EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
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MADISON, WISCONSIN

Jacqueline Puent 33 Oakbridge Ct., # 15 Madison, WI 53717 Complainant vs. Corning Besselaar Clinical Research Units, Inc. 309 W. Washington Ave. Madison, WI 53703 Respondent	HEARING EXAMINER'S DECISION AND ORDER ON RESPONDENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION Case No. 22366

BACKGROUND

On December 13, 1995, the Complainant, Jacqueline Puent, filed a complaint of discrimination with the Madison Equal Opportunities Commission (Commission). The complaint charged that the Respondent, Besselaar a/k/a Corning Besselaar, discriminated against the Complainant on the basis of her sex by permitting her sexual harassment and retaliated against her for her exercise of rights protected by the ordinance. On January 31, 1996, the Complainant filed an amended complaint only revising the name and address of the Respondent. In addition to denying that it violated the ordinance, the Respondent filed a motion to dismiss the complaint alleging that the Commission is without jurisdiction to process the complaint. The basis for the Respondent's assertion of a lack of jurisdiction is that the Complainant's complaint represents a Worker's Compensation compensable injury and therefore the Complainant's exclusive remedy lies with the Worker's Compensation Act, Wis. Stats. Ch. 102 (WCA). Additionally, the Respondent contends that the Complainant has failed to properly name her actual employer in the complaint and that certain of the acts alleged by the Complainant fall outside of the 300-day period for filing complaints under the ordinance.

The complaint was transferred to the Hearing Examiner for resolution of the jurisdictional dispute. The Hearing Examiner provided both parties with the opportunity to present written argument in support of their respective positions.

Based upon the record in this matter and the independent research of the Hearing Examiner, the Hearing Examiner concludes that the complaint should not be dismissed and remands the complaint for further investigation and the issuance of an Initial Determination.

DECISION

The question of whether the Wisconsin Worker's Compensation Act exclusivity provision, Sec. 102.03(2) stats., bars actions brought under discrimination statutes and ordinances has been one of the most hotly contested issues in the employment discrimination arena for the past several years. As a general matter, the Commission has taken the position that the WCA exclusivity provision does not

necessarily require a finding that a complaint of discrimination must be dismissed for a lack of jurisdiction. Cooper v. TCI, MEOC Case No. 21036 (Ex. Dec. on Jur. 04/16/91), Madalon v. Midcontinent Broadcasting, MEOC Case No. 21531 (Ex. Dec. on Jur. 01/05/93), Shoenemann v. Madison Gas and Electric, MEOC Case No. 21699 (Comm'n Dec. 01/28/93, Ex. Dec. 07/31/92). Wisconsin Courts of Appeal have taken a variety of positions with respect to this issue. Some have found jurisdiction in limited circumstances. Lentz v. Young, 195 Wis. 2d 457, 536 N.W.2d 451 (Ct. App. 1995), Norris v. DILHR, 155 Wis. 2d 337, 455 N.W.2d 665 (Ct. App. 1990). Others have found that there is a total preemption on the part of the WCA. Schachtner v. DILHR, 144 Wis. 2d 1, 422 N.W.2d 906 (Ct. App. 1988), Byers v. LIRC, Case No. 952490 (Ct. App. March 5, 1996).

The Wisconsin Supreme Court has accepted this issue for review in the Byers case in order to settle the different approaches taken by the Courts of Appeal.

A recent unpublished decision of the Court of Appeals on a different yet somewhat related topic has to a great extent rendered the position of the Respondent moot. In State of Wisconsin ex rel. Caryl Sprague v. City of Madison, et al. Case No. 94-2983 (Ct. App. September 26, 1996), the Court of Appeals determined that the language upon which the Commission has based its authority to award compensatory damages does not in fact support such awards.

The Sprague case means that as currently set forth the ordinance only permits the Commission to make awards of so called equitable remedies such as orders to cease and desist from discrimination, orders to reinstate an employee or to provide for back pay and attorney's fees.

The court in Norris clearly indicates that the WCA exclusivity provision does not entirely preempt all of the provisions of discrimination laws. In the Norris case, the law under attack was the Wisconsin Fair Employment Act, Wis. Stats. Sec. 111.30 et seq. (FEA) The Hearing Examiner accepts that the ordinance, in this context, holds no special position and to the extent that the FEA is actually preempted by the WCA, the ordinance is likely to be preempted. In Norris, the court determined that a claim based upon an employer's refusal to rehire an employee who suffered a work-related back injury was preempted while his claim of discrimination based upon a mental or emotional handicap that predated the employee's employment was not preempted. The court reached its conclusion by finding that the refusal to rehire claim had a counterpart under the WCA and therefore the two authorities were in conflict. The conflict was resolved by reference to the WCA's exclusivity provision.

