

1061-2010-2542-001 OVC  
7/11/11

STATE OF WISCONSIN  
LABOR AND INDUSTRY REVIEW COMMISSION  
P O BOX 8126, MADISON, WI 53708-8126 (608/266-9850)

ROBERT J KOCH, Complainant  
415 THIRD ST  
PRAIRIE DU SAC WI 53578-1139

FAIR EMPLOYMENT DECISION

ERD Case No. 201002961  
EEOC Case No. 26G201001648C

CITY OF MILWAUKEE, Respondent  
C/O CITY CLERK  
200 E WELLS ST RM 205  
MILWAUKEE WI 53202

Dated and mailed:

JUN 09 2011

kochro.rmd:164:5

**SEE ENCLOSURE AS TO TIME LIMIT AND PROCEDURES ON FURTHER APPEAL**

An administrative law judge for the Equal Rights Division of the Department of Workforce Development issued a decision in this matter. A timely petition for review was filed.

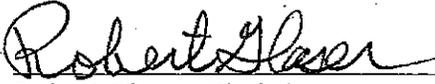
The commission has considered the petition and the positions of the parties, and it has reviewed the evidence submitted to the administrative law judge. Based on its review, the commission agrees with the decision of the administrative law judge, and it adopts the findings and conclusion in that decision as its own, except that it makes the following modification:

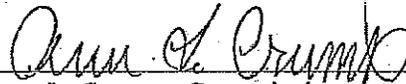
The third sentence in the second paragraph of the administrative law judge's ORDER, along with the accompanying statutory citation, is deleted.

**DECISION**

The decision of the administrative law judge (copy attached), as modified, is affirmed.

BY THE COMMISSION:

  
Robert Glaser, Chairperson

  
Ann L. Crump, Commissioner

  
Laurie R. McCallum, Commissioner

## MEMORANDUM OPINION

### *Procedural History*

The complainant was employed as a firefighter for the City of Milwaukee until October 23, 2009, when he was discharged. The complainant appealed his discharge to the Board of Police and Fire Commissioners of the City of Milwaukee (hereinafter "PFC") and, on May 12, 2010, a hearing was held before the PFC. On June 17, 2010, the PFC issued a decision upholding the discharge decision, and on July 8, 2010, the complainant filed a petition for judicial review of the decision.

On August 19, 2010, while his appeal was pending before the circuit court, the complainant filed a complaint with the Equal Rights Division (hereinafter "Division") alleging that he was discriminated against based upon his sex and disability with respect to his discharge. The Division issued a preliminary determination dismissing the complaint for lack of jurisdiction. It reasoned that Wis. Stat. § 62.13(5), which governs police and fire departments in cities with populations of 4,000 or more, provides the exclusive procedure for the review of termination decisions for firefighters and police officers.

The complainant appealed the preliminary determination, and on December 3, 2010, an administrative law judge upheld the dismissal of the complaint. The administrative law judge held that, pursuant to Wis. Stat. § 62.50,<sup>1</sup> the Division may not take jurisdiction over a complaint arising out of a decision by the PFC.

The complainant filed a petition for commission review of the administrative law judge's decision. On March 10, 2011, after the complainant filed his petition for review by the commission, the circuit court issued a decision in which it set aside the PFC decision and remanded for further proceedings. *Koch v. Fire and Police Commissioners of the City of Milwaukee*, Case No. 10-CV-11215 (Wis. Cir. Ct. Milwaukee Co. March 10, 2011).

### *Discussion*

The issue presented in this case is whether a police officer or firefighter who is discharged after a just cause hearing before the PFC pursuant to Wis. Stat. § 62.50(11) may pursue a discrimination complaint under the Wisconsin Fair Employment Act (hereinafter "WFEA").

The issue of whether a police officer or firefighter who is discharged after a just cause hearing before the PFC pursuant to Wis. Stat. § 62.13(5) may pursue a

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<sup>1</sup> The statutory section cited by the administrative law judge is the correct one. Wis. Stat. § 62.13, referenced in the preliminary determination, exempts "first class cities," i.e. cities with populations of 150,000 or more. See Wis. Stat. § 62.05(a). Instead, first class cities are covered by subchapter II of the statute, Wis. Stat. § 62.50 *et seq.* The city of Milwaukee is considered a "first class city," and, therefore, is covered under subchapter II.

discrimination complaint under the WFEA was considered and resolved by the Wisconsin Supreme Court in *City of Madison v. DWD*, 262 Wis. 2d 652, 664 N.W.2d 584 (2003). The Court concluded that the Equal Rights Division could not exercise jurisdiction over WFEA claims arising out of actions by the PFC under § 62.13(5).

