COURT OF APPEALS
DECISION
DATED AND RELEASED

September 26, 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. 94-2983

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

STATE OF WISCONSIN ex rel. Caryl Sprague,

Petitioner-Respondent,

v.

CITY OF MADISON and
CITY OF MADISON EQUAL
OPPORTUNITIES COMMISSION,

Respondents-Respondents,

ANN HACKLANDER-READY,

Respondent-Appellant,

MAUREEN ROWE,

Respondent.

APPEAL from an order of the circuit court for Dane County: SARAH B. O'BRIEN, Judge. *Affirmed in part; reversed in part.*

Before Dykman, P.J., Paul C. Gartzke and Robert D. Sundby, Reserve Judges.

SUNDBY, J. Ann Hacklander-Ready and Maureen Rowe appeal from a decision affirming the Madison Equal Opportunity Commission's (MEOC) Decision and Order which found that they refused to rent housing to Carol Sprague as their housemate because of her sexual orientation, in violation of § 3.23(4)(a) of the Madison General Ordinances (MGO). MEOC awarded Sprague $3,000 in damages for emotional distress, and $300 for the loss of a security deposit on another apartment. We conclude that the trial court correctly found that § 3.23, MGO, unambiguously applied to housemates at the time this action arose. We therefore affirm MEOC's award of damages for Sprague's loss of her security deposit. However, we reverse the award for emotional distress because we conclude that MEOC had no power to award such damages. We further affirm MEOC's award of costs and reasonable attorney's fees to Sprague. Although Sprague is not entitled to damages for emotional distress, she is the prevailing party because she established that appellants discriminated against her.

BACKGROUND

At all times relevant to this action Hacklander-Ready leased a four-bedroom house. She had the owner's permission to allow others to live with her and share in the payment of rent. In the fall of 1988, Maureen Rowe began living with Hacklander-Ready and paying rent. In April 1989 they advertised for housemates to replace two women who were moving out. They chose Sprague from among numerous applicants. They knew her sexual orientation when they extended their offer to her. Sprague accepted their offer and made a rent deposit on May 4, 1989. However, the following day Hacklander-Ready informed Sprague that they were withdrawing their offer because they were not comfortable living with a person of her sexual orientation.

Sprague filed a complaint with MEOC alleging that appellants discriminated against her on the basis of sexual orientation, contrary to § 3.23(4)(a), MGO. The administrative law judge agreed and awarded Sprague $2,000 for emotional distress, $1,000 punitive damages, and $300 for the security

deposit she lost trying to secure another apartment, together with costs and reasonable attorney's fees. Appellants appealed to MEOC. On July 10, 1992, MEOC vacated the hearing examiner's Findings of Fact and Conclusions of Law and Order on the grounds that the Madison City Council (City Council) intended to exempt roommate arrangements from the ordinance. MEOC did not state its reasons for this conclusion, nor did it address the legal arguments the parties raised.

Sprague petitioned the circuit court for a writ of certiorari to review MEOC's decision. She argued that the ordinance unambiguously applied to housemate arrangements. On August 19, 1993, the trial court reversed MEOC's order. The court found that the language of the ordinance was "crystal clear" and that MEOC had jurisdiction to provide Sprague with relief. The trial court retained jurisdiction and remanded the matter to MEOC. On February 10, 1994, MEOC issued a Decision and Order on Remand which affirmed, in part, the decision of the hearing examiner. MEOC reversed the hearing examiner's award of punitive damages but increased the award of damages for Sprague's emotional distress to $3,000. The total award remained $3,300. MEOC awarded Sprague costs and reasonable attorney's fees.

APPLICABLE ORDINANCES

At the time of the events in issue, § 3.23, MGO, provided:

> (1) Declaration of Policy. The practice of providing equal opportunities in housing ... without regard to ... sexual orientation ... is a desirable goal of the City of Madison and a matter of legitimate concern to its government ... In order that the peace, freedom, safety and general welfare of all inhabitants of the City may be protected and ensured, it is hereby declared to be the public policy of the City of Madison to foster and enforce to the fullest extent the protection by law of the rights of all its inhabitants to equal opportunity to ... housing....

(2)(b) "Housing" shall mean any building, structure, or part thereof which is used or occupied, or is intended, arranged or designed to be used or occupied, as a residence, home or place of habitation of one or more human beings, including a mobile home as defined in Section 66.058 of the Wisconsin Statutes and a trailer as defined in Section 9.23 of the Madison General Ordinances.... Such definition of "housing" is qualified by the exceptions contained in Section 3.23(4)(a).

