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

Jeanie Madalon 605 Westwood Court, Apt. 9 Madison, WI 53714 Complainant vs. Midcontinent Broadcasting Company of Wisconsin, Inc. 5721 Tokay Boulevard Madison, WI 53719 WTSO-AM/WZEE-FM 5721 Tokay Boulevard Madison, WI 53719 Respondent	HEARING EXAMINER'S DECISION AND ORDER ON APPEAL FROM INITIAL DETERMINATION Case No. 21531

BACKGROUND

On July 22, 1991 the Complainant, Jeanie Madalon, filed a complaint of discrimination against the Respondents, Midcontinent Broadcasting Company of Wisconsin, Inc. and WTSO-AM/WZEE-FM, alleging that she had been subjected to sexual harassment by other employees and as a result, suffered emotional distress and other damages and ultimately had to leave her employment, in violation of the Madison Equal Opportunities Ordinance MGO 3.23(7). The Respondents stipulated to a finding of probable cause to believe that discrimination had occurred and the complaint was transferred to the Hearing Examiner for a public hearing on the merits of the complaint. Pursuant to the provisions of a Scheduling Order entered by the Hearing Examiner, the Respondents filed a dispositive motion seeking to have the complaint dismissed for lack of jurisdiction of the Commission. Both parties submitted briefs and written argument. On the basis of the record before the Hearing Examiner and the Examiner's own research, the Hearing Examiner finds that the Commission has jurisdiction over this complaint and the Respondents' motion is hereby denied.

DECISION

The Respondents argue that the complaint is barred as a result of the operation of the exclusivity provision of the Wisconsin Worker's Compensation Act, Wis. Stats. Sec. 102.03(2). It is their position that because emotional distress has been defined as a compensable injury under the Worker's Compensation Act (WCA) Wis. Stats. Ch. 102, Jenson v. Employers Mutual Casualty Company 161 Wis. 2d 253 (1991), that the Complainant must proceed under the WCA because her claim indicates that she seeks redress for the emotional distress that she suffered as a result of the alleged sexual harassment permitted by the Respondents at the worksite. In support of their contention that a claim brought under the Madison Equal Opportunities Ordinance (MEOO) MGO 3.23 et seq. or the Fair Employment Act (FEA) Wis. Stats. 111.31 et seq. can be preempted by the WCA, the Respondents

rely on the decisions in Schachtner v. DILHR, 144 Wis, 2d 1 (Wis. App. 1988) and Norris v. DILHR, 155 Wis. 2d 337 (Wis. App. 1990). The Schachtner decision holds that the FEA is preempted by the WCA. This broad decision was narrowed by the opinion in Norris. The Norris court held that the WCA would preempt the FEA only where there was a direct conflict or overlap between the two laws. Norris, at 341.

The Respondents' application of these decision is mechanical and demonstrates no appreciation for the differences between the WCA and anti-discrimination laws. The WCA was adopted to protect employers from the uncertainty caused by their liability exposure to employees for work-related injuries. This system balanced the employer's need for predictability against the employee's need for compensation by establishing a no-fault system of structured payments for work-related injuries. In other words, the employer had to pay regardless of his or her responsibility, but knew precisely what had to be paid and avoided the vagaries of jury trials for covered accidents or injuries. Over the years, the courts have grossly extended the coverage of the WCA. Occasionally, the legislature has ratified the courts' interpretations by adopting new provisions of the WCA.

On the other hand, anti-discrimination laws such as the FEA and the MEOO were adopted in order to protect employees and prospective employees from the intentional acts of employers. Additionally, the FEA and the MEOO are intended to further the societal goals of equal treatment and to insure the full utilization of the workforce without regard to immutable characteristics. Wis Stats. 111.31 and MGO 3.23(1). Both the FEA and the MEOO were adopted in their major parts after the establishment of the worker's compensation system. They were intended to address a wide scope of problems including those of discrimination against employees during their terms of employment. See Wis. Stats. 1121.322 and MGO 3.23(7)(A). These provisions would not have been necessary if the legislature and the City Council had intended these types of discrimination cases to be covered by the WCA. This is particularly evident with the prohibitions against sexual harassment found at Wis. Stats. 111.36 adopted in 1981 and MGO 3.23(7)(k) adopted in 1984.

To further the respective ends promoted by these different laws, the State and the City of Madison have established two entirely different administrative agencies and procedures to enforce their requirements. The WCA is enforced by the Worker's Compensation Division of the Department of Industry, Labor and Human Relations. The FEA is administered by the Equal Rights Division of the Department of Industry, Labor and Human Relations. The WCA relies on an insurance-type system with a safeguard of hearings to resolve disputed claims. The FEA contemplates an entirely adversarial system of investigation and hearing. Both agencies have expertise and specialized knowledge in their respective areas. Courts have come to rely on this expertise in the separate areas covered by the two agencies. It would make a mockery of this agency expertise and the courts' reliance on the expertise of the Equal Rights Division to say that the Worker's Compensation Division has the same expertise and knowledge of discrimination and its effects as that of the Equal Rights Division. The position argued for by the Respondents would result in a de facto shift of responsibility for a major area of regulation from the ERD to the WCD without the sanction of the legislature.

