STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

ROBERT SLAMKA,

Petitioner,

v.

WERC and GENERAL HEATING AND AIRCONDITIONING, INC.

Respondents,

Case No. 19-CV-1704
RE: [WERC Dec. No. 37777-A]

FILED
JAN - 6 2020
DANE COUNTY CIRCUIT COURT

DECISION AND ORDER AFFIRMING WERC

UPON ALL OF THE FILINGS, CORRESPONDENCE AND PROCEEDINGS RELEVANT HERETO, THIS COURT FINDS THAT:

The claim of the petitioner before the WERC was appropriately dismissed, as it was preempted by federal law under the National Labor Relations Act (NLRA). [1] Here, the National Labor Relations Board (NLRB) had the ability, and actually did, exercise jurisdiction over the claim of the petitioner.

Since petitioner's claim does not involve a dispute arising out of an actual collective bargaining agreement, an exception to federal preemption, WERC was correct in the decision to dismiss petitioner's parallel claim before the state.

NOW, THEREFORE, BASED UPON THE FOREGOING: The decision of the WERC is, hereby, *AFFIRMED*. The claim of the petitioner is, therefore, *DENIED*.

This order is final for the purposes of appeal.

Dated this 9th Day of January 2020,

BY THE COURT:

Hon. William E. Hanrahan
Judge, Dane County Circuit Court

[1] Citation omitted

FILED
01-13-2020
CIRCUIT COURT
DANE COUNTY, WI
2019CV000863

BY THE COURT:

DATE SIGNED: January 13, 2020

Electronically signed by Rhonda L. Lanford
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 16

STATE OF WISCONSIN
DEPARTMENT OF
AGRICULTURE, TRADE, AND
CONSUMER PROTECTION,
And DEPARTMENT OF
ADMINISTRATION,

Petitioners,

v.

Case No.: 19CV863
Case Code: 30607

WISCONSIN EMPLOYMENT
RELATIONS COMMISSION,

Respondent.

CLAIRE FRIED,

Petitioner,

v.

Case No.: 19CV871
Case Code: 30607

WISCONSIN EMPLOYMENT
RELATIONS COMMISSION,

Respondent.

DECISION AND ORDER

INTRODUCTION

Petitioners State of Wisconsin Department of Agriculture, Trade, and Consumer Protection and Department of Administration (collectively "DATCP") and Claire Fried ("Fried") separately petitioned the Court seeking review of a Wisconsin Employment Relations Commission ("WERC") decision. The Court consolidated the cases into one action with four issues to review.

BACKGROUND

DATCP informed Fried in March 2017 that her position was in danger of elimination and that layoff was a possibility. (R. 63). Fried inquired of her options to avoid layoff. Initially, DATCP informed Fried that she would have displacement rights as an option to avoid layoff. (R. 138). DATCP later informed Fried that she did not have

displacement rights. *Id.* On October 4, 2017, DATCP officially notified Fried of her layoff effective November 8, 2017. (R. 32-33).

On November 16, 2017, Fried filed a grievance alleging her layoff was without just cause and violated certain provisions of Wis. Admin. Code Ch. ER-MRS 22. (R. 23-27). On November 21, 2017, DOA denied the grievance stating that the 2015 Wisconsin Act 150 did away with displacement rights. (R. 5). DOA further stated that since the administrative code conflicted with statutory law, the administrative code was no longer valid. *Id.*

On December 4, 2017, Fried appealed her layoff to WERC. (R. 1-4). On January 11, 2018, Fried limited her appeal to the single issue of whether she possessed displacement rights under Wis. Admin. Code § 22.08(3) at the time of her layoff. (R. 61).

On March 30, 2018, WERC issued an interim decision and order stating Fried did have displacement rights under Wis. Admin. Code § ER-MRS 22.08(3) and that DATCP did not have just cause to lay her off without allowing Fried to exercise her displacement rights. (R. 116-119). WERC ordered DATCP to extend displacement rights to Fried. (R. 117). WERC denied Fried's request for attorney fees and costs due to a finding that the DATCP's position was "substantially justified" within the meaning of Wis. Stat. § 227.485(2)(f). *Id.*

On June 13, 2018, WERC conducted a hearing regarding the appropriate remedy for DATCP's unjust layoff of Fried. (R. 120, 128-211). Fried testified at the hearing regarding the different positions and pay ranges she has held while working for the State. (R. 133-173). Fried began working for the State in 2000, acquiring permanent status in

class in three positions (clerical assistant, residential care supervisor, and office associate). *Id.* The pay ranges were 02-08, 81-04, and 02-09 with counterpart pay ranges of 81-05, 81-05, and 02-12 through 02-15 respectively. *Id.*

