

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-D

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.

EXAMINER'S ORDER DENYING 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 second motion to dismiss for lack of subject matter jurisdiction.

The Appellant was informed by letter dated October 6, 2010, that effective immediately, he was reassigned from his position in Union Grove to another position in Madison. Appellant filed an appeal with the Commission on November 5, 2010, after which Respondent filed its first motion to dismiss, contending that the Commission lacked subject matter jurisdiction because the Appellant's Madison assignment was temporary. The parties agreed in a telephone conference convened by a WERC staff attorney that the first motion to dismiss would address the issue of whether the assignment was temporary or permanent but would not address the issue of constructive discharge.

On February 17, 2012, the Commission issued a decision granting in part the Respondent's first motion to dismiss. *See DVA (Wistrom)*, Dec. No. 33180-B (WERC, 2/12) (hereinafter Wistrom I). The Commission concluded:

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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). . . .

That result disposes of this matter from our perspective, save for the constructive discharge issue.

Id. Although the Commission majority did not decide the constructive discharge issue, it offered "brief commentary on the prospective merits of a 'constructive discharge' assertion", Id., commentary with which Commissioner Neumann disagreed in a concurring opinion.

Notwithstanding the parties' previous agreement to hold the instant appeal in abeyance pending further proceedings in the related matter before the Equal Rights Division (ERD) of the Department of Workforce Development, on May 15, 2012, the Respondent filed another motion to dismiss for lack of subject matter jurisdiction – this time with respect to the allegation of constructive discharge. On May 25, 2012, the undersigned hearing examiner held a prehearing telephone conference, and, on the same date, issued a prehearing conference memorandum that stated in relevant part, "[w]hile the possibility of settlement dialogue was not foreclosed, all counsel concurred that briefing on Respondent's previously filed motion to dismiss the pending constructive discharge claim and a decision on that motion should not be delayed." The memorandum also set a briefing schedule regarding the second motion to dismiss, pursuant to which the last brief was received on July 13, 2012.

Having reviewed the record and being fully advised in the premises, the undersigned designated hearing examiner makes and issues the following

FINDINGS OF FACT¹

1. Prior to October 6, 2010, the Appellant served as the Assistant Administrator of the Respondent's Division of Veterans Homes and worked in Union Grove, Wisconsin. His

¹ These findings and the conclusions of law on which they are based are made solely for the purpose of ruling on the motion to dismiss filed by the Respondent on May 15, 2012. In his appeal, the Appellant seeks *inter alia* the following relief: a "[d]eclaration that the actions taken against him by the Department, specifically the reassignment of his position and his relocation and transfer to the Madison Central Office was contrary to the applicable Wisconsin Statutes, Administrative Codes, and other applicable legal and Department authority." He also requests 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 due to the unreasonable and improper actions taken against him". (Emphasis added). In my view, these allegations more than suffice to consider the issue of subject matter jurisdiction. However, the findings of fact based on allegations in the Complaint provide some meaningful background for considering the Respondent's motion. While the Respondent may very well dispute these findings, any such disputes go to the merits of the constructive discharge claim and thus need not be resolved to decide the issue of subject matter jurisdiction.

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. The Appellant suffers from sleep apnea, primary insomnia, Barrett's Esophagus, GERD, chronic Gastritis, delayed emptying of the stomach, herniated discs in his back, and fibromyalgia.

3. On March 4, 2010, the Appellant heard the Wisconsin Department of Veterans Affairs (DVA) Secretary Ken Black comment to the effect that the DVA employed too many old white males.

4. In September 2010, an attorney representing a former DVA employee in a pending Equal Rights Division (ERD) claim requested an affidavit from Mr. Wistrom regarding his knowledge of Secretary Black's comment.

5. Upon receiving this request, Mr. Wistrom advised his supervisory personnel of the request and his intention to submit the requested affidavit regarding Secretary Black's comments.

6. On September 27, 2010, Mr. Wistrom submitted a sworn affidavit that included details of Secretary Black's comments regarding the DVA's employment of too many old white males.

7. On October 6, 2010, Respondent's Deputy Secretary advised the Appellant *via* email, "effective immediately, you are reassigned to the position of Director, Policy and Program Compliance, Division of Veterans Homes, located in Madison, at DVA's Central Office."

