STATE OF WISCONSIN PERSONNEL COMMISSION

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NATURE OF THE CASE

The complaints in these cases were investigated and an Initial Determination was issued by the equal rights officer. Among these findings in the Initial Determination is a finding that the complainants were discriminated against by virtue of retaliation in response to their opposition to respondent's alleged practices of discrimination based on national origin. Respondent has moved to dismiss on the ground that the Fair Employment Act does not confer subject-matter jurisdiction over this type of retaliation. Complainants oppose the motion to dismiss for the reasons stated herein, and is based on briefs submitted by the parties.

OPINION

The dispute between the parties is purely one of law. The arguments are based on the subtleties of statutory construction. Respondent argues that there is no logical reason to expect the Wisconsin Fair Employment Act (Act), §111.31-111.37, Wis. Stats., to prohibit every type of discrimination or retaliation. The language of the Act is clear and unequivocal, and contains no implied or express prohibition of retaliation for opposing discrimination on the basis of national origin. Respondent cites the types of discrimination specifically prohibited and applies one of the many rules of statutory construction to argue

that the legislature intended to prohibit only those types of discrimination which are expressly mentioned, and intended to exclude from the scope of the statute those types of discrimination not expressly mentioned. To support this point, respondent cites exclusions from coverage of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e (1974) as well as judicial constructions of 42 U.S.C. Sec. 1981 (1974). Respondent also points to §111.32(5)(b) and (g), Wis. Stats., which prohibit retaliation against persons who oppose age or sex discrimination. If these two types of retaliation are expressly prohibited, any implied prohibition of retaliation against persons who oppose national origin discrimination would render §111.32(5)(b) and (g) redundant and meaningless according to respondent.

Neither specific language nor judicial interpretation of federal civil rights statutes is binding in this case with respect to the interpretation of state statute. Federal sources may be persuasive by analogy but state law on the subject provides sufficient basis for deciding the issue. There are many rules of statutory construction, the application of some of which can lead to mutually exclusive results. The Wisconsin Supreme Court has recognized the need for moderation rather than for strict application of the rules. There is sufficient ambiguity in the statutory language to require interpretation of its meaning. The Act "must be liberally construed to effect its broad purpose ...." American Motors Corp. v. Department of Industry, Labor, and Human Relations, 93 Wis. 2d 14, 26-27 (Wis. App. 1979). This language is but one of the most recent statements in the long line of Wisconsin cases which

have held that the "cardinal rule" of statutory construction is to further the purpose of the entire statute. Student Association of University of Wisconsin-Milwaukee v. Baum, 74 Wis. 2d 283, 294-295 (1976); Milwaukee County v. DILHR, 80 Wis. 2d 445, 453 (1977). The purpose of the statute is set out in §111.31. Wis. Stats.[1]

Respondent's arguments fail for several reasons to convince the Commission to grant its motion to dismiss. First, the policy statement of the Act, as set out in §111.31, Wis. Stats. specifically

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[1] 111.31 Declaration of Policy. (1) The practice of denying employment and other opportunities to, and discriminating against, properly qualified persons by reason of their age, race, creed, color, handicap, sex, national origin, ancestry, arrest record or conviction record, is likely to foment domestic strife and unrest, and substantially and adversely affect the general welfare of a state by depriving it of the fullest utilization of its capacities for production. The denial by some employers, licensing agencies and labor unions of employment opportunities to such persons solely because of their age, race, creed, color, handicap, sex, national origin, ancestry, arrest record or conviction record, and discrimination against them in employment, tends to deprive the victims of the earnings which are necessary to maintain a just and decent standard of living, thereby committing grave injury to them.

(2) It is believed by many students of the problem that protection by law of the rights of all people to obtain gainful employment, and other privileges free from discrimination because of age, race, creed, color, handicap, sex, national origin or ancestry, would remove certain recognized sources of strife and unrest, and encourage the full utilization of the productive resources of the state to benefit of the state, the family and to all the people of the state.

(3) In the interpretation and application of this subchapter, and otherwise, it is declared to be the public policy of the state to encourage and foster to the fullest extent practicable the employment of all properly qualified persons regardless of their age, race, creed, color, handicap, sex, national origin or ancestry. This subchapter shall be liberally construed for the accomplishment of this purpose.

authorizes a liberal construction of the Act. Second, the Act is a remedial statute and is entitled to liberal construction even without specific language in the declaration of policy. Third, the rule, expressio unius est exclusio alterius is to be applied only where there is "some evidence the legislative intended its application lest it prevail as a rule of construction despite the reason for and the spirit of the enactment." Columbia Hospital Association v. City of Milwaukee, 35 Wis. 2d 660, 669 (1967); State v. Engler, 80 Wis. 2d 402, 408 (1977). The history of the Act shows no specific evidence of any intent of the legislature. The Act has been amended in twelve separate chapters of the Session Laws of Wisconsin between 1945 and 1977.[2] The two subsections cited by respondent, §111.32(5)(b) and (g), Wis. Stats., were created in 1959 and 1967, respectively.[3] There is no clear evidence of intent in the legislative history to limit protection from retaliation to these two subsections. In the entire legislative history of the Act, there is no more cogent evidence of the intent of the legislature than appears in the declaration of policy in §111.31, Wis. Stats. At least one commentator has remarked

> Construction of the act is tedious because of the innumerable amendments to the original 1945 statute-the provisions are frequently redundant and unexpectedly located. Therefore, the traditional maxims of statutory construction cannot be applied to the statute as if it were a coherent whole passed by one legislature with full consideration of

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[2]The Act was amended in: 1959 Wis. Laws, ch. 149; 1961 Wis. Laws, ch. 529; 1961-62 Wis. Laws, ch. 628; 1967 Wis. Laws, ch. 234; 1973 Wis. Laws, ch. 268; 1975 Wis. Laws, ch. 31, ch. 94, ch. 275; 1977 Wis. Laws, ch. 196, ch. 418.

[3]The subsections were created by 1959 Wis. Laws, ch. 149, and 1967 Wis. Laws, ch. 234.

the interrelationship of the parts.[4]

In the absence of clear intent to limit the scope of protection from retaliation, construction of the statutory language should not defeat the manifest purposes of the Act.[5]

For all the reasons discussed above, respondent's motion to dismiss is rejected.

ORDER

Respondent's motion to dismiss is hereby denied.

Dated: July 28, 1980.

STATE PERSONNEL COMMISSION

Charlotte M. Higbee
Chairperson

Gordon H. Brehm
Commissioner

AR:jmg

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[4]Comment, Wisconsin Fair Employment Act, 1975, Wis. L. Rev. 696, 699 (1975).

[5]Milwaukee County v. DILHR, supra.

CONCURRING OPINION

I concur with the result but for reasons other than expressed in the majority opinion. Respondent's argument that no mention whatsoever, either express or implied, is made in §111.32(5)(a), Wis. Stats., of national origin discrimination by virtue of retaliation is well taken. If the statutory construction rule of expressio unius est exclusio alterius is applied it may be reasonable to conclude that the legislation did not intend to proscribe retaliatory discrimination with respect to national origin. However, I do not agree in this instance.

The current Wisconsin Fair Employment Act is the result of patchwork legislation over the last thirty years. When considering the whole legislative history of the act and the circumstances surrounding its enactment application of the express mention implied exclusion rule would lead to an absurd result. It is unreasonable to believe that the legislature intended to exclude the retaliation clause from the general section of prohibited forms of discrimination.

Dated July 28, 1980 STATE PERSONNEL COMMISSION

Donald R. Murphy
Commissioner

DRM:mew