COURT OF APPEALS
DECISION
DATED AND FILED

July 24, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2024 **Cir. Ct. No. 01-CV-2943**

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

SAM'S CLUB, INC.,

PLAINTIFF-RESPONDENT,

V.

MADISON EQUAL OPPORTUNITIES COMMISSION,

DEFENDANT-APPELLANT,

TONYA MAIER,

INTERVENING DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: ROBERT DeCHAMBEAU, Judge. *Affirmed*.

Before Vergeront, P.J., Roggensack and Lundsten, JJ.

¶1 VERGERONT, P.J. This appeal concerns the construction and application of the City of Madison's equal opportunity ordinance prohibiting an employer from discharging an employee because of physical appearance. The

Madison Equal Opportunities Commission (MEOC) decided that Sam's Club, Inc. had violated the ordinance when it discharged Tonya Maier because she wore an eyebrow ring to work in violation of the company's dress code. The circuit court reversed that decision, and Maier and MEOC both appeal.

¶2 We conclude that, under either statutory certiorari as provided in WIS. STAT. § 68.13 (2001-02)[1] or under common law certiorari, the circuit court had the authority to review MEOC's Decision and Final Order under the standards for certiorari review. We also conclude that, giving a reasonable construction to the phrase "for a reasonable business purpose" in the dress code exception in the ordinance, a reasonable decision maker could not conclude that Sam's Club's prohibition against facial jewelry did not come within that phrase, regardless of which party had the burden of proof. Accordingly, we affirm.

BACKGROUND

¶3 Maier worked for Sam's Club in the Madison store as a cashier. Sam's Club discharged her because she wore a ring through her eyebrow to work and this violated its dress code, which provides: "Nose rings or other facial jewelry are not allowed."

¶4 Maier filed a complaint with MEOC alleging that Sam's Club had discriminated against her based on physical appearance in violation of CITY OF MADISON EQUAL OPPORTUNITIES ORDINANCE § 3.23 (MGO § 3.23). MADISON GENERAL ORDINANCE § 3.23 provides:

> Employment Practices. It shall be an unfair discrimination practice and unlawful and hereby prohibited:

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

> (a) For any person or employer individually or in concert with others to fail or refuse to hire or to discharge any individual … because of such individual's sex, race, religion, color, national origin or ancestry, age, handicap, marital status, source of income, arrest record or conviction record, less than honorable discharge, *physical appearance*, sexual orientation, political beliefs…. (Emphasis added.)

MADISON GENERAL ORDINANCE § 3.23(2)(bb) defines the term "physical appearance":

> Physical appearance means the outward appearance of any person, irrespective of sex, with regard to hair style, beards, manner of dress, weight, height, facial features, or other aspects of appearance. It shall not relate, however, to the requirement of cleanliness, uniforms, or prescribed attire, if and when such requirement is uniformly applied for admittance to a public accommodation or to employees in a business establishment for a reasonable business purpose.

¶5 After an initial determination that there was probable cause to believe that Sam's Club had violated these sections, there was a hearing before an MEOC examiner. At the beginning of the hearing the parties stipulated to the facts that Sam's Club terminated Maier because she wore a loop through an eyebrow and Sam's Club did this pursuant to its dress code policy prohibiting facial jewelry. Maier's counsel explained that in his view this constituted Maier's prima facie case, and Sam's Club proceeded to present evidence from the general manager at the Sam's Club's Madison store and Dr. Sharon Lennon, a professor in the Department of Consumer and Textile Sciences at the University of Ohio.

¶6 The general manager testified that the image Sam's Club tries to present to customers was one of "price conscious[ness]," "focus on the product," "no distractions," and "don't spend any money on frivolous things." He described this image as a "traditional" or "conservative" style of retail. He explained how Sam's Club tried to convey this image through a very spartan, warehouse-type

building and through the dress code for the employees. The dress code, he testified, was intended to convey the image that the employees were working in a warehouse, were neat and clean, and were not flashy in appearance. Sam's Club considers facial piercings new and not consistent with the conservative image it wanted to convey. The general manager explained that facial jewelry does not include earrings, which are permitted.

¶7 Dr. Lennon testified that retailers commonly attempt to convey an image for their businesses and commonly have dress codes for employees so that they are dressed in a manner that is consistent with that image. She had visited Sam's Club in Madison and testified that the store had a "spartan, sparse" appearance, "no visual amenities"; she had also read some of their materials. She opined that the image Sam's Club was trying to create was "conservative," "value for a price." She also opined that nose rings and other facial jewelry were not "conservative," meaning that they were not commonly accepted and not very many people were wearing them. In her opinion, if Sam's Club is attempting to convey a conservative business image, it is good business judgment to require employees not to wear facial jewelry.

