

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

GARY WISTROM, Appellant,

vs.

Secretary, WISCONSIN DEPARTMENT OF VETERANS AFFAIRS, Respondent.

Case 17
No. 70313
PA(adv)-196

Decision No. 33180-B

Appearances:

Peter J. Fox, Fox & Fox, S.C., 124 West Broadway, Monona, Wisconsin 53716, appearing on behalf of Gary Wistrom.

Micabil Diaz-Martinez, Assistant Legal Counsel, and **James A. Stewart**, Chief Legal Counsel, Wisconsin Department of Veteran Affairs, P.O. Box 7843, Madison, Wisconsin 53707-7843, appearing on behalf of the Department of Veterans Affairs.

ORDER GRANTING, IN PART, MOTION TO DISMISS

This matter, which arises from a personnel action taken on October 6, 2010, is before the Wisconsin Employment Relations Commission (the Commission) on Respondent's motion to dismiss for lack of subject matter jurisdiction. Appellant was informed by letter dated October 6 "that effective immediately, you are reassigned [from working in Union Grove, Wisconsin, as Assistant Administrator of Respondent's Division of Veterans Homes] to the position of Director, Policy and Program Compliance, Division of Veterans Homes, located in Madison, at WDVA's Central Office." Appellant filed an appeal with the Commission on November 5, 2010, and Respondent filed a motion to dismiss. After the Respondent filed a reply brief, a staff attorney convened a telephone conference with the parties on May 6, 2011. The staff attorney summarized the conference in an email, which included the following:

The parties agreed that their dispute as to whether the reassignment referenced in Mr. Marshall's letter of October 6, 2010 was of a permanent or temporary nature is to be resolved based upon the previously submitted materials and without an evidentiary hearing. The parties jointly requested a ruling on the dispute prior to the effective date of their joint request to have this matter held in abeyance pending further proceedings in the related matter that is before the Equal Rights Division.

No. 33180-B

The Appellant specified that he is also raising a constructive discharge claim with the WERC. To the extent the Respondent will be raising objections to consideration of a constructive discharge claim, the parties agreed the constructive discharge claim and objections thereto will survive the pending motion to dismiss.

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

FINDINGS OF FACT¹

1. Prior to October 6, 2010, Appellant served as the Assistant Administrator of Respondent's Division of Veterans Homes and worked in Union Grove, Wisconsin. His supervisor was Brian Marshall, Division Administrator. Appellant's position was part of the Career Executive program and was classified as Assistant Administrator, Division of Veterans homes.

2. On October 6, 2010, Respondent's Deputy Secretary advised Appellant that he was being "reassigned to the position of Director of Policy and Program Compliance, Division of the Division of Veterans Homes located in Madison, at DVA's Central Office."

3. The letter provided that the reassignment was made pursuant to Sec. ER-MRS 30.07, Wis. Adm. Code.

4. Appellant's new assignment was 108 miles from his then current residence.

5. Appellant sought and was denied reimbursement for moving expenses.

6. Respondent anticipated that Appellant would begin his new assignment on Monday, October 25, 2010.

7. Appellant traveled to Madison on October 25 but met with one or more representatives of the Department of Employee Trust Funds and did not visit DVA's central office.

8. As a result of contact by Appellant with the Office of State Employment Relations, Edward Porter of that office (OSER) became involved in the matter of the change to Appellant's assignment.

9. In an October 22, 2010 e-mail, Porter advised Respondent's Human Resources Manager that a move to Madison should be treated as a temporary assignment pursuant to Sec. ER 30.085, Wis. Adm. Code, rather than a permanent reassignment (under Ch. ER-MRS 30).

¹ These findings, and the conclusions of law upon which they are based, are made solely for the purpose of ruling on the motion to dismiss filed by the Respondent on February 15, 2011.

10. In an October 25, 2010 e-mail, Porter again advised Respondent that “the appropriate transaction” for Appellant’s change in duties was a “temporary assignment.”

11. On October 26, 2010, Appellant resigned his position with Respondent.

12. It was the intent of Deputy Secretary Williams, Division Administrator Marshall and Human Resources Director Franke that Appellant assist Respondent with its reorganization project and that the assignment be temporary.

