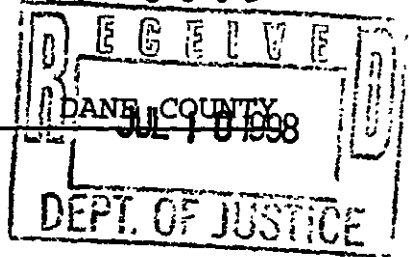


appeal from Reinhold v OCCDA
95-0086-PC-ER, 11/7/97

Meadore

STATE OF WISCONSIN CIRCUIT COURT



BARBARA REINHOLD,
Petitioner,

vs.

DECISION AND ORDER
Case No. 98-CV-0076

OFFICE OF THE COLUMBIA COUNTY
DISTRICT ATTORNEY and WISCONSIN
PERSONNEL COMMISSION,

Respondents.

FACTS

The petitioner, Barbara Reinhold (Reinhold), filed her initial complaint with the Wisconsin Personnel Commission (Commission) on June 23, 1995, alleging gender discrimination, sexual harassment and retaliation in violation of the Wisconsin Fair Employment Act (WFEA). Reinhold also alleged retaliation in violation of the Whistleblower Law. The initial complaint was signed by her attorney, Mr. Arellano, not by Reinhold. Reinhold then filed a perfected complaint on July 6, 1995, with the only change being that her own signature was notarized on the form.

The Commission issued a ruling dated November 14, 1995 which dismissed the Department of Administration as a party, added Mr. Bennett as a party with respect to the whistleblower claim only and dismissed the complaint under the worker's compensation exclusivity doctrine. Reinhold filed a petition for rehearing regarding the ruling dated November 14, 1995. On January 3, 1996, the Commission issued a second ruling which granted Reinhold's petition for rehearing on the basis of a material error of law and which reversed the dismissal of the case finding

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PERSONNEL COMMISSION

that the worker's compensation exclusivity doctrine did not present a bar to her claims.

Neither the initial nor the perfected complaint provided dates for alleged acts of discrimination/retaliation, which was a matter raised by the respondents in the investigation of the complaint. The respondents in the Commission proceedings contended that the complaints were insufficient as a matter of law because they failed to allege that any acts of discrimination occurred within WFEA's 300-day statute of limitations. Complainant replied by a letter dated August 22, 1995, which was signed by Mr. Arellano, not by complainant. The letter stated the following at pp. 3-4:

Respondent argues that complainant has failed to meet the statute of limitations requirement that discrimination claims filed under the Fair Employment Act be brought within 300 days of an alleged discriminatory act. Respondent is correct in noting that complainant did not state the dates on which these alleged discriminatory acts took place. At this time, complainant asserts that Mr. Bennett's discriminatory behavior has been ongoing since January, 1989 through the date on which complainant Reinhold filed her complaint with the Personnel Commission in June, 1995. As such, the conduct of respondent constitutes a continuing violation in satisfaction of the statute of limitations requirement. However, in fulfillment of respondent's request for specific dates, complainant hereby alleges that in November 1994, Mr. Bennett discriminated against her on the basis of sex, including but not limited to the following ways: Requiring complainant Reinhold to perform clerical duties at the expense of her legal duties based on the fact that she is a woman and in retaliation for her rejection of his sexual

innuendo, and by commenting to complainant that he should never have hired a woman assistant district attorney "to do a man's job."

The office of the District Attorney of Columbia County, respondent in the Commission proceedings, filed a Motion to Dismiss on June 16, 1997, or in the alternative, for summary judgment, based upon Complainant's failure to allege specific dates in her initial and perfected complaints, and upon her failure to submit the new allegations contained in Mr. Arellano's August 22, 1995 letter in a form required by Commission rules.

In its ruling dated September 16, 1997, the Commission recognized that the initial and perfected complaints failed to contain any specific dates regarding allegations of discrimination, unequal treatment or retaliation. The Commission, however, stated that it would allow Mr. Arellano's August 22, 1995 letter to serve as an amendment to the complaints with respect to the discrimination, sexual harassment, and Fair Employment Act retaliation claims, as long as Complainant cured the technical defects of the letter within 21 calendar days from the date of the ruling. It specifically stated:

Accordingly, Complainant has a period of 21 calendar days from the date this ruling was mailed (as recited in the Affidavit of Mailing sent with each party's copy of this ruling), to submit these three allegations in a statement that has been signed, verified and notarized, as required under PC 2.02(2) Wis. Adm. Code. If she does not submit the required statement by the due date, the Commission will dismiss the allegations.

