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ROBERT ALEXANDER

Plaintiff,

v.

MEMORANDUM DECISION  
Case No. 97-CV-1664

LABOR, INDUSTRY, REVIEW COMMISSION,

Defendant.

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The matter before the court is a Motion to Dismiss by the Labor, Industry, Review Commission (hereinafter “defendant”). Defendant has moved to dismiss on the grounds that Alexander (hereinafter “plaintiff”) failed to make his former employer, which is a necessary adverse party, a defendant in this proceeding as required by §102.23(1)(a) of the Wisconsin Statutes.

After reviewing the motion, briefs, filings, and relevant law, this court concludes that defendant’s Motion to Dismiss must be GRANTED.

#### RELEVANT FACTS

Plaintiff commenced a claim for unemployment compensation benefits by filing an application with the Department of Workforce Development (formerly the Department of Industry, Labor and Human Relations) (hereinafter “department”). Plaintiff’s claim affected the unemployment compensation account of the Wisconsin Department of Health & Family Services (hereinafter “DHFS”), plaintiff’s former employer.

The department issued an initial determination finding that plaintiff had been discharged by DHFS for misconduct connected with his employment, and for that reason was ineligible for unemployment compensation benefits. Plaintiff subsequently filed an appeal from the department's initial determination. Following due notice and hearing, an administrative judge, acting as an Appeal Tribunal, issued a decision affirming the department's initial determination that plaintiff was ineligible for benefits.

Plaintiff filed a petition for review of the Appeal Tribunal decision by defendant, the Labor, Industry, Review Commission. On May 22, 1997, the commission issued its decision, affirming the determination that plaintiff was ineligible for benefits. A copy of defendant's decision was mailed to plaintiff on that date. An enclosure containing a detailed description of plaintiff's right to seek judicial review and the necessary procedures accompanied the decision.

On June 11, 1997, plaintiff filed with the Dane County Clerk of Court and served defendant with two copies of a set of documents consisting of a one-page document entitled "summons", a one-page letter addressed to "Your Honor", and a photocopy of defendant's May 22, 1997 decision. All of these documents bore authentication stamps from the Dane County Clerk of Court. Plaintiff also served defendant at that time with a large number of other documents apparently relating to his employment or his claim for unemployment compensation benefits, none of which bore the authentication stamp from the Dane County Clerk of Court. Neither the summons nor the authenticated documents attached made or named DHFS a defendant in the action.

On June 25, 1997, defendant filed this Motion to Dismiss on the grounds that plaintiff failed to make his former employer, DHFS, which is a necessary adverse party, a defendant in the proceeding as required by Wis. Stat. §102.23(1)(a). Plaintiff objects to this motion and seeks to amend the complaint to include DHFS as a defendant in the action. The issue currently before this court is whether plaintiff's failure to name his former employer as a defendant requires dismissal of his complaint.

#### APPLICABLE LAW

The relevant portion of §108.09 of the Wisconsin Statutes states as follows:

108.09 (7) Judicial review. (a) The department or either party may commence action for the judicial review of a decision of the commission under this chapter after exhausting the remedies provided under this section if the party or the department has commenced such action in accordance with s. 102.23 within 30 days after a decision of the commission is mailed to a party's last-known address.

The relevant portion of §102.23 of the Wisconsin Statutes states as follows:

102.23 (1) Judicial review. (a) The findings of fact made by the commission acting within its powers shall, in the absence of fraud, be conclusive. The order or award granting or denying compensation, either interlocutory or final, whether judgment has been rendered on it or not, is subject to review only as provided in this section and not under ch. 227 or s. 801.02. Within 30 days after the date of an order or award made by the commission either originally or after the filing of a petition for review with the department made under s. 102.18 any party aggrieved thereby may by serving a complaint as provided in par. (b) and filing the summons and complaint with the clerk of the circuit court commence, in circuit court, an action against the commission for review of the order or award, **in which action the adverse party shall also be made a defendant.** (emphasis added)

#### DISCUSSION

Defendant argues that plaintiff's complaint should be dismissed for failure to make his former employer a defendant in the action. In support of this argument, defendant points to §108.09(7) of the Wisconsin Statutes which governs the judicial

review of unemployment compensation cases. That section provides that such actions shall be commenced in accordance with Wis. Stat. §102.23. According to Wis. Stat. §102.23(1), one of the requirements for obtaining judicial review of a commission decision is that in addition to the commission, the adverse party shall also be made a defendant in the action. As defendant points out, it is well established that where a specific method of review of an administrative agency's decision is prescribed by statute, the method is exclusive and must be pursued. Superior v. Committee on Water Pollution, 263 Wis. 2d 27, 56 N.W.2d 501 (1953), State ex rel First Nat. Bank v. M & I People's Bank, 82 Wis. 2d 529, 538, 263 N.W.2d 196 (1977). This court is in agreement with the court's position in Brandt v. LIRC, 166 Wis.2d 623, 480 N.W.2d 494 (1992). Similar to plaintiff, the plaintiff in Brandt failed to name his former employer in initiating an action challenging an unemployment compensation decision made by the commission. In dismissing the action, the court stated, "We believe that the requirements for obtaining judicial review of a commission decision involving unemployment benefits are clearly set forth in secs. 108.09(7) and 102.23(1), Stats. We must therefore require strict compliance." Id. at 634.

