

STATE OF WISCONSIN

PERSONNEL COMMISSION

* * * * *

KARSTEN R. H. SCHILLING,
Complainant,

v.

Chancellor, UNIVERSITY OF
WISCONSIN - MADISON,
Respondent.

Case No. 90-0064-PC-ER

* * * * *

KARSTEN R. H. SCHILLING,
Appellant,

v.

President, UNIVERSITY OF
WISCONSIN SYSTEM (Madison),
Respondent.

Case No. 90-0248-PC

* * * * *

FINAL
DECISION

This matter is before the Commission with respect to the question of respondent's liability for costs. A proposed interim decision and order pursuant to §227.485(5), Stats., was served on the parties on November 7, 1991. Complainant filed a petition for fees and costs on December 3, 1991. Respondent failed to file a response thereto within 15 working days as required by §227.485(5), Stats. Subsequently, the parties engaged in negotiations and reached certain stipulations regarding remedies, and also have stipulated to the amount of attorney's fees, if they are awarded.

This matter involves consolidated cases. Case No. 90-0248-PC is an appeal pursuant to §230.44(1)(c), Stats., of a discharge. Case No. 90-0064-PC-ER is a Fair Employment Act (FEA) complaint of handicap discrimination pursuant to §§230.45(1)(b), 111.375(2), Stats. Therefore, there are two potential bases for an award. First, §227.485(2), Stats., provides for an award of costs in certain

cases unless it is determined that "the state agency which is the losing party was substantially justified in taking its position or that special circumstances exist that would make the award unjust." Second, in Watkins v. Labor and Industry Review Commission, 117 Wis. 2d 753, 345 N.W. 2d 482 (1984), the Wisconsin Supreme Court held that the FEA provides authority for the award of reasonable attorney's fees to a prevailing complainant.

Respondent contends that the enactment of §227.485, Stats., in effect pre-empts the authority to award fees under Watkins and that the process and standard set forth in §227.485 now provides the exclusive means for the award of fees in an FEA case. When the EAJA was enacted in 1985, there were a number of fee shifting provisions in force, including the implied provision the Supreme Court concluded was in the FEA. The Commission is unaware of any precedent for the proposition that the EAJA has been intended to supersede existing provisions. Rather, the legislative intent behind the EAJA apparently was to provide a means for parties to proceedings involving state agencies that were not already subject to some form of specific fee shifting provision to recoup their costs under certain circumstances. In Watkins, the Court discussed the particular purposes under the FEA that would be served by interpreting the FEA as providing authority for the recovery of attorney's fees. This would permit the complainant to be "made whole," would discourage discriminatory practices in employment by enabling complainants to act as "private attorney[s] general," would discourage employers from discriminating, and would enable complainants to be represented by counsel and thus "fully enforce and give meaning to the rights created by the Act." 117 Wis. 2d at 764-65. All of these purposes would be undermined if the EAJA were applied in a way that limited the award of attorney's fees to cases where the employer had no reasonable basis in law and fact for its action, albeit it violated the FEA.

Because the Commission concludes that complainant is entitled to reasonable attorney's fees under the FEA, it will not address the issue of whether respondent's failure to have responded to complainant's petition for fees within the period set forth under §227.485(5), Stats., constitutes an effective default on the matter of costs, as complainant contends. The Commission will adopt the parties stipulations on remedies and the amount of fees and enters the following:

ORDER

1. Respondent shall pay \$21,864.35 to the firm of Axley Brynelson as complainant's reasonable legal fees and expenses.

2. Respondent shall restore complainant's retirement account with the Wisconsin Retirement System to the amount the account would have been if complainant had not been terminated and if complainant had not withdrawn any amounts therefrom. Such restoration will include \$16,384.88 in contributions plus interest earnings: \$11,286.74, plus interest earned for account holders over the period of June 4, 1990, to the present; and the \$5,098.14 in employer and employee contributions that would have been made to complainant from 1990 to the present plus interest earnings from the date these contributions would have been made

3. Respondent will credit complainant's vacation account with eighty hours and his sick leave account with one hundred seventy-six hours.

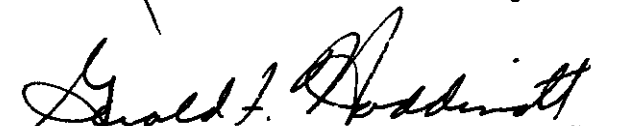
4. Respondent will pay complainant \$37,458.65 plus interest at 12 percent per annum starting from April 23, 1992.

Dated: October 1, 1992 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

AJT/gdt/2


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner

Parties:

Karsten Schilling
165 Rodney Court
Madison WI 53715

Katharine Lyall
President, UW
1730 Van Hise Hall
1220 Linden Dr
Madison WI 53706

Donna Shalala
Chancellor UW Madison
158 Bascom Hall
500 Lincoln Dr
Madison WI 53706

**NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION**

Petition for Rehearing. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.