

1 STATE OF WISCONSIN CIRCUIT COURT VILAS COUNTY

2 ROBERT B. FLANNERY,

3 Petitioner,

4 vs.

Case No. 92-CF-13

5 WISCONSIN PERSONNEL COMMISSION,

6 Respondent.

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9 TRANSCRIPT OF THE COURT'S FINDINGS & JUDGMENT

10 date: September 14, 1992

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17 SEP 22 1992  
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Mary L. Kunau, Court Reporter

1 THE COURT: I had hoped to have a written  
2 decision in this case. Unfortunately, I have been gone here  
3 the last week, and I haven't had an opportunity to start  
4 working on that, although I do have sufficient notes here  
5 that I would prefer, given the constraints that I have in  
6 the caseload here, to simply render an oral decision here,  
7 and I'm going to do that at this time simply because I don't  
8 have the time to do a written one. So here it goes.

9 This is a judicial review of a Wisconsin  
10 Personnel Commission decision and order pursuant to Section  
11 227.53 and 230.87(1) Statutes.

12 The issue presented is whether the  
13 allegations made in Petitioner's complaint dated May 20,  
14 1991 relate back to the original complaint filed on October  
15 3, 1990; the Commission held that they did not, and were  
16 untimely filed under Section 230.85 paren (1).

17 The facts are essentially undisputed. On  
18 October 3, 1990, Petitioner filed on WPC Form PC dash 3, a  
19 complaint alleging a violation of Section 230.85 Wisconsin  
20 Statute, alleging, and I quote, the Wisconsin Division of  
21 Corrections engaged in an ongoing pattern of harassment  
22 activities against Petitioner in retaliation of disclosure  
23 of information under Section 230.81 of the Wisconsin  
24 Statutes.

25 The original complaint contained two

1 paragraphs; one entitled and relating to harassment, and the  
2 other entitled and relating to alleged retaliation. And  
3 that's Record 18.

4 The Commission, in a letter dated October 5,  
5 1990, requested, again, I quote, additional information as  
6 to the specifics of Mr. Flannery's protected activity, the  
7 dates of his disclosures, copies of any written disclosures,  
8 and a list of all alleged retaliatory conduct including the  
9 dates thereof. And that's Record -- I believe it's 19.

10 That additional information as requested was  
11 filed February 20, 1991. That's Record 17. By letter dated  
12 May 22, 1991, the Commission indicated that the February  
13 14th information, Record 17, would be considered, quote,  
14 either as an amendment to the original filing or merely as  
15 clarification thereof. Record 14.

16 The Respondent subsequently filed a Motion  
17 to Dismiss which was granted by the Commission.

18 Because this Court finds that the February  
19 20th filing as requested by the Commission sets forth  
20 additional facts and allegations relating to the subject  
21 matter of the original charge, the Commission's decision and  
22 order must be reversed.

23 This case presents a legal issue for review;  
24 as such, this court is not bound by the Commission's  
25 decision. Board of Regents vs. Wisconsin Personnel

1 Commission, 103 Wisconsin 2nd 545, 308 Northwest 2nd 366,  
2 Court of Appeals 1991. However, this Court is also aware  
3 that when an agency construes a statute it is charged with  
4 applying, that construction is entitled to great weight, and  
5 the court must defer to it unless it's unreasonable. That's  
6 Drivers, etc. Local No. 695 vs. WERC, 121 Wisconsin 2nd 191,  
7 Court of Appeals 1984.

8 This court will uphold the agency's  
9 construction of a statute unless it is clearly contrary to  
10 the legislative intent. A. O. Smith Corporation vs. ILHR  
11 Department, 88 Wisconsin 2nd 262, 276 North West 2nd -- 279,  
12 I believe, 1979.

13 In enacting the Employee Protection Act,  
14 Chapter 230 Statutes, the legislature recognized a need to  
15 both encourage employee's disclosure of improper activities  
16 in governmental units and to prohibit retaliation because of  
17 such disclosure. That's a Preamble to 1983 Wisconsin Act  
18 409.