On September 13, 2018, WERC issued a proposed interim decision and order based off the June 13 remedy hearing. (R. 298-305). WERC determined the following: (1) DATCP failed to extend displacement rights to Fried following WERC's March 20, 2018 Interim Decision and Order; (2) DATCP had positions that Fried could have exercised displacement rights in the 81-05 and 02-12 to 02-15 pay ranges; (3) that exercising displacement rights would not guarantee Fried a position, rather the rights allowed Fried to be placed in a layoff pool from which the person least qualified, based primarily on job performance, to do the job would be laid off[1]; (4) that DATCP allow Fried to exercise displacement rights; and (5) that DATCP must notify WERC and Fried if they would comply with the order. (R. 398-305).

WERC ruled that 2015 Wisconsin Act 150 was silent regarding existing rules, therefore the displacement rules provided for in Wis. Admin. Code § ER-MRS 22.08(3)(a) remained in place. (R. 301-302). WERC found that Wis. Admin. Code §22.08(3)(a) provided displacement rights to pay ranges, and their counterparts, in which Fried previously had permanent status in class. (R. 304). WERC stated there were positions in DATCP in all the counterpart pay ranges. *Id.*

[1] Based off the amendment of Wis. Stat. § 230.34(2)(a) by 2015 Wisconsin Act 150, §76. The amendment added specific language stating job performance was to be the first consideration when determining whom to layoff.

On September 28, 2018, DATCP notified WERC that it did not intend to comply with the proposed order. (R. 306-11). DATCP argued that Wis. Admin. Code §22.08(3) did not survive the enactment of 2015 Wisconsin Act 150. (R. 306-09). It further argued that if § 22.08(3) survived, that WERC erred in its ruling regarding what positions were available to exercise displacement rights to. (R. 308-11). DATCP believes that an employee can only displace into a position in a classification in which an employee previously held permanent status in class. *Id.*

On October 3, 2018, Fried filed also filed objections to the proposed interim decision and order. (R. 427-30). Fried put forward two arguments: (1) WERC erred in excluding her current position from the positions WERC said Wis. Admin. Code § ER-MRS 22.08(3)(a)1.a pertained to and (2) WERC was incorrect in its interpretation that job performance was the standard for determining who was to be displaced, as opposed to seniority being the determining factor. (R. 427-31).

On October 15, 2018, Fried filed a petition for attorney's fees and costs under Wis. Stat. 227.485(3). (R. 432-37). Fried argued that DATCP was not "substantially justified" in its positions post WERC's March 30, 2018, interim decision and order. Specifically, DATCP made no effort to settle, raised a never before articulated interpretation of Wis. Admin. Code § ER-MRS 22.08, failed to work cooperatively or to stipulate issues, did not allow Fried to exercise displacement rights, and she was the prevailing party. *Id.* Fried also asked WERC to change its March 30, 2018 order denying her attorney's fees and costs on the interpretation of Wis. Stat. § 230.34(2) issue. (R. 436-37).

On November 29, 2018, WERC issued a proposed decision and order regarding Fried's petition. (R. 487-91). WERC upheld its previous decision that DATCP's interpretation of Wis. Stat. § 230.34(2) was substantially justified and therefore attorney's fees and costs on that issue were appropriately denied. *Id.* WERC also concluded that DATCP was not substantially justified in its position that no positions were available for Fried to exercise displacement rights into. *Id.* WERC found that Wis. Stat. § 230.34(2)(a) required layoff evaluations to primarily focus on job performance, not seniority. *Id.* Finally, the proposed order awarded Fried $12,646.93 in attorney's fees and costs. (R. 488, 491)

On December 7, 2018, DATCP filed a written objection to WERC's November 29th proposed decision and order. (R. 493-505). Fried filed a reply brief in support on December 17, 2018. (R. 506-513). WERC issued another decision on December 21, 2018, incorporating all of their previous rulings, as well as ordering DATCP to permit Fried to exercise her displacement rights pursuant to their ruling. WERC further ordered $14, 601.19 in attorney's fees and costs to Fried. (R. 516).

Fried filed a petition under Wis. Stat. § 227.49 on January 4, 2019. (R. 524-26). Fried sought clarification or rehearing regarding the appropriate remedies owed to her. *Id.* WERC issued an order granting rehearing and directed the parties to submit written arguments regarding the appropriate remedy if either Fried did or did not regain employment through exercising displacement rights. (R. 530-32).

