issues on behalf of the Union and against the interests of its former client.

The Respondent's Response

The Respondent stresses, again, that the two cases are completely separate. In the workers compensation matter, the law firm never undertook to act as attorney for the Complainant. It did a very preliminary evaluation of her claim and concluded that it would not be worth her while to use an attorney, and not worth the firm's investment to take the case. The firm never gave any indication that it was willing to form an attorney-client relationship with the Complainant. At most, her contact with the firm was derivative of her membership in the Union, with which the firm clearly had an attorney-client relationship.

The Complainant has failed to explain how the merits of the workers compensation claim in any way relate to the Union's duty of fair representation. There is no duty as regards such claims because the Union has no exclusivity of representation in those cases. The Complainant's own pleadings make it clear that the Union had no knowledge of the merits of her claim before it declined to represent her on the matter. Dickinson simply told her that the Union did not normally provide representation in workers compensation cases. The Union's decision was made without regard to the merits of the workers' compensation claims, and thus the firm's review of her file cannot be relevant to any issue in the case.

The Complainant's Final Response

The Complainant accuses the Respondent of putting the cart before the horse in arguing, in essence, that there is no meritorious duty of fair representation claim and thus no conflict of interests. The existence of the duty of fair representation is the issue in this litigation, and the firm cannot argue that its client is wrong in her claim and thus it should be relieved of its fiduciary duty to her.

DISCUSSION

A. The Posture of the Case

An Examiner has a basic obligation to insure that parties before the Commission receive due process of law, including a fair hearing "in which his or her substantial rights are unaffected by conflicts of interest or other professional misconduct by counsel." HOPKINS V. KENOSHA, ET. AL., DEC. NO. 29715-A (1/24/00), at page 9. Here, the Complainant sought to pursue a grievance over the workers' compensation issue under two provisions of the collective bargaining agreement. The Union declined to pursue the grievance, on the grounds that it did not provide representation in workers' compensation matters, and referred the Complainant to its law firm. The Complainant contacted the Union's law firm and asked them to represent her in a Workers' Compensation denial. She sent her medical information to the firm, which reviewed the information and declined to accept the case because it judged that the amount of the claim was not large enough to justify the expense of using counsel. The firm returned the Complainant's medical records, advised her that she could proceed pro se before the Department of Workforce Development, and advised her of the applicable statute of limitations.

The Complainant then filed the instant complaint, alleging a variety of violations of the Union's duty of fair representation, including the refusal to process the grievances over the workers compensation issues. The Union's law firm entered its appearance on behalf of the Union, and the Complainant moved to disqualify counsel under the Supreme Court Rules, SCR 20:1.9:

> A lawyer who has formerly represented a client in a matter shall not:
>
> (a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents in writing after consultation;
>
> (b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known.

There are two issues presented by the motion. "In order to prevail on a motion to disqualify an attorney, the moving party must establish: (1) that an attorney-client relationship existed between the attorney and the former client; and (2) that there is a substantial relationship between the two representations." BURKES V. HALES, 165 WIS. 2D 585, 478 N.W.2D 37 (CT. APP., 1991), AT 591.

B. Attorney-Client Relationship

Even though the Union's law firm declined to represent the Complainant in her workers compensation claim, an attorney-client relationship may be imputed where "there exists nevertheless a fiduciary obligation or an implied professional relation." WESTINGHOUSE ELEC. CORP. V. KERR-MCGEE CORP., 580 F.2D 1311, 1319 (7TH CIR. 1978). The existence of such an imputed relationship depends upon "the nature of the work performed and the circumstances under which client confidences may have been divulged." BURKES, AT 592.

Here, the work performed consisted of reviewing the Complainant's medical and other records, assessing the value of the claim, and rendering advice as to be best way for her to proceed. That advice was not to use the law firm, but to proceed on her own. It was, nonetheless, expert legal advice. As to client confidences, there is no claim that the Complainant ever actually spoke to an attorney at the Union's law firm. Her confidences consisted of the medical and other records she sent them. As to that information, the firm clearly had a duty to the Complainant to maintain the confidentiality of the records, even while returning them to her and declining the representation.

The Respondent argues that the formation of an attorney-client relationship requires intent. "Whether an attorney-client relationship was created . . . rests on the intent of the parties." MARTEN TRANSPORT V. HARTFORD SPECIALTY, 194 WIS.2D 1, 533 N.W.2D 452 (1995), AT 15. The Respondent asserts that, in turning down the Complainant's case, the law firm clearly intended not to form such a relationship. MARTEN, however, is inapposite. There a firm representing its principal client, Marten, also had occasion to enter appearances on behalf of Hartford, the client's insurer, where the client and the insurance company were named in the same actions and had identical interests. The Court found that the parties understood that the firm's loyalty was to the Marten and that, even though it styled itself as Hartford's attorney, it was at all times acting in Marten's interests and not as the attorney for Hartford.

In this case, there is no such confusion between the appearance of representation and the actual attorney-client relationship. The law firm was known to be the Union's law firm, but the Union had expressly stated that its policy was not to be involved in workers compensation cases. Even though the referral to the firm was through the Union's business agent, there is no basis for believing that the Complainant would have or should have believed that the Union was actually the firm's client in the workers compensation case. She approached the firm as an individual seeking individual legal representation, not as a member seeking representation via the Union.