¶8 In a written decision and order, the hearing examiner made recommended findings of fact, conclusions of law and an order. The examiner concluded that Maier was a member of "the protected class, physical appearance," that Sam's Club's proffered reason for prohibiting facial jewelry—to preserve a "conservative business image"—did not constitute a "reasonable business purpose" under MGO § 3.23(2)(bb), and that Sam's Club had discriminated against Maier in violation of MGO § 3.23 by discharging her for wearing facial jewelry. The examiner ordered Sam's Club "to cease and desist from discriminating on the basis of physical appearance" and not to retaliate against

Maier for the exercise of her rights, and also ordered that the "matter shall be set for further proceedings to establish damages."

¶9 Sam's Club appealed the examiner's recommended decision and order to MEOC. In a written "Decision and Final Order," MEOC adopted all the examiner's findings of fact, conclusions of law and order. It dismissed Sam's Club's appeal and remanded to the examiner "for further proceedings consistent with this decision." Attached to the decision and order was a "Notice of Right to Appeal Final Order," which stated:

> Attached is the Final Order of the Madison Equal Opportunities Commission (MEOC). If discrimination was found, the Respondent must comply with the Order or the Commission may seek judicial enforcement of the Order as prescribed by Section 3.23(9)(c)3, Madison General Ordinances and/or Respondent may be subject to the penalty described in Section 3.23(12), Madison General Ordinances. If no discrimination was found, the allegations have been dismissed. A Final Order may find discrimination regarding some allegations and no discrimination regarding other allegations.
>
> Either or both parties may seek judicial review of the attached Final Order as provided by Section 68.13 of the Wisconsin Statutes, by common law or by any other available legal remedy. Review of this Order pursuant to Sec. 68.13(1) must be commenced by petition for certiorari in the circuit court for Dane County within 30 days after receipt of this Order.

¶10 Sam's Club appealed to the circuit court, asserting that its appeal was pursuant to WIS. STAT. § 68.13(1) and MGO § 3.23(10)(c)4. These provide:

> **Judicial review. (1)** Any party to a proceeding resulting in a final determination may seek review thereof by certiorari within 30 days of receipt of the final determination. The court may affirm or reverse the final determination, or remand to the decision maker for further proceedings consistent with the court's decision.

WIS. STAT. § 68.13(1).

> All orders of the Equal Opportunities Commission shall be final administrative determinations and shall be subject to review in court as by law may be provided. Any party to the proceeding may seek judicial review thereof within thirty (30) days of service by mail of the final determination. In addition, written notice of any request for judicial review shall be given by the party seeking review to all parties who appeared at the proceeding, with said notice to be sent by first class mail to each party's last known address.

MGO § 3.23(10)(c)4.

¶11 The circuit court granted Maier's motion to intervene. Maier, but not MEOC, asserted that the circuit court did not have authority to review MEOC's Decision and Final Order because Sam's Club invoked WIS. STAT. § 68.13 as the basis for judicial review, not common law certiorari, and WIS. STAT. ch. 68 was limited to the determinations specified in WIS. STAT. § 68.02. This section provides:

> **Determinations reviewable.** The following determinations are reviewable under this chapter:
>
> **(1)** The grant or denial in whole or in part after application of an initial permit, license, right, privilege, or authority, except an alcohol beverage license.
>
> **(2)** The suspension, revocation or nonrenewal of an existing permit, license, right, privilege, or authority, except as provided in s. 68.03(5).
>
> **(3)** The denial of a grant of money or other thing of substantial value under a statute or ordinance prescribing conditions of eligibility for such grant.
>
> **(4)** The imposition of a penalty or sanction upon any person except a municipal employee or officer, other than by a court.

Maier argued that her discrimination complaint fell into none of these four categories.

¶12 The circuit court concluded that, although there appeared to be no statutory provision for review of a municipal agency's decision "that does not include the elements described in 68.02," it was not persuaded there was no common law basis for certiorari review. For that reason, as well as MEOC's lack of objection to judicial review and the court's view that the interests of justice would be served by allowing judicial review, the court decided it had the authority to review MEOC's Decision and Final Order. The circuit court then reversed MEOC's Decision and Final Order because it concluded that MEOC's construction and application of the phrase "reasonable business purpose" was unreasonable.

