STATE OF WISCONSIN PERSONNEL COMMISSION

HEATHER L. HINKFORTH,
Complainant,

v.

Secretary, DEPARTMENT OF WORKFORCE DEVELOPMENT,
Respondent.

RULING ON MOTION TO DISMISS CLAIM

Case No. 02-0074-PC-ER

On July 10, 2002, the Commission entered an order dismissing this complaint to the extent it invoked the Commission's jurisdiction under the Public Employee Safety and Health Law (§101.055, Wis. Stats.; commonly referred to as the state OSHA law), on the grounds that complainant was not a state employee in the context of a state OSHA claim, and that the complaint was not timely filed. This matter is now before the Commission on respondent's motion to dismiss complainant's WFEA (Wisconsin Fair Employment Act; Subch. II, Ch. 111, Stats.) claim of sex, disability, and WFEA retaliation discrimination with regard to the cancellation of her bricklayer apprenticeship, filed August 9, 2002, on the ground that its role in this case does not fall within the WFEA meaning of an "employer " Both parties have filed briefs. The following findings of fact do not appear to be disputed.

FINDINGS OF FACT

1. On May 7, 2002, complainant filed a complaint form with the Personnel Commission naming respondent's Bureau of Apprenticeship Standards as respondent. The complaint arose from a letter from the Bureau dated January 17, 2002, canceling complainant's bricklayer apprenticeship. Complainant alleged that respondent's action constituted discrimination based on disability and sex, as well as retaliation for engaging in activities under the Fair Employment Act and for public employee safety and

health reporting.[1] The complaint also alleges that BAS "refused to dispute all issues of complaints that I made against business representatives of BAC Local #8 and the Bureau's representative to the Joint Apprenticeship Committee, Kay Haishuk dating back to September '01. (exhibit 5)" The complaint alleges that BAS improperly processed her appeal of the notice of termination, including denial of a hearing, and failed to properly respond to her charge of sexual harassment and rape raised in her appeal.

2. Complainant was not an employee of the State of Wisconsin. She was employed by various private sector construction companies as an apprentice bricklayer. She was enrolled in an apprenticeship program administered by respondent.

3. The state has an oversight role over apprenticeship programs under s. 106.01, Wis. Stats., and related rules. Among other functions, the state must approve all apprenticeship agreements, and has the authority to terminate an apprenticeship contract if either party to the agreement is unable to continue with its obligation under the contract or has breached the contract. *See* s. 106.01(5j), Stats., s. DWD 295.20, Wis. Adm. Code

4. In a September 28, 2001, "Intent to Cancel Notice" respondent's Bureau of Apprenticeship Standards (BAS) notified complainant that it intended to cancel her apprentice contract because: "Apprentice left employer. App. failure to satisfactorily complete JAC directive (remedial rel. trng)."

5. Complainant appealed this decision to the BAS director. The BAS director investigated the appeal and in a January 17, 2002, letter informed appellant that her apprenticeship was canceled effective October 26, 2001, for the reasons stated in the notice of intent to cancel. The January 17, 2002, letter, includes the following:

> Section [DWD] 295.20(4)(c) lists matters that are unrelated to the provisions of the apprenticeship contract and are not appropriate subjects for a hearing. Among these subjects are "3. Insubordination" and "4. Refusal to perform work as assigned." Your actions leaving the assigned employer, Riley Construction, and failing to complete the di-

[1] As noted above, in an order entered July 10, 2002, the Commission dismissed the state OSHA claim on the grounds that it had not been timely filed, and that complainant was not a public employee for state OSHA purposes.

rected remedial training are matters unrelated to the provisions of the apprenticeship.

DWD 295.20(4)(d) states:

> Where the investigation of the division reveals that the dispute between the apprentice and the employer or other party to the indenture agreement is unrelated to the provisions of the indenture agreement, the division may cancel the indenture agreement.

Based on the Bureau's investigation and the information you have provided, I am directing the Bureau's field representative . to cancel your apprenticeship effective October 26, 2001 for the reasons stated in the **Intent to Cancel Notice**.