8. The October 6 email also specified that the reassignment was made pursuant to Sec. ER-MRS 30.07, Wis. Adm. Code.

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

10. On October 11, 2010, the Appellant requested *via* email that Administrator Brian Marshall delay the Appellant's commencement of work in the Central Office in Madison until November 22, 2010, to allow him time to assist his spouse with her post-operative medical issues and to accommodate necessary adjustments for his own medical issues. He further informed Mr. Marshall that commuting the 216 miles per day was not a viable option, due to his service connected health problems.

11. The Appellant was scheduled to report to the Central Office in Madison on October 25, 2010.

12. The Appellant traveled to Madison on October 25, 2010, but he met with one or more representatives of the Department of Employee Trust Funds and did not visit the DVA's Central Office.

13. Because he believed that he could not safely make the daily, 216-mile round-trip commute in light of his medical conditions, the Appellant determined that he had no viable alternative but to retire from his employment with the Department. He submitted his resignation to Human Resources to be effective at the close of business, October 26, 2010, and a copy was sent to Brian Marshall.

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

CONCLUSIONS OF LAW

1. The Appellant has the burden to prove that the Commission has subject matter jurisdiction over his alleged constructive discharge.
2. The Appellant has sustained that burden.
3. Pursuant to Sec. 230.44(1)(c), Stats., the Commission has subject matter jurisdiction over the Appellant's alleged constructive discharge.

Based upon the above and foregoing Findings of Fact and Conclusions of Law, the undersigned designated hearing examiner makes and issues the following

INTERIM ORDER

The Respondent's motion to dismiss the Appellant's constructive discharge claim for lack of subject matter jurisdiction is denied.

Dated at Madison, Wisconsin, this 15th day of August, 2012.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

John C. Carlson, Jr. /s/

John C. Carlson, Jr., Examiner

WISCONSIN DEPARTMENT OF VETERANS AFFAIRS (Wistrom)

MEMORANDUM ACCOMPANYING ORDER DENYING MOTION TO DISMISS

The Respondent has moved to dismiss the Appeal (*i.e.* any remaining claim asserting constructive discharge) for lack of subject matter jurisdiction, pursuant to Sec. PC 1.08(3), Wis. Adm. Code.² The Wisconsin Court of Appeals has clarified the meaning and source of administrative agencies' subject matter jurisdiction:

. . . the subject matter jurisdiction of administrative agencies – that is, their authority to hear certain subject matters in general – is conferred and specified by statute. . . . Statutes such as Wis. Stat. §§ 230.44(1) and 230.45(1), which establish the nature of the matters an administrative agency is authorized to hear, define subject matter jurisdiction

Stern v. Wisconsin Employment Relations Com'n, 2006 WI App 193, ¶ 24, 296 Wis. 2d 306, 324-325, 722 N.W.2d 594, 603. “The Appellant has the burden of establishing that the Commission has subject matter jurisdiction over his appeal.” Village of Camp Douglas (Liddy), Dec. No. 32989 (WERC, 2/10), *citing* Wisconsin Department of Corrections (Garcia), Dec. No. 32890 (WERC 10/09).

I. CONSTRUCTIVE DISCHARGE DOCTRINE

Determining whether the Commission has subject matter jurisdiction over any claim in the instant appeal that includes an allegation of constructive discharge requires an understanding of the constructive discharge doctrine. Helpful in this regard is the Wisconsin Supreme Court's decision in Strozinsky v. School Dist. of Brown Deer, 2000 WI 97, 237 Wis. 2d 19, 614 N.W.2d 443, a decision that the Commission majority cited in *dicta* in Wistrom I. In Strozinsky, the Court held in part that the constructive discharge doctrine applies to a common-law claim for wrongful discharge under the public policy exception to the general rule of employment-at-will, an exception first recognized in Brockmeyer v. Dun & Bradstreet, 113 Wis. 2d 561, 335 N.W.2d 834 (1983). In so holding, in a passage aptly quoted in part by the Commission majority in Wistrom I, the Court reasoned:

The doctrine of constructive discharge recognizes that some resignations are coerced, tantamount to a termination. Usually, employers do not “discharge” employees who resign: An employee can leave an at-will position at any time—for any reason or no reason at all – just as an employer can terminate an at-will employee at its discretion. An employee who departs from the workplace generally cannot pursue a claim against the employer for wrongful discharge.

² Section PC 1.08(3), Wis. Adm. Code, provides in relevant part, “Any party may move at any time to dismiss a case on the ground the commission does not have subject matter jurisdiction. The commission may raise issues on its own motion relating to its jurisdiction to hear the matter or some matter raised in an appeal or complaint.”

