STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

WISCONSIN DEPARTMENT OF EMPLOYE TRUST FUNDS, GROUP INSURANCE BUREAU, and WISCONSIN DEPARTMENT OF EMPLOYE TRUST FUNDS, GROUP INSURANCE BOARD, Petitioners, vs. WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS (Equal Rights Division), Respondent.	#141-458 MEMORANDUM DECISION

This is an appeal brought pursuant to sec. 227.15, Wis. Stats., by the petitioners, the Group Insurance Bureau of the Wisconsin Department of Employe Trust Funds (hereafter Bureau) and the Group Insurance Board of the Wisconsin Department of Employe Trust Funds (hereafter Board) against the respondent Equal Rights Division of the Wisconsin Department of Industry, Labor and Human Relations (hereafter DILHR). Petitioners seek the reversal of a decision issued by respondent on January 2, 1974, in which the differential treatment accorded uncomplicated pregnancies under the income continuation insurance plan administered by the Bureau pursuant to Ch. 40, subch. II, Wis. Stats., and Grp Ch. 25, Wis. Admin. Code, was held to constitute discrimination because of sex in terms, conditions and privileges of employment in violation of secs. 111.32 (5)(g)(1) and 111.325, Wis. Stats., as interpreted in the DILHR Guidelines on Employment Policies Relating to Pregnancy and Childbirth.

A multitude of complex issues are presented by the parties on this review. We are unable to reach the merits of the petitioners' claims as we feel that the decision by DILHR fails on jurisdictional and procedural grounds.

Numerous decisions by the Wisconsin Supreme Court have reiterated the rule that the state and its agencies are not governed by statutory language directed at private parties, however general and comprehensive it may be, unless the intention to include them is plainly expressed or must necessarily be implied. State v. Milwaukee (1911), 145 Wis. 131; Door County v. Plumbers, etc., Local No. 298 (1958), 4 Wis. 2d 142. The Wisconsin Fair Employment Act, set forth as

Ch. 111, subch. II, Wis. Stats., does not plainly express the intention of the legislature to include the state itself within the purview of the legislation. The omission of both the state as an employer and its administrative arms as facilitators of the employer-employe relationship is so striking as to discourage their inclusion by implication. We are further discouraged from reading the state into the scope of the act in view of the clarity and specificity with which other legislation affecting DILHR has expressly included the state, as sec. 101.01(2), Wis. Stats., exemplifies.

An additional jurisdictional hurdle which we feel that DILHR is unable to clear concerns the validity of the DILHR decision and order as issued against another agency of the state. The Wisconsin Supreme Court, in State ex rel. Farrell v. Schubert (1971), 52 Wis. 2d 351, has stated:

> "'Administrative agencies have only such powers as are expressly granted to them or necessarily implied and any power sought to be exercised must be found within the four corners of the statute under which the agency proceeds.' (citing cases)" Id. at 357.

As a corollary to the above rule, the court set forth the proposition that "any reasonable doubt of the existence of an implied power of an administrative body should be resolved against the exercise of such authority." Id. at 358.

We are unable to conclude with the requisite degree of certainty that the legislature intended to vest in DILHR the power to invade the legislatively directed rulemaking processes of other state agencies.

The procedural propriety of the DILHR decision is also open to question. The conclusions of law prepared by the hearing examiner and adopted by the Commission are ambiguous as to the weight accorded to the DILHR Guidelines on Employment Policies Relating to Pregnancy and Childbirth. Respondents concede that the guidelines lack binding force. (Brief, at 24.) As the guidelines do not represent rules in that their adoption by DILHR does not conform to the procedural requirements set forth in Ch. 227, Wis. Stats., a decision rendered pursuant to them cannot be accorded validity. The guidelines are not necessarily the sole permissible interpretation of secs. 111.32(5)(g)(1) and 111.325, Wis. Stats.; that competing interpretations of those statutes might exist is supported analogously by the recent decision of the Supreme Court in Geduldig v. Aiello (1974), 42 LW 4905. The possibility of competing interpretations buttresses the need for properly adopted rules, a requirement unmet here, which no amount of

merit attaching to the current guidelines can be permitted to circumvent. The stated reliance by DILHR upon the guidelines in formulating its conclusions of law constitutes the utilization of unlawful procedure on which the decision must further be reversed.

For the foregoing reasons related to jurisdiction, statutory authority, and procedure, the decision of respondent is reversed. Counsel will prepare an appropriate judgment for the court's signature.

Dated: August 30, 1974.

BY THE COURT:

/s/ William C. Sachtjen
William C. Sachtjen, Judge

cc Wilcox, Samuelsen