STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

SUSAN G. SCHULTE, Complainant

vs.

WAUKESHA COUNTY TECHNICAL COLLEGE, Respondent.

Case 117
No. 68879
MP-4499

Decision No. 32785-E

Appearances:

Susan G. Schulte, appearing on her own behalf.

Sean M. Scullen, Attorney at Law, Quarles & Brady, LLP, 411 East Wisconsin Avenue, Milwaukee, WI 53202-4497, appearing on behalf of Waukesha County Technical College.

Jina L. Jonen, Attorney at Law, Wisconsin Education Association Council, 33 Nob Hill Road, Madison, WI 53708-8003, appearing on behalf of Wisconsin Education Association Council.[1]

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

On May 8, 2009, Susan G. Schulte (Schulte) filed a complaint with the Wisconsin Employment Relations Commission (Commission) asserting that Waukesha County Technical College (College) had committed prohibited practices within the

[1] The Association's motion to intervene in this matter was granted at the hearing. Schulte continues to object to the Association's involvement in this matter, arguing that the inclusion of the Association complicates her ability to argue her case and that she had "carefully selected the respondent in this case. It was Dr. Prindiville [WCTC's president] and WCTC. It was not WEAC." To the extent that Schulte did not waive objections to motions made at the hearing that she voluntarily did not participate in, even after being informed of the consequences of her non-participation, *see* ERC 18.08(3)(b), her concerns are unwarranted. The Association has not been added as a respondent in this matter. Rather, the Association is an intervening party in interest, representing the position of one of the parties to the collective bargaining agreement at issue. Although Schulte's written submissions indicate her unhappiness with the Association's legal counsel in particular, there is no indication in the record that Schulte's ability to argue her case was prejudiced by the Association's participation in this case.

meaning of the Municipal Employment Relations Act (MERA) by not proceeding to contractual grievance arbitration over her termination.[2] On August 7, 2009, the College filed a motion to dismiss the complaint on the basis that the complaint alleged prohibited practices that were barred by the statute of limitation and that, as an individual employee, Schulte did not have the right to proceed to arbitration absent the participation or acquiescence of the Association. On September 15, 2009, Commission Examiner Daniel Nielsen granted the motion to dismiss, finding that the allegations raised in the complaint failed to state a claim upon which relief could be granted because, although the contractual language was ambiguous, evidence submitted by the College established that the parties to the collective bargaining agreement – the College and the Association - did not intend for the arbitration step of the grievance procedure to be available to individual bargaining unit members absent Association approval not present in this case. Because the complaint was dismissed on this basis, Examiner Nielsen did not address the statute of limitations issue.

On September 29, 2009, Schulte filed a petition for review of Examiner Nielsen's decision with the Commission. On December 17, 2009, the Commission issued its decision on review where it agreed with Examiner Nielsen that the contractual language was ambiguous on the question of whether individual bargaining unit members have the right to pursue arbitration with the College absent the participation or acquiescence of the Union. However, the Commission concluded that the evidence was not sufficient to definitively resolve the ambiguity against Schulte and that Schulte should have the opportunity to test the evidence at hearing before such a finding could be made. The Commission set aside the Examiner's Order and assigned the matter to the undersigned for further proceedings.

Subsequently, an evidentiary hearing was held on April 26, 2010 in Waukesha, Wisconsin. Schulte appeared at the hearing room but voluntarily left before the hearing began. The hearing proceeded and WEAC's motion to intervene was granted. The College and WEAC then presented evidence on the record in support of their positions. At the conclusion of the hearing, the College made an oral motion to dismiss the complaint for failure to prosecute, which was joined by WEAC. On June 24, 2010, the motion to dismiss was denied and a briefing schedule was established. All parties, including Schulte, submitted written arguments in support of their positions, the last of which was received on September 7, 2010.

[2] A more thorough rendering of the background can be found in the three previous decisions related to this case. DEC. NO. 32785-A (Nielsen, 9/09), DEC. NO. 32785-B (WERC, 12/09), and DEC. NO. 32785-D (Greer, 6/10).

Having reviewed the record and being fully advised in the premises, the Examiner makes and issues the following

FINDINGS OF FACT

1. Respondent Waukesha County Technical College (College) is a municipal employer.

2. Complainant Susan G. Schulte (Schulte) was employed by the College as a part-time instructor for a portion of the Fall semester of the 2006/2007 school year. She was terminated from employment by the College in November 2006.