19 The Court concludes that Section P.C. 2.02  
20 paren (3) is susceptible of two reasonable but conflicting  
21 views, susceptible to two or several reasonable interpre-  
22 tations, and is therefore, ambiguous. The phrase, and I  
23 quote, related to the subject matter of the original charge,  
24 unquote, could mean the harassment or retaliation in broad  
25 terms as suggested by Petitioner, or the limited view as

1 argued by the Commission. Given the general purpose of  
2 Chapter 230, I hold that the phrase, quote, related to the  
3 subject matter of the original charge, unquote, were, first,  
4 the allegations of retaliation, not specific facts contained  
5 therein.

6           It's interesting to note that the form used  
7 is termed charge of discrimination form. And that is Record  
8 19. It is interesting to note that therefore, all allegations  
9 concerning that charge of discrimination is as equally and  
10 as likely a form of interpretation involved in the phrase in  
11 question. To find in any other fashion would not pursue the  
12 legislative intent. Given the legislative intent to  
13 encourage employer disclosure, the extremely limited  
14 interpretation of the complaint process cannot be contem-  
15 plated; in fact, as Attorney Harrold indicated, again, in  
16 the oral argument, the Commission is required to assist  
17 those in filing complaint forms, and certainly cannot be  
18 expected, although there was an attorney involved here, that  
19 all matters need to be as expressively stated as the  
20 Commission has stated.

21           In this case, the Personnel Commission  
22 decided that the other allegations of Petitioner's amendment  
23 relating to denial of promotion, denial of a wage increase,  
24 and oral reprimand, and conduct of DOC counsel during a  
25 deposition, arise from discreet personnel actions that are

1 not related to the subject matter of the original charge.

2 As pointed out, another equally consistent  
3 inference is that all the allegations cited flow from a  
4 course of retaliation against Petitioner. Respondent argues  
5 and urges this court to defer to the Commission's reasonable  
6 interpretation, and cites West Bend Education Association  
7 vs. WERC, 121 Wisconsin 2nd 1, 357 Northwest 2nd 534, 1984.  
8 Because this is a general procedural regulation contrary to  
9 legislative intent, this court does not defer to the  
10 Commission's expertise in its interpretation of this  
11 procedural concern.

12 Here Petitioner has been denied his  
13 fundamental right to be heard at pleading stage. This is an  
14 administrative stage. The Commission is in fact charged with  
15 assisting in the completion of all forms. To strictly  
16 interpret such complaint does not foster the intent  
17 addressed by the legislature. In fact, such action can have  
18 a chilling affect on future employer disclosure. Retaliation  
19 by its very nature can be subtle or overt, sudden or  
20 prolonged. Once retaliation is alleged, Petitioner should be  
21 able to relate all appropriate allegations.

22 Pleadings of such nature should be liberally  
23 construed and reasonable inferences must be accepted at the  
24 pleading stage. I cite Morgan vs. Pennsylvania General  
25 Insurance Company, 87 Wisconsin 2nd 723, 275 Northwest 2nd

1 660, 1979 case.

2 The Commission, in deciding on the motion to  
3 dismiss, erroneously referred to an affidavit submitted by  
4 the Petitioner. In the Court's opinion, to go outside the  
5 pleadings on the motion to dismiss stage, was  
6 inappropriate.

7 Therefore, this court must reverse the  
8 decision and order of the Personnel Commission, and this  
9 matter will be remanded back to the Personnel Commission for  
10 further action consistent with this decision.

11 [Request for preparation of this transcript]  
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STATE OF WISCONSIN )  
                              ) SS.  
COUNTY OF VILAS        )

I, Mary L. Kunau, Official Shorthand Reporter, said  
county, do hereby certify the foregoing is a true and  
correct transcript of the proceedings had in the above-  
entitled matter as compared with my original stenographic  
notes taken at said time and place.

Dated this 18th day of September, 1992.

Mary L. Kunau, Reporter