STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JOHN VERBERKMOES, Complainant

vs.

DEPARTMENT OF CHILDREN AND FAMILIES and OFFICE OF STATE EMPLOYMENT RELATIONS, Respondents.

Case 830
No. 69708
PP(S)-406

Decision No. 33125-A

Appearances:

Philip E. Klein, 201 E. Washington Ave., Room A200, Madison, WI 53702, appearing on behalf of Complainant.

William H. Ramsey, Chief Legal Counsel, Office of State Employment Relations, 101 East Wilson Street, P.O. Box 7855, Madison, WI 53707-7855, appearing on behalf of Respondents.

ORDER GRANTING IN PART AND DENYING IN PART RESPONDENTS' MOTION TO DISMISS AND DENYING RESPONDENTS' MOTION TO HOLD CASE IN ABEYANCE PENDING EXHAUSTION OF CONTRACTUAL REMEDIES

On March 22, 2010, John Verberkmoes (Verberkmoes) filed a Complaint with the Wisconsin Employment Relations Commission (Commission) asserting that Respondents Wisconsin Department of Children and Families (DCF) and Wisconsin Office of State Employment Relations (OSER) had committed unfair labor practices within the meaning of the State Employment Labor Relations Act (SELRA) by intimidating, retaliating, and discriminating against him for engaging in protected activities related to his duties as union steward. On May 26, 2010, DCF and OSER filed a motion to dismiss the Complaint, or in the alternative, to hold the Complaint in abeyance pending exhaustion of contractual remedies. The Examiner established a briefing schedule on the motion and the last written arguments were received on July 12, 2010.

The Examiner, being fully advised in the premises, makes and issues the following

ORDER

Respondents' Motion to Dismiss is granted as to all claims except for the Sec. 111.84(1)(a), Stats. claim and Sec. 111.84(1)(c), Stats. claim. The Motion to Hold the Complaint in Abeyance is denied.

Dated at Madison, Wisconsin this 16th day of September, 2010.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Matthew Greer /s/
Matthew Greer, Examiner

MEMORANDUM ACCOMPANYING ORDER

Respondents have filed a two-part motion asking the Examiner to 1) dismiss the Complaint because it does not allege facts sufficient to state a claim under SELRA as a matter of law, or 2) hold the processing of the Complaint in abeyance pending the exhaustion of contractual remedies.

1. Motion to Dismiss

A motion to dismiss a complaint "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." ERC § 12.04(2)(f).[1] The Commission applies a standard where "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 [Commission] has jurisdiction." WEST SALEM SCHOOL DIST., DEC. NO. 32696-D (WERC, 10/09).

Consistent with this standard, the facts as pled by Complainant are assumed to be true for the purpose of deciding this Motion and are summarized as follows. Verberkmoes is a union steward representing employees in various labor relations and employment issues. On the morning of December 7, 2009, Verberkmoes was traveling to a work-related meeting at a location away from his normal workplace. On the way to the meeting, he detoured to the Commission's office to file a complaint[2] in another matter and on behalf of a different individual. The time taken to deliver that complaint to the Commission was less than fifteen minutes and within the length of time normally taken by DCF employees for breaks.

On December 23, 2010, Verberkmoes was questioned by DCF human resources about improperly using work time on the morning of December 7, 2009. As a result, Verberkmoes' pay on December 7, 2010 was reduced by 20 minutes and his request for a half-hour "working lunch" was denied. A grievance was filed and was denied at the third step of the grievance procedure on February 22, 2010. After three requests for information regarding how DCF human resources became aware of Verberkmoes' presence at the Commission on December 7, 2009, DCF's human resource director admitted during the third step grievance meeting that DCF gained this information from David Vergeront, the Chief Legal Counsel for OSER (Vergeront). Vergeront was at the Commission's office at the same time as Verberkmoes on December 7, 2009 and saw him there. Although Verberkmoes was not the only employee to travel to the off-site meeting on December 7, 2009, he was the only employee who was questioned regarding his whereabouts while traveling to the off-site meeting.

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[1] ERC § 12.04(2)(f) is made applicable to this proceeding pursuant to ERC § 22.04.

[2] A copy of this complaint was attached to the Motion. Although submitted on a SELRA unfair labor practices complaint form, the Commission treated it as a personnel appeal matter falling within a separate area of its jurisdiction under Sec. 230.45(1)(a), Stats. and Sec. 230.44, Stats.

