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FERC Rules Against Wisconsin Municipals

In a decision issued on June 1, 2001, the Federal Energy Regulatory Commission (FERC) rejected a complaint by six Wisconsin municipalities (*i.e.*, the Village of Belmont and the cities of Plymouth, Juneau, Reedsburg, Sheboygan Falls and Wisconsin Rapids) that their long-term wholesale electric contracts with Wisconsin Power and Light Company (WP&L) should be modified.

The FERC ruling ends a dispute between the municipals and WP&L dating back to 1996. At that time, the municipals gave notice to WP&L of their intention to terminate the evergreen contracts and filed a complaint at the FERC asking that the term of the notice be reduced from the ten years set out in the contracts. FERC rejected that claim in its ruling.

The WP&L evergreen contracts are requirements wholesale contracts with a ten-year term, and a ten-year notice for termination. Thus, unless notice is given the contracts have a rolling ten-year term. The case was believed to be one of the first in which the FERC was asked to invoke the authority it set forth in Order 888 to modify existing contracts if they denied wholesale customers effective entry into the market. The new FERC decision may effectively read that authority out of Order 888.

Another issue raised by the decision concerns FERC's long delay in issuing a decision. The municipals originally gave their notices of termination in 1996, when other

municipalities in Wisconsin were getting much lower rates on the newly-available wholesale market due to Order 888. However, over the course of the five years since the initial complaint was filed, the market has significantly changed. Whereas most of these municipals could have obtained significant savings had they been able to enter the market sometime during the past five years, at the current time, with power supplies in Wisconsin very tight and little transmission access to the outside, the fact that the contracts now run through 2006 may be an advantage.

Nonetheless the long length of time it took FERC to decide the case reflects a general trend that has made it difficult for municipal utilities to seek relief from FERC. Particularly on matters that relate to market conditions, a delay of five years in reaching a decision may constitute an effective denial of relief.

In its decision, the FERC also vacated a portion of the Administrative Law Judge's decision on stranded costs, indicating the municipals and WP&L may need to consider those issues in other proceedings. The case is *Belmont, et al. v. Wisconsin Power and Light Co.*, 95 FERC ¶61,334 (FERC Docket No. EL97-19-000).

—Michael P. May and Richard A. Heinemann

Please Note:

We will cover the Wisconsin Supreme Court's decision regarding the Wisconsin Retirement System in the August 2001 issue.

Supreme Court Rules That Front Pay Is Not Subject To Damages Cap

The United States Supreme Court recently decided that an award of front pay in a discrimination case arising under Title 7 of the Civil Rights Act of 1964 ("Title 7") is not subject to the maximum \$300,000 damages cap in Title 7. *Pollard v. E.I. du Pont de Nemours & Co.*, (No. 00-763, June 4, 2001).

Title 7 prohibits discrimination on the basis of sex, race, gender and other similar status-based classifications. If a municipality violates Title 7, remedies include injunctive relief, reinstatement, back pay, lost benefits and attorneys fees. Prior to 1991, federal courts around the nation also included front pay among these remedies. Front pay is money awarded for lost compensation during the time between a legal finding of discrimination and reinstatement ordered as a remedy for the discrimination. Such a delay might occur when reinstating a prevailing employee because there might not be a vacant position at the time of the reinstatement order. Front pay may also be appropriate where reinstatement is not viable because returning the employee to the workforce would not be appropriate given the past history between the employee, the employer and other employees.

In 1991, Congress amended Title 7 to include as additional remedies "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses." These additional damages were, however, subject to a statutory dollar cap, the maximum being \$300,000 for employers with 500 or more employees. For employers with fewer than 500 employees, the damage cap is at a lower amount.

The issue before the United States Supreme Court in *Pollard* was whether an award for front pay is subject to the dollar cap. The employer argued that the cap applied because front pay seemed to fit within the definition of "compensatory damages . . . for future pecuniary losses."

Not so says a unanimous Supreme Court. The Court concluded that the dollar cap is applicable only to the remedies added to Title 7 in 1991. Since front pay was universally recognized by the federal courts as a remedy which existed prior to the 1991 statutory amendments, it was not subject to the dollar damage cap placed on the 1991 remedies.

