

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JERRY M. KLEMA, Complainant,

vs.

WINGRA REDI-MIX, INC., Respondent.

Case 3
No. 58899
Cw-3670

Decision No. 31056-D

Appearances:

Jerry Klema, *pro se*, 4212 Oak Street, McFarland, Wisconsin 53558, appearing on his own behalf.

Peter Richter, Attorney, Stroud, Willink & Howard, LLC, 25 West Main Street, Suite 300, Madison, Wisconsin 53701-2236, appearing on behalf of Wingra Redi-Mix, Inc.

ORDER DENYING MOTIONS

On May 22, 2000, Complainant filed a complaint with the Wisconsin Employment Relations Commission (WERC) against Wingra Redi-Mix, Inc. (herein "Respondent-Employer") alleging that Respondent-Employer committed unfair labor practices in violation of the Wisconsin Employment Peace Act (WEPA). Specifically, he alleged that the Union representing employees of Respondent-Employer arbitrated a grievance involving him under a collective bargaining agreement between Respondent-Employer and the Union. He alleges that the arbitrator ordered his reinstatement, with back pay and benefits. He alleged that the Union and Respondent-Employer thereafter entered into an "agreement" on that remedy which the Respondent-Employer breached. The Complainant alleged that this conduct violated Sec.111.06(2)(c), Stats., which provision solely relates to violations of WEPA committed by employees and their representatives. The remedy he sought includes a request for an order requiring the Respondent-Employer to comply with the agreement by having the Respondent-Employer repay Complainant's unemployment account. The Union was not named as a party in the complaint.

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The records of the Commission indicate that Examiner Raleigh Jones had discussions with the Union, identified as Teamsters Local 695, and that the Union declined to participate in proceedings on this complaint. Stroud, Willink & Howard, LLC notified the WERC that it was appearing for Respondent-Employer by letter dated June 15, 2000. Examiner Jones tentatively set the matter for hearing on November 9, 2000, but the hearing was never held. Instead, the matter was held in abeyance at Complainant's request for over 3 years. Ultimately, Respondent-Employer moved to dismiss the matter because of the delay, but did not move to dismiss it on any other grounds. Examiner Jones issued an order dismissing the matter on February 15, 2005, which was reversed by the WERC, by order dated May 27, 2005. It reassigned the matter to the Undersigned for hearing, by a separate order dated July 7, 2005.

This Examiner issued a notice of hearing on July 7, 2005, in the above-entitled matter for a hearing to be held on August 15, 2005, (a date agreed upon by the parties). Respondent-Employer filed a motion to dismiss the complaint on July 11, 2005, together with an affidavit in support of the motion. It simultaneously filed a motion to postpone or adjourn the hearing pending a decision on the motion to dismiss. Complainant Klema responded to the motion by a letter-brief received July 12, 2005. Respondent-Employer filed a reply which was received July 15, 2005. The Examiner having determined that the motion to dismiss should be denied with leave to renew the motion, and that the motion to postpone should be denied,

NOW, THEREFORE, it is

ORDERED

1. That the motion filed by Respondent-Employer to postpone hearing is denied.
2. That the motion to dismiss is denied, with leave to renew the motion at the close of Complainant's case.

Dated at Madison, Wisconsin, this 21st day of July, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Stanley H. Michelstetter II /s/

Stanley H. Michelstetter II, Examiner

WINGRA-REDI-MIX, INC.

MEMORANDUM ACCOMPANYING ORDER DENYING MOTION TO DISMISS

The procedural history of this case is set out in the motion above and will not be restated here.

DISCUSSION

The hearing on this matter has been delayed over 4 years. The Examiner has reviewed the motions of Respondent-Employer and response of the parties. He has concluded that the motions should be denied.