In communications related to other matters where Verberkmoes represented employees, Vergeront made various comments that Verberkmoes found threatening and retaliatory. In an October 28, 2009 e-mail, Vergeront accused Verberkmoes and another steward of being "perpetrators" of "pure, unadulterated frivolous conduct" and characterized a complaint filed by Verberkmoes in his capacity as union steward as "a clear, slam dunk 'frivolous' action." Vergeront further stated that if the complaint was not withdrawn, his client would seek severe sanctions. He further characterized the complaint as being a "travesty brought on by misguided 'jail house' lawyers who have absolutely no respect for laws and rules and obviously have too much time on their hands, time that should be spent on the state's work and not 'chasing windmills' and the impossible dream."[3]

The Complaint claims that these actions demonstrate "undue coercion and intimidation, as well as singling out a Union Steward for differential treatment."

The Complaint cites two sections of SELRA, *viz*. Sec. 111.82, Stats. and Sec. 111.84(2)(b), Stats., as the basis for the Commission's jurisdiction. Section 111.82, Stats. provides certain rights to covered state employees as follows:

> **Rights of employees.** Employees shall have the right of self−organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing under this subchapter, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection. Employees shall also have the right to refrain from any or all of such activities.

Section 111.84(2)(b), Stats. makes it an unfair labor practice for an "employee individually or in concert with others:"

> To coerce, intimidate or induce any officer or agent of the employer to interfere with any of the employer's employees in the enjoyment of their legal rights, including those under Sec. 111.82, Stats. or to engage in any practice with regard to its employees which would constitute an unfair labor practice if undertaken by the officer or agent on the officer or agent's own initiative.

The facts as alleged in the Complaint cannot be read to comprise a claim of an unfair labor practice under the foregoing section. The section prohibits certain actions taken by employees. The named Respondents, OSER and DCF, are not employees

[3] These comments arose during the pendency of DEPT. OF WORKFORCE DEVELOPMENT, DEC. NO. 32938-A (Levitan, 1/10), AFF'D BY OPERATION OF LAW, DEC. NO. 32938-B (WERC, 2/10).

within the meaning of SELRA. Further, the primary individual actor named in the Complaint is Vergeront and the facts alleged in the Complaint center on his actions. As Chief Legal Counsel for OSER, Vergeront was a management employee and not an employee covered by SELRA. *See* Sec. 111.81(7), Stats. As a management employee, his actions are imputed to the employer. Since the Complaint does not contain any facts related to employee conduct, it does not state a claim under Sec. 111.84(2)(b), Stats. and that claim is dismissed.[4]

Although the Complaint does not state a claim for relief under Sec. 111.84(2)(b), Stats., to dismiss the Complaint as a whole, I must find that there are no violations of Sec. 111.84, Stats. alleged, even where, as here, the applicable unfair labor practice section numbers are not specifically identified by the Complainant. *See* WEST SALEM SCHOOL DIST., DEC. NO. 32696-D (WERC, 10/09) AT FN 1.

For the purposes of surviving a motion to dismiss, the Complaint adequately alleges an unfair labor practice under Sec. 111.84(1)(a), Stats. and Sec. 111.84(1)(c), Stats.[5] In relevant part, Sec. 111.84(1)(c), Stats. makes it an "unfair labor practice for an employer individually or in concert with others...[t]o encourage or discourage membership in any labor organization by discrimination in regard to hiring, tenure or other terms or conditions of employment." To establish a 1(c) claim alleging discrimination, the Complainant must establish the following four elements: "(a) that the employee has engaged in lawful concerted activity (or was believed to have so engaged); (b) that the employer was aware of (or believed it was aware of) such activity at the time of the adverse action; (c) that the employer bore animus toward the activity; and (d) that the employer's adverse action against the employee was motivated *at least in part* by that animus, even if other legitimate factors contributed to the employer's adverse action." WISCONSIN RAPIDS SCHOOL DIST, DEC. NO. 30965-B (WERC, 1/09) (CITING MUSKEGO-NORWAY SCHOOL DIST. V. WERB, 35 WIS. 2D 540 (1967) AND EMPLOYMENT RELATIONS DEPT. V. WERC, 122 WIS. 2D 132 (1985)).

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[4] Complainant argues that if Respondents and Vergeront are not considered employees for the purposes of an unfair labor practice complaint under Sec. 111.84(2)(b), Stats., then the statute is rendered meaningless and he is left without a remedy in situations where management employees violate the Sec. 111.82, Stats. rights of employees. This argument disregards the section of SELRA that prohibits unfair labor practices committed by employers. Section 111.84(1), Stats. addresses those unfair labor practices that are committed by employers and employers' management employees. As will be discussed below, the Complaint can be read to allege a violation of Sec. 111.84(1), Stats.