Wisconsin Stat. § 62.13 requires municipalities with populations above 4,000 to maintain a police and fire commission with jurisdiction over the hiring, promotion, discipline, and discharge of members of police and fire departments. Wis. Stat. § 62.13(5) governs disciplinary actions against police officers and firefighters and provides that a police officer or firefighter may not be suspended, demoted or discharged unless the PFC determines there is just cause to sustain charges of misconduct. Wis. Stat. § 62.13(5)(em). "Just cause" is determined by reference to seven factors, including "Whether the chief is applying the rule or order fairly and without discrimination against the subordinate." Wis. Stat. § 62.13(5)(em)6. The statute provides for judicial review of an adverse PFC ruling in circuit court and states that an action for judicial review of a PFC order has precedence over any other cause of a different nature pending in the court. Wis. Stat. § 62.13(5)(i). If the circuit court reverses a PFC order, the police officer or firefighter shall be reinstated and entitled to pay "as though in continuous service." *Id.* If the order of the PFC is sustained by the circuit court it shall be final and conclusive. *Id.*

In finding that Wis. Stat. § 62.13(5) provides the exclusive remedy for discrimination complaints by police officers and firefighters in municipalities where that statute applies, the Court reasoned that the judicial review and due process requirements of Wis. Stat. § 62.13(5) adequately safeguard the right of police officers and firefighters to be free from discrimination. *City of Madison*, 262 Wis. 2d 652, 670. The statute requires a hearing and allows for representation by counsel, with the opportunity to present evidence and cross-examine witnesses. Wis. Stat. § 62.13(5)(d). Further, the PFC's decision is governed by legal standards that require consideration of whether the proposed discipline is discriminatory in violation of the WFEA, if applicable, and the decision is subject to judicial review. Wis. Stat. § § 62.13(5)(em) and (i).

The Court further reasoned that to permit the Division to assert jurisdiction over a WFEA claim arising out of action by the PFC would not merely frustrate the purposes of the statute, but would undermine it completely, as it would displace the authority of the PFC, whose decisions by statute are final and conclusive unless reversed by a circuit court. The Court noted that the statutory conclusiveness would become meaningless if the PFC's disciplinary order could be subjected to collateral agency review by the Equal Rights Division under the WFEA. *City of Madison*, 262 Wis. 2d 652, 667-668, 670.

In his brief to the commission the complainant argues that *City of Madison* does not apply in his case because that decision pertains to Wis. Stat. § 62.13(5), rather than Wis. Stat. § 62.50. The complainant concedes that the two statutory sections contain "somewhat parallel" language regarding the review of employee discipline by fire and police commissioners, but nonetheless contends that it does not necessarily follow that *City of Madison* should apply to his complaint. In support of this

argument, the complainant attempts to draw meaningful distinctions between the two statutory subsections. However, as can be seen by reference to the chart contained on page 4 of the complainant's brief to the commission, the differences between the two statutes are insignificant. While the complainant argues that subchapter II lacks a separate statement of legislative intent, and that this omission constitutes a significant difference warranting a different reading of the two statutes, subchapter II is, in fact, covered by a statement of legislative intent that is identical to that contained in subchapter I. See Wis. Stat. § 66.0101(11).<sup>2</sup> Moreover, even if such statement were lacking, the absence of a statement of legislative intent is not a reason to read one section of the statute differently than another when both say essentially the same thing.

Wisconsin Stat. § 62.50, which applies to police and fire departments in first class cities, contains a provision that is strikingly similar to Wis. Stat. § 62.13(5), discussed by the court in *City of Madison*. As in Wis. Stat. § 62.13(5), Wis. Stat. § 62.50(11) provides that no member of a police or fire department may be discharged except for cause and after a trial, at which the officer may present evidence, cross-examine witnesses, and be represented by counsel. Wis. Stat. § 62.50(16). The same seven "just cause" standards referenced in § 62.13 proceedings apply under Wis. Stat. § 62.50(11), and the question of whether the discharge was discriminatory may be considered.<sup>3</sup> Wis. Stat. § 62.50(17)(b). Further, as in Wis. Stat. § 62.13, the police officer or firefighter can appeal the decision of the PFC to circuit court. Wis. Stat. § 62.50(20). The statute provides that, if the decision of the PFC is reversed by the court, the officer will be reinstated to his or her former position and entitled to the same pay as if not discharged or suspended. Wis. Stat. § 62.50(22). If the decision is sustained it shall be final and conclusive. *Id.*

Based on the foregoing, the commission concludes that the rationale the Court relied upon in *City of Madison* to find exclusive PFC jurisdiction to hear complaints of discriminatory discharge or discipline under Wis. Stat. § 62.13(5) applies equally to the treatment of WFEA claims arising out of actions by the PFC under § 62.50(11).

