STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LISA GRIBBLE, Complainant,

vs.

FLORENCE COUNTY, WISCONSIN and
LABOR ASSOCIATION OF WISCONSIN, INC., Respondents.

Case 55
No. 66969
MP-4344

Decision No. 32435-C

Appearances:

Nicholas Fairweather, Hawks Quindel, S.C., 222 West Washington Avenue, Suite 450, P.O. Box 2155, Madison, Wisconsin 53701-2155, appearing on behalf of Lisa Gribble.

Jonathan Swain, Lindner & Marsack, S.C., 411 East Wisconsin Avenue, Suite 1800, Milwaukee, Wisconsin 53202, appearing on behalf of Florence County.

Patrick J. Coraggio and **Benjamin Barth**, Labor Consultants, Labor Association of Wisconsin, Inc., N116 W16033 Main Street, Germantown, Wisconsin 53022, appearing on behalf of the Labor Association of Wisconsin, Inc.

ORDER REVERSING EXAMINER'S INTERLOCUTORY ORDER AND GRANTING MOTION TO AMEND COMPLAINT

On November 11, 2009, Examiner Raleigh Jones issued an Interlocutory Order Denying Motion to Amend Complaint wherein he concluded that the May 11, 2007 complaint "did not make a duty of fair representation claim against the Association, nor can such claim be assumed or inferred from its contents" and that it was untimely for Complainant Lisa Gribble to seek to amend the complaint to add such a claim. Consequently, the Examiner denied Ms. Gribble's motion to amend the complaint.

By order dated November 27, 2009, pursuant to Sec. 111.07 (6), Stats., the Commission set aside the Examiner's order for the purpose of determining whether the Examiner erred in said order. We did so to avoid the risk that the parties would proceed without sufficient guidance as to the matters being litigated and to minimize the potential for unnecessary delay and expense should the Commission receive a petition for review after the Examiner had issued a final decision on the merits of complaint and then conclude that the Examiner's interlocutory order had been erroneous and further hearing would be necessary.

At the Commission's direction, the parties filed written argument on this matter, all of which was received on December 14, 2009. For the reasons set forth in the Memorandum that follows, we reverse the Examiner's interlocutory order dismissing Ms. Gribble's duty of fair representation claim and remand this matter to the Examiner for further proceedings as appropriate, including setting a hearing date that is no later than February 15, 2010, absent good cause shown to enlarge that period of time.

Having reviewed the record and being fully advised in the premises, we make and issue the following

ORDER

A. The Examiner's order dated November 11, 2009, is reversed.

B. The Complainant's Motion to Amend Complaint is granted.

C. This matter is remanded to the Examiner for further proceedings as appropriate, including setting a hearing date that is no later than February 15, 2010, absent good cause shown to enlarge that period of time.

Given under our hands and seal at Madison, Wisconsin, this 4th day of January, 2010.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

I dissent.

Paul Gordon /s/
Paul Gordon, Commissioner

Florence County

MEMORANDUM ACCOMPANYING ORDER

As recounted in the Examiner's order, this case has already had a lengthy history although it has not yet proceeded to hearing. In part because of the already protracted litigation, we exercised our discretion to review the Examiner's interlocutory order to set straight the course of the litigation at its outset and thus avoid the need for remanding for further litigation after the record has been closed and the Examiner has issued a final order. As discussed below, our review has led us to the conclusion that the Examiner erred in dismissing the duty of fair representation claim against the Respondent Labor Association of Wisconsin (Union).[1]

The complaint as originally filed on May 11, 2007, named both the Union and the employer, Florence County (County), as Respondents. The complaint contained 11 enumerated paragraphs setting forth certain alleged actions on the part of the County that reduced Gribble's work hours and/or changed her job status from full time to part time. Paragraph 9 of the complaint alleged, "Both Respondents, the County and L.A.W., have refused to arbitrate this dispute." Paragraph 11 alleged, "By engaging in the conduct described above, the County and L.A.W. have violated Wis. Stat. §111.70(3)(a)5. in that they have violated the terms of the 2006-2008 Collective Bargaining Agreement, previously agreed upon by the County and L.A.W. with respect to wages, hours and conditions of employment." For relief, the complaint requested, inter alia, "a finding that . . . the County and L.A.W. have violated Wis. Stats. §111.70(3)(a)5. and an order directing the Respondents to cease and desist violating MERA and any other relief that the Commission deems appropriate."