Nonetheless, many courts reason that employers should not escape liability simply because the employer forced a resignation

We agree with the decision of the circuit court that constructive discharge is not a generic, free-flowing cause of action. Other jurisdictions recognize that constructive discharge is not actionable by itself. Turner, 32 Cal.Rptr.2d 223, 876 P.2d at 1030. Rather, *the doctrine is ancillary to an underlying claim in which an express discharge otherwise would be actionable*. Balmer, 604 N.W.2d at 643; Slack v. Kanawha County Hous. & Redev. Auth., 188 W.Va. 144, 423 S.E.2d 547, 555 (1992). Constructive discharge joins the actionable claim and operates as a defense against an employer's contention that the employee quit voluntarily. An employee who relies on a constructive discharge defense *in a public policy exception case* still must identify a fundamental and well defined public policy and then prove that the discharge, whether constructive or express, violated that policy. See Seery v. Yale-New Haven Hosp., 17 Conn.App. 532, 554 A.2d 757, 761 (1989).

Strozinsky v. School Dist. of Brown Deer, 2000 WI 97, ¶¶ 68-69, 237 Wis. 2d 19, 56-58, 614 N.W.2d 443, 461-462 (footnotes omitted) (emphasis added.)

The Court's observations illuminate an important distinction between the underlying wrongful discharge claim in Strozinsky brought by an at-will employee and claims in which plaintiffs or appellants enjoy statutory or contractual just-cause protection. As an at-will employee alleging wrongful discharge, the Plaintiff in Strozinsky needed to "identify a fundamental and well defined public policy, and then prove that the discharge, whether constructive or express, violated that policy", in order to establish an underlying claim to which the alleged constructive discharge was "ancillary". Id. Moreover, the "clear public policy at issue [in a common law wrongful discharge claim] must be evidenced by existing law", meaning "constitutional or statutory provisions", or, in some cases, "administrative rules". Id., 2000 WI 97, ¶ 39, 237 Wis. 2d at 42, 614 N.W.2d at 454 (internal citations omitted). The allegation of constructive discharge effectively supplants the element of discharge and requires proof that "a reasonable person in the position of the plaintiff would feel forced to quit." Strozinsky, 2000 WI 97, ¶ 76, Wis. 2d 19, 63, 614 N.W.2d 443, 464, *citing* Rutan v. Republican Party of Illinois, 868 F.2d 943, 950 (7th Cir.1989) (en banc), *rev'd on other grounds*, 497 U.S. 62, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990). By contrast, a discharged employee's identification and proof of the employer's violation of a well-defined public policy is not necessary where the discharged employee is not employed at will and bases his or her claim on statutory or contractual, just-cause protection. For example, the Wisconsin Supreme Court has "allowed parties to raise constructive discharge in termination proceedings brought under our civil service statute. Strozinsky, 2000 WI 97, ¶ 72, 237 Wis. 2d at 60, 614 N.W.2d at 463, *citing* Watkins v. Milwaukee County Civil Serv. Comm'n, 88 Wis. 2d 411, 276 N.W.2d 775 (1979). Moreover, "[w]here . . . an employer's written policy guarantees its employees that they will not be discharged without cause, a constructive discharge without cause constitutes a breach of contract." Tennyson v. School Dist. of Menomonie Area, 232

Wis. 2d 267, 280-281, 606 N.W.2d 594, 601 -602 (Ct. App. 1999). *See also* Strozinsky, 2000 WI 97, ¶ 69, n. 19, 237 Wis. 2d at 58, 614 N.W.2d at 462, *citing* Tennyson.³

II. WHETHER ALLEGED CONSTRUCTIVE DISCHARGES ARE GENERALLY SUBJECT TO THE COMMISSION'S REVIEW

Applying the foregoing distinction, I conclude that Sec. 230.44(1)(c), Stats., constitutes the statutory ground for a State civil service employee's *underlying* claim of discharge without just cause, where the Appellant has permanent status in class and asserts constructive discharge in rebuttal to the employer's contention that the Appellant resigned. Supporting my conclusion are the Commission's observations in DHS (Gabower), Dec. No. 32898 (WERC, 11/09):

Section 230.44(1)(c), Stats., authorizes the Commission to review certain disciplinary actions, including discharges, taken with respect to State civil service employees with permanent status in class. "Discharge decisions, *including constructive discharges* or coerced resignations, are subject to the Commission's review pursuant to Sec. 230.44(1)(c), Stats. Voluntary (rather than coerced) resignations are not." DNR (Peterson), Dec. No. 32605 (WERC, 11/08); *citing* Wachtel v. DOC, Case No. 99-0037-PC (Pers. Comm. 11/19/1999).