Accordingly, front pay awards are not subject to the dollar cap in Title 7. This is significant since front pay can be a fairly substantial dollar figure depending on the number of years for which front pay is awarded. Taking front pay outside the maximum \$300,000 cap has significant implications in future Title 7 suits. For one thing, the potential dollar risk involved in Title 7 litigation will be somewhat more difficult.

— Steven C. Zach

Florida Court Holds Municipalities May Collect Stormwater Charges Even From A State Agency

In *City of Gainesville v. State of Florida Department of Transportation*, 778 So. 2d 519 (Fla. App. 1 Dist. 2001), the Florida Court of Appeals held that under both the Florida Constitution and state statutes, municipalities may create stormwater management utilities, and charge utility rates even from a state agency.

The City of Gainesville ("City") filed a complaint seeking a judgment declaring that the stormwater utility charges the City had billed the Department of Transportation ("DOT") on account of DOT property in the City were valid utility fees. Under the City's ordinance, stormwater management service charges or rates were computed based upon equivalent residential units of 2,300 square feet each, which was the estimated average impervious area of a developed, single-family lot. Charges for other customers were based on the amount of impervious property on the lot divided by 2,300 square feet to determine the number of equivalent residential units for that lot. Undeveloped property was exempt, as was property which did not contribute run-off. A property owner that retained stormwater on site could reduce or eliminate charges.

DOT took the position that DOT's status as a state agency precludes liability for the charges because, as a matter of law, the stormwater fee is a tax or special assessment. The Court disagreed, noting that Florida state statutes and case law make it clear that municipalities have the option of establishing stormwater management systems as traditional utilities and financing them by collecting utility fees. The Court concluded that the City's rates were user fees, not taxes or special assessments, and that a state facility was obligated to pay the rates.

The Court also approved the City's "equivalent residential unit" methodology for calculating charges and noted that the use of "equivalent residential units" for stormwater utility billing purposes has been mentioned with approval in *Atlantic Gulf Communities v. City of Port St. Lucie*, 764 So. 2d 14, 15 (Fla.).

DOT also claimed that the City's stormwater utility fees do not correlate exactly with the benefits each individual user of the service receives. However, a lack of uniformity in the utility rate charged is not necessarily unlawful discrimination. The establishment of different classifications of consumers and the charging of different rates for the several classes is not unreasonable and does not violate the requirements of equality and uniformity. Discrimination with respect to rates charged only becomes a problem when it is arbitrary and without a reasonable fact basis or justification. Furthermore, in reviewing utility rate setting, the judiciary gives deference to legislative bodies like municipal governments.

The DOT argued that, even if the City's ordinance does create a bonafide utility and authorize valid utility fees, sovereign immunity shields it from liability for the City's fees. The Court disagreed citing precedent holding that the user fees are distinguished from taxes because "they are charged in exchange for a particular government service which benefits the party paying the fee in a manner not shared by other members of society...and they are paid by choice, in that the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge." The Court pointed out that just as the state facility could haul its solid waste to the landfill, dig its own well or generate its own electricity, "it could construct swales, berms, retention ponds and the like to contain all stormwater runoff on its property."

— Richard A. Lehmann and Lawrie J. Kobza

U.S. Supreme Court Bogey's ADA Case

The recent United States Supreme Court ruling requiring the Professional Golf Association ("PGA") to allow Casey Martin to use a golf cart during tournament competition has received much media play in the last several weeks. *PGA Tour, Inc. v. Martin* (No. 00-24, May 29, 2001). While the facts of the case may lead some employers to believe it has little applicability to them, I think the ruling may have a much broader impact.

In recent years, the federal appellate courts and the United States Supreme Court have issued a number of decisions which have narrowly interpreted the Americans With Disabilities Act ("ADA"). For example, last year the United States Supreme Court held that in assessing whether an individual is a "qualified individual with disability," one must take into account any corrective measures which mitigate the alleged disability. Thus, a person with poor eyesight should be assessed with eyeglasses for determining the applicability of the ADA. The "Catch -22" of this interpretation is that if the requested accommodation is a modification of a rule that disqualifies applicants who require eyeglasses to see, the accommodation requested would preclude them from qualifying for the accommodation request in the first place.

In light of these types of ruling in the last few years, I expected the Supreme Court in *Martin* to follow its course of narrowly interpreting the ADA. However, rather than restrict its interpretation, the Court in *Martin* broadly expanded its role in reviewing the ADA, leaving some question as to where the Supreme Court will head in future ADA cases and what impact it may have on employers.

