STATE OF WISCONSIN PERSONNEL COMMISSION

BARBARA REINHOLD,

Complainant,

v.

DEPARTMENT OF ADMINISTRATION, OFFICE OF THE COLUMBIA COUNTY DISTRICT ATTORNEY, and MARK BENNETT,

Respondents.

Case No. 95-0086-PC-ER

RULING ON MOTIONS AND FINAL ORDER

This matter, which involves WFEA (Wisconsin Fair Employment Act) claims of sex harassment and retaliation and "whistleblower" retaliation (Subchapter III, Chapter 230, Stats.), is before the Commission on two motions:

1) A motion by the original respondent, DOA (Department of Administration) to dismiss DOA as a party-respondent and substitute Mark Bennett, Columbia County District Attorney.

2) A motion by District Attorney Bennett to dismiss this claim on the following bases:

a) District Attorney Bennett cannot be liable personally because he is not a state agency;

b) District Attorney Bennett cannot be liable personally to the extent that he was acting as an agent of the Columbia County District Attorney;

c) District Attorney Bennett is protected by the official immunity doctrine;

d) Complainant has failed to allege any discriminatory actions occurred within the 300 day period of limitations provided by §111.39(1), Stats.;

e) This claim is barred by the exclusivity provision of the WCA (Workers' Compensation Act), §102.03(2), Stats.

In her response to this motion, complainant has stipulated to the dismissal of DOA, and that agency will be dismissed as a party respondent. However, the parties disagree as to who else should be parties respondent in this matter. Complainant asserts that the respondents should be: 1) the State

of Wisconsin, 2) the Office of the District Attorney for Columbia County, 3) Mark Bennett. Respondent Bennett objects to being named as a respondent in his individual capacity.

In the Commission's opinion, the only appropriate respondent with respect to the FEA claim is the Office of the District Attorney for Columbia County. Section 111.375(2), Stats., provides, inter alia:

> This subchapter applies to each agency of the state except that complaints of discrimination ... against the agency as an employer shall be filed and processed by the personnel commission. (emphasis added)

Thus the Commission's jurisdiction over the employer in FEA cases is limited to agencies per se, as opposed to a broader entity such as the State of Wisconsin. Pellitteri v. DOR, 90-0112-PC-ER (9/8/93); affirmed, Pellitteri v. PC, 94CV3540 (Dane Co. Cir. Ct. Br. 10, 7/19/95).

Mr. Bennett cannot be named as a party respondent in his individual capacity with respect to the FEA claim. The FEA defines "employer" at §111.32(6)(a), Stats., which provides, inter alia:

> "Employer" means the state and each agency of the state and ... any other person engaged in any activity, enterprise or business employing at least one individual.

Section 111.325, Stats., provides:

> Unlawful to discriminate. It is unlawful for any employer, labor organization, licensing agency or person to discriminate against any employe or any applicant for employment or licensing.

Thus, while it is unlawful for a "person" to discriminate, the Commission's jurisdiction under the FEA runs only to the state agency as the employer, pursuant to §111.375(2), Stats., and not to individual agents of the agency in their individual capacities.[1]

Complainant's whistleblower retaliation claim is a different matter. This law is governed by a statutory framework (Subchapter III, Chapter 230, Stats.) which is completely separate from the FEA. Section 230.85(1), Stats., allows an employe to file a retaliation complaint with this Commission if the

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[1] C.f. Sinclair v. Mike's Town & Country (LIRC, 4/6/90) (suggests that "where a person has acted under color of their authority as an agent of an employer, it is the employer rather than the individual person that is properly viewed as the respondent.")

employe "believes that a supervisor or appointing authority has initiated or administered, or threatened to initiate or administer, a retaliatory action against the employe." (emphasis added) The law appears to contemplate that a respondent may be a supervisor or appointing authority in his or her individual capacity. For example, §230.85(3) provides, inter alia:

> (3) (a) After hearing, the commission shall make written findings and orders. If the commission finds the respondent engaged in or threatened a retaliatory action, it shall order the employe's appointing authority to insert a copy of the findings and orders into the employe's personnel file and, if the respondent is a natural person, order the respondent's appointing authority to insert such a copy into the respondent's personnel file. In addition, the commission may take any other appropriate action, including but not limited to the following:
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> * * *
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> 4. Order payment of the employe's reasonable attorney fees by a governmental unit respondent, or by a governmental unit employing a respondent who is a natural person if that governmental unit received notice and an opportunity to participate in proceedings before the commission.
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> 5. Recommend to the appointing authority of a respondent who is a natural person that disciplinary or other action be taken regarding the respondent, including but not limited to any of the following:
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> a. Placement of information describing the respondent's violation of s. 230.83 in the respondent's personnel file.
> b. Issuance of a letter reprimanding the respondent.
> c. Suspension.
> d. Termination. (emphasis added)

Since Mr. Bennett in his individual capacity is a proper party respondent as to the whistleblower claim, he will be retained as a a party respondent in that capacity for that purpose.[2]

With respect to the issue of WCA exclusivity, it is undisputed from the parties' briefs that complainant has filed a WCA claim arising from the same subject matter involved in the instant charge of discrimination. Section

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[2] Mr. Bennett's contention that the doctrine of official immunity bars this complaint against him is inapposite, because that doctrine "is a substantive limitation on their [public officers'] liability for damages," Lister v. Board of Regents, 72 Wis. 2d 282, 299, 240 N.W. 2d 610 (1976) (emphasis added), and the whistleblower law does not expose an individual state employe respondent to liability for damages.

102.03(2), Stats., provides, inter alia: "Where such conditions [of liability] exist, the right to recovery under this chapter shall be the exclusive remedy against the employer, [and] any other employe of the same employer." In Norris v. DILHR, 155 Wis. 2d 337, 341, 455 N.W. 2d 665 (Ct. App. 1990), the Court held that "to the extent that coverage of employers' acts overlap under both Acts, the Worker's Compensation Act provides the exclusive remedy." Since in the instant case, both complainant's WCA claim and his FEA whistleblower charges arise from the same subject matter, the Commission is barred from proceeding with the FEA claim.

Complainant's brief in opposition asserts as follows:

> Contrary to Mr. Bennett's assertions, complainant is not barred from bringing this action because she has filed a worker's compensation claim arising from the same events. While it is true that § 102.03 of the Worker's Compensation Act, Wis. Stats., serves as an exclusive remedy provision, it excludes only actions in tort to recover for injuries that come within the conditions listed therein. County of La Crosse v. WERC, 182 Wis. 2d 15, 34 (1994) (emphasis added). As respondent may be aware, civil rights actions as such are not precluded by the filing of a worker's compensation claim.

However, County of La Crosse v. WERC involved the issue of whether the operation of §102.03(2), Stats., supplanted an employe's grievance alleging a violation of a labor agreement. The Court distinguished this situation from the operation of §102.03(2) with respect to a statutory remedy such as provided by the FEA:

> In Schachtner and Norris the question was whether sec. 102.03(2), in conjunction with sec. 102.35(3), precluded an employe with a work-related injury from filing a complaint with the Equal Rights Division alleging that her employer had refused to rehire her because the employer perceived her as handicapped in violation of the Wisconsin Fair Employment Act. In both cases the court of appeals concluded that to the extent that coverage under the Worker's Compensation Act and the Fair Employment Act overlaps, the Worker's Compensation Act provides the exclusive remedy. All that the court of appeals held in Schachtner and Norris was that the Worker's Compensation Act was the exclusive statutory remedy for refusal to rehire an employe because of a work-related injury. These cases do not involve the issue raised in the case at bar. 182 Wis. 2d at 37.

See also Genger v. Waukesha Co. Technical College (LIRC, 9/21/94) (WFEA complaint of sexual harassment barred by WCA exclusivity where employe filed WCA claim with respect to the same conduct by the employer.)

Since this charge is barred by the operation of §102.03(2), Stats., the Commission will not address respondent's arguments with respect to timeliness.

ORDER

1. DOA is dismissed as a party respondent pursuant to stipulation.

2. Mark Bennett in his individual capacity is added as a respondent with respect to the whistleblower claim only.

3. This complaint is dismissed on the ground of §102.03(2), Stats., WCA exclusivity.

Dated: November 14, 1995 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

AJT:rcr

JUDY M. ROGERS, Commissioner

Parties: (for purposes of judicial review)

Barbara Reinhold
6673 Traveler
Windsor, WI 53598

James Klauser
Secretary, DOA
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Mark Bennett
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NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities.

Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.) 2/3/95