STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

SARAH BELL, Complainant,

vs.

MILWAUKEE COUNTY, Respondent.

Case 695
No. 69139
MP-4530

Decision No. 33004-B

Appearances:

Sarah A. Bell, 3756 North 23rd Street, Milwaukee, Wisconsin 53206, appearing on her own behalf.

Timothy R. Schoewe, Corporation Counsel, 901 North Ninth Street, Room 303, Milwaukee, Wisconsin 53233, appearing on behalf of Milwaukee County.

ORDER OF REVIEW OF EXAMINER'S DECISION

On March 17, 2010, Wisconsin Employment Relations Commission Examiner John R. Emery issued an Order Dismissing Complaint based on his determination that the complaint filed by Sarah A. Bell against Milwaukee County had not been filed within one year of the alleged prohibited practices and thus was untimely under Secs. 111.07, 111.07(14) and 111.70(4)(a), Stats.

Bell filed a timely petition with the Wisconsin Employment Relations Commission seeking review of the Examiner's decision pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats. The parties thereafter filed written argument in support of and in opposition to the petition and the record was closed June 19, 2010.

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

ORDER

1. The Examiner's Order Dismissing Complaint is reversed.

2. On or before 4:30 p.m. August 31, 2010, Sarah A. Bell shall file an amended complaint with the Wisconsin Employment Relations Commission (by e-mail, facsimile transmission, hand delivery or mail) which meets the requirements specified in the Memorandum accompanying this Order. If such an amended complaint is not physically received by 4:30 p.m. on August 31, 2010, the existing complaint will be dismissed. If a timely filed amended complaint does not meet the three requirements specified in the Memorandum accompanying this Order, the amended complaint will be dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 22nd day of July, 2010.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

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

I concur.

Paul Gordon /s/
Paul Gordon, Commissioner

MILWAUKEE COUNTY (Sarah Bell)

MEMORANDUM ACCOMPANYING ORDER OF REVIEW OF EXAMINER'S DECISION

On August 27, 2009, Sarah A. Bell filed a complaint with the Wisconsin Employment Relations Commission alleging that Milwaukee County had committed prohibited practices within the meaning of Sec. 111.70(3)(a) 5, Stats.

Section 111.70(3)(a) 5, Stats., makes it a prohibited practice for a municipal employer (such as Milwaukee County) to violate a collective bargaining agreement. However, when the collective bargaining agreement allegedly violated contains a grievance arbitration procedure applicable to alleged violations of the agreement, the Commission generally will not exercise its Secs. 111.70(3)(a) 5, Stats., jurisdiction because the contractual grievance arbitration procedure is presumed to be the exclusive mechanism for resolution of such contractual disputes. MAHNKE V. WERC, 66 Wis. 2D 524 (1974); GREEN BAY SCHOOLS, DEC. NO. 32602-B (WERC, 6/2010). However, if an employee attempts to use the contractual grievance arbitration procedure and that attempt is unsuccessful because the employee's collective bargaining representative allegedly failed to meet its duty of fair representation as to the use of said procedure, then the Commission will exercise its Sec. 111.70(3)(a) 5, Stats., jurisdiction over a complaint that is filed with the Commission both within one year of the contractual deadline for filing a grievance and one year of the date the employee's collective bargaining representative ended the employee's effort to use the contractual procedure. GREEN BAY SCHOOLS, *supra*.

On September 9, 2009, the County filed a motion asserting among other matters that the complaint should be dismissed because Bell did not file a grievance under an applicable contractual grievance arbitration procedure. The Examiner gave Bell an opportunity to respond to the County's motion and the written argument the County subsequently filed in support of the motion. Bell did not file any response with the Examiner.

In MAHNKE, *supra*, at 533, the Wisconsin Supreme Court held as follows regarding the procedure and burdens applicable to disputes such as the one before us here.

> We believe the employer is obligated in the first instance by way of affirmative defense to allege that the contract grievance procedure has not been exhausted. If this fact has been established by proof, admission or stipulation, the employee cannot prosecute his claim unless he proves that the union breached its duty of fair representation to him.

Here, consistent with MAHNKE, the County has asserted the affirmative defense of failure to exhaust an applicable contractual grievance procedure. Bell did not respond to the affirmative defense. The question posed is whether the absence of a response meets the MAHNKE requirement that failure to exhaust be "established by proof, admission or

stipulation." We conclude it does not. Clearly, silence is not "proof" or a "stipulation." Where, as here, the affirmative defense raised in such a motion is potentially dispositive of the case, it is appropriate to exercise our statutory authority under Sec. 227.44 (4)(a), Stats. to require that a party respond to the motion and to advise her that failing to do so will be deemed an "admission." [1] Absent such a directive from an examiner or the Commission, the failure to respond, particularly from a *pro se* litigant, does not constitute such an "admission" under MAHNKE. As discussed earlier herein, the question of whether and when an employee attempted to exhaust an applicable grievance procedure bears directly on whether a complaint is timely filed. Because the answers to those questions are presently unknown, the Examiner erred by dismissing the complaint as untimely filed and thus we have reversed his Order.