[5] If Respondents are found to have violated Sec. 111.84(1)(c), Stats., they would also be found to have derivatively violated Sec. 111.84(1)(a) Stats. An independent violation of Sec. 111.84(1)(a), Stats. can also be found if Verberkmoes proves that Respondents engaged in conduct that had a "reasonable tendency to interfere with, restrain or coerce employees in the exercise of their rights" guaranteed by Sec. 111.82, Stats." JEFFERSON COUNTY, DEC. NO. 26845-B (WERC, 7/92), *aff'd*, 187 Wis. 2D 647 (Ct. App. 1994).

The Complaint alleges facts sufficient to satisfy these elements for the purposes of surviving a motion to dismiss. Complainant is alleged to have engaged in protected activity, namely that he is an active union steward who represents state employees and former state employees in labor and employment actions, including filing the December 7, 2009 complaint at the Commission.[6] As Legal Counsel for the state agency that represents DCF in labor litigation, Vergeront, and thereby OSER, is at least implicitly alleged to have been aware of the protected activity as the individual representing the State in actions brought by Complainant and seeing Complainant at the Commission's offices on December 7, 2009.[7] The Complaint adequately alleges that DCF was made aware of the protected activity through Vergeront and OSER when DCF's human resources director told Complainant that it was questioning Complainant's whereabouts on the morning of December 7, 2009 based on a conversation she had with Vergeront. Vergeront's comments made by e-mail on October 28, 2009 are facts that could be interpreted to indicate animus towards the alleged protected activity. Finally, the Complaint adequately alleges a connection between the animus and the Complainant

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[6] Respondents argue that union stewards do not engage in protected activity when assisting and representing former state employees or current state employees who are not in the steward's bargaining unit. In support, they cite DEPARTMENT OF WORKFORCE DEVELOPMENT (KLEIN), DEC. NO. 32574-A (Jones, 10/08) where the examiner found that the complainant in that case did not state a claim for an unfair labor practice under SELRA when he was allegedly thwarted by the respondent in that case in his efforts to file a non-represented employee grievance under another statute. The examiner explicitly did not find it necessary to decide whether the complainant, a represented employee covered by SELRA, had engaged in protected activity when he assisted another employee, a non-represented employee not covered by SELRA, in her efforts to exercise her rights under various workplace rules and statutes other than SELRA. ID. at 12. While it may be true, as Respondents point out, that a steward who assists a fellow employee in small claims court might not be engaging in protected activity, assisting other state employees and former state employees in labor and employment related matters is at least arguably protected activity. Further, regardless of whether Complainant's actions at the Commission were actually protected concerted activity, a reasonable inference from the Complaint is that Vergeront believed that Complainant's presence at the Commission's offices was protected activity. There would be little other reason for a union steward to be at the Commission's offices other than for purposes related to protected activity.

[7] Respondents point out that the complaint that was filed on December 7, 2009 was actually a personnel appeal, falling under a separate area of the Commission's jurisdiction. Even assuming for the sake of argument that a union steward does not engage in protected activity when filing a personnel appeal, the facts indicate only that Vergeront witnessed Verberkmoes presence at the Commission filing a document. Even if Vergeront did see the document that was filed, the document was filed on an unfair labor practice complaint form. These facts, as alleged, are sufficient to show that Vergeront was "aware (or believed [he] was aware)" of Verberkmoes' protected activity. At least as to the Sec. 111.84(1)(c) claim, it is sufficient for Complainant to demonstrate that the employer believed that he was engaging in protected activity to allege a claim of retaliation. WISCONSIN RAPIDS SCHOOL DIST, DEC. NO. 30965-B (WERC, 1/09).

being singled out for questioning by DFS human resource regarding his travel to an off-site meeting, the reduction in his pay, and the denial of the working lunch.[8] Therefore, I conclude that, given a liberal interpretation, the Complaint alleges facts sufficient to state a claim under Sec. 111.84(1)(c), Stats.

Respondents argue that the timing of Vergeront's actions could not have been retaliation for Complainant's refusal to withdraw a complaint he filed on behalf of another individual because the request to withdraw did not come until after Vergeront saw Complainant at the Commission's office and after Vergeront requested Complainant to withdraw the complaint in that matter. However, the Complaint can be read to allege that Vergeront's alleged actions against Complainant were directed at more than his decision not to withdraw that complaint in the face of OSER's request. In particular, the Complaint alleges that OSER expressed displeasure at Complainant's purported protected activity as early as October 26, 2009.[9] Further, the Complaint can be read to allege that Respondents retaliated against Verberkmoes for filing a complaint at the Commission's office on December 7, 2009.