WERC issued its final decision and order on February 26, 2019. (R. 557-68). WERC's final order adopted its December 21, 2018 decision, increased Fried's award of

attorney's fees to reflect the additional work required since December 21, and added two provisions regarding remedies. *Id.* The new provisions stated that if Fried became re-employed through the exercise of displacement rights then DATCP must make her whole in all respects for the period between November 8, 2017 and the date of employment, including wages, benefits, seniority, and out-of-pocket expenses incurred as a consequence of her layoff. (R. 560). If Fried did not become re-employed through the exercise of displacement rights then the remedy was the same, except the dates Fried was to be made whole for were March 30, 2018 and the date the displacement process is completed. *Id.*

STANDARD OF REVIEW

Administrative decisions that affect the substantial interests of a person are subject to judicial review. Wis. Stat. § 227.52. The review is limited to the record. Wis. Stat. § 227.57(1). If there is substantial evidence to support the agency's decision, it must be affirmed. *State ex. rel. Whiting v. Kolb*, 158 Wis. 2d 226, 233, 461 N.W.2d 816 (Ct. App. 1990); Wis. Stat. § 227.57.

The court shall accord no deference to an agency's interpretation of law. Wis. Stat. § 227.57(11). The court will independently review an agency's interpretation of a statute while giving "'due weight' to the experience, technical competence, and specialized knowledge of the administrative agency." *Tetra Tech EC, Inc. v. Wisc. Dept. of Revenue*, 2018 WI 75, ¶108, 382 Wis. 2d 496, 914 N.W.2d 21.

DISCUSSION

There are four distinct administrative decisions that the parties have asked the court to review: (1) whether a right of displacement existed at the time Fried was laid off; (2) whether Fried had displacement rights as to certain DATCP positions; (3) whether Fried was entitled to fees and costs under Wis. Stat. § 227.485(3); and (4) whether WERC's ordered remedies were appropriate. If the court determines that Fried had no right of displacement at the time of layoff, then the rest of the issues are moot.

Whether a right of displacement existed at the time of Fried's layoff is a matter of statutory interpretation. Statutory interpretation begins with the language of the statute. *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. If the meaning of the statute is plain, the inquiry ends. *Id.* Language is given its common, ordinary, and accepted meaning. *Id.* Context and structure are important to meaning. *Id.* ¶ 46. The court interprets the statutory language in the context is used, in relation to surrounding or closely-related statutes, and to avoid absurd or unreasonable results. *Id.* If the statutory language is unambiguous, there is no need to consult extrinsic sources such as legislative history. *Id.*

If a statute can be understood by reasonably well-informed persons in two or more senses, then it is ambiguous and further evaluation is needed. *Id.* ¶ 47. If ambiguity exists, a court turns to extrinsic sources, typically items of legislative history. *Id.* ¶ 50.

The statute in question is Wis. Stat. § 230.34(2)(b), which reads: "The director shall promulgate rules governing layoffs and appeals therefrom and alternative procedures in lieu of layoff to include voluntary and involuntary demotion, as well as the

subsequent employee eligibility for reinstatement." This is how the statute looked at the time of Fried's layoff. Notice that displacement rights are not mentioned. However, there was an active administrative code, Wis. Admin. Code § ER-MRS 22.08, that specifically states displacement is an option available to someone who has been laid off.

DATCP contends that since Wis. Stat. § 230.34(2)(b) does not mention displacement rights that the administrative code is in conflict with the statute and therefore the statute prevails. DATCP Initial Br.; *Milwaukee Transport Servs. v. DWD*, 2001 WI App 40, ¶ 9, 241 Wis. 2d 336, 624 N.W.2d 895. Fried argues that Wis. Stat. § 230.34(2)(b) as written neither authorizes displacement rights, nor removes them. Fried Reply Br. and Pet. at 7. WERC meanwhile, interpreted the statute as being silent as to what was to happen to prior administrative rules regarding layoff rights. Resulting in ER-MRS 22-08 being valid until amended or repealed. WERC Letter Br. at 1-2.

The parties involved had different views of the statute, but that is not dispositive of ambiguity. The Court will look to the language and context of Wis. Stat. § 230.34(2)(b) to interpret it and if there is ambiguity then the Court will turn to extrinsic sources.

The pivotal language of the statute are the words "to include". Do the words "to include" limit the options available in lieu of layoff to the options specifically put into words by the legislature? Or, do the words "to include" act as a term of enlargement and the options listed in the statute are just the baseline and the director can promulgate whatever rules he/she finds necessary?