(4) It shall be an unfair discrimination practice and unlawful and hereby prohibited: (a) For any person having the right of ownership or possession or the right of transfer, sale, rental or lease of any housing, or the agent of any such person, to refuse to transfer, sell, rent or lease, or otherwise to deny or withhold from any person such housing because of ... sexual orientation.... (b) Nothing in this ordinance shall prevent any person from renting or leasing housing, or any part thereof, to solely male or female persons if such housing or part thereof is rented with the understanding that toilet and bath facilities must be shared with the landlord or with other tenants.

DECISION

On certiorari we review the decision of the administrative agency. ***State ex rel. Thompson v. Nash***, 27 Wis.2d 183, 194, 133 N.W.2d 769, 775 (1965). Our review is limited to (1) whether MEOC kept within its jurisdiction, (2) whether it acted according to the law, (3) whether its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment, and (4) whether the evidence was such that MEOC might reasonably have made the order or determination in question. ***Marris v. City of Cedarburg***, 176 Wis.2d 14, 24, 498 N.W.2d 842, 846 (1993).

Sprague claims that § 3.23, MGO, was intended to apply to housemate arrangements.[1] The interpretation of a statute or ordinance is a question of law which we decide without deference to the trial court. ***Id***. at 32, 498 N.W.2d at 850. Where a statute is unambiguous there is no need to go beyond the clear language of the statute. ***County of Sauk v. Trager***, 113 Wis.2d 48, 55, 334 N.W.2d 272, 275 (Ct. App. 1983), *aff'd* 118 Wis.2d 204, 346 N.W.2d 756 (1984).

Section 3.23(4), MGO, unambiguously prohibits any person having right of rental to refuse to rent to any person because of the person's sexual orientation. Hacklander-Ready concedes that she held the lease to the house and that she had the right to rent the property to others. Further, she and Rowe admit that the sole reason they withdrew their offer was Sprague's sexual orientation. Finally, the room that appellants sought to rent falls within the definition of housing under § 3.23(2)(b), MGO, as a part of a building intended as a place of habitation for one or more human beings.

While appellants correctly argue that a statute is ambiguous if it may be construed in different ways by reasonably well-informed persons, we fail to see any reasonable interpretation that would make § 3.23, MGO, inapplicable in this case. *See* ***La Crosse Footwear v. LIRC***, 147 Wis.2d 419, 423, 434 N.W.2d 392, 394 (Ct. App. 1988). Appellants also correctly note that a court may resort to construction if the literal meaning of a statute produces an absurd or unreasonable result. ***NCR Corp. v. Department of Revenue***, 112 Wis.2d 406, 411, 332 N.W.2d 865, 868 (Ct. App. 1983). However, applying § 3.23(4) to the rental of a room within a house with shared common areas is not unreasonable or absurd. Because we find that the ordinance clearly and unambiguously applies to the subleasing of housing by a person having the right of rental, our inquiry in this respect is at an end.

Appellants argue that to apply the ordinance to the lease of housing by a tenant to a housemate makes § 3.24(4)(a), MGO, unconstitutional in its application. The trial court properly declined to consider this argument because appellants failed to notify the attorney general of their challenge, as

[1] In September 1989, subsequent to the commencement of this action, the Madison City Council amended the Equal Opportunities Ordinance by adding § 3.23(c), MGO, which states, "Nothing in this ordinance shall affect any person's decision to share occupancy of a lodging room, apartment or dwelling unit with another person or persons."

required by § 806.04(11), STATS.[2] However, appellants notified the attorney general subsequent to the trial court's decision.[3] This notice cured the defect. *See* ***In re Estate of Fessler***, 100 Wis.2d 437, 444, 302 N.W.2d 414, 418 (1981).

Appellants cite many cases which they argue support their constitutional challenge: ***NAACP v. Alabama***, 357 U.S. 449 (1958): ***Griswold v. Connecticut***, 381 U.S. 479 (1965); ***City of Ladue v. Gilleo***, 512 U.S. 43 (1994); ***Payton v. New York***, 445 U.S. 573 (1980); ***Moore v. City of East Cleveland***, 431 U.S. 494 (1977); ***City of Wauwatosa v. King***, 49 Wis.2d 398, 182 N.W.2d 530 (1971). However, those cases deal either with the right to privacy in the home or family or the right to engage in first amendment activity free of unwarranted governmental intrusion. Appellants gave up their unqualified right to such constitutional protection when they rented housing for profit. The restrictions placed by the Madison City Council on persons who rent housing for profit are not unreasonable and do not encroach upon appellant's constitutional protections. We therefore reject appellants' challenge to the constitutionality of § 3.24, MGO, as applied.

