STATE OF WISCONSIN PERSONNEL COMMISSION

BARBARA REINHOLD,

Complainant,

v.

OFFICE OF THE COLUMBIA COUNTY DISTRICT ATTORNEY and MARK BENNETT,

Respondents.

Case No. 95-0086-PC-ER

RULING ON PETITION FOR REHEARING

This matter is before the Commission on complainant's petition for rehearing filed December 4, 1995. This petition relates to the Commission's November 14, 1995, ruling which resulted, among other things, in the dismissal of this complaint on the basis of Worker's Compensation exclusivity pursuant to §102.03(2), Stats. In her petition, complainant asserts that this determination is legally incorrect. She relies primarily on a recent Court of Appeal decision, Lentz v. Young, 195 Wis. 2d 457 ____, N.W. 2d ____ (1995).[1]

In its ruling on the WCA issue, the Commission relied on Norris v. DILHR, 155 Wis. 2d 337, 341, 455 N.W. 2d 665 (Ct. App. 1990), where the court held that "to the extent that coverage of employer's acts overlap under both Acts, the Worker's Compensation Act provides the exclusive remedy," and County of La Crosse v. WERC, 182 Wis. 2d 15, 37, 513 N.W. 2d 579 (1994), where the Supreme Court confirmed this principle. In support of her petition for rehearing, complainant characterizes Lentz as follows:

> The Wisconsin court of Appeals in a recent decision found that sexual harassment by a coworker was an intentional [sic] and therefore, the action for harassment was not barred by the exclusivity provision of the Worker's Compensation statute.
>
> Despite these allegations and despite the deliberate nature of his conduct, Young suggests that Lent's [sic] injuries were an accident under the WCA. Neither the law nor the public policy

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[1] Complainant also argues that the WCA exclusivity clause "has an exception for intentional acts." Brief, p. 5. However, this exception in s. 102.03(2), Stats., is not a general exception for intentional acts but is limited to a specific situation ("action against any coemploye for an assault intended to cause bodily harm") which has not been alleged here.

> underlying the WCA support such a result. Lent [sic] v. Young, 195 Wis. 2d 457 [, 471] (Wis. Ct. App. 1995), ____ NW2d _____ (1995).

Brief in support of petition for rehearing, p. 5.

Lentz involved a tort claim against the employer which alleged that the employer "threatened, assaulted and touched her [plaintiff] in an offensive manner ... engaged in a continuous series of actions that constituted an offensive invasion of her privacy ... [and] caused her emotional distress and that she was required to seek medical treatment as a result of her injuries." 195 Wis. 2d at 462-63. The plaintiff contended that because her injuries had not been caused by an "accident," §102.03(1)(e), Stats.,[2] since her injuries resulted from intentional, rather than accidental conduct, therefore as a matter of law her claim was not cognizable under the WCA, and WCA exclusivity did not bar her tort claim.

In addressing this contention, the court distinguished Jenson v. Employers Mut. Cas. Co., 161 Wis. 2d 253, 468 N.W. 2d 1 (1991), where the supreme court held that: "whether an injury is an accident is to be determined from the perspective of the injured employee. If the injury is unexpected or unforeseen from that perspective, the injury is an accident, regardless of whether the conduct giving rise to the accident was intentional or unintentional." 195 Wis. 2d at 469 (citations omitted). The court of appeals pointed out that in Jenson the barred claim was an action against a coemploye, while in Lentz the action was against the employer[3] himself. The court of appeals concluded this latter situation presented an issue of first impression in Wisconsin, and that for a number of reasons it should be resolved against a holding of WCA exclusivity.

If this were the extent of the Lentz decision, it would not lead to a different result with respect to WCA exclusivity than the Commission reached

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[2] (1) Liability under this chapter shall exist against an employer only where the following conditions occur:

* * *

(e) Where the accident or disease causing injury arises out of the employe's employment." (emphasis added)

[3] The plaintiff/employe worked for the defendant/employer as a waitress. The court's decision does not elaborate on how the defendant/employer was doing business -- e.g., as a sole proprietor or in a corporation or a partnership.

in its November 14, 1995, decision. A state employe is employed by a state agency, not the individual who heads the agency. See, e.g., §111.32(6)(a), Stats., which includes in the definition of "employer" under the WFEA "the state and each agency of the state," and §102.04(1)(a), Stats., which includes in the definition of "employer" under the WCA "[t]he state ... and other public and quasi-public corporations therein." Respondent Bennett is not complainant's employer; rather, he is a co-employe in the Office of the District Attorney for Columbia County, which is the employer per se. This factor distinguishes this case from that part of Lentz discussed above, because Lentz only exempts from WCA exclusivity the intentional actions of the employer per se, not the intentional acts of co-employes. Therefore, WCA exclusivity would apply to the instant case under this aspect of the Lentz holding.

