COURT OF APPEALS
DECISION
DATED AND RELEASED

May 1, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-3317-FT

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

METROPOLITAN MILWAUKEE FAIR HOUSING COUNCIL,

Plaintiff-Appellant,

v.

THE HARTFORD TIMES PRESS,

Defendant-Respondent.

APPEAL from an order of the circuit court for Washington County: JAMES B. SCHWALBACH, Judge. *Affirmed*.

Before Anderson, P.J., Brown and Snyder, JJ.

PER CURIAM. Metropolitan Milwaukee Fair Housing Council (the Council) has appealed from an order awarding it $100 as attorney's fees and costs incurred in a circuit court action commenced by the Hartford Times Press (the Times) pursuant to § 101.22(5), STATS., 1989-90. The Council contends that it was entitled to reasonable attorney's fees and costs of approximately $17,000 in the circuit court action. Pursuant to this court's order of January 4, 1996, and a presubmission conference, the parties have submitted

memorandum briefs. Upon review of those memoranda and the record, we affirm the order of the trial court.

We affirm on the ground that the statutes applicable to this action did not expressly authorize an award of attorney's fees on judicial review in the circuit court and limited costs to $100. This action arose from advertisements for rental housing placed in the Times in January and December 1990. In February 1991, the Council filed a complaint with the equal rights division of the Department of Industry, Labor and Human Relations (DILHR), alleging that under § 101.22(2)(d), STATS., 1989-90, the first advertisement constituted discrimination based upon religion, and the second constituted discrimination based upon both religion and sex.

At the time the Council commenced complaint proceedings, it had the option of commencing a private civil rights action in the circuit court or proceeding through the administrative hearing process before DILHR under § 101.22(4), STATS., 1989-90, which included a hearing before an administrative law judge and review by the Labor and Industry Review Commission (LIRC). The losing party in that process was entitled to seek judicial review in the circuit court pursuant to § 101.22(5), which included a right to a jury trial.

By electing to proceed through the administrative agency hearing process, the Council elected not to use the other remedy available under § 101.22(7), STATS., 1989-90, in discrimination cases, which was a private civil rights action in circuit court. Under the 1989-90 statute, a prevailing plaintiff in a private civil rights action was entitled to reasonable attorney's fees. ***Id.*** The statute at the time contained no similar provision for an award of attorney's fees before either the agency or the circuit court when a complainant chose the administrative hearing route.

The Council proceeded under the administrative hearing provisions of § 101.22(4), STATS., 1989-90, and prevailed before both the administrative law judge and LIRC. LIRC awarded it $1723 in attorney's fees and costs. The Times sought judicial review of LIRC's decision pursuant to § 101.22(5), and a jury trial was held. The jury found that both advertisements constituted discrimination based upon religion, but that the second

advertisement did not constitute discrimination based on sex. The jury found no damages.

Subsequently, the Council requested $17,599 in attorney's fees incurred in the circuit court proceeding. The trial court awarded the $1723 assessed by LIRC for attorney's fees in the agency proceedings, but awarded only $100 as attorney's fees and costs in the circuit court, relying on § 101.22(5), STATS., 1989-90.[1]

In contending that the trial court erred in limiting costs and attorney's fees to $100, the Council relies on the current version of § 101.22, STATS. It contends that § 101.22(6)(i) allows an administrative law judge to award attorney's fees in a proceeding before DILHR, and on case law holding that when a statute authorizes the award of attorney's fees before an administrative law judge, then they may also be awarded in the courts, even absent express statutory authorization. The Council also relies on § 101.22(6m), which authorizes the award of attorney's fees when a complainant brings a private civil rights action.

The defect in the Council's argument is twofold: (1) it did not bring a private civil rights action under either the old or current version of the statute, and therefore has no statutory right to attorney's fees under either § 101.22(6m), STATS., or § 101.22(7), STATS., 1989-90; and (2) § 101.22(6)(i), which currently authorizes administrative law judges to award attorney's fees and upon which the Council piggybacks its claim of entitlement to circuit court fees, is inapplicable to these proceedings. The current provisions of § 101.22, relied on by the Council apply only to acts of discrimination committed after September 1, 1992, long after these advertisements were placed and the proceedings were commenced before DILHR. *See* 1991 Wis. Act 295, §§ 43, 44.[2]

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[1] The trial court inadvertently cited § 100.22(5), STATS., rather than § 101.22(5), STATS., 1989-90. It clearly intended to refer to § 101.22(5), which contains the provisions discussed by it, rather than § 100.22, which deals with milk purchases.

[2] Although the Council relies on provisions in the current version of the statute in its brief on appeal, it makes no argument contesting the Times' contention that the 1989-90

The statutes applicable to this action did not expressly authorize the administrative agency or the trial court to award reasonable attorney's fees, and, in reference to judicial review proceedings pursuant to § 101.22(5), STATS., 1989-90, provided: "Costs in an amount not to exceed $100 plus actual disbursements for the attendance of witnesses may be taxed to the prevailing party on the appeal." Based upon § 101.22(5), we agree with the trial court that costs, including attorney's fees, are limited to $100 for the judicial review proceedings involved here.[3]

This result does not conflict with ***Richland Sch. Dist. v. DILHR***, 174 Wis.2d 878, 498 N.W.2d 826 (1993); ***Shands v. Castrovinci***, 115 Wis.2d 352,

(..continued)
version of the statute applies to this action.