DHS (Gabower), Dec. No. 32898 (WERC, 11/09) (footnotes omitted) (emphasis added). It is undisputed that the Appellant herein has permanent status in class; therefore, his alleged constructive discharge is subject to the Commission's review, unless the unique factual circumstances of this appeal and/or other legal authority somehow remove the constructive discharge from the jurisdictional scope of Sec. 230.44(1)(c), Stats. For the following reasons, and notwithstanding Respondent's arguments to the contrary addressed below, I conclude that the Commission indeed does have subject matter jurisdiction to review the Appellant's alleged constructive discharge, pursuant to Sec. 230.44(1)(c), Stats.⁴

³ Other types of underlying statutory claims to which the constructive discharge doctrine may attach include "federal statutory claims brought under the National Labor Relations Act" Strozinsky, 2000 WI 97, ¶ 70, 237 Wis. 2d at 58-59, 614 N.W.2d at 462, *citing* Balmer, 604 N.W.2d at 641-42 and Turner, 32 Cal.Rptr.2d 223, 876 P.2d at 1026; "discrimination actions launched under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, and the Americans with Disabilities Act of 1990" Strozinsky, 2000 WI 97, ¶ 70, 237 Wis. 2d at 59, 614 N.W.2d at 462; and claims under the Wisconsin Fair Employment Act (WFEA), "Wisconsin's counterpart to Title VII." Strozinsky, 2000 WI 97, ¶ 73, 237 Wis. 2d at 61, 614 N.W.2d at 463, *citing* Marten, 176 Wis. 2d at 1021-25, 501 N.W.2d 391.

⁴ The Appellant argues that the Commission's authority to review the alleged constructive discharge is grounded in Sec. 230.44(1)(d). The Respondent correctly notes that the Commission has concluded it does not have the authority to review the temporary assignment of a career executive employee as a "personnel action after certification which is related to the hiring process in the classified service", within the meaning of Sec. 230.44(1)(d). *See* DVA (DeMoya) Dec. Nos. 31636 and 31637 (WERC, 3/06). The Commission is nevertheless free to raise the applicability herein of Sec. 230.44(1)(c) *sua sponte* under Sec. PC 1.08(3), Wis. Adm. Code.

III. WHETHER THE COMMISSION HAS JURISDICTIONAL AUTHORITY TO REVIEW THE ALLEGED CONSTRUCTIVE DISCHARGE IN THIS CASE

The Respondent offers several arguments why the Commission lacks jurisdiction to review any claim asserting a temporary assignment as the basis for constructive discharge. As demonstrated below, I find these arguments unavailing.

A. Import of Temporary Assignment on Commission's Jurisdiction to Review Constructive Discharge

Relying on Wistrom I and DVA (DeMoya) Dec. Nos. 31636 and 31637 (WERC, 3/06), the Respondent argues that 1) the Appellant's assignment in Madison was temporary; 2) the Commission lacks "subject matter jurisdiction over any challenges to career executives' temporary assignments"; and 3) "[a]s the same temporary reassignment serves as Appellant's basis for alleging constructive discharge, the Commission would likewise lack jurisdiction to review that claim." (Respondent's Br. 3). I address each of these three contentions, respectively.

In Wistrom I, the Commission did determine that "the assignment challenged by Appellant was a temporary assignment and was not a permanent reassignment under ER-MRS 30.07 or 30.10." The pertinent statutes and rules create a distinction between *permanent reassignments* and those that are temporary (less than four years) and create a substantive (and limited) right of review only over those that are permanent. Thus, after concluding that the Appellant's reassignment in this case was intended to be temporary, the Commission concluded in Wistrom I that the Appellant could not pursue direct substantive review over his temporary assignment *as such*.

However, in arguing that the Commission lacks "subject matter jurisdiction over *any challenges* to career executives' temporary assignments" (emphasis added), the Respondent significantly overstates the Commission's holding in Wistrom I. That decision, as well as the earlier decision in DVA (DeMoya) Dec. Nos. 31636 and 31637 (WERC, 3/06) reason that temporary assignments are not reviewable by the Commission *under Sec. ER-MRS 30.10(2), Wis. Adm. Code*, because review under that provision is limited to reassignments, which, by definition, include only permanent appointments.