2. Motion to Hold Complaint in Abeyance

As an alternative to dismissing the complaint, Respondents move to defer the Complaint to the contractual grievance procedure in the collective bargaining agreement. In this case, the Complaint alleges statutory violations other than breach of contract. As a result, the Commission may defer asserting jurisdiction over these other statutory claims if it appears that an award issued under the grievance procedure may resolve the dispute in a manner that is consistent with SELRA. Upon issuance of such an arbitration award, either party would have the opportunity to request that the Commission proceed with processing the Complaint if they believe that the SELRA claims have not been resolved by the award or that the SELRA claims have been resolved in a manner that is contrary to SELRA. STATE OF WISCONSIN (DOC), DEC. NO. 31384-B (WERC, 11/05). Such non-contractual claims can be deferred to arbitration when it apparent that "the alleged violations … can be submitted to, and materially resolved and remedied in an arbitration procedure." MILWAUKEE ELKS, DEC. NO 7753 (WERB, 10/66). However, this does not prevent the Commission from addressing the violations even if there is "the possibility of full relief through arbitration." ID.

[8] Respondents argue that Complainant was not subjected to differential treatment and that there was a legitimate operational need to address Complainant's actions in filing the complaint during working hours. While these are defenses that Respondents are free to pursue, based on the record in the current phase of litigation, I find that the Complaint adequately alleges that Complainant was treated differentially based on his alleged protected activity.

[9] The Complaint is unclear as to the action at which the October 28, 2009 e-mail from Vergeront is directed, since that e-mail was sent prior to the December 7, 2009 filing of another complaint specifically mentioned in the instant Complaint. However, the Complaint can be read to allege that the comments were directed at Complainant for pursuing complaints at either the Commission or Equal Rights Division.

In STATE OF WISCONSIN, DEC. NO. 15261 (WERC, 1/78), the Commission provided the following guidance on the deferral analysis:

> Among the guiding criteria for deferral are these: First, the parties must be willing to arbitrate and renounce technical objections, such as timeliness under the contract and arbitrability, which would prevent a decision on the merits by the arbitrator. Otherwise, the commission would defer only to have the dispute go unresolved. Second, the collective bargaining agreement must clearly address itself to the dispute. The legislative objective to encourage the resolution of disputes through arbitration would not be realized when the parties have not bargained over the matter in dispute. Third, the dispute must not involve important issues of law. An arbitrator's award is final and ordinarily not subject to judicial review on questions of law. Further, questions of legislative policy and law are neither within the province nor the expertise of arbitrators.

In this case, Respondents argue that Complainant's allegations of "undue coercion, retaliation and discrimination based upon his status as a union steward will all be addressed in the arbitration of his pending grievance," but do not cite a contractual provision that would place those issues before an arbitrator. Even if such a provision exists, Respondents have not clearly indicated that they are willing to arbitrate the matter and withdraw any technical objections. More importantly, the Complaint alleges facts that raise important issues of law under the Commission's SELRA jurisdiction, including allegations of animus towards Complainant's protected activity and discrimination based on that animus.

Even if an arbitrator awards repayment of the 20 minute pay deduction and remedies the denial of a working lunch, the central issue of the Complaint will remain unresolved – namely, that Respondents harbor animus towards and retaliates against union leaders who engage in protected activity. The contractual remedy, if any, would likely consist of a token sum of money, the award of which is peripheral to the central issue of the Complaint. That the violations alleged in the Complaint would likely not be "materially resolved and remedied," convinces me that deferral is not appropriate in this case.

Respondents cite to STATE OF WISCONSIN (HAMMOND), DEC. NO. 31384-B (WERC, 11/05) in support of their motion to defer. In that case, an individual employee alleged that she had been discharged in part due to the employer's retaliation against her for engaging in protected activity and anti-union animus. The examiner in that case denied the motion to defer, finding that the allegations of animus and retaliation raised important issues of law. The Commission overturned that decision and exercised its discretion to defer the case to the grievance procedure. The central

violation in Hammond related to the complainant's discharge from employment without just cause. In reviewing the decision to discharge utilizing the just cause analysis, an arbitrator is likely to deal with allegations of retaliation and anti-union animus that may have motivated the decision to discharge. As discussed above, it is less clear that such issues would be addressed if this case went to arbitration.

Respondents also cite to STATE OF WISCONSIN, DEC. NO. 32997-A (McLaughlin, 3/10). In that case, the respondents provided the examiner with relevant excerpts from the collective bargaining agreement that clearly demonstrated that the subject matter of the complaint fell within the contract. Further, respondents had expressly agreed to arbitrate the matter and pose no objections that would prevent an arbitrator from reaching the merits of the claim. More importantly, unlike this case, there were no allegations of retaliation or anti-union animus.

For the foregoing reasons, the motion to defer is denied.

Dated at Madison, Wisconsin, this 16th day of September, 2010.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Matthew Greer /s/
Matthew Greer, Examiner

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