When boiled down to its basic premise, the PGA's position was that it had the right to define the rules of its operation (i.e., the tour). In this case it meant creating a rule which required golfers in tournaments to walk and not ride carts. This is no different than an employer defining what constitutes the essential functions of each job. Prior to *Martin*, it has always been understood that an employer is free to determine what functions are essential for every job in the operation. If an employee cannot perform those essential functions with or without accommodation, the employer would not violate the ADA by not placing that employee in the position.

Thus, in *Martin*, the PGA decided that walking was an essential function of its competition. The Supreme Court, disagreed, however, concluding, after a review of the rules and origin of golf, that the element of walking was not in fact an significant element of golf on the tournament circuit, but rather was peripheral to the game. In effect, the Supreme Court redefined what is "essential" in a golf tournament.

In a bitter dissent, Justice Scalia stated as follows:

If a shoe store wishes to sell shoes only in pairs it may and if a golf tour ... wishes to provide only walk-around golf it may. The PGA tour cannot deny respondent access to that game because of his disability but it need not provide him a game different ... from that offered to everyone else.

The rules are the rules. They are (as in all games) entirely arbitrary, and there is no basis on which anyone - not even the Supreme Court of the United States - can pronounce one or another of them to be non-essential if the rulemaker (here the PGA tour) deems it to be essential.

The question which arises after *Martin* is whether courts will be inclined to second-guess an employer's determination as to the essential functions of job. Since the Court allowed itself to redo the PGA rules, what is to prevent it from entering into the arena which has heretofore been within the employer's discretion; i.e., determining the essential functions of the job.

Viewed in this light, *Martin* is a departure from the strict construction of the ADA which we have seen in past Supreme Court cases. While *Martin* has been publicized as just a case involving the game of golf, influenced as it may have been by the sympathies for Martin, the potential exists that the case will have a broader impact. However, until I see where the Supreme Court goes in future ADA cases, I'll consider the *Martin* case to be a mulligan.

— Steven C. Zach

Customers First! New Generation Proposal Gaining Support

The Customers First! Coalition ("CFC") plan to promote the development of new electric generation in Wisconsin without accelerating the deregulation of electricity markets has been gaining legislative momentum. CFC's plan, dubbed "Power the Future-2," was originally filed in January with the Public Service Commission of Wisconsin ("PSCW") in response to a pair of generation proposals developed by Wisconsin Public Service Corporation ("WPS") and Wisconsin Electric Power Company ("WEPCO") (see *Municipal Law Newsletter*, February 2001). The CFC plan would allow the PSCW to retain jurisdiction over new generation proposals while encouraging generation construction through the use of innovative rate-making techniques.

In a compromise agreement reached with CFC, WEPCO filed an amendment to its original proposal with the PSCW. Under the terms of the compromise, no deregulation would occur in Wisconsin at this time and the PSCW would retain regulatory authority over electric generation. The compromise also includes a plan for construction over ten years of new base-load coal plants. This plan would allow WEPCO to sell its existing property sites to a non-utility limited liability company ("LLC") at book value, then lease the generation facilities built there from the LLC and operate them under current PSCW rules.

Legislation required for moving the proposal forward was unanimously passed by the State Legislature's Joint Committee on Finance, and was included in the 2001-2003 State Budget on May 18, 2001. In addition to the generation construction plan, the proposed bill ensures "regulatory certainty" by permitting the PSCW to maintain control over rates without re-examining capital costs in the lease once they are approved. A portion of the new generation would be set aside for municipal utilities to purchase on the wholesale market.

Although WPS did not reach a similar agreement with CFC, it withdrew its original generation proposal. However, a WPS subsidiary, WPS-Power Development, Inc. ("WPS-PDI") is currently seeking PSCW approval of an application to own and operate one or more cogeneration wholesale power plants in eastern Wisconsin with a combined capacity of up to 100 megawatts. Because the application includes a retail sales component, it has raised market power concerns, which have yet to be addressed by the PSCW.

With budget battles looming, it is anticipated that the PSCW hearings on both generation proposals may be longer than originally hoped.

— Richard A. Heinemann

MUNICIPAL LAW NEWSLETTER

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