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

CONCLUSIONS OF LAW

1. That the assignment challenged by Appellant was a temporary assignment and was not a permanent reassignment under ER-MRS 30.07 or 30.10.

2. That the Commission lacks subject matter jurisdiction over Appellant’s claim brought under Sec. ER-MRS 30.10(2).

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

INTERIM ORDER

That Appellant’s challenge to the legality of his reassignment pursuant to ER-MRS 30.10(2) is dismissed. Pursuant to the agreement of the parties, Appellant’s discharge claim remains pending.

Given under our hands and seal at the City of Madison, Wisconsin, this 17th day of February, 2012.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott /s/

James R. Scott, Chairman

Rodney G. Pasch /s/

Rodney G. Pasch, Commissioner

I concur:

Judith Neumann /s/

Judith Neumann, Commissioner

Wisconsin Department of Veterans Affairs (Wistrom)

MEMORANDUM ACCOMPANYING
ORDER GRANTING, IN PART, MOTION TO DISMISS

This case turns on the determination of whether Wistrom was “temporarily assigned” or “permanently reassigned” to perform his Career Executive duties.

The Career Executive program established by Sec. 230.24, Stats., is a distinct program within the Wisconsin Civil Service that “emphasizes excellence in administrative skills” to provide agencies with a pool of “highly qualified executive candidates” to serve as administrative employees. It is also designed to provide participants with broad opportunities for career advancement and to “provide for the mobility of such employees”. (Emphasis added.)

Administrative rules promulgated by the Director of the Office of State Employment Relations (OSER), address aspects of the Career Executive Program and are set forth at Ch. ER 30, Wis. Adm. Code. The Administrator of the Division of Merit Recruitment and Selection (DMRS) has also adopted administrative rules addressing other elements of the Career Executive program which are contained in Ch. ER-MRS 30, Wis. Adm. Code.

The rules established by each of the entities above create distinctions (important to this matter) between temporarily reassigning a Career Executive (ER 30.085) to a set of duties and permanently reassigning (ER-MRS 30.10) a Career Executive.

Those who are “permanently reassigned” may request that we exercise our review authority, albeit in a limited framework. We may review such action but only to determine whether it is “unreasonable and improper” or otherwise violates Sec. 230.18, Stats. As more fully set forth in Sec. ER-MRS 30.10, Wis. Adm. Code, those individuals assigned to the Career Executive program have the benefit of being able to move between positions without “examination and additional competition.” Movement to a position with a lower or higher pay range is not considered a demotion or promotion and statutory appeal rights do not apply as long as the new position remains part of the career executive program. One’s recourse to the Commission arising from moving to a different career executive position is limited to the previously mentioned “unreasonable and improper” standard and then only to cases involving a permanent reassignment.

Conversely, the Director of OSER has adopted Sec. ER 30.085, Wis. Adm. Code, which permits Career Executive “temporary assignment” for “employee development purposes” or “to complete a special project for a duration not to exceed four years”. No recourse to this Commission is available for such temporary assignments and we so held in DVA (DEMOYA), DEC. NOS. 33136 and 33137 (WERC, 3/2006). That decision reflects the position that we lack subject matter jurisdiction over any challenges to career executive temporary assignments. Given that legal framework we turn to Wistrom’s circumstance.

To say the least, the paper trail beginning on October 6, 2010 and ending with the affidavits submitted in this case, creates confusion as to whether the assignment was temporary or permanent. That is perhaps understandable in light of the fact that a “temporary”

assignment can last up to four years. Even at the end of the path we find OSER representative Porter speculating as to Wistrom's status. ("I'm going back to thinking that the appropriate transaction for Mr. Wistrom to be in Madison now is a temporary assignment.") (Exhibit H)

While an evidentiary hearing might be the best way to resolve this conundrum, the parties have requested that we resolve this aspect of their dispute by examination of the record they have created. We accept their invitation. The record contains three unrefuted affidavits from, respectively, the Deputy Secretary, Wistrom's immediate supervisor and the agency's Human Resources Director, all indicating that their intent was that the October 6, 2010, transfer be temporary rather than permanent. Accordingly, we conclude that the assignment was intended to be temporary and, therefore, we lack subject matter jurisdiction over the appeal.