Some delay ensued while the Commission resolved Gribble's related petition for declaratory ruling, which was dismissed on April 15, 2008. On May 17, 2008, the Examiner issued a Notice of Hearing setting the hearing for August 26, 2008. The Examiner's notice directed both Respondents to file and serve an answer to the complaint on or before August 15, 2008. The Respondent County filed an Answer and Affirmative Defenses on August 14, 2008. The Respondent Union did not file an answer. Based upon the Union's failure to file a timely answer, Ms. Gribble, on August 20, 2008, filed a Motion in Limine, asking the Examiner to preclude the Respondent Union "from asserting any affirmative defense or presenting any evidence supporting the same at hearing or during post-hearing argument." The file does not reflect any response to Ms. Gribble's motion by either Respondent or by the Examiner.

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[1] The Examiner's order was also flawed in its ambiguity on the important issue of whether the litigation would include evidence of the Union's alleged failure to fairly represent, even without the formal claim against the Union. Even if no claim is brought against a union itself in a matter such as this, an individual employee complainant generally is required to produce evidence of a breach of the union's duty of fair representation before the Commission will assert jurisdiction over a breach of contract claim against an employer. MAHNKE V. WERC, 66 WIS. 524 (1974); MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 31602-C (WERC, 1/07); WEST SALEM SCHOOL DISTRICT, DEC. NO. 32696-D (WERC, 10/09). Therefore, even if we had agreed with the Examiner that no timely duty of fair representation claim had been brought against the Union in this case, the Examiner's order would have required clarification as to how the duty of fair representation evidence would be handled insofar as it comprised an element of Ms. Gribble's case against the County.

The hearing convened on August 26, 2008, and the transcript reflects that the parties mutually agreed to postpone the hearing pending certain outside events. On October 30, 2008, the Examiner issued a Notice of Continued Hearing setting the date as December 18, 2008.

On December 11, 2008, the Examiner issued a Notice of Rescheduling of Hearing, setting it for January 14, 2009. In this notice, the Examiner specifically directed that "the date for filing an Answer . . . is hereby extended to Wednesday, January 7, 2009." The Respondent Union did not file an answer in response to this directive. On January 5, 2009, Gribble filed the Motion to Amend Complaint and Amended Complaint which is the subject of the instant interlocutory order and review. On January 8, 2009, at the mutual request of the parties, the Examiner issued a Notice of Cancellation of Hearing.

On April 23, 2009, the Examiner conducted a mediation session. By letter dated June 30, 2009, Ms. Gribble informed the Examiner that the matter remained unresolved and requested that a hearing be scheduled. By letter dated July 13, 2009, the Examiner informed the parties that a ruling was required on Gribble's Motion to Amend Complaint that had been filed the previous January, and asked the Respondents to file their response to the motion by Friday August 14, 2009, later extended for 20 days at the request of both Respondents. On September 11, 2009, the Union for the first time filed an answer, entitled "Answer and Affirmative Defenses," in which, inter alia, the Union contended that Gribble's Motion to Amend should be denied because the duty of fair representation allegation contained in the amended complaint was untimely. On September 14, 2009, the Respondent County stated that it did not object to Ms. Gribble amending her complaint, though it (the County) reserved its rights as to defenses and motions.

On November 11, 2009, the Examiner issued an interlocatory Order Denying Motion to Amend Complaint. On November 24, 2009, the Commission set the Examiner's order aside and invited the parties to file argument as to any errors in the Examiner's order. The County took the position that the Examiner was correct in his determination that the duty of fair representation claim in the Amended Complaint was untimely. The Union stated that it was unsure how to respond. Gribble argued that the amendment should be allowed under the Commission's Rules, ERC 12.02(4)(a), Wis. Adm. Code, because the complaint "alleges the same facts as the original complaint" and "simply adds a second cause of action – that of a breach of the duty of fair representation …." This being the case, argued Gribble, there is no need for "additional investigation" and no other delay, disruption, or injustice such as the Commission's rule would require in order to deny a motion to amend. Further, according to Gribble, the statute of limitations is not a bar, since, by analogy to Sec. 802.09(3), the statute governing amendments of civil complaints, the duty of fair representation claim "relates back" to the original complaint. Finally, Gribble asserted that, contrary to the Examiner, the duty of fair representation claim can be "assumed or inferred" from the contents of the original May 2007 complaint.

We agree with Ms. Gribble that the original complaint, while imperfect, sufficiently placed both named Respondents on notice that Ms. Gribble was challenging as unlawful the Union's handling of her termination from her position as deputy treasurer as a breach of its

duty of fair representation.