You may also appeal this decision in writing to the Secretary of Workforce Development, Ms. Jennifer Reinert, under the provisions of Chapter 227.42, Wisconsin Statutes.[2]

6. Prior to filing her complaint with this Commission on May 7, 2002, complainant had filed a complaint with the Equal Rights Division (ERD) of DWD on February 11, 2002. ERD returned her complaint on or about February 20, 2002, along with a completed form (Exhibit 1 attached to her complaint she filed with this agency) with the box checked which was associated with this information: "Your complaint should be filed with the Wisconsin Personnel Commission because the Bureau of Apprenticeship is a state entity." This form was signed by Lynda Holloway, Equal Rights Officer

CONCLUSIONS OF LAW

1. Respondent acted as a "licensing agency" under s. 111.32(11), Stats., in its role in this case.

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[2] Complainant filed an appeal with Ms. Reinert on February 10, 2002. The disposition of that appeal is not known.

2. Pursuant to s. 111.375(2), Stats., the Commission only has jurisdiction over state agencies acting as "employers."

3. The Commission lacks subject matter jurisdiction over this complaint.

OPINION

Pursuant to s. 111.375(2), Stats., this Commission has jurisdiction over WFEA complaints against each state "agency as an *employer* " (emphasis added) The Department of Workforce Development (DWD), acting through the Bureau of Apprenticeship Standards (BAS) clearly is a state agency. The question raised here is whether DWD was acting as an employer at the time it terminated complainant's apprenticeship contract.

Based on the relevant statutes (s. 106.01) and administrative rules (Ch. DWD 295), the BAS plays a key role in what is a four-party relationship for apprentices. Involved in this situation is the employee (the apprentice), the employer (contractor or other entity employing, in this case, bricklayers), the Milwaukee Area Bricklaying Joint Apprenticeship Committee (JAC), and the BAS. Their interrelationship involves the fact that many employers/building contractors hire trades workers for specific jobs on a project basis. With regard to apprentices, this is done through the JAC which administers the apprenticeship program and is responsible for overseeing the apprentices' training and progress in their trades. The BAS has oversight responsibility, and signs/approves the initial apprentice contract (Respondent's Exhibit 1 attached to respondent's brief in support of motion), which is also signed by the sponsor—JAC—and the apprentice. Pursuant to s. DWD 295.07(2), Wis. Adm. Code, "No indenture shall be considered in force unless it has the approval of the department." The apprenticeship contract provides the extent of the period of apprenticeship (3 years), and other aspects of the relationship, including school attendance, a schedule of hours of on-the-job (OTJ) training and experience, and minimum compensation to be paid. Pursuant to s. 106.01(5j), Stats., DWD has the authority to terminate an apprenticeship agreement

if it concludes that a party to the contract is unable to continue with its obligations under the contract or has breached the contract.

Section 111.321, Stats., provides that no "employer, labor organization, employment agency, licensing agency or other person may engage in any act of employment discrimination as specified in s. 111.322 against any individual." Pursuant to s. 111.375(2), Stats., "This subchapter applies to each agency of the state except that complaints of discrimination . against the agency as employer shall be filed with and processed by the personnel commission under s. 230.45(1)(b)." The entities prohibited from discriminating under s. 111.322 are the "employer, labor organization, employment agency, licensing agency or other person," but the legislature has limited the Commission's authority under s. 111.375(2) to complaints against an "agency as employer." The Commission has held that if an agency is acting in some capacity other than the employer—e. g., licensing agency or employment agency—it does not have subject matter jurisdiction of a complaint against an agency acting in that capacity. *See, e. g., Collins v. DHSS,* 83-0080-PC, 8/17/83 (No jurisdiction over the Division of Vocational Rehabilitation for denying funding for on-the-job training for complainant/client because it was not acting as an employer); *Balele v. DOA, DHFS & DOJ,* 96-0156-PC-ER, 6/4/97 (No subject matter jurisdiction over DHFS and DOJ which were acting other than as employers in their roles in obtaining a garnishment order against complainant, a DOA employee, in connection with costs awarded in a judicial proceeding complainant had pursued against DHFS; nor against DOA for effecting the garnishment order).

