

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ANNE JUDGE, Complainant

vs.

UNIVERSITY OF WISCONSIN SYSTEM (EXTENSION)

and

SUE BUCK, Respondent.

Case 33
No. 67218
PP(S)-386

Decision No. 32354-A

ORDER GRANTING RESPONDENT'S MOTION TO DISMISS COMPLAINT

Anne Judge, Complainant, having on August 16, 2007, filed a complaint with the Wisconsin Employment Relations Commission alleging that Sue Buck, had committed unfair labor practices within the meaning of Sec. 111.84, Wis. Stats. by denying her the right to communicate with her colleagues.

On October 1, 2007 Respondent filed a Notice of Motion and Motion to Make More Definite and Certain seeking specific information from Complainant which Respondent asserted was necessary in order for Respondent to prepare an answer to the complaint. Respondent sought the following:

1. A copy of the letter referenced therein;
2. Who sent the letter?
3. To what did the sentence "You are expected to refrain from doing so as a condition of your employment" refer?
4. Did she want to contact someone from the Health Beginnings program and if so who and for what purpose?

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5. In what specific concerted activity did she wish to engage and with whom?
6. Was she prevented from engaging in concerted activities and if so what does she contend prevented her from doing so?
7. Was the grievance she filed a represented or nonrepresented grievance?
8. A copy of the grievance filed;
9. What was the resolution of the grievance filed or if not resolved what is its status?
10. If she is no longer working for Extension, what is preventing her from discussing matters now with her former colleagues if she allegedly was barred from doing so before?

Respondent's motion was granted in part and Complainant was directed to provide the following to the Examiner:

1. A copy of the letter referenced in the complaint;
2. An explanation as to what she was directed to "refrain from doing ... as a condition of employment;
3. An explanation as to the purpose of contacting someone in the Health Beginnings program and the nature of the communication;
4. An explanation as to what specific concerned activities she was prevented from engaging in while at her place of employment;
5. A copy of the grievance filed and its current disposition;
6. Clarification as to whether she is still subject to the jurisdiction of Respondent and if not, what it is that is preventing her from communicating with her former colleagues.

Complainant filed a reply to Respondent's motion on November 5, 2007 and provided most of the requested information. Complainant's response did not include a copy of the letter that allegedly instructed her to refrain from communication with colleagues, but did include a copy of a grievance which she filed on August 16, 2007 which read as follows:

RE: Formal Grievance/Complaint

Resulting from continuing retaliation from Sue Buck, Jan Piltz, and Mark Hilliker for reporting negative information. These include; Program Mismanagement, my supervisor's inappropriate and unprofessional workplace conduct, and my personnel file mismanagement which all adversely affect the efficiency and accomplishments of the agency's function.

I was given a non-renewal letter that violated UWEX policy

On July 13, 2007 I was given a letter stating that I was being demoted, transferred, reassigned and responsibilities that were part of my position were taken away. I was told to have no contact with co-workers. The letter also stated that my contract would not be renewed after September 30, 2007. In Academic Staff Policies and Procedures section 10.07 (1) Notice of Non-renewal regarding notice periods, it states employees who have given "Years UW System Service of two – six years will be given six months written notice" for non-renewal.

It further states "If Proper notice on non-reappointments, non-renewalis not given in accordance with UWEX 10.08 (1), the appointment shall be extended so that at least the required notice is given."

Complainant also offered the following narrative:

6. My contract was not renewed at (sic) end of September, so I am no longer employed, however, I feel my rights were violated in this letter saying I could not communicate with my colleagues from July 16-September 30 or I would be fired.

On November 8, 2007 in email correspondence to the Examiner and the Complainant, Respondent moved for the dismissal of Complainant's case on the basis that is was jurisdictionally flawed in as much as Complainant was an academic staff member and therefore did not meet the definition of employee as contained in Sec. 111.81, Wis. Stats.

On November 20, 2007 the Examiner directed correspondence informing the Complainant that Respondent was requesting the dismissal of her complaint on the basis of a jurisdictional failure. The Examiner's letter read in part:

On November 8, 2007 Mr. Vergeront asserted in email correspondence that because you are academic staff, you do not meet the statutory definition of an employee as contained in Sec. 111.81, Wis. Stats. Mr. Vergeront's correspondence requests that I dismiss your case based on this jurisdictional failure.

In advance of any action on my part, you are afforded the opportunity to respond to Mr. Vergeront's email motion. You should clarify whether you are academic staff. Should you choose to respond to his motion for dismissal based on lack of jurisdiction, please do so in writing on or before December 15, 2007. Thereafter, I will address the issues presented in Mr. Vergeront's correspondence.

The Complainant did not respond to the Examiner's November 20, 2007 correspondence, but thereafter informed the Examiner that it was "possible that correspondence from you [Examiner] by mail was lost".. The Examiner sent Complainant a letter dated March 5, 2008 which reiterated the prior communication and stated:

. . .

Accordingly, please be advised that any response to the jurisdictional challenge to your complaint must be physically received at the WERC Madison office at or before 4:30 p.m. on March 31, 2008. In the event that you do not respond, I will conclude that you were academic staff, that you have waived objections to Respondent's motion to dismiss and that dismissal is appropriate.

. . .

Respondent objected to the Examiner's opportunity for Complainant to clarify whether she was an academic staff member and reiterated the State's position in correspondence dated March 20, 2008. Complainant timely responded by March 31, 2008 and confirmed that she was an academic staff member.