In his brief to the commission the complainant also makes the alternative argument that, even if *City of Madison* applies to proceedings under Wis. Stat. § 62.50, there

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<sup>2</sup> "Sections 62.13 and 62.50 and chapter 589, laws of 1921, and chapter 423, laws of 1923, shall be construed as enactments of statewide concern for the purpose of providing uniform regulation of police and fire departments." Wis. Stat. § 66.0101(11).

<sup>3</sup> The complainant argues that, under Wis. Stat. § 62.50, the "just cause" factors, including nondiscrimination, only apply to police officers, because Wis. Stat. § 62.50(17)(b) specifically references "police officers," but not firefighters. The commission does not find the complainant's arguments on this point to be persuasive. Moreover, in its decision regarding the complainant's appeal, the circuit court specifically rejected this argument and applied an analysis of whether the complainant's discharge was discriminatory. *Koch v. of Fire and Police Commissioners of the City of Milwaukee*, Case No. 10-CV-11215 (Wis. Cir. Ct. Milwaukee Co. March 10, 2011).

are a number of reasons to question the holding in that case. The complainant contends, for example, that limiting his remedies to the procedure outlined in Wis. Stat. § 62.50 denies him additional due process protections and remedies provided for under the WFEA. The commission finds it unnecessary to address these arguments since, having concluded that the Court's decision in *City of Madison* applies to separations following a just cause hearing under Wis. Stat. § 62.50(11), the commission is bound by that decision. Accordingly, the dismissal of the complaint for lack of jurisdiction is affirmed.

NOTE: The commission has modified the administrative law judge's decision to delete the finding that the PFC found that the complainant's termination was "fair and done without discrimination." The PFC found just cause for the complainant's termination, but did not make any specific findings that the decision was fair and nondiscriminatory.

cc: Attorney Jessica M. Kramer  
Attorney Marynell Regan

STATE OF WISCONSIN  
DEPARTMENT OF WORKFORCE DEVELOPMENT  
EQUAL RIGHTS DIVISION

Robert J. Koch  
415 Third Street  
Prairie Du Sac, Wisconsin 53578-1139  
Complainant

V.

ORDER  
ERD Case #201002961  
EEOC Case #26G201001648C

City of Milwaukee  
C/O City Clerk  
200 East Wells Street Room 205  
Milwaukee, Wisconsin 53202  
Respondent

In a complaint filed on August 3, 2007, with the Equal Rights Division of the Department of Workforce Development, the Complainant, Robert J. Koch, alleged that the Respondent, City of Milwaukee violated the Wisconsin Fair Employment Act, sec. 111.31--111.397, Wis. Stats. Act), by discriminating against him on the basis of sex and disability in regard to the termination of his employment. On September 27, 2010, the Equal Rights Division issued an Order dismissing the complaint in this matter based on the Division lacking jurisdiction under the Act. The ERD notified the Complainant that the dismissal would become final if he failed to file a written appeal within two weeks of this letter. The Complainant filed a timely appeal.

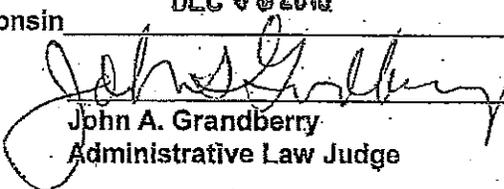
In this matter, the Complainant filed the appeal of his termination pursuant to sec. 62.50 Wis. Stats. Sec. 62.50, Stats. refers to Police and fire departments in 1<sup>st</sup> class cities. The Board of Fire and Police Commission (Board) found just cause and upheld the termination. The Board found that the termination was fair and done without discrimination. See sec. 62.50(17) Stats. In City of Madison v. State of Wisconsin Department of Workforce Development, 2003 WI 76, 262 Wis. 2d 652, 664 N.W. 2d 584 the Court held that DWD may not take jurisdiction over a WFEA complaint arising out of a decision of a fire and police commission.

Based on the above, the Administrative Law Judge hereby Issues the following:

ORDER

1. That the complaint in this matter is dismissed.

Dated at Milwaukee, Wisconsin DEC 03 2010

  
John A. Grandberry  
Administrative Law Judge

cc: Complainant  
Respondent  
Marynell Regan, Attorney for Respondent  
EEOC