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

Deborah Harvey 1120 Merrill Springs Rd. Madison, WI 53705 Complainant vs. Marshall Erdman & Associates 5117 University Ave. Madison, WI 53705 Respondent	HEARING EXAMINER'S DECISION AND ORDER ON RESPONDENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION Case No. 21614

BACKGROUND

The Complainant, Deborah Harvey, filed a complaint of discrimination with the Madison Equal Opportunities Commission (Commission) on December 19, 1991. In her complaint, the Complainant charged that the Respondent, Marshall Erdman & Associates, Inc., discriminated against her on the basis of her sex in the terms and conditions of her employment by permitting or engaging in her sexual harassment, causing her constructive discharge from employment because of the sexual harassment she allegedly suffered, and treated her differently from male employees or supervisors in her pay and other compensation. The Respondent denied all allegations of discrimination.

After an investigation of the allegations of the complaint, a Commission Investigator/Conciliator, on April 29, 1992, issued an Initial Determination concluding that there is no probable cause to believe that the Respondent discriminated against the Complainant with regard to her sex in any manner. The Complainant appealed the Initial Determination's conclusion of no probable cause to the Hearing Examiner. On May 12, 1995, subsequent to submission of additional documents and argument, the Hearing Examiner issued his Decision and Order on Appeal of Initial Determination reversing in part and affirming in part, the conclusions of the Initial Determination. The Hearing Examiner found that there is probable cause to believe that the Respondent had discriminated against the Complainant on the basis of her sex in her terms and conditions of employment because of the sexual harassment she allegedly suffered, and that such alleged sexual harassment could have resulted in her constructive discharge from employment. The Hearing Examiner affirmed the Initial Determination's conclusion that there was no probable cause to believe that the Respondent had discriminated against the Complainant on the basis of her sex in the terms and conditions of her compensation and benefits. The Complainant did not appeal the Hearing Examiner's conclusion of no probable cause on some of her allegations of discrimination.

Subsequent to the Hearing Examiner's Decision and Order, the remaining allegations of the complaint were transferred to conciliation for an attempt to resolve the outstanding allegations. Efforts at conciliation proved unsuccessful. The complaint was transferred back to the Hearing Examiner for a public hearing on the outstanding allegations.

In February of 1996, the Respondent filed a Motion to Dismiss the complaint asserting that the complaint before the Commission was preempted by the exclusivity provision of the Wisconsin Worker's Compensation Act. Wis. Stats. 103.03(2). The Hearing Examiner permitted the parties to submit briefs and written argument with respect to the allegations of the Respondent's motion.

DECISION

The Respondent asserts that the Complainant's complaint before the Commission is preempted by the operation of the exclusivity provision of the Wisconsin Workers Compensation Act, (WCA) Wis Stats. 103.03(2). The Respondent argues that where an injury triggers the provisions of both the WCA and the Madison Equal Opportunities Ordinance (MEOO), the exclusivity provision of the WCA bars the action under the MEOO. The Respondent contends that the Complainant's injuries, depression and emotional distress, are ones compensable under the WCA and therefore the Complainant's claim must be brought solely under the WCA.

In support of its position, the Respondent cites several cases of the Court of Appeals. Byers v. LIRC, 200 Wis. 2d 728, 547 N.W.2d 788 (Ct. App. 1996), Norris v. DILHR, 155 Wis. 2d 337, 455 N.W.2d 665 (Ct. App. 1990), Schachtner v. DILHR, 144 Wis. 2d 1, 422 N.W.2d 906 (Ct. App. 1988). These decisions to one extent or another limit the jurisdiction of the Department of Industry, Labor and Human Relations, now the Department of Work Force Development, to regulate pursuant to the Fair Employment Act (FEA) Wis. Stats. 111.31 et seq. claims of discrimination that contain allegations of injuries that are also subject to the WCA. In Norris and Schachtner, the Court determined that claims brought by individuals who assert that they suffered an on the job disability and were not rehired once they were medically released for work could not bring a claim under the FEA because such claims were subject to a companion provision of the WCA and the WCA's exclusivity provision required the employee to utilize the WCA procedure rather than the FEA process. The Schachtner court seems actually to make a more blanket claim for preemption of the FEA by the WCA than does the Norris court. In Norris, the court dictates an analysis of a claim to determine whether it is one that properly falls within the ambit of both laws and if it does, only then does the WCA preempt the FEA claim.

In Byers, an employee suffered emotional distress as a result of the unwanted attention of a coworker. Despite the efforts of Byers to have her employer address her complaints about the harassment of her coworker, the employer did little and nothing was effective in stopping her harassment. The Court of Appeals found that because Byers claims of emotional distress stemming from her sexual harassment could have been brought under either the WCA or the FEA, she was limited to her WCA remedy and her FEA claim had to be dismissed.