Denying the instant Motion to Amend has the same practical effect as granting a motion to dismiss the original complaint against the Union for failing to state a duty of fair representation claim. As the Commission has often and recently pointed out, such a "pre-hearing motion to dismiss a complaint should be granted only if, under a liberal interpretation of the content of the complaint, no allegations are raised over which the [WERC] has jurisdiction." WEST SALEM SCHOOL DISTRICT, SUPRA, DEC. NO. 32696-D (WERC, 10/09), and cases cited therein.

Here the original complaint did not include the phrase "duty of fair representation" and also erroneously labeled the Union's conduct as a violation of Sec. 111.70(3)(a)5, Stats., rather than citing one or more subsections in Sec. 111.70(3)(b), Stats, pertaining to union prohibited practices. However, the original complaint plainly alleged that the reduction in hours violated the collective bargaining agreement and that "Both Respondents, the County and L.A.W., have refused to arbitrate this dispute." Complaint ¶ 9. Under longstanding case law, an allegation by an individual employee that a union has refused to arbitrate a grievance is cognizable principally in terms of a breach of the union's duty of fair representation. See WEST SALEM SCHOOL DISTRICT, SUPRA, and cases cited therein. We are confident that, had the Union moved to dismiss Gribble's original complaint for failure to state a duty of fair representation claim, the WEST SALEM decision and others would have led the Commission to construe Gribble's allegations liberally and would have denied that motion.

Similarly, the Commission does not require absolute accuracy in identifying the statutory section alleged to have been violated by the conduct allegedly attributable to a named Respondent, so long as "the substance of the complaint itself makes it apparent that a claim is being presented that falls within the jurisdiction of the Commission." WEST SALEM, SUPRA, at 4 n. 1.

Thus Gribble's original complaint would have survived a motion to dismiss because the allegations contained therein, liberally construed, assert a claim against the named Respondent Union -- a duty of fair representation claim – that falls within the Commission's jurisdiction. There is no reason to apply a more restrictive standard simply because the question has arisen here in connection with a motion to amend rather than a motion to dismiss. Ms. Gribble correctly points out that the Commission's rule regarding amendments, ERC. 12.02(4)(a), Wis. Adm. Code, contemplates the application of a liberal standard: "A motion to amend a complaint shall be granted by the commission or examiner unless the amendment would unduly delay or disrupt the proceeding, or would otherwise result in an injustice to any party." In effect, Ms. Gribble's Motion to Amend simply clarifies what we find to have been implicit in her original complaint, i.e., an assertion that the Union violated its duty of fair representation by refusing to arbitrate her grievance. It appears on the face of the pleadings that the original complaint was filed within the one year limitations period, and, accordingly, the duty of fair representation claim is not time-barred.

Since we have concluded that the original complaint sufficiently and timely alleged a breach of the duty of fair representation claim against the Union such that the Union's Motion to Amend is properly granted, we do not need to rely upon other grounds for permitting that amendment. We note, however, that the Respondent Union itself has twice failed to submit a

timely answer to the original complaint or otherwise bring forward timely motions based upon alleged defects in that complaint, contrary to directions in the notices of hearing. This undermines the Union's claims of prejudice and delay regarding the Amended Complaint.[2] We also note, as Gribble argues, it appears likely that the duty of fair representation claim expressly asserted in the Amended Complaint would "relate back" to the allegations in the original complaint within the contemplation of the statute governing analogous civil complaint amendments (Sec. 802.09(3), Stats.). This analogy also militates in favor of granting the Motion to Amend.

For the foregoing reasons, we have reversed the Examiner's interlocutory order and we remand this matter to the Examiner for further proceedings as appropriate. Such proceedings shall include setting a hearing date that is no later than February 15, 2010, absent good cause shown for enlarging that period of time.

Dated at Madison, Wisconsin, this 4th day of January, 2010.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

DISSENTING OPINION OF COMMISSIONER PAUL GORDON

I do not join the Commission's decision because I continue to believe that the Commission should not have set aside the Examiner's interlocutory order sua sponte for the reasons set forth in my dissenting opinion in the Commission's November 24, 2009 order.

Dated at Madison, Wisconsin this 4th day of January, 2010.

Paul Gordon /s/
Paul Gordon, Commissioner

[2] The Commission's rules require the answer to include "A specific admission or denial of each allegation" and "A specific detailed statement of any affirmative defense." ERC 12.03(3), Wis. Adm. Code. The rules further specify that "Affirmative defenses not raised by a timely answer are waived." ERC 12.03(1), Wis. Adm. Code. However, the rules also state that the Commission's notice of hearing will inform parties about these obligations. ERC 12.02(6), Wis. Adm. Code. Since the notice of hearing in the instant case failed to include that information, we note but do not rest the instant decision on the Respondent Union's failure to assert affirmative defenses in a timely filed answer.