3. Waukesha County Technical Educators Association (Association) is the collective bargaining representative of a bargaining unit of instructors at the College. The Association represented Schulte during her employment as an instructor at the College. The Wisconsin Education Association Council intervened in this matter and submitted arguments in support of the Association's positions.

4. The Association and the College are parties to a collective bargaining agreement covering years 2004 through 2007 (Contract). The Contract was in effect during all times relevant to Schulte's complaint and contains a five-step grievance procedure culminating in arbitration. The grievance procedure provides that employees may initiate a grievance on their own behalf, but is ambiguous as to whether the employee may proceed to the arbitration step of the grievance procedure absent the participation or acquiescence of the Association.[3]

5. On December 28, 2006, Schulte filed a grievance with the College, challenging, among other things, the decision to terminate her employment (Grievance). The Association processed the Grievance through the fourth step of the grievance procedure. At both the third and fourth step of the grievance procedure, the College offered to settle the Grievance by compensating Schulte for the remainder of the Fall 2006 semester. Schulte declined to accept the settlement.

6. In a letter dated February 27, 2008, Schulte was informed that the Association Executive Committee would meet on March 10, 2008 to decide whether to proceed to arbitration on the Grievance. Schulte was invited to the meeting to "present your rationale and reasons why this grievance should be taken to arbitration." Schulte

[3] The relevant portions of the grievance procedure were reproduced in Examiner Nielsen's decision in this matter. *See* Dec. No. 32785-A (Nielsen, 9/09).

did not attend the meeting and was informed in a letter dated March 17, 2008 that the Association had decided not to proceed to arbitration if the College agreed to settle the Grievance by paying Schulte for the remainder of the Fall 2006 semester.

7. In an e-mail to the Association dated March 24, 2008, Schulte disputed that the Contract allowed a "third party" to take away her right to arbitration and requested that the arbitration process begin. She requested that the Association forward this communication to the College. The Association's legal counsel responded to this e-mail by letter on March 26, 2008, informing Schulte that it was the Association's decision whether or not to pursue arbitration on the Grievance, that the Association had decided to "accept the [College's] settlement offer" to resolve the Grievance, that the College "has agreed to pay the amount to fully and completely resolve the grievance," and that Schulte did not have the right as an individual employee to proceed to arbitration with the College without the participation of the Association.

8. On March 28, 2008, the College's manager of labor relations sent a letter to Schulte with a copy of the settlement agreement signed by representatives of the Association and College and a check representing "wages you would have earned had you taught through the end of the first semester of the 2006-07 school year."[4] The settlement agreement made it clear that it was intended to "resolve" the Grievance. On May 1, 2008, Schulte e-mailed the Association's legal counsel contesting the authority of the College and Association to settle the Grievance prior to arbitration and contesting the amount of the settlement.[5] The Association's legal counsel responded to Schulte by e-mail on May 5, 2008, again informing Schulte that the College and the Association had settled the Grievance and that arbitration was no longer available.

9. By no later than the end of March 2008, Schulte knew or reasonably should have known that the College had settled the Grievance and would not proceed to arbitration with her.

Based on the foregoing Findings of Fact, the Examiner makes and issues the following

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[4] In her written arguments, Schulte claims that she never received this letter and its attachments. However, by leaving the hearing before the letter was offered into evidence, she has waived any objections to its admission into evidence. *See* ERC 18.08(3)(b).

[5] The dollar amount of the original settlement package in fact was determined to be wrong. The College corrected the error and sent a new set of settlement documents to Schulte on December 4, 2008.

CONCLUSION OF LAW

The complaint alleges prohibited practices that occurred on a date more than one year prior to the date on which the complaint was filed and they are therefore barred by Sec. 111.70(4)(a), Stats. and Sec. 111.07(14), Stats.

Based on the foregoing Findings of Fact and Conclusion of Law, the Examiner makes and issues the following

ORDER

The complaint is hereby dismissed.