That result disposes of this matter from our perspective, save for the constructive discharge issue. The parties' agreement that we resolve the jurisdictional issue also referenced the agreement of counsel that "the constructive discharge claim and objections thereto" would "survive" the pending motion to dismiss. We will hold ourselves to the agreement of counsel with a brief commentary on the prospective merits of a "constructive discharge" assertion in this matter.

We know that the concept of constructive discharge arises out of the notion that an employer may not avoid the legal consequences of a discharge by engaging in conduct which causes the employee to quit. The concept of a "constructive discharge" is not a "generic, free-flowing cause of action" which is "actionable by itself." *STROZINSKY V. SCHOOL DISTRICT OF BROWN DEER*, 2000 WI 97 ¶ 69, 237 WIS.2D 19, 614 N.W.2D 443.

We read Wistrom's complaint as alleging a constructive discharge based upon claimed age, race and disability discrimination, all of which are matters within the jurisdiction of the Equal Rights Division. Sec. 230.45(1e), Stats. There appears to be no specific allegation of any unlawful conduct by the employer which falls within our jurisdiction and which caused Wistrom's work environment to become so intolerable that a reasonable person would have been forced to resign. Even if he can identify such illegal action, Wistrom faces an uphill battle to establish that a single transfer from Union Grove to Madison created an intolerable working condition. This is particularly true for a Career Executive position where mobility is an "identified" element of the job.

At the motion to dismiss stage, we are not prepared to foreclose Wistrom's efforts to fashion a claim in light of the agreement of the parties, and therefore we only directly address the temporary/permanent assignment issue.

Our concurring colleague takes issue with our acknowledged skepticism of Wistrom's "constructive discharge claim" before this agency. As noted above, the complaint does not set forth a specific allegation of any wrongful conduct within our jurisdiction which allegedly

caused Wistrom's work environment to become intolerable. Our observations with regard to the merits of such a claim (if it exists) harm no one. At worst, they provide guidance to the parties that, absent some additional evidence, it will be difficult to establish a "constructive discharge." As the Court observed in STROZINSKY, constructive discharge "is ancillary to an underlying claim in which an express discharge otherwise would be actionable." *Id.* at ¶ 69. Our conclusion that Wistrom's transfer was "temporary" and therefore outside our jurisdiction would suggest that if Wistrom was discharged for refusing the temporary transfer he would have no viable claim over which we would have jurisdiction. It therefore follows that a constructive discharge claim based upon the temporary transfer would meet a similar fate.

Our observation is proffered for the purpose of providing guidance to the litigants. We recognize that the matter is here on a motion to dismiss without a fully developed record. When a discharged employee has multiple potential avenues of recourse, we do no disservice by providing a suggestion as to which path may prove more productive.

Dated at Madison, Wisconsin this 17th day of February, 2012.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott /s/

James R. Scott, Chairman

Rodney G. Pasch /s/

Rodney G. Pasch, Commissioner

Wisconsin Department of Veterans Affairs

CONCURRING OPINION OF COMMISSIONER JUDITH NEUMANN

I concur in the majority's conclusion that we lack subject matter jurisdiction over Mr. Wistrom's claim that his reassignment was "an unreasonable and improper exercise of an appointing authority's discretion" as provided in Sec. ER-MRS 30.10 (2), Wis. Adm. Code. As noted in the majority memorandum, the Commission's jurisdiction over that claim depends upon a determination that the reassignment was permanent rather than temporary. Here the parties requested that we base that determination solely upon the written materials submitted in connection with Respondent's motion to dismiss. Although the contemporaneous paper trail surrounding the reassignment itself seems uniformly indicative of a permanent reassignment,¹ the Respondent submitted affidavits in response to the Appellant's submission asserting that the Respondent intended the assignment to be temporary, and the Appellant has not challenged that assertion. Hence, I agree with the majority that we may take those affidavits at face value and conclude that the reassignment was temporary and outside our jurisdiction under the above-cited regulations.

