

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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MILWAUKEE DEPUTY SHERIFFS' ASSOCIATION, Complainant,

vs.

MILWAUKEE COUNTY, Respondent.

Case ID: 161.0009  
Case Type: COMP\_MP

DECISION NO. 36098-A

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**Appearances:**

Christopher J. MacGillis, MacGillis Wiemer, LLC, 11040 West Bluemound Road, Suite 100, Wauwatosa, Wisconsin, appearing on behalf of the Complainant Milwaukee Deputy Sheriffs' Association.

Mark L. Olson and Daniel G. Vliet, Buelow, Vetter, Buikema, Olson & Vliet, LLC, 20855 Watertown Road, Suite 200, Waukesha, Wisconsin, appearing on behalf of the Respondent Milwaukee County.

**ORDER DENYING MOTION TO DISMISS**

Complainant having, on July 17, 2015, filed a prohibited practice complaint alleging that the Respondent had committed certain prohibited practices within the meaning of §§ 111.70(3)(a)1, 2 and 4, Stats.; and Respondent having, on September 2, 2015, filed a motion to dismiss the complaint; and Complainant having amended the complaint on September 14, 2015; and briefing on the motion to dismiss having been completed on September 22, 2015; and the Examiner being satisfied that the motion should be denied;

NOW, THEREFORE, it is

**ORDERED**

The motion to dismiss is denied.

Signed at the City of Madison, Wisconsin, this 21st day of October 2015.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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Peter G. Davis, Examiner

**MEMORANDUM ACCOMPANYING ORDER DENYING MOTION TO DISMISS**

Wisconsin Administrative Code § ERC 12.04(2)(f) provides in pertinent part:

... 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

The complaint alleges violations of §§ 111.70(3)(a)1 and 4, Stats.<sup>1</sup> The motion to dismiss alleges that the complaint is untimely and focuses on the § 111.70(3)(a)4 claim by asserting there are no facts alleged that would establish a breach of the duty to bargain.

As to the matter of timeliness, Complainant amended the complaint in response to the motion to dismiss to clarify that the allegations refer to matters occurring in 2015. Thus, the complaint as amended is timely filed.

As to the alleged breach of the duty to bargain, paragraph 35 alleges the Complainant "... has repeatedly attempted to address the unsafe working conditions of its members during collective bargaining." Paragraphs 36 and 37 allege that the Respondent has refused to bargain over such matters. Those three paragraphs are sufficient to allow the complaint to survive the motion to dismiss.

In closing, I note that the Respondent asserts a willingness to bargain at least some of the issues Complainant has raised. Hopefully such bargaining is ongoing and could warrant a joint request that the November 12, 2015 hearing date be utilized as a bargaining or mediation session. I also note that the legal analysis as to whether employee safety issues primarily relate to employee working conditions (and thus are mandatory subjects of bargaining) is complex and fact intensive and requires a balancing of the safety impact against the service level choices the Respondent is entitled to make. *City of South Milwaukee*, Dec. No. 32059-A (WERC, 7/09).

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<sup>1</sup> Paragraph 43 of the complaint appears to allege a violation of § 111.70(3)(a)2, Stats. Such allegations are generally understood to be limited to assertions of a "company dominated" union while the instant complaint allegation refers to domination based on unsafe working conditions and excessive overtime. However, as this allegation may not have been readily apparent to Respondent and thus was not addressed in the motion to dismiss, I reserve judgment on whether such a cause of action, if pursued by Complainant, exists. Complainant shall advise me and the Respondent on or before November 2, 2015, as to whether it is pursuing this allegation. Similarly, the independently pled § 111.70(3)(a)1, Stats., interference allegation is also somewhat novel in that it in effect asserts the employees are too tired from working to exercise their statutory rights. Although not directly addressed by the motion to dismiss, this theory has a factual premise and will survive to hearing if pursued by Complainant. Complainant shall advise me and the Respondent on or before November 2, 2015, as to whether it is pursuing this allegation.

Signed at the City of Madison, Wisconsin, this 21st day of October 2015.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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Peter G. Davis, Examiner