Accordingly, we have directed Bell to respond on or before August 31, 2010, to the County's affirmative defense. In response, she must amend her complaint, if she can accurately do so, to include the following information:

(1) the date on which the County allegedly violated the collective bargaining agreement by taking certain actions against Bell;

(2) the date on which Bell sought the Union's assistance or attempted on her own to use the grievance procedure in the collective bargaining agreement to challenge the County's alleged violations of that agreement;

(3) the date on which Bell's attempt to use the contractual grievance procedure was unsuccessful because the Union violated its duty of fair representation.

Any information Bell provides must show that Bell attempted to use the contractual grievance procedure no later than one year after the County's actions that allegedly violated the contract. The information must also show that it was sometime after August 26, 2008 (i.e. within one year of the date Bell filed her complaint with the Commission) that Bell first knew or should have known that the Union would not pursue her grievance. If the information Bell provides does not include the three pieces of information discussed above, or if the

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[1] Section 227.44(4)(a), Stats. provides:

> (4)(a) In any action to be set for hearing, the agency or hearing examiner may direct the parties to appear before it for a conference to consider:
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> 1. The clarification of issues.
> 2. The necessity or desirability of amendments to the pleadings.
> 3. The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof.
> 4. The limitation of the number of witnesses
> 5. Such other matters as may aid in the disposition of the action.

information provided does not meet both of the one year time limits just described, her complaint will be dismissed.

Dated at the City of Madison, Wisconsin, this 22nd day of July, 2010.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

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

MILWAUKEE COUNTY (Sarah Bell)

CONCURRENCE OF COMMISSIONER PAUL GORDON

The issue under the MAHNKE requirement is whether Bell's failure to respond to the County's motion is an admission. There are no specific ERC rules or WERC decisions which address this. Although not controlling in Chapter 227 actions, guidance on procedural questions is often derived from reference to the Wisconsin Statues governing civil procedure. Section 802.02(4), Stats., provides generally that the failure to deny averments in a pleading to which a responsive pleading is required are admitted when not denied in a responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided. In Bell's situation, pleadings and motions are governed under ERC 12.04. ERC 12.04(2)(f) provides:

> ERC 12.04(2)(f)
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> (f) *To dismiss*. A motion to dismiss shall state the basis for the requested dismissal. A motion to dismiss shall not be granted before an evidentiary hearing has been conducted except where the pleadings, viewed in the light most favorable to the complainant, permit no interpretation of the facts alleged that would make dismissal inappropriate.

That subsection does not itself require a response and does not address whether a response to a motion to dismiss is required. ERC 12.04 MOTIONS. (1) GENERALLY. (a) does provide that …"Any statement opposing a motion shall be promptly filed and shall conform to the same requirements as this paragraph provides for motions."… This too, does not clearly require a response to a motion to dismiss. But only that a statement opposing a motion must meet the form and filing requirements in the subsection. Thus, ERC 12.04 does not answer the question of whether a response to a motion to dismiss is required in order to determine the effect of such failure as an admission or denial.

Neither party briefed this limited procedural issue. The Examiner did not specifically address the issue of what MAHNKE requires by way of an admission based on failure to respond to the motion. The Commission takes that failure to respond as not being an admission, and the Commission is now prepared to also take a failure by Bell to respond prospectively to result in the dismissal of her case. That dismissal would still be based upon the County's motion, which requires here that there be an admission under MAHNKE. Thus, the Commission is prepared to find the admission required under MAHNKE as deriving from the failure of Bell to respond now. Silence at the Examiner level would not be an admission, but silence at the Commission level would be an admission. The only difference is that Bell is now being told by the Commission what response is required to avoid dismissal without hearing on the merits of the County's motion and that her silence, or failure to respond, will be the basis for dismissal. To avoid confusing and potentially conflicting results I would have the dismissal set aside by exercising our power under ERC 10.01 to waive the requirements of

ERC 12.04. We would not be making a decision as to whether there is or is not an admission under MAHNKE due to a failure to respond to the Motion to dismiss, then or now. A decision as to admission would be based upon a direct order to Bell to serve the purposes and provisions of MERA. The potentially conflicting procedural result is thus avoided without having to determine, on this record, if a motion to dismiss requires a response which, in its absence, is an admission of the averment in the motion.

Dated at the City of Madison, Wisconsin, this 22nd day of July, 2010.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Paul Gordon /s/
Paul Gordon, Commissioner

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