The Hearing Examiner understands the Norris court to require some analysis of whether the provisions of the WCA and the ordinance are actually in conflict and it is only where such a conflict exists that preemption is applicable. The court let stand the complaint of handicap discrimination based upon a pre-existing condition even though one of the reasonably anticipated claims of such a complaint might be that the Complainant had suffered emotional distress, humiliation or embarrassment as a result of such discrimination. There may also be a component of back pay in such a claim.

This result tracks well with the decision of Judge Susan Steingass in Madison Gas and Electric Company v. the Equal Opportunities Commission of the City of Madison and Sandra Shoenemann, Case No. 93 CV 0894, Dane County Circuit Court (November 22, 1993). Judge Steingass allowed a claim of sex discrimination to proceed because the protected category of sex was a condition that was unrelated to the Complainant's employment. It can be presumed that the Complainant, Ms. Shoenemann, would have been distressed by the facts leading to her complaint of sex discrimination.

The underlying complaint in that instance was not one of sexual harassment though. The claim, based upon an accommodation of a male employee's handicapping conditions and not hers also, claimed back pay as a part of her damages. In discussing this case in its brief, the Respondent makes much of Judge Steingass' dismissal of Shoenemann's claim of discrimination based upon a work-related injury. What is not clear from the court's opinion is that the Commission withdrew its decision on that issue essentially rendering the challenge of Madison Gas and Electric moot.

The courts in Schachtner and Byers have taken a more sweeping approach to the question. In Schachtner, the court found that a claim of handicap discrimination based upon an employer's refusal to rehire an employee who had suffered an on the job injury was preempted by the WCA because of a similar provision in the WCA. The Schachtner court did not perform the type of analysis that it conducted two years later when deciding Norris. Schachtner simply stated that FEA claims were preempted by the WCA.

Similarly the Court of Appeals in the Byer case determined that where there was a claim of sexual harassment by a coworker leading to emotional injuries, the claim must be preempted by the WCA. In Byers, an employee brought a claim of sexual harassment discrimination against her employer for the employer's failure to take steps adequate to prevent the employee's sexual harassment by a coworker.

In Byers, the court distinguished its earlier decision in Lentz v. Young, supra, where it found that the WCA did not preempt the employee's FEA sexual harassment claim. In Lentz, the employee was sexually harassed by her employer who was also the owner of her place of employment. The decision in Lentz appears to turn more on the definition of "accident" than on the status of the harasser. The decision in Byers appears to create a flat rule that claims of emotional distress based upon coworker sexual harassment are always preempted by the WCA.

Generally speaking, the recent cases analyzing this area turn on the type of injury suffered by the Complainant. The approach taken by the court in the Norris case does not require such a limited analysis. As noted above, the Norris court indicated that one must evaluate the provisions in question, and only where there is a conflict does the exclusivity doctrine apply. In the current circumstances, the Hearing Examiner concludes that there is no conflict and therefore no preemptive effect need be recognized.

The WCA is the exclusive remedy for compensation where a WCA compensable injury is alleged. While the parties may dispute whether the injuries allegedly sustained by the Complainant are ones covered by the WCA, it is not disputable that the Commission, subsequent to the Sprague decision, may not award compensatory damages for claims of emotional distress. While an amendment to the ordinance may remedy the lack of authority relied upon by the Court, for the present, the Commission cannot make awards of the type of damages contemplated by the WCA for the Complainant's alleged emotional injuries.

The Sprague case has effectively removed any conflict between the ordinance and the WCA with regard to the award of compensatory damages for injuries stemming from acts of discrimination occurring during an employment relationship. The Commission, subsequent to the Sprague case, may still make findings of discrimination, make appropriate orders, such as those to cease and desist from a discriminatory practice or for reinstatement to employment, necessary to otherwise effectuate the purposes of the ordinance, and make awards of attorney's fees and other appropriate costs. These remedies are not ones contemplated by the WCA but fall squarely within the purview of the Commission.

Because the remedies remaining to the Commission are not ones that may be made under the WCA, there is no apparent conflict between the ordinance and the WCA. Should the Common Council make the Commission's authority to award compensatory damages in employment cases clear as it did in the housing context, the issue of preemption by the exclusivity principle may once again raised as a potential bar to the Commission's proceeding. However, the Hearing Examiner need not decide that issue at this time. Cases pending before the Supreme Court may make such a decision unnecessary in any event.

The remaining issues raised by the Respondent in its motion to dismiss relating to the correct name of the Respondent and whether the complaint has been timely filed need not be determined by the Hearing Examiner at this point. Further fact finding before the Investigator may more clearly set forth these issues.

ORDER

The Respondent's motion to dismiss for lack of jurisdiction is denied. This matter is remanded to the Investigator for completion of the investigation and issuance of an Initial Determination.

Signed and dated this 10th day of January, 1997.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell III
Hearing Examiner