

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

August 15, 1995

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. 93-3364

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

NARDA FORMAN,

Plaintiff-Appellant,

v.

**LABOR AND INDUSTRY REVIEW COMMISSION
and CARDINAL STRITCH COLLEGE,**

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Milwaukee County: LAURENCE C. GRAM, JR., Judge. *Affirmed.*

Before Sullivan, Fine and Schudson, JJ.

PER CURIAM. Narda Forman appeals from a trial court judgment affirming a Labor and Industry Review Commission (the Commission) order that dismissed her claim that Cardinal Stritch College had discriminated against her based on creed,¹ resulting in her constructive

¹ Sections 111.31 to 111.395, STATS., Wisconsin Fair Employment Act. Section 111.321, STATS., prohibits an employer from engaging in any act of employment discrimination against any individual on the basis of creed. Section 111.32(3m), STATS., defines creed: "Creed means a system of religious beliefs, including moral or ethical beliefs about right and wrong, that are

discharge as an employee of the college.² Forman raises the following issues of alleged error: (1) the Commission erred in relying on the administrative law judge's findings; (2) the Commission failed to articulate a reason for changing the decision of the administrative law judge, thereby rendering its substituted findings a violation of due process; (3) the Commission failed to review the complete record in reversing the administrative law judge, thereby violating due process; (4) the circuit court misused its discretion in denying her motion for a hearing under § 227.57(1), STATS.; (5) the Commission erred in reaching its conclusions because Forman has satisfied the "substantial evidence" standard of review necessary to establish discrimination; and (6) the Commission erred because the evidence supports a conclusion that Forman's quitting from employment was a constructive discharge. We affirm.

Forman filed a complaint with the Equal Rights Division of the Department of Industry, Labor and Human Resources on May 5, 1986, alleging that Cardinal Stritch discriminated against her because of her creed, in violation of the Wisconsin Fair Employment Act, §§ 111.31, STATS., *et seq.*, and that the conditions of her employment resulted in her constructive discharge. An administrative law judge found that Cardinal Stritch did not discriminate against Forman because of her creed and that it did not constructively discharge her. Forman appealed to the Commission, which affirmed the administrative law judge. On appeal, the trial court affirmed the Commission's decision. Pursuant to Chapter 227, STATS., she appeals to this court.

Upon appeal to a trial court's judgment, we review the determination of the agency rather than that of the trial court. *Liberty Trucking v. DILHR*, 57 Wis.2d 331, 342, 204 N.W.2d 457, 463-64 (1973). Nonetheless, we apply the same standard and scope of review employed by the trial court when it reviewed the agency's decision. *General Castings Corp. v. Winstead*, 156 Wis.2d 752, 756, 457 N.W.2d 557, 560 (Ct. App. 1990).³

(..continued)

sincerely held with the strength of traditional religious views.”

² Cardinal Stritch is a Roman Catholic college. Forman is a member of the Jewish faith.

³ In her appellate brief, Forman requests that this court enter a “finding” of discrimination based upon the administrative law judge's findings. This court lacks jurisdiction to make findings of fact. *See* § 227.57, STATS.

1. *Commission Error – Jurisdiction*

Without citation to the record, and without reference to authority, Forman concludes that the Commission lost subject matter jurisdiction over the matter because it relied upon the administrative law judge's withdrawn findings. The record evidences no such withdrawal.⁴ The record also shows that the Commission belaboredly listened to tapes of the administrative law judge's proceedings. Mere reference to the synopses ordinarily would have met the call of due process. *Carley, Ford, Lincoln, Mercury v. Bosquette*, 72 Wis.2d 569, 573-74, 241 N.W.2d 596, 599 (1976).⁵ The argument merits no further discussion.

2. *Commission's failure to explain deviation from administrative law judge's findings.*

Forman argues that the Commission's findings should be vacated because it failed to state why it changed certain findings of the administrative law judge. See *Transamerica Ins. Co. v. ILHR*, 54 Wis.2d 272, 284, 195 N.W.2d 656, 662-63 (1972). This omission, and the administrative law judge's failure to prepare a credibility analysis, she contends, were fundamentally unfair, and form the basis for reversal of the findings. She asserts that: (1) the six-month time lapse between the Commission's and the administrative law judge's memory of the witnesses' testimony prejudiced her, given that the testimony was originally received at a hearing held approximately four years previously; and (2) the Commission's adoption, without any explanation, of the

⁴ We glean from the appellate briefs that Forman's reference to "withdrawal" means the administrative law judge's acquiescence to the Commission's correction of errors in the synopses. This betrays Forman's essential misconception of the nature of the Commission's review. It is a *de novo* determination. *State ex rel. Eckmann v. DHSS*, 114 Wis.2d 35, 40, 337 N.W.2d 840, 842-43 (Ct. App. 1983). The Commission does not conduct a judicial-type review of a hearing examiner's decision.