The Examiner addresses Respondent-Employer's second ground for its motion to dismiss, namely that the complaint fails to state a claim upon which relief can be granted. The basis is that Complainant cited Section 111.06(2)(c), Stats., instead of Section 111.06(1)(f), Stats., as the basis for his complaint and that, despite of the passage of over 4 years since the complaint was filed, he has not amended his complaint. First, Respondent-Employer has also waited over 4 years to make a motion on this basis even though it has previously filed a motion to dismiss this matter. The Examiner views a motion on this basis as untimely. Sec. 111.07(2), Stats. provides for a hearing within 40 days. Motions attacking the sufficiency of a complaint must be filed promptly or the procedural goal contemplated by the statute would be frustrated. This policy also comports with the ordinary rules of civil procedure. See, Sec. 802.08(1), Stats. Second, pleadings before the WERC are to be liberally construed if a cause of action can be discerned from the document as a whole. CITY OF MEDFORD, DEC. NO. 30537-B (WERC, 1/04). It is clear that Complainant is alleging that Respondent-Employer violated a collective bargaining agreement, an arbitration award in his favor, and/or a collectively bargained settlement agreement. He has correctly cited Sec. 111.06 as the basis, albeit the wrong subsection. Further, it is clear from the record that Respondent-Employer has not been prejudiced by any technical deficiency in the statement of the claim. Accordingly, Respondent-Employer's motion to dismiss on this basis is denied.

Respondent-Employer's first ground for dismissal is really a motion for summary judgment rather than a motion to dismiss. This is true because Respondent-Employer's motion cannot be decided based solely upon the facts stated in the complaint. The WERC will entertain motions to dismiss complaints for failure to state a cause of action. See, EAU CLAIRE SCHOOL DISTRICT, DEC. NO. 30020-C (WERC, 11/03). However, Wis. Admin. Code Sec. ERC 12, does not provide for a significant motion practice and there remains a question as to whether the WERC will entertain motions which are effectively for summary judgment in unfair labor practice or prohibited practice proceedings. Even were the WERC to permit motions for summary, the procedure would likely conform to the similar rules in civil proceedings. Under the familiar Wisconsin case law, a civil case may not be dismissed by motion to dismiss or by summary judgment when there are disputed facts which are material to the issues raised by the motion. cf. BLACKHAWK TECHNICAL COLLEGE, DEC. NO. 30023-C (Levitan, 5/03).

Respondent's motion cannot be decided even with the affidavit it supplied because there are material facts in dispute. The basis of the motion is that Complainant has not alleged or shown that the Union violated its duty of fair representation in not pursuing Complainant's claims. The facts which are in dispute in addition to the allegations in the complaint include, but may not be limited to, the nature of the settlement, whether under the settlement's terms the Union has the sole right to enforce it, whether there are other circumstances under which Complainant may pursue his claims without a showing that the Union violated its duty of fair representation, and whether the Union violated its duty of fair representation. I note that the WERC currently takes the view that ordinarily an individual employee lacks standing to bring proceedings to enforce an arbitration award involving him or her where the union has the exclusive right to pursue grievances to arbitration. See, G&H PRODUCTS, INC., DEC. No. 17630-B (WERC, 1/82), aff'd. BODOH V. WERC AND G&H PRODUCTS, INC., Kenosha County Cir. Ct. Case No. 82 CV 255 (4/84). As the appellate decision notes, there may be circumstances in which an individual employee may have a right to proceed without a showing of a violation of the duty of fair representation after an award is issued. Also see, for example, BEAUDETTE V. EAU CLAIRE COUNTY SHERIFF'S DEPARTMENT, 265 Wis.2D 744, 668 N.W.2D 133, 2003 WI App 153 (Ct. App., 2003). This ruling is not a determination that Complainant can proceed without alleging and showing that the Union violated its duty of fair representation. Accordingly, the motion is denied with leave to renew it at the end of Complainant's case on that basis.

The Examiner notes that Teamsters Local 695 has previously declined to participate in this case. However, the record does not reveal that they were ever formally served with notice. A potential party ought to have adequate information to make an informed choice. The Examiner has this day directed that a copy of the complaint, this decision, and the notice of hearing be mailed to Teamsters Local 695. This is done solely as a courtesy and not for the purpose of involuntarily making Teamsters Local 695 a party. The hearing will be held as scheduled.

Dated at Madison, Wisconsin, this 21st day of July, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Stanley H. Michelstetter II /s/

Stanley H. Michelstetter II, Examiner

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