STATE OF WISCONSIN PERSONNEL COMMISSION

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MARY L. SMITH

Appellant,

v.

Secretary, DEPARTMENT OF HEALTH & SOCIAL SERVICES

Respondent.

Case No. 88-0063-PC

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RULING ON MOTION TO DISMISS FOR LACK OF JURISDICTION

This is a ruling on respondent's motion to dismiss on subject matter jurisdiction grounds filed on December 1, 1989.

This matter involves an appeal of a job abandonment/constructive discharge. In a decision entered on February 9, 1989, the Commission determined, among other things, that it had jurisdiction over this matter pursuant to §230.44(1)(c), stats., which provides for appeals of certain disciplinary actions, including discharges. The Commission also found that appellant had not worked since October 9, 1987, that this non-work status was related to knee and neurological and psychological problems, that her employment as a Social Services Collection Specialist I in the Division of Management Services was terminated effective January 30, 1988, pursuant to §ER-Pers 21.03, Wis. Adm. Code, and that respondent had acted arbitrarily in violation of §230.37(2), stats., by failing to attempt to place appellant in a less arduous position as an alternative to termination.

Respondent's motion to dismiss rests on the exclusivity provision of the Worker's Compensation law, §102.03(2), stats.:

"Where such conditions [as set forth in §102.03(1), stats.] exist the right to recovery of compensation under this chapter shall be the exclusive remedy against the employer...."

Respondent asserts[1] that appellant sustained an injury compensable under the Worker's Compensation law on February 15, 1986, when she was employed as a correctional officer at Waupun Correctional Institution (WCI), and that:

> "...[t]he state as an employer has conceded liability under the Worker's Compensation statutes from September 21, 1987 through July 28, 1988. (Attachment 1) The medical condition which gave rise to the appellant's apparent inability to perform her work as a social services collections specialist I was caused by the injury sustained while she was at Waupun Correctional Institution. Section 102.03(2) bars any other forum from taking jurisdiction." Respondent's brief, p.3.

Section 102.03(1), stats., provides (as relevant):

> "Liability under this chapter shall exist against an employer only where the following conditions concur:
>
> (a) Where the employe sustains an injury.
> (b) Where, at the time of the injury, both the employer and employe are subject to the provisions of this chapter.
> (c) 1. Where, at the time of the injury, the employe is performing service growing out of and incidental to his or her employment....
> (d) Where the injury is not intentionally self-inflicted.
> (e) Where the accident or disease causing injury arises out of his employment...."

To reiterate, section 102.03(2), stats., provides:

> "Where such conditions [as set forth in §102.03(1)] exist the right to recovery under this chapter shall be the exclusive remedy against the employer..."

It seems clear that the "the right to recovery under this chapter" which is the "exclusive remedy against the employer" refers to a remedy for the work-related injuries referred to in §102.03(1), since §102.03(2) is

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[1] The Commission will assume as true respondent's factual assertions for the purpose of addressing the legal merits of this motion.

prefaced by "[w]here such conditions exist," and each condition in §102.03(1) refers to an "injury." "Injury" is defined as the "mental or physical harm to an employe caused by accident or disease," §102.01(2)(c), stats. See Franke v. Durkee, 141 Wis. 2d 172, 176, 413 N.W. 2d 667 (Ct. App. 1987):

> "Section 102.03(2), Stats., which provides that the terms of the Act constitute an employee's exclusive remedy against his or her employer for work-related injuries, has been held to bar any action by the employee against the employer for such injuries...." (emphasis supplied)

The matter currently before this Commission is not a claim seeking a remedy for the February 15, 1986, injury — i.e., the "mental or physical harm to an employee caused by accident or disease...," "§102.01(2)(c), stats. — but a claim seeking a remedy for the January 30, 1988, termination of employment.

The Court of Appeals has held that the exclusivity provision of the Worker's Compensation Law extends to foreclose a Fair Employment Act handicap discrimination charge involving a refusal to rehire an employe injured in the course of employment, noting that §102.35(3), stats., addresses the employer's duty to rehire and provides a penalty for failing to do so, and stating that "[w]hen the legislature creates a right, the statutory remedy for violation of that right is exclusive." Schachtner v. DILHR, 144 Wis. 2d 1, 8, 422 N.W. 2d 906 (Ct. App. 1988). However, what respondent DHSS is seeking to do in this case goes far beyond Schachtner. Respondent is seeking to foreclose a civil service appeal of a termination of employment. This appeal is not seeking a remedy for the injuries which occurred in 1986, nor for a failure to rehire, because of those injuries, but for a personnel transaction that occurred two years later and which apparently has no more than a "but for" causal relationship to the

injuries — i.e., apparently but for her injuries, appellant would not have been unable to work and hence would not have been terminated. Since this appeal is not seeking a remedy for injuries covered by the Worker's Compensation law, and since an employer's action discharging an employe because of inability to work occasioned by work-related injuries covered by the Worker's Compensation law is not proscribed by that law[2], there is no basis for a conclusion that this appeal is foreclosed by the exclusivity provision of the Worker's Compensation law. Cf. Reese v. Sears, Roebuck & Co, 51 FEP Cases 784 (Wash, 1987).

Because respondent's motion to dismiss filed December 1, 1989, lacks legal merit even if the underlying facts alleged by respondent are assumed, the motion must be, and hereby is, denied.

Dated: February 7, 1990 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

AJT:gdt
JMF08/2

GERALD F. HODDINOTT, Commissioner

[2] Section 102.35(2), stats., prohibits employer discrimination against an employe "because of a claim or attempt to claim compensation benefits," but the law does not address discrimination related to the underlying injuries.