⁵ In another part of her brief, Forman critiques the Commission for not reviewing a transcript. Forman, however, failed to provide the Commission with a transcript, as is the usual practice. WIS. ADM. CODE § IND 88.17 concededly does not require this. Forman also could have claimed indigency to obtain a free copy under WIS. ADM. CODE § IND 88.17(1). Her complaint about lack of a transcript is meritless and disingenuous.

administrative law judge's findings, was unfair. Although not expressly stated in her appellate brief, Forman's argument invokes § 227.57(4), STATS., providing:

- (4) The court shall remand the case to the agency for further action if it finds that either the fairness of the proceedings or the correctness of the action has been impaired by a material error in procedure or a failure to follow prescribed procedure.

To obtain relief, Forman is required to show that the Commission engaged in material errors in procedure or failed to follow prescribed procedure which so impaired the fairness of the proceedings or correctness of the action that remand to the Commission is required. Section 227.57(4), STATS. She has made no such showing.

The trial court examined Forman's claims of irregular procedure and found them without substance. As stated previously, the Commission could have relied upon the administrative law judge's record and synopses to affirm. Instead, it meticulously went beyond the minimally acceptable by listening to the tapes to ensure that its findings would comport with the record. Forman's argument that the Commission engaged in procedural irregularity by substituting its findings for contrary findings of the administrative law judge based upon the tapes, rather than relying upon synopses, is errant nonsense. Review of the tapes revealed errors in the synopses and familiarized the Commission with the record far more incisively than the synopses possibly could.

Equally meritless is Forman's critique of the Commission and the administrative law judge's "credibility conference." When the Commission makes findings of conflicting witnesses' credibility it must, to comply with due process, avail itself of the findings, conclusions and impressions of the administrative law judge. *Id.* at 282, 195 N.W.2d at 662. Here, the Commission conducted a conference and only after conferring with the administrative law judge about specific testimony that appeared inconsistent, made its own findings of credibility based upon the entire record.

Forman also questions the administrative law judge's assessment in 1992 of the witnesses' credibility relating to testimony taken in 1986. She argues that the time period impaired the administrative law judge's memory, constituting a violation of procedure. As such, the scope of our review on this issue is also governed by § 227.57(4), STATS.

In support of her contention, Forman cites an unpublished circuit court opinion as authority that such a credibility finding should be vacated. She contends that the lapse of time reduced the capacity of the administrative law judge to recollect matters of credibility. The circuit court opinion is not precedential and, hence, has no binding effect upon this court. *Servomation Corp. v. DOR*, 106 Wis.2d 616, 620 n.3, 317 N.W.2d 464, 466 n.3 (1982). Further, we reject Forman's argument because it does not account for the presumption of regularity that attends administrative proceedings and we decline to join in her speculation about the administrative law judge's ability of recall.

3. *Commission's failure to review entire record.*

Forman argues that the presumption that the evidence has been fully reviewed by the Commission was overcome by the Commission's remarks that it "extensively reviewed" the hearing tapes which afforded it a familiarity with the record at least equivalent to the synopses and, further, that it was confident that its findings would correspond with the transcript to be filed. From these comments Forman invites us to conclude that the Commission did not consider the entire record.

Forman's argument does not specifically question statements in the Commission's memorandum opinion. The Commission, in its memorandum opinion, states that it reviewed the record and conferred with the administrative law judge on witnesses' credibility. We are presented with nothing to discount the Commission's statement.

Further, Forman's argument that the Commission violated procedures by listening to tapes of the proceedings—the best available information—is patently meritless. After the Commission compared the tapes with the synopsis, it became apparent that the latter contained errors and

omissions. Forman does not question the accuracy or completeness of the tapes. By listening to the tapes and correcting the synopsis, the Commission arrived at determinative findings and conclusions. A call of due process is served if the agency relies solely on the synopsis. See *Carley Ford, Lincoln, Mercury, Inc.*, 72 Wis.2d at 573-74, 241 N.W.2d at 599. Here, the Commission not only reviewed the synopsis, but also painstakingly compared it with the tapes to reach independent and corrected findings. We conclude that neither the “fairness of the proceedings” nor the “correctness of the action” was impaired by the Commission's use of the audio tapes to supplement the administrative law judge's synopsis. See § 227.57(4), STATS.

4. Denial of motion hearing.

Forman argues that the trial court erroneously exercised its discretion when it denied her request for an evidentiary hearing pursuant to § 227.57(1), STATS.⁶ The court denied her request, concluding that she failed to present sufficient reasons to support her request. The trial court did not erroneously exercise its discretion when it denied this request.

