

**EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
210 MARTIN LUTHER KING, JR. BOULEVARD
MADISON, WISCONSIN**

<p>Della L. Cooper c/o Attorney A. Steven Porter 25 West Main Street, Suite 503 Madison, WI 53703</p> <p style="text-align:center">Complainant</p> <p style="text-align:center">vs.</p> <p>TCI Cablevision of Wisconsin, Inc. 5723 Tokay Boulevard Madison, WI 53719</p> <p style="text-align:center">Respondent</p>	<p style="text-align:center">DECISION AND ORDER ON RESPONDENT'S MOTION IN LIMINE</p> <p style="text-align:center">Case No. 21036</p>
--	--

This matter comes before the Commission on the Respondent's Motion in Limine to prevent the Complainant from taking any discovery or from introducing any testimony at the time of hearing concerning any emotional injuries alleged to have been suffered by the Complainant as a result of the Respondent's allegedly discriminatory conduct. The Respondent filed its motion and supporting brief on December 14, 1990. The Complainant submitted a responsive brief on January 31, 1991 and the Respondent filed a reply brief on February 12, 1991.

The Respondent's position rests upon two theories. First, the Respondent argues that the Commission is without statutory authority to make an award of emotional damages and that in fact, the Commission is affirmatively precluded from making such awards because other authorities have determined that emotional damages are not awardable pursuant to Wisconsin's Fair Employment Act Sec. 111.31 Stats., et seq. (FEA). The second theory of the Respondent is that the Wisconsin Worker's Compensation Act Ch. 102 Wis. Stats., provides the exclusive remedy for emotional damage awards where the emotional injury arises out of the employment context.

Initially the Complainant argues that the Respondent has waived this defense by failing to properly plead it at the time of filing its Answer. Additionally, the Complainant asserts that the Commission has the statutory authority to issue awards for emotional damages and that the Commission is not bound by the limitation of damages under the FEA. The Complainant further argues with respect to Respondent's argument that the Commission is precluded from issuing an award of damages for emotional injuries by the Wisconsin Worker's Compensation Act, that the Respondent has misapplied the law concerning the exclusivity of the Worker's Compensation remedy. Specifically, the Complainant contends that the exclusivity principle does not apply in this case because the damages arise from the termination of the employment relationship and that the exclusivity principle only applies to injuries that arise within the employment relationship.

After review of the submittals of the parties and review of the law and upon the record in this matter, the Hearing Examiner concludes that the Commission has the authority to make awards of compensatory damages for emotional injuries resulting from acts of discrimination and that the Wisconsin Worker's Compensation Act does not provide the exclusive remedy for these damages in

the discrimination context and does not act as a bar to an award of such damages by the Commission. Accordingly the Respondent's motion is denied.

MEMORANDUM DECISION

The Complainant correctly states that in order to raise a defense of exclusivity of the Worker's Compensation remedy, this defense must be pleaded at the time of answering. However, given the generous rules applied by the Commission with respect to procedural matters, I find that the Respondent has properly placed this issue before the Commission. Generally speaking, the Commission follows the principle of notice pleading used in federal and state courts. Application of this principle to the Respondent's pleadings in this matter results in the conclusion that the Complainant could have reasonably understood the nature of the Respondent's defenses or, at a minimum, was placed on notice that the Complainant should have requested further specificity with respect to the defenses of the Respondent.

The issue of the authority of the Commission to award compensatory damages for emotional distress and related emotional injuries has been previously addressed by the Commission in the case of Nelson v. Weight Loss Clinic of America Inc. and Weight Loss Clinic, MEOC Case No. 20684 9/29/89. The decision in that case addresses the issues raised by the parties concerning the general authority of the Commission to award compensatory damages for emotional injuries arising from discrimination in the employment context. I adopt the ruling and decision of the Nelson case and incorporate it by reference as part of the decision in the case currently before the Commission.

Neither party in Nelson raised the issue of the exclusivity of the Worker's Compensation remedy as a bar to an award of compensatory damages for emotional consequences of discrimination. Accordingly, this issue shall be addressed in this decision.