While the relationship between the Complainant and the Union's law firm was clearly marginal, I conclude that it was suffices to establish an attorney-client relationship under SCR 20:1.9. If the firm had subsequently been hired by the School District to fight the Complainant's appeal, there could be no plausible argument that it did not have a conflict.

Although, as discussed below, the asserted conflict here is not nearly so direct, that goes to whether there is a substantial relationship between the disputed matters, not to the existence of the attorney-client relationship.

C. Substantially Related

The second prong of the inquiry is whether there is a substantial relationship between the two matters. "A substantial relationship will be found to exist 'if the factual contexts of the two representations are similar or related.'" BERG V. MARINE TRUST CO. 141 WIS.2D 878, 416 N.W.2D 643 (CT. APP. 1987) AT 889, and only where it can be clearly discerned "that the issues involved in [the] current case do not relate to matters in which the attorney formerly represented the adverse party will the attorney's present representation be treated as measuring up to the standard of legal ethics." BERG, AT 889-890, QUOTING WESTINGHOUSE. The Complainant's consultation with the Union's law firm concerned the merits of her workers' compensation claim. A portion of her complaint against the Union concerns its refusal to pursue grievances over her workers compensation claim. The Complainant argues that the two matters are thus substantially related. While this argument has a superficial appeal, it bears remembering that more than the Complainant's rights are at stake here. As observed in BERG, "a party to litigation . . . has an important interest in being represented by the counsel of his or her choice. As a result, disqualification 'ought not be applied so indiscriminately as to undercut this interest without justification.'" [CITING MORTIZ V. MEDICAL PROTECTIVE CO., ETC., 428 F. SUPP. 865, 874 (W.D. WIS. 1977)].

The apparent relationship between the two matters is that both touch on the Complainant's claim of a workers compensation injury. However, the contact with, and the information provided to, the law firm went to the merits of her claim – whether she was injured, the extent of her injury, and the value of any claim she might have. The complaint against the Union regards its policy position that it does not provide representation on workers compensation matters. The Complainant asserts that the Union did not assess the merits of her claim, and the Union agrees. The issue in the labor complaint is thus whether a policy such as this is consistent with the Union's status as exclusive bargaining representative and its attendant duty of fair representation.

The Complainant argues that, under MAHNKE V. WERC, 66 WIS.2D 524, 225 N.W.2D 617, 623 (1975), a Union declining to pursue a grievance must prove that it made a decision as to the merits of the grievance, taking into account the monetary value of the claim, the impact of the case on the employee and the likelihood of success in arbitration. Thus, the Complainant argues, the merits of the workers compensation claim must be relevant to the duty of fair representation case, and the two matters must be viewed as substantially related. The Complainant's citation of MAHNKE is, I believe, misplaced. MAHNKE dealt with a Union's refusal on cost grounds to process an individual's grievance protesting his termination to arbitration. The Court found that refusing to arbitrate a grievance purely

because of the expense involved was a violation of the duty of fair representation, unless the Union could show that it had also weighed the value of the claim and the impact on the worker. In MAHNKE, unlike in this case, there was no question that the collective bargaining agreement provided the basic protection to workers in cases of termination, nor that the Union had the exclusive right to access the means for enforcing those protections, and thus the duty to fairly represent employees who had been terminated. The question was whether it could abandon its duty based solely on the cost of arbitration. Here, the Union denies that it has a duty to represent workers in workers compensation appeals, since it does not have status as the exclusive representative in such matters. It does not allege that its refusal was based on the cost of pursuing the workers compensation claim, and thus the MAHNKE balancing between the cost of litigating versus the value of the claim does not come into play.

Taking the parties' pleadings at face value, there is no overlap in the issues or in any non-confidential information between the fleeting representation of the Complainant on the workers compensation appeal, and the representation of the Union in the labor case. The facts of the one do not bear on the facts of the other. If the Union had no duty to represent her on a workers compensation issue, it would not matter if she had a strong and meritorious claim. If, on the other hand, it had a duty to provide such representation and made a blanket refusal on policy grounds, it would not matter if her workers compensation claim was utterly without merit. On the record the parties have placed before me, I conclude that there is no substantial relationship between the appeal of the workers compensation denial and the Union's refusal to represent the Complainant on the workers compensation issue.

The pleadings, of course, are just that. No evidence had been taken and it cannot be said with certainty what facts the parties may seek to contest should the matter proceed to hearing. If, contrary to its position here, the Union wishes to reserve the right to take the position that the merits of the Complainant's workers compensation claim, the extent of her injuries and/or her medical condition, were in some way relevant to its decision not to provide representation, then there would be a substantial relationship between the two matters. The orderly litigation of this case demands that this aspect of the case be fixed in place prior to any further proceedings. Therefore, I condition my Order denying the Motion on the Union's execution of a waiver of such arguments within seven days. If the Union does not wish to make a waiver, or if such a waiver is not submitted within seven (7) days of the date of this Order, I will issue an Order disqualifying counsel.

Dated at Racine, Wisconsin, this 1st day of April, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel Nielsen /s/
Daniel Nielsen, Examiner

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