The express limitation of these holdings to Sec. ER-MRS 30.10(2), Wis. Adm. Code, is significant for at least two reasons. First, absent some other authority for directly appealing a career executive *temporary* assignment as a *discrete personnel action* – and I am aware of no such authority – the Commission lacks subject matter jurisdiction over such appeals. However, by limiting the scope of the holdings in Wistrom I and DVA (DeMoya) to the Commission's review of reassignments under Sec. ER-MRS 30.10(2), Wis. Adm. Code, the Commission has not foreclosed reliance on the circumstances surrounding a temporary assignment to support

the distinctly different claim of discharge (actual or constructive) without just cause under Sec. 230.44(1)(c), Stats. To the extent the Respondent's broad assertion that the Commission lacks

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subject matter jurisdiction over *any challenges* to career executives' temporary assignments may conflict with this conclusion, the Respondent overstates the scope of the Commission's previous holdings.

As noted above, the Respondent argues that because the Commission lacks "subject matter jurisdiction over any challenges to career executives' temporary assignments", and because "the same temporary reassignment serves as Appellant's basis for alleging constructive discharge, the Commission would likewise lack jurisdiction to review that claim." (Respondent's Br. 3). The Respondent's conclusion that the Commission lacks authority to review the Appellant's alleged constructive discharge, however, is invalid. *To wit*, while the Commission does not have subject matter jurisdiction to review an Appellant's direct appeal of a temporary assignment as a discrete personnel action under Sec. ER-MRS 30.10(2), Wis. Adm. Code (or any other authority), it does have jurisdiction, as the Commission has previously held, to review an actual or constructive discharge under Sec. 230.44(1)(c), Stats. *See DHS (Gabower)*, Dec. No. 32898 (WERC, 11/09). That such jurisdiction, moreover, includes an actual or constructive discharge based on the circumstances surrounding a career executive temporary assignment accords with principles of statutory construction:

We interpret administrative rules as we do statutes generally. *Kruczek*, 278 Wis.2d 563, ¶ 13, 692 N.W.2d 286. Thus, we begin with the plain language of the rule. *See State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. We interpret the language of the rule in context, relating it to surrounding or closely related rules. *See id.*, ¶ 46.

Robertson v. Wisconsin Dept. of Workforce Development, 2007 WI App 215, ¶ 5, 305 Wis. 2d 432, 436-437, 740 N.W.2d 162, 165. Moreover, "[w]e interpret statutes [or rules] reasonably, to avoid absurd results." *Harbor Credit Union v. Samp*, 2011 WI App 40, ¶ 22, 332 Wis. 2d 214, 226-227, 796 N.W.2d 813, 819, *citing State v. Jensen*, 2010 WI 38, ¶ 14, 324 Wis. 2d 586, 782 N.W.2d 415.

Applying these canons of construction, I note that the Respondent has not identified, nor am I aware of, any statute or administrative code that bars the exercise of the Commission's subject matter jurisdiction over an appeal of an actual or constructive discharge under Sec. 230.44(1)(c), Stats., where the appeal is predicated on a career executive temporary assignment and the circumstances surrounding it. To the contrary, a closely related rule, Sec. ER-MRS 30.10(4), Wis. Adm. Code, expressly preserves redress rights under Sec. 230.44, Stats.: "Permanent status in the career executive program grants an employee the same redress rights granted employees with permanent status in class under s. 230.44, Stats., except as provided in sub. (1)."⁵

⁵ Sec. ER-MRS 30.10(1), Wis. Adm. Code, provides:

In addition, affording an appellant only a limited right to appeal a reassignment to the Commission and *no* right to appeal a temporary assignment, while also affording him a full right to appeal an actual or constructive discharge based on a temporary assignment, reflects a reasonable counterpoise between the needs of both employers and career executive employees. Such jurisdiction spares state agencies and the Commission a surfeit of appeals challenging run-of-the-mill temporary assignments, thereby furthering the express statutory objective “to provide agencies with a pool of highly qualified executive candidates”, “a broad opportunity for career advancement”, and “mobility of such employees among the agencies and units of state government for the most advantageous use of their managerial and administrative skills.” Sec. 230.24(1), Stats. At the same time, in those few and extreme situations where an appeal alleges a discharge without just cause (or a constructive discharge) based on the circumstances surrounding a temporary assignment, affording a right of appeal accords with the language and spirit of civil service protections guaranteed by Sec. 204.44(1)(c), Stats., and Sec. ER-MRS 30.10(4), Wis. Adm. Code.