The Respondents' argument leads inevitably to the conclusion that all cases of discrimination that occur during the term of employment must be processed through the Worker's Compensation system. This conclusion stems from the many rulings that find that discrimination almost always leads to feelings of emotional distress as a consequence of the humiliation and embarrassment due to being discriminated against. The Supreme Court recognized this effect of discrimination when it found that actions for discrimination were essentially dignitary torts. Curtis v. Loether, 415 U.S. 189 (1974). This decision has been carried through in Federal courts, Hunter v. Allis-Chalmers Corp., Engine Div., 7979 F.2d 1414 (7th Cir. 1986), Muldrew v. Anheuser-Busch, Inc., 728 F.2d 989 (8th Cir.

1984), Johnson v. Hale 940 F.2d 1192 (9th Cir. 1991), Seaton v. Sky Realty Company, Inc., 491 F.2d 634 (7th Cir. 1974), the courts of Wisconsin Chomicki v. Wittekind 128 Wis. 2d 188, 381 N.W. 2d 561 (Wis. App. 1985) and by the Madison Equal Opportunities Commission Nelson v. Weight Loss Clinic of America Inc. et al. MEOC Case No. 20684, September 29, 1989, Ossia v. Rush, MEOC Case No. 1377, June 7, 1988. The Respondents' position would nullify the considered action of the legislature and the City of Madison in adopting protections against discrimination in the terms, conditions and benefits of employment and proscribing sexual harassment specifically. Such a result would lead to the conclusion that the legislative bodies of Wisconsin and the City of Madison had no idea of what they were doing in adopting these provisions. This is contrary to generally accepted principles of statutory construction that presume the legislature's knowledge of the effect of other laws on their actions.

The distinction between injury and damage that is reflected in cases such as Curtis v. Loether is the distinction that the Wisconsin Supreme Court made in the case of Coleman v. American Universal Insurance 86 Wis. 2d 615, 273 N.W. 2d 220 (Wis. 1979). The Court in Coleman indicated that if an injury was not WCA compensable, then all damages flowing from that injury even if those damages might be WCA compensable, were not preempted by the exclusivity provision of the WCA. This case was relied upon by the Hearing Examiner in reaching his decision in Cooper v. TCI Cablevision of Wisconsin Inc. MEOC Case No. 21036. The Respondents argue that the decisions in Schachtner and Norris dispose of this distinction in finding that the FEA is to some extent preempted by the WCA. It must be pointed out that Schachtner and Norris were both decided by the same Court of Appeals and as such cannot dispose of a decision of the State Supreme Court. The Norris decision is not necessarily inconsistent with the decision in Coleman. Norris found that the plaintiff's pre-employment condition was not covered by the WCA and therefore could not be preempted by the WCA. The Norris court, in reaching its decision, did not conduct the type of analysis of coverage performed by the Coleman court because of the clear overlap of the rehire provisions in the two laws.

While the above reasons alone support the finding of jurisdiction on the part of the MEOC, jurisdiction is supported by the cases cited by the Respondents. The Schachtner court was the first court in Wisconsin to address the potential conflict between the WCA and the FEA. In a broad interpretation that gave no effect to the FEA, the court determined that the exclusivity provision of the WCA preempted any application of the FEA. The Schachtner case stemmed from the employer's failure or refusal to rehire a worker who had been physically injured on the job but had recovered from the injuries. In a factually similar case, the Norris court refined the analysis from the Schachtner decision by finding that the FEA was preempted only where there were overlapping provisions in both the WCA and FEA. Norris, at 341. The Norris court found that the WCA included a provision that extended coverage identical to that of the FEA for failure to hire or to rehire a worker who has suffered a work-related injury. By employing this analysis, the court attempted to give effect to the provisions of both the WCA and the FEA. The Norris court, in fact, found that only one of the employee's causes of action were preempted by the WCA. The non-preempted cause stemmed from a condition that allegedly predated the plaintiff's employment. In the case before the Commission, the Complainant's claim is primarily founded on MGO 3.23(7)(k). This provision is roughly the equivalent of Wis. Stats. Sec. 111.36. Neither of these provisions have any counterpart in the WCA because of their narrow focus on a specific social problem. These provisions were adopted in response to specific problems of workers in their workplaces. These were problems that were quite evidently not being addressed by the WCA or even the FEA or MEOO or there would have been no need to adopt them. Given the Norris court's analysis, the lack of an overlapping of substantially identical provision in the WCA leads to the conclusion that the WCA does not preclude the FEA or MEOO. The form of general analysis performed by the Respondents to show preclusion by the WCA does not

fit with the rather narrow approach used by the Norris court. The inability of the Respondents to find an equivalent statutory provision in the WCA to those of the FEA and the MEOO must result in the conclusion that the WCA does not act to bar the MEOC from jurisdiction in cases like that before the Commission now.

It would be impossible to give full effect to two statutes that have significant differences in purpose and background if the Respondents were correct that one entirely preempts the other. For the foregoing reasons, the Hearing Examiner believes that the Commission has jurisdiction over this complaint. To render any other decision would do substantial and significant damage to the ability of the Commission to fulfill its responsibilities for remedying and preventing discrimination within the City of Madison. The Respondents' motion is dismissed.

Signed and dated this 5th day of January, 1993.

IT IS SO ORDERED,

Clifford E. Blackwell, III
Hearing Examiner