The new allegations to be included in the amended complaint were as follows:

1. Sex harassment occurred on an ongoing basis.
2. In November 1994, Reinhold was required to represent herself as a secretary to the court and other members of the Wisconsin bar.
3. In November 1994, Reinhold was told by Mr. Bennett that he should never have hired a woman assistant district attorney "to do a man's job."

On or about October 3, 1997, Mr. Arellano, on behalf of the Complainant, filed an Amended complaint. The complaint was signed by Mr. Arellano, not the Complainant.

The Commission dismissed the Complaint in its Decision and Order dated November 7, 1997 stating the following at p. 2:

Complainant has not cured the technical defect as directed by the Commission. Instead of verifying the information herself, her attorney (by letter dated October 3, 1997) once again provided the information under his own signature which is the same defect addressed in the Prior Ruling. Accordingly, the three claims remain defective and are dismissed.

As a result, the Commission held that the claims did not contain any allegations of sex harassment or of FEA retaliation during the 300 day period prior to the date the complaint was filed and dismissed all allegations as untimely filed.

Reinhold filed a Petition for Rehearing arguing that the amended complaint should not be dismissed because it included three additional allegations which arose out of the same conduct and acts which formed the basis of her original complaint and this original complaint was properly notarized and verified by Reinhold herself. She further argued that because the amended complaint "relates back" to this original complaint, it was improper to dismiss the amended complaint on the basis of a technical error that did not exist in the original complaint. In the alternative, Reinhold asserted that the failure to verify the amended complaint constituted a technical error which she should be allowed to cure, because such an error did not affect the substantial rights of the parties. Finally, Reinhold argued that pleadings before the Personnel Commission are to be liberally construed, allowing for amendments when needed, and Reinhold should have been given the opportunity to cure this purely technical error.

On December 17, 1997, the Commission denied Reinhold's Petition for Rehearing holding that Reinhold is not entitled to a second opportunity to cure a technical defect and that Reinhold failed to show that the November 7, 1997 ruling was based on any material error of fact or law.

On January 9, 1998, Reinhold filed a Petition for Judicial Review.

Decision

In its September 16, 1996 ruling, the Commission noted that certain allegations of Complainant would be dismissed unless Complainant followed a prescribed procedure. The ruling addressed respondent's motion to dismiss the complaint as well as deficiencies in the complaint which the Commission treated as requests to amend the complaint. The Commission held that complainant's argument was problematic in that she alleged acts of sexual harassment as a separate claim from the acts of alleged unequal treatment. Therefore, the Commission treated complainant's argument as a request to amend her complaint to convert three claims of unequal treatment (namely, that the sex harassment occurred on an ongoing basis; that in November 1994, complainant was required to represent herself as a secretary to the court and other members of the Wisconsin bar; and that in November 1994, complainant was told by Mr. Bennett that he should never have hired a woman assistant district attorney "to do a man's job") to claims of sex harassment under paragraph 7 of the complaint. Complainant's request to amend the complaint to include three new allegations was granted on a conditional basis. The Commission allowed the Complainant to cure the technical defects since, if Complainant did not allege that a discriminatory or retaliatory act occurred during the Actionable Period, the case would have been dismissed on the basis that it was untimely filed. In its September 16 ruling, the Commission

stated the following at p. 8:

These amendment requests are granted. They were raised about 6 weeks after the initial complaint was filed. The allegation of ongoing conduct is akin to adding a basis of discrimination (continuing violation) which is acceptable as an amendment when raised (as is was here) prior to issuance of the ID. The allegation that Mr. Bennett stated during the actionable period (in November 1994) that he should never have hired a woman as an assistant district attorney provides clarification of the allegations made in paragraph 7 of the complaint. This especially is true because complainant noted in paragraph 7 of the complaint the not all acts of harassment were specified therein. Respondent contends the allegations of ongoing conduct and the two actions alleged to have been made by Mr. Bennett in November 1994, are defective as amendments because complainant has not sworn or attested to them "in a Complaint or Amended Complaint." The Commission agrees that a technical defect exists in this regard but concludes it is appropriate to provide complainant with an opportunity to cure the defect. Accordingly, complainant has a period of 21 calendar days from the date this ruling was mailed (as recited in the Affidavit of Mailing sent with each party's copy of this ruling), to submit these three allegations in a statement that has been signed, verified and notarized, as required under PC 2.02(2), Wis. Adm. Code. If she does not submit the required statement by the due date, the Commission will dismiss the allegations.