Section 227.57(1), STATS., states “that in cases of alleged irregularities in procedure before the agency, testimony thereon may be taken in the court.” A general rule of statutory construction is that the word “may” is construed as permissive or allowing discretion. See *Rotfeld v. DNR*, 147 Wis.2d 720, 726, 434 N.W.2d 617, 620 (Ct. App. 1988). Proper exercise of discretion entails judicial application of relevant law to the facts of record to arrive at a reasoned decision. *Village of Shorewood v. Steinberg*, 174 Wis.2d 191, 204, 496 N.W.2d 57, 62 (1993). In *Wright v. Industrial Comm'n*, 10 Wis.2d 653, 103 N.W.2d 531 (1960), the supreme court balanced the interest of an administrative

⁶ Section 227.57(1), STATS., provides:

- (1) The review shall be conducted by the court without a jury and shall be confined to the record, except that in cases of alleged irregularities in procedure before the agency, testimony thereon may be taken in the court and, if leave is granted to take such testimony, depositions and written interrogatories may be taken prior to the date set for hearing as provided in ch. 804 if proper cause is shown therefor.

agency to freedom from untoward judicial interference with the interest of the judiciary to adjudicate claims of unconstitutional procedure by agencies, stating:

Those who exercise the quasi-judicial powers entrusted to administrative agencies ordinarily should not be harassed by judicial inquiry directed toward ascertaining how they performed their adjudicative function in a particular case. The presumption of regularity that attaches to the decisions of administrative agencies should protect against such harassment based upon mere suspicion. However, on a proper showing of illegal procedure, the circuit court does possess the power to subpoena Industrial Commission personnel in a workmen's compensation review proceeding.

Id. at 661-62, 103 N.W.2d at 535 (footnote omitted). It was incumbent upon Forman, as a condition to invoking the court's discretion under § 227.57(1), STATS., to make a *prima facie* showing of procedural irregularities. See *State ex rel. Madison Airport Co. v. Wrabetz*, 231 Wis. 147, 155, 285 N.W. 504, 508 (1939).

Forman has made no such showing. Her petition to the trial court consisted of the following:

In view of the apparent irregularities in procedure before [the Commission], request is hereby made pursuant to [§227.57(1), Stats.] for testimony to be taken in court for the purpose of determining the extent of its denial of Plaintiff's right to due process.

We agree with the trial court's conclusion that Forman failed to present sufficient reasons to justify the hearing — she presented nothing.

5. *Sufficiency of evidence to support Commission's findings.*

Forman argues that the evidence does not support the Commission's determination that Cardinal Stritch did not discriminate against her on the basis of creed.⁷ Section 227.57(6), STATS., provides that if an agency's action depends upon a disputed finding made by it, this court will not judge the weight of the evidence and may set aside an agency action or direct remand only if the action is not supported by substantial evidence of record. See *Sieger v. Wisconsin Personnel Comm'n*, 181 Wis.2d 845, 855, 512 N.W.220, 223 (Ct. App. 1994).

The Commission made, *inter alia*, the following findings of fact. Bernard O'Connell, Cardinal Stritch Director of Programs in Management for Adults (PMA), hired Forman in June 1985 to temporarily fill the PMA Administrative Assistant position. She later worked as an administrative assistant. In October 1985, amidst controversy with the school administration, O'Connell departed Cardinal Stritch. Charles Cook, who described himself as a "fundamentalist" and a "born again Christian," was hired to replace O'Connell in November 1985. Cook undertook numerous changes to the department, some of which affected Forman. Cook increased Forman's typing assignments and extended her work week from thirty-two to forty hours. Forman resisted these changes to her position. Unsatisfied with the changes to her position, Forman decided to search for a new job in December 1985. Then, in January 1986, Cardinal Stritch alleged that Forman had falsified her time cards. The college dropped the inquiry after Forman disputed the allegation and appeared at a meeting with an attorney. Cardinal Stritch later conceded that Forman had properly accounted for her time. On January 13, Forman gave Cardinal Stritch notice that she would not return to work.

A review of the record convinces us that substantial evidence was presented to support the Commission's determination that Cardinal Stritch neither discriminated against Forman on the basis of creed, nor constructively discharged her. In its memorandum opinion, the Commission concluded that Forman's treatment consisted of "nothing more onerous than that which many employees experience when a change in management brings some degree in

⁷ In her last two arguments, Forman asserts that she has met the substantial evidence standard of review and that the evidence supports a conclusion that Cardinal Stritch discharged her. We construe her arguments to mean that the evidence supports a conclusion that Cardinal Stritch engaged in an act of employment discrimination against her on the basis of creed and that it constructively discharged her.

change in their jobs.” We agree. Hence, the judgment of the trial court affirming the Commission's decision must be affirmed. *See* § 227.57(6), STATS.

By the Court. – Judgment affirmed.

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