

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**MARILYN R. MEIER-O'BRIEN**, Appellant,

v.

**Secretary, WISCONSIN DEPARTMENT OF ADMINISTRATION**, Respondent.

Case 6  
No. 69045  
PA(der)-168

**Decision No. 32955**

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**Appearances:**

**Marilyn R. Meier-O'Brien**, appearing on her own behalf.

**Elisabeth Dieterich**, Assistant Legal Counsel, Department of Administration, P. O. Box 7864, Madison, Wisconsin 53707-7864, appearing on behalf of the Department of Administration.

**ORDER GRANTING MOTION TO DISMISS**

This appeal, which arises from various matters related to the employment of Appellant Marilyn R. Meier-O'Brien with Respondent DOA, is before the Wisconsin Employment Relations Commission (the Commission) on Respondent's motion to dismiss two of Appellant's claims as untimely and her remaining claim as lacking subject matter jurisdiction. The Commission received the final written argument relating to Respondent's motion to dismiss on November 17, 2009.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

**FINDINGS OF FACT**

1. Respondent employed Appellant in various positions, the last of which ended no later than September 1, 1990.<sup>1</sup>

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<sup>1</sup> Respondent's Exhibit A contains *inter alia* a column entitled "CLASS TITLE" that lists positions Appellant apparently held with Respondent and a column entitled "TRANSACTION TYPE" with entries associated with those positions. Exhibit A indicates Appellant's last position with the DOA was "PROGRAM ASSISTANT 2 CONF". "TRANSACTION TYPE" entries for that position include "TER-DISABLED-PERM." with an "EFFECT DATE" of July 4, 1989 and "LOA-MEDICAL" with an "EFFECT DATE" of July 5, 1989. Respondent's Exhibit B, entitled, "Wisconsin Retirement System (WRS) Previous Service and Benefit Inquiry", states in part, "Retirement Annuity Information. . . . Annuity Benefit Effective Date: 09/01/1990" but does not indicate any creditable service. A reasonable inference from Respondent's Exhibits A and B is that Appellant's employment with Respondent ended no later than September 1, 1990. Appellant alleges in her June 2, 2009 letter to Attorney Van Hollen that she "was fired from a Wisconsin State civil service position after twenty-nine years (29) of commendable service." However, she has alleged neither a beginning nor an ending date of employment with Respondent, has not contested any information regarding her employment set forth in Respondent's Exhibits A and B, and thus has not put in issue the date that her employment with Respondent ended.

2. Appellant sent or delivered a letter dated June 2, 2009 to Attorney General J.B. Van Hollen. The letter states in part:

I was fired from a Wisconsin State civil service position after twenty-nine years of commendable service. During the last 4 years, even though in those last 4 years I received the EPA for my exceptional performance, gender discrimination, sexual harassment from my first line supervisor and retaliation for reporting this abuse was taking place.

I was a civil servant covered by a union contract when I was involuntarily switched into a unrepresented title of confidential employee.

In short I was reclassified out of union of my position which afforded me certain contracted rights.

As a confidential I was not entitled to union protection. I was singled out for this reclassification because my co-workers in my section did not work for management in the capacity of confidentially I did in my construed position.

Once I was converted to the status of a confidential employee I was fired from my position or forced-out by unscrupulous, sleazy supervisors. It was done without due process and for no real cause.

3. Assistant Attorney General Corey Finkelmeyer responded to Appellant in a letter dated June 17, 2009. His letter advised in part:

[Y]ou might consider contacting the Wisconsin Equal Rights Division or the Wisconsin Employment Relations Commission to ascertain whether you have any recourse under state law relating to employment discrimination, civil service, or labor relations.

4. In correspondence dated July 3, 2009 and received by the Commission on July 9, 2009, Appellant wrote in part:

Dear Chair Judy Neumann,

Please see the attached letter the assistant attorney general said I should contact you[.] It is from the State of Wisconsin dated 06/17/09. Per his suggestion I am reaching out to you for your assistance in this matter.

5. Enclosed with Appellant's letter received by the Commission on July 9, 2009, were copies of Assistant Attorney General Corey Finkelmeyer's letter to her, dated June 17, 2009, and Appellant's letter to Attorney General J.B. Van Hollen, dated June 2, 2009.

Based on the above and foregoing Findings of Fact, the Commission makes and issues the following

**CONCLUSIONS OF LAW**

1. The Appellant has the burden of establishing that her claims relating to the change in her classification and her discharge were filed in accordance with the 30-day time limit established in Sec. 230.44(3), Stats.