In the Commission's opinion, the statutory and regulatory framework discussed above supports a conclusion that DWD had an alleged role in the cancellation of this employment contract that brings the agency within the purview of the WFEA in one capacity or another This is consistent with *Tillman v. City of Milwaukee,* 715 F. 2d 354 (7th Cir. 1983). That Title VII case involved an electrician apprentice who was discharged from his apprentice position with the city, and whose indenture was annulled by DILHR (Department of Industry, Labor and Human Relations, the predecessor

agency to DWD). The district court had concluded that DILHR was an indispensable party:

> "Mr Tilman's discharge stemmed not from the defendant city of Milwaukee but from the department. it was the department, not the city of Milwaukee, which terminated the indenture agreement and brought about the discharge of the plaintiff. Whatever role the city played in the process was tangential and secondary, since the department, by law, was in control of the program." 715 F. 2d at 356-57 [3]

Therefore, the question before the Commission comes down to whether DWD's role in terminating complainant's apprenticeship contract fits within the category of an "employer" under the WFEA, in which case the Commission would have jurisdiction over this complaint, or within some concept other than an "employer"—i. e., as a "labor organization, employment agency, licensing agency or other person.")

The WFEA defines "labor organization" as: "Any organization, agency or employee representation committee, group, association or plan in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours or other terms or conditions of employment," s. 111.32(9)(a), Stats., or a subordinate body, s. 111.32(9)(b). Clearly, DWD does not fall within this definition.

Section 111.32(7) defines "employment agency" as "any person, including this state, who regularly undertakes to procure employees or opportunities for employment for any other person." While DWD plays a role in an apprenticeship system that has some connection with the process of apprentices finding employment, its role is not that of procuring "employees or opportunities for employment for any other person." *Id.*

Section 111.32(11) defines "licensing agency" as "any board, commission, committee, department, examining board, affiliated credentialing board or officer, except a judicial officer, in the state or any city, village, town, county or local government authorized to grant, deny, revoke, suspend, annul, withdraw or amend any li-

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[3] The Court of Appeals affirmed the conclusion of the district court that DILHR was an indispensable party, but reversed in part on other grounds.

cense." The term "license" is defined as "the whole or any part of any permit, certificate, approval, registration, charter or similar form of permission required by a state or local unit of government for the undertaking, practice or continuation of any occupation or profession." S. 111.32(10). Since DWD 295.07(2), Wis. Adm. Code, requires that DWD's approval is required for a valid apprenticeship contract, and the contract is required for employment and training in an apprenticeship relationship, which is a significant means of practicing the occupation of bricklaying, it appears DWD is acting as a "licensing agency" under s. 111.32(11) in the context of this case.

This conclusion is consistent with *Flowers v. South Central Wisconsin Joint Apprenticeship and Training Committee,* Case #8204620 (LIRC, 6/21/85). In that case the complainant was an apprentice electrician who worked for various electrical contractors. The respondent committee appeared to function in the same manner as the JAC here. The complainant's indenture of apprenticeship was canceled by the Division of Apprenticeship and Training, which functioned like the BAS here, at the recommendation of the committee. LIRC dismissed the complaint on the ground that the Committee was not an employer under the WFEA. It rejected the complainant's argument that the Committee could be considered a "licensing agency" under the act. At the time that case was decided, the 1982 amendments[4] to the WFEA which provided a specific definition of "license" and "licensing agency" at ss. 111.32(10) and 111.32(11), Stats., respectively, had been enacted but were not *per se* applicable because the transaction covered by the complaint had preceded the effective date of the amendments. However, LIRC considered the changes in its decision:

> The 1982 amendments to the Act included a definition of the term "licensing agency." Although not conclusive of the term as used in prior statutes, it is useful as a general guide to legislative intent. The later definition confirms that "licensing agency" was intended to refer to an actual unit of government. As discussed above, the Respondent [Committee] is <u>not</u> a division or unit of state government. . *Flowers* at p. 4.

[4] 1981 Wis. Laws. Ch. 334, sec. 9, eff. May 7, 1982.