[3] In footnote one of its brief, the Council argues that § 101.22(5), STATS., 1989-90, is inapplicable. It contends that this provision was simply renumbered in the current version of the statute as § 101.22(10)(c), STATS., and, like subsec. (10)(c), applies only to proceedings alleging discrimination in public places of accommodation or amusement. This argument is meritless. While § 101.22(10)(c) deals strictly with violations involving public accommodations and amusements, § 101.22(5), STATS., 1989-90, was not similarly limited. By its express terms, it was applicable to judicial review of orders of LIRC pertaining to "*any alleged discrimination* or act prohibited under sub. (9)." (Emphasis added.)

Discrimination was defined in § 101.22(2)(d), STATS., 1989-90, to include discrimination in advertising rental housing. Acts prohibited under § 101.22(9), STATS., 1989-90, were acts related to public places of accommodation and amusement. When § 101.22(5), STATS., 1989-90, was renumbered as § 101.22(10)(c), STATS., it was amended to delete the provisions applicable to acts of discrimination unrelated to public accommodations and amusements. *See* 1991 Wis. Act 295, § 23. Those provisions were then dealt with in other portions of § 101.22, STATS.

If, as contended by the Council, the judicial review proceedings of § 101.22(5), STATS., 1989-90, referred only to public accommodation and amusement proceedings, it would have meant that DILHR and LIRC lacked authority before September 1, 1992, to receive, investigate and decide claims of discrimination except those related to public accommodations and amusements, which is plainly not the case. This is so because the subsection authorizing the processing of complaints by DILHR used the same language as § 101.22(5), STATS., 1989-90. *See* § 101.22(4), STATS., 1989-90 (giving DILHR the power to receive and investigate complaints charging "a violation of this section if the complaint is filed with the department no more than 300 days after *the alleged discrimination* or act prohibited under sub. (9) occurred."). (Emphasis added.)

340 N.W.2d 506 (1983); ***State ex rel. Hodge v. Town of Turtle Lake***, 180 Wis.2d 62, 508 N.W.2d 603 (1993), or the other Wisconsin cases cited by the Council. In ***Shands***, 115 Wis.2d at 357-59, 340 N.W.2d at 508-09, the court determined that a prevailing party was entitled to attorney's fees on appeal when attorney's fees were statutorily authorized in the circuit court. In ***Hodge***, 180 Wis.2d at 76, 508 N.W.2d at 608, a statute expressly authorized the award of reasonable attorney's fees in the trial court. In ***Richland School District,*** the court determined that attorney's fees incurred in judicial review and appeal proceedings could be awarded because even though no statutory provision expressly authorized their award in the courts, statutes authorized their award before the administrative agency. Discussing other cases dealing with this issue, it held that fees were properly awarded in the circuit court and on appeal "[i]n accordance with these cases holding that a statute authorizing recovery of fees at either an administrative proceeding or a court proceeding includes recovery of attorney fees on appeal." ***Richland Sch. Dist.***, 174 Wis.2d at 911, 498 N.W.2d at 838-39. Here, no statute provided for the award of attorney's fees by the administrative agency or the trial court.

Watkins v. LIRC, 117 Wis.2d 753, 345 N.W.2d 482 (1984), is also distinguishable. As discussed in ***Watkins***, the Wisconsin Fair Employment Act (WFEA) did not expressly authorize the award of attorney's fees by the administrative agency or circuit court. However, the Wisconsin Supreme Court held that DILHR's authority to award them could be fairly implied from the provision permitting it to order such action "as will effectuate the purpose of this subchapter" and from the statutory language indicating that the WFEA should be liberally construed to accomplish its purposes, which are to make victims whole and discourage discrimination in employment. ***Id.*** at 763-64, 345 N.W.2d at 487.

Unlike the WFEA, § 101.22, STATS., 1989-90, contained no provision mandating liberal construction. In addition, § 101.22(5) expressly provided for costs in an amount not to exceed $100 plus actual disbursements on judicial review. The ***Watkins*** decision does not discuss any similar limitation applicable to the WFEA. We therefore conclude that ***Watkins*** provides no basis for disturbing the trial court's order.[4] *Cf.* ***Milwaukee***

[4] We recognize that LIRC awarded attorney's fees to the Council, even though it lacked express statutory authority to do so at the time. In finding implicit authority to do so, it relied upon its own interpretation of ***Watkins v. LIRC***, 117 Wis.2d 753, 345 N.W.2d 482

Teachers' Educ. Ass'n v. Milwaukee Bd. of Sch. Directors, 147 Wis.2d 791, 797, 433 N.W.2d 669, 671-72 (Ct. App. 1988) (indicating that ***Watkins*** has been limited to its specific circumstances).

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

(..continued)
(1984), and its own prior application of ***Watkins*** in another case before it.

The trial court confirmed LIRC's award, which will not be reviewed by us because no cross-appeal was filed by the Times. However, because the award was made by LIRC in the absence of express statutory authority and because we are not bound by LIRC's construction of ***Watkins***, we reject any argument that the existence of the award, standing alone, mandates that attorney's fees also be awarded in the judicial review proceedings.