NOW, THEREFORE, it is

ORDERED

That the complaint filed herein is dismissed.

Dated at Rhinelander, Wisconsin, this 18th day of June, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Lauri A. Millot /s/

Lauri A. Millot, Examiner

UNIVERSITY OF WISCONSIN SYSTEM (EXTENSION)

**MEMORANDUM ACCOMPANYING ORDER GRANTING
RESPONDENT'S MOTION TO DISMISS COMPLAINT**

For purposes of this motion, the following facts are not disputed. The statement of facts is based on the complaint, the pleadings and matters of which the Examiner took notice pursuant to Section 227.45(3), Stats.

1. Complainant was an academic staff member employed under a contract for services by the University of Wisconsin Extension with the official title of Associate Instructional Specialist assigned to work in Portage County with the Healthy Beginnings Program.

2. On July 13, 2007 Complainant was demoted, transferred, and reassigned by Respondent and directed to refrain from further contact with her co-workers.

3. Shortly after her reassignment, Complainant sought medical assistance from her physician due the high stress, harassment and retaliation she was experiencing and her physician issued a letter to Respondent describing her condition and requesting an accommodation.

4. Complainant's contract for services was non-renewed effective September 30, 2007.

5. Complainant filed a grievance pursuant to Sections 13 of the UW Extension Academic Staff Policies and Procedures. The grievance was scheduled for "hearing" on October 29, 2007.

6. Complainant filed a complaint with the Commission alleging a violation of Sec. 111.84, Wis. Stats., in as much as "Every employee has the right to engage in certain concerted activities with other employees. This is a well known labor law." Complainant further explained in October 27, 2007 correspondence that she was denied the right to communicate with colleagues.

DISCUSSION

The Respondent's motion to dismiss is governed by Chapters 227 and 111 of the Wisconsin Statutes. Chapter 227 establishes the course of action for administrative agency proceedings. Section 111.84 provides the basis for the unfair labor practice alleged and Sec. 111.07 creates the procedure by which those allegations are addressed.

The Commission is an "Agency" under Sec. 227.01(1), Stats. and sub-section (3) defines a contested case as "an agency proceeding in which the assertion by one party of any

substantial interest is denied or controverted by another party and in which, after a hearing required by law, a substantial interest of a party is determined or adversely affected by a decision or order.” The Complainant has asserted that she has been denied the right to communicate with colleagues while in Respondent’s employ. Complainant’s interest in the conditions of her employment are “substantial” and given Respondent’s adverse motions, a controversy exists.

Respondent argues that the Complainant lacks subject matter jurisdiction and therefore, the complaint should be dismissed.

Sec. 111. 81 (7) (a) defines an employee in the classified service as:

Any state employee in the classified service of the state, as defined in s. 230.08, except limited term employees, seasonal employees, project employees, supervisors, management employees and individuals who are privy to confidential matters affection the employer-employee relationship, as well as all employees of the commission.

Sec. 230.08 establishes that all positions are considered classified service unless specifically excluded per the unclassified service position listing which includes:

(2) UNCLASSIFIED SERVICE. The unclassified services comprises positions held by:

. . .

(d) all faculty and academic staff, as defined in s. 36.05(1) and (8), in the University of Wisconsin System.

. . .

Sec. 111.84 provides classified service employees protection from unfair labor practices, including those asserted by the Complainant, namely protection from retaliating by an employer for engaging in protected concerted activity. These protections are afforded to classified service employees consistent with the definition of classified service personnel in Sec. 111.08.

The WERC will entertain motions to dismiss, albeit with limitations,

Dismissal prior to evidentiary hearing would be proper if based on lack of jurisdiction, lack of timeliness and in certain other cases ... [I]t would b a rare case where circumstances would permit dismissal of the proceedings prior to the

conclusion of a meaningful evidentiary hearing on other than jurisdictional grounds or failure of the complaint to state a cause of action. ¹

Recognizing the harshness of dismissal, Commission case law establishes that,

Because of the drastic consequences of denying an evidentiary hearing, on a motion to dismiss the complaint must be liberally construed in favor of the complainant and the motion should be granted only if under no interpretation of the facts alleged would the complainant be entitled to relief. ²

The Complainant was contracted by the University of Wisconsin Extension to an Associate Instructional Specialist position in the Portage County area. Complainant was a member of the UWEX Academic staff. Persons employed by the University of Wisconsin System in the capacity of academic staff are not employees in the classified service of the State and therefore the Complainant is not a classified service employee. Because the rights created by the State Employment Labor Relations Act do not extend to employees in the unclassified service, there are no interpretation of the facts that will give me jurisdiction over the complaint. Therefore, I have granted Respondent's motion to dismiss.

Dated at Rhinelander, Wisconsin, this 18th day of June, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Lauri A. Millot /s/

Lauri A. Millot, Examiner

¹ DAIRYLAND GRAYHOUND PARK, DEC. NO. 28134-B (McLaughlin, 10/95). See also BLACKHAWK VOCATIONAL AND TECHNICAL COLLEGE, DEC. NO. 30023-C (Levitan, 5/03).

² UNIFIED SCHOOL DISTRICT NO. 1 OF RACINE COUNTY, WISCONSIN, DEC. NO. 15915-B (Hoornstra, with final authority for WERC, 12/77), at 3.