LIRC's discussion then indicated that it viewed the BAS's predecessor as a licensing agency:

> The Commission would note, however, that even if it accepted the Complainant's definition of the term "licensing agency,"[5] the fact remains that the Respondent's status does not conform to that definition. The Commission considers that it is not the Respondent which has the capacity to exert power or is the entity through which power is exerted. The power rests with and is exerted through the Division of Apprenticeship and Training. The respondent simply is not a licensing agency, regardless of what definition of the term is applied. *Id.*

Therefore, while LIRC rejected the proposition that the apprenticeship committee was a licensing agency, it viewed the Division of Apprenticeship and Training as playing that role, and that role was the same as DWD has here. *See also Johnson v. Central Regional Dental Testing Service [CRDTS]*, Case # 9352414 (LIRC, 2/29/96). That case involved a dentist's complaint against the Department of Regulation and Licensing (DRL) as a s. 111.32(11), Stats., "licensing agency," and the CRDTS, a non-governmental independent testing agency whose results were relied on by DRL for licensing dentists. LIRC observed that CRDTS functioned in a similar manner to the apprenticeship and training committee in *Flowers,* and distinguished its function from DRL's function as "licensing agency":

> CRDTS, like the joint management-labor apprenticeship and training committee in *Flowers,* is a non-governmental organization that makes determinations concerning what it believes to be the fitness of certain persons to engage in certain remunerative activities. The Department of Regulation and Licensing and its Dentistry Examining Board, like the Division of Apprenticeship and Training in *Flowers,* is a governmental agency that actually controls the legal right of individuals to engage in the remunerative activity in question, and which uses the determinations of the private body as a basis for its decision-making. *Johnson* at pp. 9-10.

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[5] Complainant's definition was: "a licensing agency need only be a person or thing through which the power to permit a person to engage in an occupation is exercised." *Flowers* at p. 4.

An argument could be made that in its role in this case, DWD is acting as an "employer" under the WFEA. *See, e. g., Betz v. UW-Extension,* 88-0128-PC-ER, 1/8/91, where the Commission cited federal Title VII cases which provide "a broad construction [of the term "employer"] that focuses on control over conditions of employment." P. 4. However, the control respondent exerted in this case is more specifically described as that of a licensing agency. It does not control the day-to-day activities complainant performs, e. g., how, where and when to do the work. That was controlled by the traditional employer-contractors who were paying complainant's wages. Where respondent's role is explicitly described by a specific category--"licensing agency"--among those found in s. 111.321, Stats., that is a more apt application of the statute than a more general category—"employer" or "other person." Therefore, it appears that this case should by processed by the ERD of DWD pursuant to s. 111.375, Stats., as was done in *Johnson v. DRL,* Case # 26G931805 (LIRC, 2/29/96).

The Commission notes that, as set forth in Finding 7, the complainant initially filed her complaint with ERD only to have it rejected with the directive to file it here because of respondent's status as a state entity. While this advice conflicts with the result reached in this case by this Commission, we do not interpret the form signed by an Equal Rights Officer as a final ERD jurisdictional decision, for a number of reasons, including the fact that the action taken did not follow the process required by DWD to render a final decision on jurisdiction. LIRC discussed what appears to be essentially the same process in *Johnson v. DRL.* In that case, an ERD employee returned the complainant's initial complaint, which had just named CRDTS as respondent, with instructions to file an amended claim naming DRL as the respondent. LIRC commented that this "rejection" of the complaint was improper under DRL rules, which require that if ERD determines on preliminary review that a complaint is defective because (among other things) it names a respondent not subject to the WFEA, ERD is to issue a preliminary determination dismissing the complaint, which is appealable within ERD, and subsequently to LIRC. The current rules have been re-titled but are substantively

the same. *See* s. DWD 218.05, Wis. Adm. Code. Therefore, there is no reason to think that there has been a final decision on jurisdiction by ERD, no less a decision that would have some kind of preclusive effect on the Commission's handling of this matter

ORDER

This complaint is dismissed for lack of subject matter jurisdiction.

Dated: NOVEMBER 13, 2002 STATE PERSONNEL COMMISSION

ANTHONY J. THEODORE, Commissioner

AJT:020074Crul2

KELLI S. THOMPSON, Commissioner

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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 peti-

tion 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