2. The Appellant has failed to sustain that burden.

3. The Appellant's claims relating to the change in her classification and her discharge are untimely.

4. The Appellant has the burden of establishing the Commission's subject matter jurisdiction.

5. The Appellant has failed to sustain that burden regarding her claim that Respondent discriminated and retaliated against her.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following

**ORDER**<sup>2</sup>

Appellant's claims relating to the change in her classification and her discharge are untimely. The Commission lacks subject matter jurisdiction over Appellant's claim that Respondent discriminated and retaliated against her. Accordingly, Respondent's motion is granted and this matter is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 28<sup>th</sup> day of January, 2010.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

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Judith Neumann, Chair

Paul Gordon /s/

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Paul Gordon, Commissioner

Susan J. M. Bauman /s/

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Susan J. M. Bauman, Commissioner

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<sup>2</sup> Upon issuance of this Order, the accompanying letter of transmittal will contain the names and addresses of the parties to this proceeding and notices to the parties concerning their rehearing and judicial review rights. The contents of that letter are hereby incorporated by reference as a part of this Order.

**Department of Administration (Meier-O'Brien)**

**MEMORANDUM ACCOMPANYING ORDER GRANTING MOTION TO DISMISS**

The issues before the Commission raised by Respondent's motion to dismiss are as follows:

- 1) Does the Commission have subject matter jurisdiction over Ms. Meier-O'Brien's appeal of alleged actions of discrimination and retaliation by Respondent against her?
- 2) Did Appellant's claims relating to the change in her classification and her discharge comply with the time limit for filing a State classified service personnel appeal, as set forth in Sec. 230.44(3), Stats.?

**Procedural History**

Ms. Meier-O'Brien's July 3, 2009 letter addressed to Chairperson Neumann and received by the Commission on July 9, 2009, initiated her appeal. The substantive allegations of her appeal are set forth in her previous letter to Attorney General J.B. Van Hollen, a copy of which was enclosed with her July 3 letter.

The allegations in Appellant's letter to the Attorney General set forth three grounds for appeal: 1) Respondent's discrimination and retaliation against Appellant while she was employed and when she was discharged;<sup>3</sup> 2) the change in Appellant's classification and concomitant loss of rights and protection under the collective bargaining agreement; and 3) Ms. Meier-O'Brien's discharge without just cause.

Respondent has moved to dismiss Appellant's claim that Respondent discriminated and retaliated against her for lack of subject matter jurisdiction. In addition, Respondent has moved to dismiss Ms. Meier-O'Brien's claims relating to the change in her classification and her discharge as untimely under Sec. 230.44(3), Stats.

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<sup>3</sup> Although Appellant clearly alleges unlawful discrimination and retaliation while Respondent employed her, it is less clear whether she alleges discriminatory discharge. She alleges in part that she was "fired from [her] position or forced-out by unscrupulous, sleazy supervisors. It was done without due process and for no real cause." The Commission liberally construes Appellant's allegation that she was fired by "unscrupulous, sleazy supervisors" to mean that her discharge was not only without just cause but also discriminatory. See OAKLEY V. BARTELL, CASE NO. 78-66-PC (PERS. COMM. 10/10/78), *quoted with approval in* REINHOLD V. OFFICE OF THE COLUMBIA COUNTY DISTRICT ATTORNEY, CASE NO. 95-0086-PC-ER (PERS. COMM. 12/17/97) ("It is a general rule of administrative law that pleadings are liberally construed and are not required to meet the standards applicable to pleadings in a court proceeding.") In addition, it is not entirely clear from Appellant's submissions that she is asserting a claim based on the change in her classification, but the Commission assumes as much. ID.

### **Appellant's Claims of Discrimination and Retaliation**

Appellant claims that during her employment with Respondent, she was subject to “gender discrimination, sexual harassment from [her] first line supervisor and retaliation for reporting this abuse”. The Commission has observed, “where the letter of appeal provides an unambiguous basis for concluding that the Commission lacks subject matter jurisdiction, the Commission may exercise its authority to raise a jurisdictional question *sua sponte*.” DHFS (MEYER), DEC. NO. 31509 (WERC, 10/05), *citing* ACHTOR V. PEWAUKEE LAKE SANITARY DIST. 88 WIS. 2D 658, 664, 277 N.W.2D 778 (1979). The Commission has exercised such authority in this case.<sup>4</sup> Moreover, the “[a]ppellant has the burden of establishing the Commission’s subject matter jurisdiction.” DOC (GARCIA), DEC. NO. 32890 (WERC, 10/09), *citing* LAWRY V. DP, CASE NO. 79-26-PC (PERS. COMM., 7/31/79).