However, the court of appeals in Lentz enunciated a second basis for its decision, independent of the employer/coemploye distinction:

> Finally, we note that even were we to accept Young's argument that this case must be analyzed in light of Jenson, we would nevertheless conclude that Lentz's injuries were not an accident. Lentz alleges that she sustained her injuries as a result of Young's prolonged and unrelenting sexually improper conduct. Lentz alleged that Young repeatedly touched her, verbally abused her and followed her over the course of a one-year period. In fact, Young's conduct was so extreme and pervasive that Lentz, with the aid of her fellow employees, took steps to avoid Young at work. Thus, given the protracted and persistent nature of Young's conduct viewed from Lentz's perspective, Young's conduct was not unexpected or unforeseen. Accordingly, we conclude that even under Jenson, Young's intentional sexual harassment of Lentz was not an "accident" within the meaning of the WCA. 195 Wis. 2d at 472-73 (footnote omitted)

In the instant case, complainant alleges an extensive litany of acts of sexual harassment and discrimination throughout her employment (since 1989) as an assistant district attorney. This case cannot be distinguished from Lentz on a motion to dismiss.

Respondent argues in opposition to the petition for rehearing that this case can be distinguished from Lentz in that here, unlike Lentz, complainant actually has filed a WCA claim, thereby alleging that her injuries were the result of an accident (i.e., covered by the WCA), and she cannot take a contrary position in this case. Respondent apparently is seeking an application of judicial estoppel. Assuming arguendo that this doctrine is both applicable to administrative proceedings and governed by the same criteria utilized in

judicial proceedings, this doctrine should not be considered controlling at this stage of the process on a motion to dismiss.

In State v. Fleming, 181 Wis. 2d 546, 510 N.W. 2d 837 (Ct. App. 1993), the court characterized this doctrine as "'intended to protect against a litigant playing 'fast and loose' with the courts by asserting inconsistent positions.' ... 'Because the rule looks toward cold manipulation and not unthinking or confused blunder, it has never been applied where plaintiff's assertions were based on fraud, inadvertence, or mistake.'" 181 Wis. 2d at 557-58 (citations omitted). Since at this point in the process, there is no copy of the WCA claim in the record, and there is no record on the circumstances under which the claim was filed,[4] it would be inappropriate to dismiss this WFEA claim on that basis at this time.

Respondent also points out that this case involves the application of WCA exclusivity to another statutory proceeding under the WFEA, while Lentz involved the application of WCA exclusivity to a tort action. However, this distinction does not affect the outcome. Under County of La Crosse, "to the extent that coverage under the Worker's Compensation Act and Fair Employment Act overlaps, the Worker's Compensation Act provides the exclusive remedy." 182 Wis. 2d at 37. However, the statutory coverage must overlap -- i.e., both acts must be applicable. Lentz holds that under the circumstances here alleged -- a protracted, persistent course of sexual harassment -- there is no "'accident' within the meaning of the WCA," 195 Wis. 2d at 473 (footnote omitted). Therefore, an essential element for a WCA claim is absent, and thus there is no "overlap" between the WCA and the WFEA.

Complainant has made certain arguments concerning her rights under Title VII. These arguments are immaterial and will not be addressed further.

## ORDER

Complainant's petition for rehearing filed December 4, 1995, is granted on the basis of "a material error of law", s. 227.49(3)(a), Stats., and so much of the Commission's November 14, 1995, ruling and order which resulted in the dismissal of this complaint on the basis of WCA exclusivity is rescinded, and

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[4] For example, pursuant to §102.12, Stats., an injured employe usually has only 30 days in which to file a notice of injury. If it were determined that WCA exclusivity applies to this WFEA claim, complainant's interests conceivably could be prejudiced by not having filed a timely WCA claim.

this case is restored to active status. The dismissal of Mr. Bennet in his individual capacity in relation to the WFEA discrimination claim was unchallenged and survives.

Dated: January 3, 1996 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

AJT:rcr

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

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