Appellants next argue that MEOC exceeded its jurisdiction when it awarded Sprague damages for emotional distress. MEOC relies on § 3.23(9)(c)2.b, MGO, as the source of its authority to make such an award. At the time this action arose, § 3.23(9)(c)2.b, MGO, stated that when MEOC determines that discrimination has occurred "it shall order such action by the Respondent as will redress the injury done to the Complainant in violation of this ordinance ... and generally effectuate the purpose of this ordinance." Whether this language empowered MEOC to award damages is again a question of law which we decide without deference to the trial court's decision. ***Marris***, 176 Wis.2d at 24, 498 N.W.2d at 846. In construing a statute or ordinance, we seek the intent of the legislative body. ***Watkins v. LIRC***, 117 Wis.2d 753, 761, 345 N.W.2d 482, 486 (1984).

As remedial legislation, § 3.24, MGO, must be liberally construed to accomplish its purpose. MEOC has awarded damages for emotional distress

[2] Section 806.04(11), STATS., provides: "In any proceeding which involves the validity of a municipal ordinance or franchise ... if any ordinance or franchise is alleged to be unconstitutional, the attorney general shall also be served with a copy of the proceeding and be entitled to be heard."

[3] The attorney general declined to appear in this matter.

in two previous cases;[4] however, this brief history is not sufficient to persuade us to defer to the agency's interpretation without our own careful examination. We need not give deference to an administrative agency's interpretation of a statue or ordinance unless the agency's interpretation has been long-continued, substantially uniform and without challenge by governmental authorities and courts. ***Local No. 695 v. LIRC***, 154 Wis.2d 75, 83, 452 N.W.2d 368, 372 (1990).

Section 3.23, MGO, as it read when this dispute arose, did not explicitly authorize MEOC to award compensatory or punitive damages. Moreover, when this action arose not even the State's Fair Housing Law allowed the administrative agency to award damages in an administrative proceeding. Such damages could be awarded only in a civil action. Section 101.22(7), STATS.[5] Further, when this action arose, § 66.432(2), STATS., which enables municipalities to enact ordinances prohibiting discrimination in the rental of housing, only authorized them to impose forfeitures.[6] Without such statutory authority, it is extremely unlikely that the City Council intended to empower MEOC to award compensatory damages. Finally, the plain language of § 3.23, MGO, that the agency "shall order such action by the Respondent as will redress the injury done to the Complainant ... and generally effectuate the purpose of this ordinance," is far more consistent with the imposition of forfeitures and equitable relief. We also note that the City Council has now amended § 3.23, MGO, to explicitly grant MEOC authority to award economic and non-economic damages. Section 3.23(9)(c)5b, MGO. That the City Council added this language after this action was begun is strong evidence that the Council did not consider that the former language of § 3.23(4) empowered MEOC to award compensatory damages. *See* Sutherland, STAT. CONSTR. § 48.01

[4] ***Nelson v. Weight Loss Clinic of America***, case No. 20684 (9/29/89), and ***Ossia v. Rush***, case No. 1377 (6/7/88).

[5] Section 101.22, STATS., was amended in 1993 to permit a hearing examiner to award economic and non-economic damages, and was renumbered to § 106.04 by 1995 Act 27, § 3687.

[6] Even the present version of § 66.432(2), STATS., does not specifically authorize a municipal agency to award damages to redress housing discrimination. Rather it provides for either party to elect to remove the action to the circuit court after a finding has been made that there is reasonable cause to believe that a violation has occurred.

(5th Ed.). We therefore hold that MEOC exceeded its jurisdiction and acted contrary to law when it awarded Sprague damages for emotional distress.[7]

Appellants also argue that the $300 award for the lost security deposit should be vacated because it reflects MEOC's will and not its judgment. However, we find that MEOC's determination that appellants' illegal refusal to rent to Sprague was the proximate cause of the lost security deposit is reasonably supported by the evidence and is an appropriate restitutionary remedy.

Finally, appellants contend that Sprague's inquiries as to whether the household would respect her sexual orientation constituted a waiver of her rights under § 3.23, MGO. To hold that a prudent inquiry about the environment in which one will live waived the protections afforded by § 3.23, MGO, would be an unreasonable construction of the ordinance. We therefore hold that by her inquiries Sprague did not waive her rights under the ordinance.

Because we hold that in enacting § 3.23(9)(c)2.b, MGO, the Common Council did not authorize MEOC to award damages for emotional distress, we do not decide whether the award violated appellants' right to a jury trial. Further, we need not consider the broader question whether municipalities generally have the power to authorize administrative agencies to award compensatory damages.

By the Court.—Order affirmed in part and reversed in part.

Not recommended for publication in the official reports.

[7] Sprague does not contest MEOC's decision which deleted the examiner's proposed award of punitive damages.