The law is clear on the question of who an adverse party is for purposes of actions for judicial review under Wis. Stat. §102.23(1). Wisconsin courts have generally relied upon three approaches in determining whether a party is adverse. Miller Brewing Company and National Union Fire Insurance v. LIRC and Beverly, 173 Wis.2d 700, 716, 495 N.W.2d 660 (1993).

According to the first approach, a party is adverse if an award has been made in that party's favor. In this case, the decision rendered by defendant was against plaintiff and in favor of DHFS, in that it relieved DHFS of liability for the unemployment compensation benefits that it would have been otherwise required to pay plaintiff.

Under the second approach, an adverse party is one whose interest is in conflict with the modification or reversal of the administrative decision sought by the action for judicial review. It is clear that DHFS's interests are in conflict with reversal or modification of the defendant's decision. Reversal or modification of the decision would result in the imposition of liability on DHFS for the payment of benefits to plaintiff.

Finally, according to the last approach, a party whose interests were adverse to the appellant during the administrative proceedings is adverse to the appellant in an action for judicial review. It is evident that DHFS's interests were adverse to the plaintiff's during the administrative proceedings. The caption of the Appeal Tribunal decision identifies the case as "In the matter of Robert E. Alexander, Appellant vs. **Department of Health & Family Services, Respondent**" (emphasis added). Plaintiff even recognized that his interests were in opposition to those of his former employer when he used the same caption in his petition for commission review. DHFS was also listed in the caption of the commission's decision.

This court is in agreement with defendant that regardless of which approach is followed, DHFS is an adverse party who should have been named a defendant in the action. An employer is an adverse party in unemployment compensation judicial review

proceedings and should therefore be named as a party defendant in the summons and complaint. Brandt, 166 Wis.2d at 630.

Plaintiff argues that he should be given the opportunity to correct any errors he made in initiating this action. He claims that while he may not have mentioned DHFS in the summons and complaint, the other documents delivered to the commission spoke clearly of DHFS as a defendant. The court is not persuaded by this argument. Defendant correctly points out that while some of the pages within the large number of documents contain references to DHFS as plaintiff's former employer, the references do not make DHFS a defendant in the proceeding. Since all of the documents predate the commencement of this judicial review proceeding, it is not possible that any of them could in any way express an intention that DHFS be made a defendant in the action. Moreover, because the documents were not filed and authenticated with the complaint, they cannot be considered part of the complaint.

Plaintiff further argues that his complaint should not be dismissed because defendant had the opportunity to reject the documents when first served. Plaintiff implies that defendant had some sort of obligation to immediately reject the documents upon learning that DHFS was not made a defendant. This court finds no merit in this argument. Defendant, like any other party served with documents attempting to initiate a legal action, has no such obligation. Rather, if a party believes that there is a defect in the documents, the only obligation it has is to bring an objection to the court's attention in a timely manner. This is precisely what defendant has done by bringing this motion.

As for plaintiff's request for an opportunity to correct his error, this court is in agreement with defendant that any attempt to amend the complaint at this point would be ineffectual. Under Wis. Stat. §102.23 and §108.09(7), Stats., an action for judicial review of a decision of the commission concerning unemployment compensation benefits **must** (emphasis added) be commenced within 30 days after the decision of the commission is mailed to the last-known address of the appealing party. When the statutory requirements to commence such review are not strictly complied with, the court never acquires competency to proceed, and when the appeal cannot be taken within the time limit, it is no longer possible for a court to acquire such competency. Because the statutory 30 day period within which to commence an action has expired, plaintiff's request to amend the complaint is denied.

It is worth noting that this court is in agreement with defendant that plaintiff's *pro se* status does not provide a legal or equitable basis for ignoring the defects in his complaint. This court is of the opinion that civil litigants who chose to represent themselves are bound by the same rules that apply to attorneys. "The right to self-representation is '[not] a license not to comply with relevant rules of procedural and substantive law.'" Waushara County v. Graf, 166 Wis.2d 442, 452, 480 N.W.2d 16 (1992), (quoting Faretta v. California, 422 U.S. 806, 834 n. 46 (1975)). Plaintiff was provided with notice of the necessary procedures in obtaining judicial review. These procedures were explained to him in plain language, and with the exception of his failure to name DHFS as a defendant, there is no evidence that he was unable to follow those

directions in all other respects. For these reasons, this court refuses to afford plaintiff any leniency due to his *pro se* status.

When a plaintiff fails to name his employer as a party defendant in unemployment compensation judicial review proceedings, the court in which the matter is pending lacks competency to proceed and the case must be dismissed. Brandt, 166 Wis.2d at 627. Plaintiff's failure to name DHFS as a defendant deprives DHFS of notice that an action has been commenced. In addition, it precludes this court from making a decision that would be considered binding on DHFS. For this reason, plaintiff's failure to name DHFS is not merely a "hypertechnical" deficiency. Instead, it is a lack of compliance with a statutory requirement. Id. at 634. Plaintiff's non-compliance with the statutory requirements, must therefore, result in the dismissal of his action with prejudice.

#### CONCLUSION

For the reasons stated above, the court finds that plaintiff has failed to comply with Wis. Stats. §102.23(1), in that he did not make a necessary adverse party a defendant in the action. Defendant's Motion to Dismiss is hereby GRANTED.



IT IS SO ORDERED.

Dated this 28 day of October, 1997.

BY THE COURT:

A handwritten signature in cursive script, reading "Robert A. DeChambeau", written over a horizontal line.

Honorable Robert A. DeChambeau  
Circuit Court, Branch 1