It is the position of the Respondent that the Wisconsin Worker's Compensation Act acts as a bar to the Complainant's claim of emotional damages resulting from the acts of alleged discrimination on the part of the Respondent. In support of its theory, the Respondent relies on the "exclusivity" principle of Worker's Compensation law. In essence, this principle states that for any injury covered by the Worker's Compensation Act, the Act provides the exclusive remedy and tort claims for the same injury are barred. In support of its argument, the Respondent cites primarily Zabkowicz v. West Bend Co., Div. Dart Industries, 789 F.2d 540 (7th Cir. 1986) and Busse v. Gelco Exp. Corp., 678 F. Supp. 1398 (E.d. Wis. 1988). In both of these cases the Court dismissed plaintiffs' claims for the intentional or negligent infliction of emotional distress, finding that the plaintiffs' claims should have been pressed under the Worker's Compensation Act.

The Complainant argues that the authorities relied upon by the Respondent are inapplicable to the instant case and cites the case of Keenan v. Foley Co., 35 FEP Cases 937 (E.D. Wis. 1984), which holds that the Worker's Compensation Act was not intended to cover actions or damages arising from the termination of employment. The Complainant's position is essentially that the case before the Commission arises out of the termination of the Complainant's employment and therefore falls outside of the ambit of the Worker's Compensation Act. Accordingly, the claim cannot be barred.

In response, the Respondent argues that the holding in Keenan with respect to the issue of exclusivity was merely dictum and not entitled to any weight. Busse, supra. Contrary to the holding in Busse, the Zabkowicz court clearly believed that the decision in Keenan needed to be distinguished and possessed more weight than mere dictum. Zabkowicz at 545 n. 3. I am persuaded that the holding in Keenan carries more weight than dictum and that the principle set forth in that case is applicable in

this case. The principle that an injury that stems from conduct while the Complainant was not an employee of the Respondent or at the end of the employment relationship is consistent with the general application of the Worker's Compensation Law. 2A Larson. Workmen's Compensation Law sec. 65.00.

In the case before the Commission, the parties disagree whether the claimed emotional distress occurred as a result of conduct during the employment relationship or as a result of the allegedly discriminatory termination of the Complainant's employment. This factual dispute would be sufficient reason to deny the Respondent's motion and allow the taking of discovery and presentation of evidence at hearing in order to ascertain the cause of the alleged emotional distress. There is a more important reason for denying the Respondent's motion.

In Coleman v. American Universal Insurance, 86 Wis. 2d 615, 273 N.W.2d 220 (Wis. 1979) the court found that the exclusivity principle of the Worker's Compensation Act does not preclude an action for damages that might otherwise be covered by the Act, if those damages flow from an injury that is not covered by the Act. In this analysis the court applied the general principle of coverage as set forth in Larson, supra. In applying this principle, the Coleman court holds that, "The compensation remedy is exclusive, however, only if the injury falls within the coverage of the act" (cite omitted) Coleman at 621. The import of this decision is that even if a component of the damages might be covered by the Worker's Compensation Act, such as damages for emotional distress, if the injury giving rise to those damages is an injury not covered by the Worker's Compensation Act, then a separate action including a claim for those damages is not barred. Coleman at 622. Though in the Coleman case the decision applied to an injury that occurred subsequent to a covered injury, the decision applies with equal force to any injury not covered by the Worker's Compensation remedy.

The Respondent has essentially conceded at pp. 6-7 of its reply brief that the underlying claim of discrimination is properly before the Commission for at least the purposes of making an award of back pay. Given the holding in Coleman that damages that stem from an injury not covered by the act are not subject to the exclusivity principle, it follows that the emotional distress flowing from the act of discrimination may be pursued even though the tort claim would be barred if brought as a separate cause of action. The holding in the Nelson case demonstrates that the emotional injuries claimed by the Respondent are the type of damages that typically flow from acts of discrimination. The injury in the case before the Commission is the loss of equal employment opportunity and violation of the Complainant's civil rights and as such falls outside the coverage of the Worker's Compensation Act. The emotional damages that the Complainant might claim are not the primary injury to be addressed in this action. The exclusivity principle does not come into play because the actual injury to be addressed, that of employment discrimination, falls outside of the coverage of the Worker's Compensation Act.

Accordingly, the Respondent's Motion in Limine is denied.

IT IS SO ORDERED,

Clifford E. Blackwell, III
Hearing Examiner