I also concur in the majority's decision to abide by the parties' request that we hold the constructive discharge claim and objections thereto in abeyance pending the outcome of related proceedings regarding Wistrom's claims at the Equal Rights Division. In my view, however, that should have ended the discussion regarding the constructive discharge claim. Having agreed to leave that claim in abeyance and lacking anything close to a complete evidentiary record about the circumstances surrounding Wistrom's resignation, I decline to speculate, as the majority does, about the potential validity of that claim. I believe that the proper role of the Commission is to decide those issues that have been properly joined, after the parties have been provided an opportunity to create a record and to offer argument. It is not appropriate to offer unsolicited conjecture on whether or not a party faces "an uphill battle" on an issue that the parties, by express agreement, have decided *not* to place before us. That restraint is especially appropriate here, because constructive discharge is quintessentially a factual issue requiring an evidentiary record.

Since the majority nonetheless has chosen to offer "guidance" on the merits of Wistrom's constructive discharge claim, I feel compelled to note that I do not agree with that guidance. The majority asserts that, "There appears to be no specific allegation of any unlawful conduct by the employer which falls within our jurisdiction. . . ." To the contrary,

¹ All of the correspondence relating to the October 6 personnel action taken in regard to Appellant Wistrom suggests that the transaction was a permanent reassignment rather than a temporary assignment. In contrast to the facts in DVA (DEMOYA), DEC. NOS. 33136 and 33137 (WERC, 3/06), Deputy Secretary Williams' October 6 letter provides that Appellant's "reassignment is made per ER-MRS 30.07 of the Administrative Code." The second paragraph of the letter indicates the relevant classification specifications would be formally revised to reference Appellant's new central office duties. The Respondent has not argued that class specifications would also have to be changed for only a temporary assignment. The emails from Edward Porter of OSER make it clear that he understood Appellant's work in Madison to be permanent as provided in Sec. ER-MRS 30.07 and .10, rather than a temporary assignment described by Sec. ER 30.085, and there is no correlating correspondence from DVA informing Porter that his understanding was incorrect. Nothing suggests that the Appellant understood the action to be temporary or that Respondent tried to dissuade him from permanently relocating to Madison in order to take on the new responsibilities.

however, Wistrom's complaint specifically seeks, among other things, "A declaration that his resignation/retirement dated October 26, 2010 is null and void and a finding that he was constructively discharged from his employment with the WDVA . . ." The prehearing conference summary dated May 6, 2011 also states, "The Appellant specified that he is also raising a constructive discharge claim with the WERC." Thus, contrary to the majority's assertion, the Appellant has more than adequately asserted a claim for constructive discharge.

I also distance myself from what seems to be the majority's view about the Commission's jurisdiction over claims of constructive discharge of career executive employees. The majority states, "[I]f Wistrom was discharged for refusing the temporary transfer he would have no viable claim over which we would have jurisdiction," and, more troubling, "It therefore follows that a constructive discharge claim based upon the temporary transfer would meet a similar fate." This is seriously flawed on two grounds. First, it suggests that the majority is prejudging the factual circumstances surrounding Wistrom's reassignment, the effects of those circumstances on Wistrom's ability to do his job, and/or the extent to which those circumstances compelled Wistrom to quit. As discussed above, such prejudging is at best injudicious. Second, the majority seems to believe that a temporary assignment cannot be the basis of a constructive discharge claim, simply because temporary assignments are not actionable under Sec. ER 30.085, Wis. Adm. Code. This would be both illogical and a serious error of law. Our conclusion that Wistrom's assignment was temporary implies nothing whatsoever about the bona fides of that reassignment – i.e., about whether or not we would conclude, after an evidentiary hearing, that the reassignment (if permanent) was reasonable and proper under Sec. ER 30.085. The majority's logic implies that a temporary (up to four years!) reassignment to the equivalent of Siberia, which would cause any reasonable employee to quit, could not be challenged as a constructive discharge under Sec. 230.44(1)(c) simply because it was temporary.² This would be a serious misapplication of the law. The majority's "guidance" therefore is flawed and indeed harmful to the extent it so suggests.

Dated at Madison, Wisconsin this 17th day of February, 2012.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Commissioner

² The analogy to Siberia is purely hypothetical. Lacking an evidentiary record, I do not intend to imply any prejudgment that Wistrom's reassignment would or would not cause a reasonable employee to quit.