Dated at Madison, Wisconsin, this 8th day of November, 2010.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Matthew Greer /s/

Matthew Greer, Examiner

Waukesha County Technical College

MEMORANDUM ACCOMPANYING FINDINGS OF FACTS AND CONCLUSION OF LAW

BACKGROUND

As discussed above, this case has a fairly complicated procedural history. Much of the focus has been on whether the Contract between the College and the Association provides individual employees with the right to proceed to arbitration with the College absent the participation or acquiescence of the Association. The prior examiner, who decided the first motion to dismiss, determined that it did not. On review, the Commission reversed, finding that further evidence was required on the issue of whether the Contract does or does not provide such a right. A hearing was held on that question and, because Schulte decided not to participate, the College and Association presented unrebutted evidence that they – the parties to the Contract – do not interpret the Contract to provide such a right, nor has such a right ever been exercised by an employee under the Contract.

Since the initial stages of this matter, however, the College also has argued that the statute of limitations under the Municipal Employment Relations Act (MERA) bars the complaint because it alleges a prohibited practice that occurred more than one year before the filing of the Complaint with the Commission. As will be discussed below, I find that the statute of limitations does bar the complaint and dismiss the action accordingly.

DISCUSSION

Section 111.07(14), Stats., made applicable to this proceeding by Sec. 111.70(4)(a), Stats., provides:

> 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.

Section 111.07(14), Stats., is a statute of limitations that can be waived when not properly raised by a party as an affirmative defense. STATE OF WISCONSIN, DEC. NO. 28222-C (WERC, 7/98). Affirmative defenses are to be raised in the answer to the complaint. ERC 12.03(3)(b). In its answer to the complaint, dated July 29, 2009, the College included the following affirmative defense:

> Complainant's claims are barred by the statute of limitations as she was notified more than 12 months prior to May 8, 2009 that the grievance at issue would not be submitted to arbitration.

The College subsequently filed a motion to dismiss the complaint on this basis, as well as on the basis that individual employees do not have the right to proceed to arbitration absent the participation or acquiescence of the Association. The latter basis was the focus of Examiner Nielsen's decision and subsequent reversal by the Commission. The statute of limitations issue was not substantively addressed or decided in either decision. The College raised the issue once again in its post-hearing brief. The Association also raised the issue in its post-hearing brief.[6]

The statute of limitations begins to run on the date when the complainant first knew, or reasonably first should have known, of the actions alleged to have constituted the prohibited practice. *See* STATE OF WISCONSIN, DEC. NO. 26676-B (WERC, 4/91). In this case, Schulte alleges in her complaint that the College committed prohibited practices when it refused to proceed to arbitration on the Grievance. Therefore, in order to satisfy the statute of limitations, she must have first known, or first reasonably should have known, that the College did not intend to proceed to arbitration within one year prior to May 8, 2008, the date she filed her complaint.

The credible evidence establishes that Schulte first knew, or first reasonably should have known, by no later than the end of March 2008 that the Grievance had been settled and that the College would not be arbitrating the matter with her. She obtained this knowledge directly from the College as well as indirectly from the Association. On March 28, 2008, the College sent Schulte a settlement package, including three documents: a letter explaining that the College and Association had reached a settlement agreement "to bring closure" to the Grievance, a copy of the settlement agreement signed by representatives of the College and Association, and a check issued by the College compensating Schulte for the portion of the Fall 2008 semester that she did not teach.

Schulte argues that she never received the March 28, 2008 settlement package and that the College has evidence that she did not receive this package. However, other than the unsworn argument contained in her briefs, she did not make any effort to rebut the fact that the settlement package was sent, nor did she present, or even describe, the

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[6] The statute of limitations issue was fully briefed by all Parties when the first motion to dismiss was argued. Additionally, Schulte had an opportunity to address the statute of limitations argument in her reply brief to the College's and Association's post-hearing briefs.

evidence that she asserts proves that she did not receive the package. Therefore, based on the credible evidence contained in the record before me, I conclude that Schulte received unequivocal notice from the College that the Grievance had been resolved in late March 2008.[7]

Schulte made numerous arguments regarding the statute of limitations during the pendency of the first motion to dismiss, which were reproduced in Examiner Nielsen's decision on that motion. *See* DEC. NO. 32785-A. Schulte's central arguments in support of the contention that the statute of limitations should not bar her complaint are 1) she timely filed and pursued her Grievance, 2) she is not able to identify a date on which the statute of limitations should run, 3) she sent numerous letters from May 2008 through March 2009 to the College and Association that demonstrate her belief that she was entitled to arbitration, 4) she did not accept the validity of any settlement reached by the College and Association regarding the Grievance, 5) she filed her complaint as soon as she felt she had sent enough letters to give the College an opportunity to respond to her demand for arbitration, 6) she had filed a charge with the National Labor Relations Board (NLRB) on April 25, 2008 and that is the date that should be considered when determining when she filed a complaint with the Commission, 7) since she is a lawyer, she would have immediately filed a complaint when she identified any event that could have triggered the statute of limitations, 8) she never received a copy of the settlement package sent from the College on March 26, 2008, 9) she never received any notice regarding her due process rights, her right to appeal, or with which agency to make an appeal, and 10) she never really knew that the College was not willing to arbitrate the Grievance until August 10, 2009, when the College filed its motion to dismiss.