B. Commission’s Lack of Jurisdiction Over Allegations of Discrimination

The Respondent argues, “Appellant’s claim of constructive discharge, premised on the allegations regarding discrimination based on race, age, sex, and disability, falls outside the jurisdiction of this forum and the Commission should dismiss the claim on that basis.” (Respondent’s Br. 4). While I agree that the Commission does not have subject matter jurisdiction over discrimination claims, I disagree that facts that may support a discrimination claim under the WFEA cannot be considered in the context of an actual or constructive discharge claim under Sec. 230.44(1)(c), Stats. For example, as noted in the findings of fact, the Appellant alleges that he suffers from a variety of health problems. While the Commission has no authority to review whether any of these problems individually or collectively constitute a “disability” within the meaning of the WFEA, or, if so, whether Respondent unlawfully discriminated against the Appellant based on disability within the meaning of that statute, it does have the authority to consider his health issues as material to his contention that he was unable to commute 216 miles and thus had no choice but to resign. “The question [of constructive discharge] hinges on whether a reasonable person *in the position of the plaintiff* would feel forced to quit.” Strozinsky v. School Dist. of Brown Deer, 2000 WI 97, ¶ 76, 237 Wis. 2d 19, 63, 614 N.W.2d 443, 464 (emphasis added), *citing* Rutan v. Republican Party of Illinois, 868 F.2d 943, 950 (7th Cir.1989) (en banc), *rev’d on other grounds*, 497 U.S. 62, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990). Thus, while I express no opinion on the merits of the Appellant’s reliance on the doctrine of constructive discharge in furtherance of his claim under

Career executive program employment grants to each employee thereunder rights and privileges of movement between positions within the program without examination and additional competition. Career executive reassignment and career executive voluntary movement to a position allocated to a classification assigned to a lower or higher pay range shall not be considered a demotion, or a promotion, respectively, and the statutory appeal rights provided thereto shall not apply.

This express exception does not apply herein, because the Madison assignment was neither a reassignment nor a voluntary movement, and the personnel action at issue herein is an alleged constructive discharge, not a demotion.

Sec. 230.44(1)(c), I do believe that the Commission, when examining the totality of circumstances relevant to constructive discharge, may consider facts on which the Appellant

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may also rely to support his claims of discrimination under the WFEA pending before the ERD.

In addition, the undisputed increase in the distance of the Appellant's commute occasioned by the Madison assignment, irrespective of any discriminatory motive on Respondent's part, is a factor germane to the assertion of constructive discharge. *See, e.g., Policastro v. Northwest Airlines, Inc.*, 297 F.3d 535, 539 (6th Cir. 2002) (noting that the "increased distance from home to a new position is a factor in determining whether a constructive discharge has occurred."); *Bradford v. Norfolk Southern Corp.*, 54 F.3d 1412, 1420 (8th Cir. 1995) (observing that "[t]here may be situations in which a transfer to another location is so intolerable when viewed in the light of the attendant circumstances that a finding of constructive discharge is warranted) *and citing* *Christensen v. Equitable Life Assur. Soc'y*, 767 F.2d 340, 342 (7th Cir.1985), *cert. denied*, 474 U.S. 1102, 106 S.Ct. 885, 88 L.Ed.2d 920 (1986) and *Spagnuolo v. Whirlpool Corp.*, 717 F.2d 114, 118-19 (4th Cir.1983). Whether the increased distance in the Appellant's commute in light of relevant circumstances constitutes a constructive discharge is ultimately a question of fact that cannot be resolved on a motion to dismiss. *See Strozinsky v. School Dist. of Brown Deer*, 2000 WI 97, ¶ 78, 237 Wis. 2d 19, 65, 614 N.W.2d 443, 465. I only decide here that the Commission has jurisdiction to hear the matter.

C. Relocation Costs and Position Description

The Respondent notes the "Appellant has claimed that Respondent did not provide relocation costs or a position description to him" (Respondent's Reply Br. 9) and argues that such relief is not within the Commission's jurisdiction. However, I interpret these allegations not as separate claims for relief subject to a jurisdictional determination but rather as allegations supporting the Appellant's theory of constructive discharge.

For the foregoing reasons, the Respondent's motion to dismiss is denied.

Dated at Madison, Wisconsin, this 15th day of August, 2012.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

John C. Carlson, Jr. /s/

John C. Carlson, Jr., Examiner

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