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

Sandra Schoenemann 5014 Stonehaven Dr. Madison, WI 53716 Complainant vs. Madison Gas & Electric Rolland Hughes 133 South Blair Madison, WI 53703 Respondent	HEARING EXAMINER'S DECISION AND ORDER ON APPEAL FROM INITIAL DETERMINATION Case No. 21699

BACKGROUND

On April 9, 1992, the Complainant, Sandra Schoenemann, filed a complaint of discrimination against the Respondents, Madison Gas and Electric and Rolland Hughes. This complaint charged that the Respondents discriminated against the Complainant on the basis of the Complainant's handicap by refusing to reasonably accommodate her handicap. The Complainant alleges that she suffers from carpal tunnel syndrome and that she proposed to the Respondent several potential accommodations that the Respondents declined to make.

On May 5, 1992, the Complainant amended her complaint to include an allegation of sex discrimination. She alleges that the Respondent accommodated several male employees with handicaps while refusing to accommodate her handicap. Implicit in this amendment is that this decision was made, at least in part, on the basis of the Complainant's sex.

On May 22, 1992, the Respondent filed a Motion to Dismiss the complaint for lack of jurisdiction. The basis for the Respondents' motion is their belief that the provisions of the Equal Opportunities Ordinance, relied upon by the Complainant, are pre-empted by the exclusivity provision of the Wisconsin Worker's Compensation Act, Chapter 102, Wis. Stats.

The parties were provided the opportunity to present arguments and to submit briefs in support of their positions.

DECISION

The Respondents' motion presents the Commission with the difficult task of trying to give effect to two different statutes that may conflict with each other. The Respondents contend that, at least in the case of handicapping conditions, the "exclusivity" rule acts to bar both of the Complainant's claims. In support of their position, the Respondents rely on the cases of Schachtner v. DILHR, 144 Wis. 2d 1 (Ct. App. 1988) and Norris v. DILHR, 155 Wis. 2d 337 (Ct. App. 1990). While these cases attempt to sort out the apparent conflicts between two state statutes, their logic and holdings are applicable to the conflict between a state statute and the Equal Opportunities Ordinance.

Both the Schachtner and Norris cases held that in the circumstance of a refusal to rehire after an on-the-job injury that the Worker's Compensation Act represented the exclusive remedy. These holdings were premised upon the Court's reading of the Act's "exclusivity" provision in combination with the fact that the Act specifically provides a remedy for the failure to rehire an injured employee.

The Schachtner court set forth the principle that in conflicts between the Worker's Compensation Act and the Fair Employment Act (FEA), sec. 111.31 et seq., Wis. Stats. that the Worker's Compensation Act would win out. Because of the broad language of the ruling, it left confusion over what role there might be for the FEA in regulating the employment relationship. Since the legislature is presumed to have intended the FEA to have a role in the battle against discrimination, the Schachtner decision must not have applied so broadly as the Respondents argue.

The Court in Norris dealt more directly with the apparent conflict between the two laws. It explicitly recognized the "exclusivity" provision of the Worker's Compensation Act over the FEA only when there is an overlap with the FEA. In the Schachtner and Norris cases, the overlap was provided by an explicit remedy for the failure to rehire in the Worker's Compensation Act. Given the ruling in Norris, we must look at whether there is an overlap between the coverage of the Ordinance and the coverage or purposes of the Worker's Compensation Act.

First, the Respondents argue that the Complainant's amendment of the complaint to add a claim of sex discrimination should be dismissed as an attempt to back door a claim of handicap discrimination under a different name. At this stage in the process, it would be premature for the Commission to draw that conclusion. The amendment sets forth facts that could lead to a finding that the Respondent treated male employees differently from the way it treated the Complainant, a female employee. While it may ultimately be difficult for the Complainant to demonstrate that this difference in treatment is attributable to the Complainant's sex, at this stage the complaint should go forward to investigation. The amendment asserts that male employees with handicaps had their handicaps accommodated, while the Complainant, a female, allegedly did not. On its face, this claim is one of sex-based discrimination rather than handicap discrimination even though the individuals may have been temporarily handicapped. The Respondents are not precluded from demonstrating, if they can, that if there was differential treatment, it was not provided on the basis of the Complainant's sex but instead was justified for a legitimate nondiscriminatory business reason. In short, there is no overlap between the coverages of the Worker's Compensation Act and the Ordinance with respect to the amended claim of sex discrimination and it is not barred by the Worker's Compensation Act.

Second, the Respondents contend that there is a direct conflict between the Complainant's claim of handicap discrimination and the provisions of the Worker's Compensation Act because the injury or handicap of which the Complainant complains stemmed from her employment with the Respondent. While it seems uncontested that the Complainant's condition is attributable to her employment, the thrust of the Complainant's claim is not the cause of her handicap but the Respondents' alleged failure to reasonably accommodate that handicap. We must look to see if there is a conflict between the purposes of the Ordinance and the Worker's Compensation Act given the precise nature of the Complainant's claim. It is generally acknowledged that the Worker's Compensation Act represents a societal compromise of the interests of employers and employees. Both employers and employees were required to give up rights of individuals in order to achieve some stability and predictability of results in cases where injuries arose from an employee's work conditions. One main purpose of the Worker's Compensation Act is to assure compensation for the injured employee. Compensation comes through the payment of money for medical expenses incurred and wages lost. The FEA and the Ordinance, in part, share the goal of compensating employees for injuries incurred on the job, but particularly with respect to handicapped employees has other goals and purposes. Most important of

these additional purposes is that of assuring that the handicapped are able to work at their highest possible level. The duty of an employer to reasonably accommodate an employee's handicap recognizes the value of continuing employment and that "mere" compensation for injuries is insufficient to redress the damage of discrimination. This emphasis on the value of employment is not reflected in the Worker's Compensation Act's emphasis on compensation. In this important aspect, the two laws do not overlap.

There is some appearance of overlap in the area of damages. Both the Worker's Compensation Act and the Ordinance provide for awards of monetary damages for lost wages and out-of-pocket expenses, such as medical expenses. The Ordinance also provides for awards of damages for emotional injuries. More importantly the Ordinance provides for equitable remedies such as orders for compliance and orders for employment. To the extent that the remedies sought by the Complainant are provided by both the Worker's Compensation Act and the Ordinance, the Schachtner and Norris cases hold that the Worker's Compensation Act will control. At this stage of the process, it is too early to know what precise remedies may be sought by the Complainant. There has been no determination of probable cause or a finding of discrimination and the issue of remedies may never need to be addressed.

The Complainant, in support of her position that the Commission has jurisdiction, asserts that the passage of the Americans with Disabilities Act (ADA) requires the Commission to process this case. The Respondents correctly point out that the Commission has no jurisdictional grant due to the ADA. The employment provisions of that federal act are administered by the United States Equal Employment Opportunity Commission, not the Madison Equal Opportunities Commission. The effective date of the employment provisions of the ADA was July 26, 1992. The acts of discrimination alleged by the Complainant, absent a showing of a pattern or practice or a continuing violation, took place prior to the date on which the ADA could regulate such conduct.

Because of the different purposes of the Worker's Compensation Act and the Ordinance particularly in the area of reasonable accommodation of an employee's handicap, and for the other reasons stated above, I find that the Commission has jurisdiction to investigate this complaint and its amendment. The Respondents' Motion to Dismiss is denied. Nothing in this decision is intended to preclude the Respondents from arguing that some or all of the Complainant's requested remedies are barred by the Worker's Compensation Act at a time where those remedies are in question.

IT IS SO ORDERED,

Clifford E. Blackwell, III
Hearing Examiner

July 30, 1992