Further, after the College and Association argued the statute of limitations issue in their post-hearing briefs, Schulte provided the following response contained in her post-hearing reply brief:

[7] Even accepting, for the sake of argument, that Schulte did not receive the March 28, 2008 settlement package from the College, she also had learned from the Association that the College viewed the matter as settled outside the statute of limitations period. On March 26, 2008, legal counsel for the Association sent Schulte a letter informing her that the Association had accepted the College's settlement offer to resolve the Grievance. The Association's legal counsel again informed Schulte by e-mail on May 5, 2008 that the Association "accepted the $384.75 as settlement of the case." Although Schulte disputes the validity of the settlement because she did not agree to it nor sign it, there is no doubt that this correspondence establishes that she had knowledge that the College viewed the Grievance as settled and therefore that it was not going to proceed to arbitration with her.

> Regarding the issue of any Statute of Limitations, again, generally there was no date for such a statute of limitations to run from. I never knew I would never proceed through arbitration. There was no trigger date except one or another arbitrarily selected.... What triggered my WERC complaint was the eventual compiling of evidence at the time of my complaint, that it was getting too difficult for me to get [College president] Dr. Prindiville to follow the demands of the contract without the intervention of WERC. My complaint should not be dismissed

Schulte does not cite any authority in support of the legal conclusions contained in any of her arguments regarding the statute of limitations. The statute of limitations governing her complaint is established by MERA, not the Contract between the College and Association. Therefore, Schulte's arguments that relate to the timely filing of the Grievance, her efforts to prosecute the Grievance, her refusal to acknowledge the settlement of the Grievance reached by the Association and College, and her personal belief that she is entitled to arbitration under the Contract are not relevant to deciding whether the complaint filed with the WERC was timely filed within MERA's statute of limitations.

Schulte also does not provide any legal support for her argument that April 24, 2008, the date she filed the NLRB charge, should be taken as the filing date for her complaint with the Commission. The NLRB and the Commission are agencies with distinct jurisdictions. The filing of a charge with the NLRB has no legal or administrative effect at the Commission; just as filing a complaint with the Commission does not have any effect at the NLRB. Similarly, Schulte does not provide any legal support for the argument that the Association or College had a duty to inform her of "due process" rights, or notification of any relevant statute of limitations or administrative appeal rights.

Many of Schulte's remaining arguments are premised on her misunderstanding of the law regarding the act that triggers the statute of limitations under MERA. In Schulte's view, the date that would have begun the statute of limitations was the date on which she knew that she was not entitled to arbitration. Therefore, she argues, since she has never acknowledged that she is not entitled to arbitration, the statute of limitations has never started and she accordingly dismisses any attempt to apply the statute of limitations to her complaint as a "lawyer's trick." As discussed above, the date when the statute of limitations began to run was not the date on which Schulte knew the outcome of the merits of her complaint – that she was or was not entitled to arbitration under the contract - but rather the date on which she first knew or first reasonably should have known that the College was not going to proceed to arbitration with her absent the Association's involvement. It is the College's act in not proceeding to arbitration with her that the complaint alleges violated MERA. The evidence establishes that she first knew or first reasonably should have known that the College

would not proceed to arbitration with her by no later than the end of March 2008, more than one year prior to May 8, 2009, when she filed her complaint with the Commission. This fact remains even though Schulte continued to collect evidence that the College was not going to proceed to arbitration after March 2008.

In their post-hearing briefs, the College and Association request an award of reasonable costs and fees. They do not cite any authority or make any specific argument as to why an award of costs and fees is appropriate in this matter. I find that such an award is not warranted in this case and deny the requests.

For the foregoing reasons, the Complaint is dismissed as untimely and the requests for costs and fees are denied.

Dated at Madison, Wisconsin, this 8th day of November, 2010.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Matthew Greer /s/

Matthew Greer, Examiner

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