The employee in the Byers case appealed the Court of Appeals decision to the state Supreme Court. On April 18, 1997, the Supreme Court issued its decision in Byers v. LIRC, -- Wis. 2d -- (1997). The Court reversed the Court of Appeals decision and specifically overruled the Schachtner and Norris decisions. The Court permitted claims that could be filed under both the WCA and the FEA to proceed under either or both in an attempt to recognize the different remedial purposes of the WCA and the FEA and to effectuate to the greatest extent possible, the legislatures purpose behind each statute. There was an explicit acknowledgment that the Court's decision might cause some problems with respect to possible double recoveries where actions are brought under both laws. The Court opted to defer any decision on the double recovery issue because it had not been briefed by the parties. The Byers decision clearly resolves the issue of WCA preemption as it applies to the FEA in favor of permitting an aggrieved person to pursue his or her discrimination remedy.

While the Supreme Court's decision in Byers applies explicitly only to the FEA, the Court's rationale applies with equal force to the MEOO. The MEOO is a broad remedial ordinance intended to address discrimination on a variety of bases in employment, housing, public accommodations, credit, and City services and facilities. As was the FEA, the MEOO was adopted in response to a perceived need to address problems at a less than national level and predated efforts at similar legislation on the federal level. Because the FEA and the MEOO have different geographic foci, they address similar though not identical issues. For purposes of this decision, the differences in the coverage between the FEA and the MEOO are relatively unimportant while the similarities are more important.

Both laws utilize a system of individual filed complaints to enforce their provisions. Both seek to remedy complaints of discrimination and prevent discrimination through education and by making public the results of complaints adjudicated before their respective administrative agencies. Both address discrimination that occurs during the employment relationship as well as that which occurs as a result of failure to hire or termination of the employment relationship. Both laws have specific provisions proscribing sexual harassment of employees and provide for relief when it is determined that sexual harassment has occurred. Both laws grant to their administrative agency broad authority to effectuate the purposes of the laws. While the FEA, was enacted directly by the legislature, the MEOO was enacted in part as a result of the legislatures general grant of police powers to municipalities in Wis. Stats. 62.11(5). Some provisions of the MEOO were enacted by other grants of authority but the employment sections at question here, result primarily from an exercise of police power. Fed. Rural Elec. Ins. v. MEOC, unpublished opinion No. 79-538 (Ct. App. April 27, 1981), affirmed per curiam 106 Wis. 2d 767 (1982), Badger Produce, Inc. v. Equal Opportunities Commission of the City of Madison, 106 Wis. 2d 767, 319 N.W.2d 177 (1982)(per curiam decision affirming an unpublished opinion of the Court of Appeals). Elsewhere in the statutes, the legislature has recognized the need for municipalities to be active in the effort to prevent and remedy employment discrimination along with other social problems. Wis. Stats. 66.433. This statute, known as the Wisconsin Bill of Human Rights, explicitly encourages local governments to establish Commission's to study and recommend legislation in several areas including employment discrimination. The statute implicitly if not explicitly authorizes municipalities to adopt remedial ordinances in order to prevent and remedy employment discrimination. By adopting Wis. Stats. 66.433, the legislature clearly intended municipalities to play an important role in eliminating the adverse consequences of discrimination in employment.

Given the legislature's strong support for municipal participation in the effort to eliminate discrimination, it would be anomalous for the WCA not to preempt an action filed under the FEA but to preempt the same action if it were filed under the MEOO. To require preemption under the MEOO would clearly frustrate the legislatures intent to encourage local governmental units to actively assist in accomplishing the legislature's goal of reducing and ultimately eliminating the invidious effects of employment discrimination. Preemption of a complaint filed under the MEOO in these circumstances would do significant damage to the type of comprehensive local regulation of employment discrimination envisioned by the legislature.

As the Supreme Court found in Byers, it seems unlikely that the legislature would have found it necessary or desirable to encourage local units of government to become active in the fight against employment discrimination, if other state laws were going to preempt the efforts of the local government. This applies to the effect of the FEA as well as the WCA. Where the legislature has wished to limit its general grants of authority it has done so in no uncertain terms. Wis. Stats. 111.337 (3). The WCA does not represent such an explicit withdrawal of authority from other governmental units. It instead acts to strike a balance between the employer's need for certainty in damage awards

and the employee's need for reasonable compensation for work-related injuries to replace lost income. The Supreme Court recognized that the interests embodied in the WCA differ from the broad remedial purposes of the FEA. The purposes of the MEOO mirror those of the FEA and as the Court reasoned do not conflict with the purposes of the WCA.

It is entirely consistent with the holding in Byers that the current action not be preempted by the WCA. To hold otherwise would reduce the effectiveness of the state/local scheme of regulation of employment discrimination established by the legislature and carried out by the Department of Work Force Development and the Commission.

ORDER

The Respondent's motion to dismiss for lack of jurisdiction is hereby denied. Further proceedings in this matter will be scheduled by separate cover.

Signed and dated this 9th day of May, 1997.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell III
Hearing Examiner