Section 230.45, Stats. expressly differentiates the powers and duties of the Commission and those of the Division of Equal Rights (ERD) of the Wisconsin Department of Workforce Development (DWD). Pursuant to Sec. 230.45(1)(a), Stats., the Commission shall conduct hearings and appeals under Sec. 230.44, Stats. The latter section expressly recognizes actions appealable to the Commission, including, without limitation, personnel decisions regarding reclassification and reallocation, Secs. 230.44(1)(b) and 230.09, Stats., and discharges without just cause, Sec. 230.44(1)(c), Stats.

In contrast, claims of employment discrimination and retaliation are not included in the actions appealable to the Commission pursuant to Secs. 230.45(1)(a) and 230.44, Stats. Rather, Sec. 230.45(1e)(a), Stats. provides that the ERD shall “[r]eceive and process complaints of discrimination of state employees under s. 111.375.”<sup>5</sup> *See also* DOC (ALT), DEC. NO. 31795 (WERC, 9/06) (noting that “the Commission lacks the authority to receive and process complaints of discrimination that seek to invoke Wisconsin’s Fair Employment Act, subch. II, ch. 111, Stats.”).

In sum, the Equal Rights Division of the Department of Workforce Development, not the Commission, has exclusive subject matter jurisdiction over Ms. Meier-O’Brien’s allegations of employment discrimination and retaliation in violation of the Wisconsin Fair Employment Act. Appellant’s claims to this Commission that Respondent unlawfully discriminated and retaliated against her must therefore be dismissed for lack of subject matter jurisdiction.

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<sup>4</sup> In correspondence to the parties dated October 1, 2009, and written on behalf of the Commission, a staff attorney “invite[d] the parties to submit any argument it wishes on the following issue: *Does the Commission have subject matter jurisdiction over Ms. Meier-O’Brien’s appeal of alleged actions of discrimination and retaliation by Respondent against her?*”

<sup>5</sup> Section 111.375, Stats. provides that DWD shall administer subchapter 2 of Chapter 111, the Wisconsin Fair Employment Act.

**Appellant’s Claims Relating to Change in Classification and Discharge**

The remaining issue is whether Ms. Meier-O’Brien’s claims relating to the change in her classification<sup>6</sup> and her discharge<sup>7</sup> complied with the time limit for filing a State classified service personnel appeal, as set forth in Sec. 230.44(3), Stats.:

**(3) Time limits.** Any appeal filed under this section may not be heard unless the appeal is filed within 30 days after the effective date of the action, or within 30 days after the appellant is notified of the action, whichever is later . . . .

Appellant has the burden of establishing that her appeal was timely filed. UW & OSER (KLINE), DEC. NO. 30818 (WERC, 3/04). Ms. Meier-O’Brien filed her appeal on July 9, 2009, the date on which the Commission received it. UNIVERSITY OF WISCONSIN (ELMER), DEC. NO. 30910 (WERC, 5/04). If the appeal of Appellant’s discharge is untimely, so, too, is her appeal of the change in classification of her position – an earlier action than the discharge.

Ms. Meier-O’Brien has not alleged that she was notified of her discharge on a date subsequent to September 1, 1990, the latest possible date on which her employment with Respondent ended. Thus, Ms. Meier-O’Brien had 30 days from, at the latest, September 1, 1990, to file an appeal of her discharge.

Ms. Meier-O’Brien filed her claims relating to the change in her classification and her discharge on July 9, 2009, over eighteen years after the deadline for a timely appeal of her discharge. Accordingly, Ms. Meier-O’Brien’s claims relating to the change in her classification and her discharge must be dismissed as untimely filed.

Dated at Madison, Wisconsin, this 28<sup>th</sup> day of January, 2010.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

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Judith Neumann, Chair

Paul Gordon /s/

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Paul Gordon, Commissioner

Susan J. M. Bauman /s/

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Susan J. M. Bauman, Commissioner

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<sup>6</sup> Pursuant to Sec. 230.44(1)(b), Stats., the “actions appealable to the commission under s. 230.45(1)(a)” include “a personnel decision under s. 230.09(2)(a) or (d) . . .” (regarding reclassification and reallocation). Appellant has alleged in part that “[she] was reclassified out of union of my position which afforded me certain contracted rights.”

<sup>7</sup> Pursuant to Sec. 230.44(1)(c), Stats., the “actions appealable to the commission under s. 230.45(1)(a)” include a “discharge . . . if the appeal alleges that the decision was not based on just cause.” Appellant has alleged in part that “[she] was fired . . . without due process and for no real cause.”