The administrative rules governing the filing of complaints is found in PC 2.02, Wis. Adm. Code:

PC 2.02 Complaints.

(1) **CONTENT.** Complaints should identify name, address and telephone number of the

complainant, the name of the respondent agency, the facts which constitute the alleged unlawful conduct and the statutory basis of the allegation.

(2) **FORM.** Complaints shall be written on a form available from the commission or on any other form that is acceptable to the commission. The complaint shall be signed, verified and notarized.

(3) **AMENDMENT.** A complaint may be amended by the complainant, subject to approval by the commission, to cure technical defects or omissions, or to clarify or amplify allegations made in the complaint or to set forth additional facts or allegations related to the subject matter of the original charge, and those amendments shall relate back to the original filing date.

(4) **ASSISTANCE.** Appropriate assistance in completing complaint forms, including notarization, shall be provided by the commission in the commission's offices.

The Commission dismissed the Complaint in its Decision and Order dated November 7, 1997 stating the following at p. 2:

Complainant has not cured the technical defect as directed by the Commission. Instead of verifying the information herself, her attorney (by letter dated October 3, 1997) once again provided the information under his own signature which is the same defect addressed in the Prior Ruling. Accordingly, the three claims remain defective and are dismissed.

The Commission held that Complainant did not cure the technical defect since her attorney, not Reinhold, provided the information under his own signature. The Commission stated that this was the defect specifically addressed in its prior ruling and therefore dismissed the three claims as defective.

As a result, the Commission held that Reinhold's perfected complaint was insufficient as a matter of law to state a claim for sexual harassment or of FEA retaliation during the 300 day period prior to the date the complaint was filed and dismissed all allegations as untimely filed.

PC 2.02(2), Wis. Adm. Code, requires that a "complaint shall be signed, verified and notarized." Reinhold failed to meet these requirements and she does not argue to the contrary. Reinhold does argue that she should be allowed to cure the defect by correcting the signature on the amended complaint since it constituted only a technical error. However, Reinhold was previously given the opportunity to cure the technical defects by the Commission per its September 16, 1997 ruling as discussed above. The Commission had determined that it was appropriate to provide complainant with an opportunity to cure the defect within 21 days even after concluding that a technical defect existed.

Reinhold cannot claim that the Commission did not allow her an opportunity to cure the defect on the amended complaint.

Reinhold asserts that the Commission's ruling should be set aside or modified. A "court shall set aside or modify the agency action if it finds that the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action, or it shall remand the case to the agency for further action under a correct interpretation of the provision of law." Wis. Stats. 227.57. "Where the material facts are not in dispute and the only question is one of law, the court may substitute its judgment for that of the agency, Frito-Lay, Inc. v. LIRC, 95 Wis. 2d 395, 400, 290 N.W.2d 551 (Ct. App. 1980), aff'd, 101 Wis. 2d 169 (1981). The Commission's ruling should only be set aside or⁴ modified if a provision of the law was incorrectly interpreted. There is no indication that the Commission erroneously interpreted the applicable law.

Reinhold also argues that the defect is one which is harmless to the Respondent and can be cured quickly. She argues that correcting the signature on the complaint did not affect, either beneficially or prejudicially, the Respondent. Wis. Stats. 805.18(1) states that the "court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party." A further argument provided by Reinhold is that the three new allegations to be included in the amended complaint arose out of the same conduct and acts which formed the basis of

her original complaint. Since, the original complaint was verified and notarized by Reinhold herself, she argues that the amended complaint should not have been dismissed since the amended complaint "related back" to the original complaint.

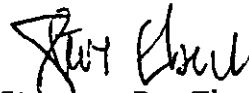
However, these factors do not justify allowing Reinhold additional time to cure the defect. Reinhold was specifically ordered to cure the defects on the amended complaint and failed to do so knowing that such failure would lead to a dismissal of the case.

Accordingly, the Commission did not abuse its discretion by failing to allow her additional time to amend the pleadings and the order of the Commission should be affirmed.

THEREFORE, IT IS³ ORDERED that the Petition is DISMISSED.

Dated this 8 day of July, 1998.

BY THE COURT:



Steven D. Ebert
Circuit Court Judge