STATE OF WISCONSIN CIRCUIT COURT BRANCH 8 DANE COUNTY

WISCONSIN DEPARTMENT OF TRANSPORTATION,

Petitioner,

vs. CASE NO. **90-CV-4982**

WISCONSIN PERSONNEL COMMISSION,

Respondent.

DECISION AND ORDER

PROCEDURAL POSTURE

This is before me on petition for review of an order of the Wisconsin Personnel Commission (WPC) directing the Department of Transportation (DOT) to pay costs for discovery motions filed by a complainant in an action under the Wisconsin Fair Employment Act (WFEA). For the reasons given below, I affirm WPC's order.

STANDARD OF REVIEW

This matter involves review of an agency's construction of statutes and therefore presents questions of law, which are reviewable ab initio. Boynton Cab Co. v. Department of Industry, Labor & Human Relations, 96 Wis. 2d 396, 405, 291 N.W. 2d 850 (1980); Wisconsin Department of Revenue v. Milwaukee Brewers Baseball Club, 111 Wis. 2d 571, 577, 331 N.W. 2d 383 (1983). However, courts shall accord due weight to agencies' experience and specialized knowledge. Section 227.57(10), Stats. In

particular, courts "frequently will defer to the interpretation and application of a statute by the agency charged with its administration." Montgomery Ward & Co., Inc. v. Wisconsin Department of Revenue, 142 Wis. 2d 772, 775-6, 419 N.W. 2d 348 (1987):

> "In these situations, [reviewing courts] will sustain the agency's conclusions of law if they are reasonable, even though an alternative view may be equally reasonable."

Id., at 776; However, where the question raised is one of first impression, "[reviewing courts] will give the agency's interpretation only due weight . . ."

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"Statutes relating to the same subject matter must be construed together. . . . Apparently conflicting provisions should be harmonized to give effect to the leading idea behind the statute." Pulaski State Bank v. Kalbe, 122 Wis. 2d 663, 665, 364 N.W. 2d 162 (1985). The Wisconsin Supreme Court "has consistently stated that the spirit or intention of a statute should govern over the literal or technical meaning of the language used." City of Madison v. Town of Fitchburg, 112 Wis. 2d 224, 236, 332 N.W. 2d 782 (1983).

In this case, the WFEA contains a clear statement of the intention by the legislature that the public policy of the state is to encourage and foster employment of all properly qualified individuals. Section 111.31(3), Stats. The legislature further

provides that: "[t]his subchapter shall be liberally construed for the accomplishment of this purpose." Id.

The statute defines employer to include the state and each agency of the state, provides that the subchapter applies to each agency of the state, and provides for Section 227 review of decisions of WPC. Sections 111.32(6)(a), 111.375(2), Stats. Review under Section 227 provides rights to parties, under section 804, which include the right to obtain reasonable expenses from the party against whom a discovery motion has been made and granted. Section 227.45(7)., Stats.

The DOT advances the proposition that:

> "costs may not be taxed against the state or an administrative agency of the state unless expressly authorized by statute, . . . [and] that statutes allowing taxation of costs are to be strictly construed."

Martineau v. State Conservation Commission, 54 Wis 2d 76, 79-80, 194 N.W. 2d 664 (1971). More recent cases, however, examine policy issues pertinent to this case that were not addressed in Martineau.

Regarding statutory construction, taxation of costs against the sovereign is, indeed, in derogation of common law and such statutes should be construed strictly:

> "Strict construction, however, is a rule of construction only, not a rule of law and it must yield to the clear evidence of an intention on the part of the legislature."

Sheely v. DHSS, 150 Wis. 2d 320, 329, 442 N.W. 2d 1 (1989). In addition, courts should "interpret statutes to avoid an absurd or unreasonable result, . . ." Acquisition of Certain Lands by

Benson, 101 Wis. 2d 691, 697, 305 N.W. 2d 184 (1981).

As set forth in the WFEA, as quoted above, the intention of the legislature is abundantly clear: encouragement of employment, liberal construction of the statute, and procedures per sec. 804, Stats., that allow taxation of costs for discovery motions. In light of the statement of purpose of the WFEA it is difficult to conclude that the legislature intended for the WFEA to provide lesser relief.

The Wisconsin Supreme Court analyzed the WFEA in Watkins v. LIRC, 117 Wis. 2d 753, 345 N.W. 2d 482 (1984). DOT would limit Watkins to its facts, but I do not think that is warranted. The Watkins court refers to two analogous federal cases, dealing with the Civil Rights Act and the Age Discrimination in Employment Act, for the proposition that broad remedial language can be liberally construed to allow recovery of reasonable attorney's fees in the absence of express language to that effect. Watkins, 117 Wis. 2d at 758-759. The decision in Watkins was based in part on the court's analogous reading of it's earlier decision in Anderson v. Labor & Industry Rev. Comm., 111 Wis. 2d 245, 330 N.W. 2d 594 (1983). There, the court made it clear that one purpose of the WFEA was to make victims of discrimination "whole." Watkins, 117 Wis. 2d at 763. Although there was no express provision in WFEA for prejudgment interest on back pay awards, the court found that prejudgment interest was required by this purpose of the act -- to make the complainant "whole." Id.

As was so in Watkins and Anderson, this case concerns a complainant seeking redress under the remedial legislation of WFEA. Thus it joins them under the umbrella of liberal construction. Extending Watkins, using its own rationale, I find that WPC may assess these motion costs against DOT.

To the extent that DOT invokes the concept of sovereign immunity as protection from WPC, I am not persuaded. Any such protection was waived when the legislature included "the state and each agency of the state" in the WFEA's definition of "Employer." Section 111.32(6)(a), Stats. Also, sec. 111.375(2), Stats., provides that "[t]his subchapter applies to each agency of the state . . ."

DOT further asserts that even if WPC has the authority to award these costs, it does not have authority to award partial costs. If the complainant in the underlying matter is "ultimately a prevailing party" DOT asserts, he may receive the awarded costs at that time but not before.

WPC points to the "Catch 22" position in which this places the complainant. He is hindered in his inability to obtain effective discovery if he does not have meaningful relief available. This would frustrate the proper working of our adversary system. See, State ex rel. Dudek v. Circuit Court, 34 Wis. 2d 559, 575-6, 150 N.W. 2d 387 (1967). This dilemma would clearly be present under DOT's approach. But this actually proves too much. The complainant has already been a prevailing party -- on the motion. And therefore costs can be properly

assessed and ordered.

WPC's statutory interpretation, that it has the power to tax discovery costs against another state agency, is reasonable. This is especially true in light of the remedial nature of the WFEA and the public policy clearly expressed by the legislature that WFEA provisions be construed liberally.

The order of WPC assessing costs against DOT is affirmed.

IT IS SO ORDERED.

Dated this 4th day of June, 1991

BY THE COURT:

Susan Steingass, Judge
Circuit Court Branch 8