Generally, the word "includes" is to be given an expansive meaning, indicating that which follows is but a part of the whole. *Milwaukee Gas Light Co. v. Dept. of Taxation*, 23 Wis. 2d 195, 203 & n. 2, 127 N.W.2d 64 (1964). However, under the doctrine of expressio unius est exclusio alterius—"the expression of one thing excludes another"—courts may read "includes" as a term of limitation or enumeration, so that a statute encompasses only those provisions or exceptions specifically listed. *State v. Delaney*, 2003 WI 9, ¶ 22, 259 Wis. 2d 77, 658 N.W.2d 416. This rule applies only where there is some evidence that the legislature intended it to apply. *Pritchard v. Madison Metro. Sch. Dist.*, 2001 WI App 62, ¶ 13, 242 Wis. 2d 301, 625 N.W.2d 613.

By adding the word "to" in front of "include" the legislature has created some ambiguity. The statute can read as both a limitation, via expressio unius est exclusio alterius, as well as simply providing two examples of options in lieu of layoff, not a complete list. Since ambiguity exists the Court turns to extrinsic sources to help determine the legislature's intent.

The parties' briefs and the multitude of decisions WERC issued throughout the long procedural history of this case all use legislative history to convey their arguments and decisions. This is because Wis. Stat. § 230.34(2)(b) was amended on July 1, 2016. The prior version of the statute read as follows: "The director shall promulgate rules governing layoffs and appeals therefrom and alternative procedures in lieu of layoff to include voluntary and involuntary demotion *and the exercise of displacing right to a comparable or lower class*, as well as the subsequent employee right of restoration or eligibility for reinstatement." (emphasis added). The pre July 1, 2016 version of the

statute specifically authorizes displacement rights as an alternative to layoff. The amended statute, which was the law at the time of Fried's layoff, removed the displacement right language.

The removal of the displacement right language points towards a legislative intent to remove the option of displacement rights after layoff. Even WERC states that "the words deleted by the statutory amendment clearly convey a legislative intent to revoke the Director's authority to promulgate rules that provide displacement rights." WERC Letter Br. at 2. WERC goes on to say that it is unclear whether the Legislature intended for Wis. Admin. Code § ER-MRS 22.08(3) to be in effect until repealed and ruled that it was in effect. *Id.*

Fried argues that if the Legislature's intent had been to repeal displacement rights then they had a number of options to do so. Fried Reply Br. and Pet. at 8. The Legislature could have used Wis. Stat. § 227.265 to signal that displacement rights had specifically been repealed. *Id.* Also, Wis. Stat. § 227.24 allows an administrative agency to promulgate emergency regulations. *Id.* at 9. If DATCP believed displacement rights were no more then it had the option to make an emergency rule. *Id.* Fried contends that since the Legislature did not utilize the above options ER-MRS 22.08 remained in full effect. *Id.*

If the Legislature thought that removing the displacement rights language from Wis. Stat. § 230.34(2)(b) was enough to repeal then it would not have considered using one of the options Fried listed. The only way for the Legislature to think that removing the language from the statute was enough is if it believed that the options listed in the

statute were the only options the director could promulgate rules for. However, "It is the *law* that governs, not the intent of the lawgiver.... Men may intend what they will; but it is only the laws that they enact which bind us." *State ex rel. Kalal*, 2004 WI 58, ¶ 52, 271 Wis. 2d 633, 681 N.W.2d 110 (citation omitted).

An examination of ER-MRS 22.08's history shows that the director has treated the list of options available in lieu of layoff listed in Wis. Stat. 230.34(2)(b) as an exhaustive list. This suggests a reading of Wis. Stat. 230.34(2)(b) to be under the guidance of expressio unius est exclusio alterius. Therefore, when the Legislature amended the statute it was doing more than simply removing language. It intended, and succeeded, in repealing displacement rights as an option in lieu of layoff.

In a Wisconsin Legislative Council Act Memo, the Legislature states explicitly that "displacement (commonly known as 'bumping') rights are eliminated." R. 96. The Court, while not relying heavily on legislative history such as this document, finds the Memo as further persuasive evidence that Wis. Stat. 230.34(2)(b) provides an exhaustive list of acceptable options in lieu of layoff.

<u>CONCLUSION</u>

Wis. Stat. § 230.34(2)(b)'s language is ambiguous as to whether or not the statute lists the only options available in lieu of layoff or whether it lists two specific options that must be available on top of possible other options. By consulting the legislative history of both Wis. Stat. § 230.34(2)(b) and ER-MRS 22.08 this Court finds that expressio unius est exclusio alterius applies. Wis. Stat. § 230.34(2)(b) as written when Fried was laid off

no longer allowed displacement; therefore ER-MRS 22.08(3) was no longer valid and no right of displacement existed.

IT IS HEREBY ORDERED THAT WERC's decision that displacement rights existed at the time of layoff is **REVERSED**. Due to the reversal, all other issues are moot.