STATE OF WISCONSIN
CIRCUIT COURT
MILWAUKEE COUNTY

UNIVERSAL FOODS CORPORATION, a Wisconsin corporation,
Petitioner,

vs.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,
Respondent.

Case No. 90-CV-011-892
Decision No. 26197-B

NOTICE OF ENTRY OF DECISION

To:
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PLEASE TAKE NOTICE that a decision, of which a true and correct copy is hereto attached, was signed by the court on the 2nd day of May, 1991, and duly entered in the Circuit Court for Milwaukee County, Wisconsin, on the 2nd day of May, 1991.

Dated this 7th day of May, 1991.

JAMES E. DOYLE
Attorney General

/s/ David C. Rice
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DECISION

Petitioner Universal Foods Corporation seeks judicial review of a Wisconsin Employment Relations Commission decision dismissing its unfair labor practice complaint. The Wisconsin Employment Relations commission affirmed the decision of the Hearing Examiner that the conduct of Randy L. Seeman in pursuing a handicap discrimination complaint under the Wisconsin Fair Employment Act, Secs. 111.31-111-395, Wis. Stats., was not in violation of the Wisconsin Employment Peace Act, Secs. 111.01-111.19, Stats. For the reasons stated herein, the decision of the Commission is affirmed.

The facts are not in dispute. Randy L. Seeman (Seeman), an employee of petitioner Universal Foods Corporation (Universal) was in the bargaining unit represented by Teamsters Local No. 579. During February and March 1988, Seeman filed three grievances against Universal for violation of the collective bargaining agreement concerning overtime scheduling, wages for light duty work, and vacation and birthday pay. In accordance with the terms of the collective bargaining agreement, the grievances were processed to arbitration. On September 19, 1988, an arbitration award was issued which sustained Seeman's overtime grievances in part and denied the rest.

In March 1966, Seeman filed a handicap discrimination complaint with the Equal Rights Division (ERD) of the Department of Industry Labor and Human Relations alleging that Universal violated the Wisconsin Fair Employment Act (WFEA), 111.34, Wis. Stats. The facts underlying Seeman's ERD complaint were basically the same as those supporting his collective bargaining grievances. In the arbitration proceedings, Seeman claimed that Universal's conduct violated the collective bargaining agreement. In the ERD proceedings, Seeman claimed that Universal's conduct discriminated against him on the basis of handicap in violation of the WFEA.

Subsequently, Universal, responding to Seeman's ERD complaint, filed an unfair labor practice complaint with the Wisconsin Employment Relations Commission (Commission) alleging that Seeman violated the Wisconsin Employment Peace Act (WEPA), 111.06 (2) (c), Wis. Stats. Universal argued that Seeman's pursuit of the handicap discrimination claim constituted a refusal to accept the arbitrator's decision. The hearing examiner disagreed and dismissed Universal's complaint, finding that § 111. 06 (2) (c) prohibited an employee from refusing to accept the arbitration award as it pertains to the collective bargaining agreement, but does not preclude the institution of a separate statutory claim that was not and could not be resolved by arbitration. The examiner's decision was upheld by the Commission in August 1990.

The interpretation and application of statutes is a question of law and a court is not bound by an agency's conclusions of law. West Bend Educ. Ass'n v. WERC, 121 Wis.2d 1, 357 g.W.2d 534 (1984). Although deference is given to an agency's decision when it has made regular and repeated interpretations of a statute, the standard of review when the case is one of first impression is de novo. Local No. 695 v. LIRC, 154 Wis.2d 75, 452 N.W.2d 368 (1990). The issue in the instant case with respect to Sec. 111.06(2)(c), Wis. Stats., is one of first impression and is therefore reviewed de novo.

Sec. 111.06(2)(c) provides that it is an unfair labor practice for an employee to "violate the terms of a collective bargaining agreement (including an agreement to accept an arbitration award)." When a collective bargaining agreement provides for final and binding arbitration, this statute precludes an employee from pursuing a claim against his employer for violation of the terms of the agreement in a forum other than that of arbitration. To permit such conduct would be to subvert the arbitration process.

In this case there is no allegation that Seeman failed to comply with any portion of the arbitrator's award; Seeman accepted the dismissal of his grievances. Nevertheless, Universal contends that Seeman's conduct in pursuing the ERD complaint constitutes a failure to comply with Sec. 111.06(2)(c).

In the arbitration proceedings, the arbitrator did not consider, and indeed had no authority to consider, Seeman's rights under Sec. 111.34, Wis. Stats. The parties and the arbitrator framed the issues in terms of Universal's compliance with the collective bargaining agreement. The arbitration award spoke exclusively in terms of alleged violations of the collective bargaining agreement. Seeman's pursuit of his statutory rights may be reconciled with his acceptance of the arbitrator's decision. Seeman may concede that the arbitrator's interpretation of the employment agreement is correct, but nonetheless believe that the agreement itself, or the terms contained therein, violate Sec. 111.34.

To hold otherwise would be to foreclose an employee from asserting rights granted by the legislature. This court agrees with the Commissions's analysis that the legislature did not intend to deprive litigants of the opportunity to pursue statutory or common law rights before administrative agencies or courts merely because the propriety of the conduct in question has already been litigated in a contractual forum. Universal's interpretation of Sec. 111.06(2)(c) must be rejected.

This analysis is supported by federal authority relating to similar federal legislation. While such authority is not binding on this court, it is persuasive. In Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728 (1981), the employees pursued a grievance before a joint grievance committee for final and binding decision pursuant to the collective bargaining agreement. When their grievances were rejected by the committee, the employees filed a complaint in federal court alleging a violation of the Fair Labor Standards Act. The Supreme Court allowed the statutory claim based on the same facts, stating that "because the arbitrator is required to effectuate the intent of the parties, rather than to enforce the statute, he may issue a ruling that is inimical to the public policies underlying the [statute], thus depriving an employee of protected statutory rights." Id. at 744.

Even more persuasive is the decision in Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974). The collective bargaining agreement at issue in this case provided for final and binding arbitration and explicitly proscribed racial discrimination. After filing a grievance, the employee filed a race discrimination charge with the state administrative agency alleging a violation of Title VII of the Civil Rights Act of 1964. The Supreme Court allowed the employee to pursue this statutory claim despite the fact that the employee's grievance pending before the arbitrator was based upon the same facts. The Court stated that:

> In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective-bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence. And certainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums.

Id. at 49-50.

Seeman in proceeding to arbitration, was acting under rights spelled out by the employment agreement with Universal. In proceeding under the WFEA, Seeman seeks to assert his statutory rights which exist independently of the agreement. This court concludes that such action is not in violation of S 111. 06 (2) (c) .

The decision of the Examiner to deny Seeman's request for attorney's fees is also affirmed. The issue presented in this action is one of first impression and Universal's position has not been taken frivolously.

Seeman's pursuit of a handicap discrimination complaint against Universal is not in violation of Sec. 111.06(2) (c). The decision of the Commission dismissing Universal's unfair labor practice complaint is affirmed.

Dated: May 2, 1991

BY THE COURT:

/s/ Patricia D. McMahon
PATRICIA D. MCMAHON
CIRCUIT JUDGE