DISCUSSION

Availability of Judicial Review

¶13 The threshold question is whether the circuit court had the authority to review MEOC's Decision and Final Order. On appeal, Maier argues, as she did in the circuit court, that WIS. STAT. ch. 68 is inapplicable because Maier's complaint does not come within any of the categories of WIS. STAT. § 68.02, which defines the determinations that are governed by that chapter. She objects to review by common law certiorari on two grounds: (1) Sam's Club did not allege in its complaint that it was seeking review by common law certiorari; and (2) common law certiorari is available to review only final determinations and MEOC's Decision and Final Order was not final because there were to be further proceedings on the matter of damages. In the alternative, Maier argues that, if we decide that ch. 68 is applicable, Sam's Club may not seek judicial review now

under WIS. STAT. § 68.13(1) because MEOC's Decision and Final Order is not a "final determination" as required by that provision.[2]

¶14 MEOC joins Maier in arguing that Sam's Club may not seek judicial review now under WIS. STAT. § 68.13(1) because the Decision and Final Order is not a "final determination" within the meaning of that provision. However, as we understand MEOC's position, unlike Maier, MEOC views WIS. STAT. ch. 68 as generally applicable because, once damages are determined, they will constitute a "penalty or sanction" within the meaning of WIS. STAT. § 68.02(4) and thus there will be a "final determination" under § 68.13(1).

¶15 Sam's Club responds that MEOC's Decision and Final Order comes within WIS. STAT. § 68.02(2) because it revokes Sam's Club's right to enforce its dress code, and it comes within § 68.02(4) because it imposes a penalty or sanction in that violation of the order subjects Sam's Club to a forfeiture of between $10 and $500 per day. MGO § 3.23(15). Sam's Club also contends that MEOC's Decision and Final Order is a "final determination" within the meaning of WIS. STAT. § 68.13(1) because it is MEOC's final determination that Sam's Club discriminated against Maier, and because both MGO § 3.23(10)(c)4 and the notice MEOC attached to the Decision and Final Order state that the order is final. However, Sam's Club asserts, if we determine that WIS. STAT. ch. 68 is inapplicable and review is proper by common law certiorari, its complaint is sufficient for that purpose.

¶16 Whether Sam's Club may seek judicial review under WIS. STAT. § 68.13(1) requires construction of a statute, thus presenting a question of law,

[2] Maier made this argument in a footnote in her brief before the circuit court. The circuit court did not address it.

which we review de novo. ***Reyes v. Greatway Ins. Co.***, 227 Wis. 2d 357, 364-65, 597 N.W.2d 687 (1999). Whether a court may review a particular decision of an administrative agency by common law certiorari is also a question of law. ***Vidal v. LIRC***, 2002 WI 72, ¶14, 253 Wis. 2d 426, 435, 645 N.W.2d 870.

¶17 Turning first to the issue of whether WIS. STAT. ch. 68 applies, we bear in mind that the aim of all statutory construction is to discern the intent of the legislature. ***Reyes***, 227 Wis. 2d at 365. To that end, we consider first the language of the statute, and if that clearly and unambiguously sets forth the legislative intent, we apply that language. ***Id.*** In this process, we do not consider disputed language in isolation, but in the context of the entire statute. ***Town of Avon v. Oliver***, 2002 WI App 97, ¶7, 253 Wis. 2d 647, 644 N.W.2d 260.

¶18 Our analysis of WIS. STAT. ch. 68 reveals a number of provisions that lead us to question the chapter's applicability in this case, but which no party addresses. First, WIS. STAT. § 68.001 expressly states the legislature's intent:

> **Legislative purpose**. The purpose of this chapter is to afford a constitutionally sufficient, fair and orderly administrative procedure and review in connection with determinations by municipal authorities which involve constitutionally protected rights of specific persons which are entitled to due process protection under the 14th amendment to the U.S. constitution.

Therefore, WIS. STAT. § 68.02, which lists the specific types of determinations covered by the chapter, must be read in light of the express purpose. However, neither MEOC nor Sam's Club explains why Maier's complaint that Sam's Club violated the ordinance prohibiting discrimination involves a "constitutionally protected right" that is "subject to due process protection," § 68.001, and our own research has not disclosed any case applying ch. 68 to this type of proceeding.

¶19 Second, WIS. STAT. § 68.03(8) excludes from the coverage of the chapter "[a]ny action which is subject to administrative review procedures under an ordinance providing such procedures as defined in s. 68.16." WIS. STAT. § 68.16 provides:

> **Election not to be governed by this chapter.** The governing body of any municipality may elect not to be governed by this chapter in whole or in part by an ordinance or resolution which provides procedures for administrative review of municipal determinations.

The City of Madison has established administrative procedures to decide complaints of violations of its equal opportunity ordinance. MGO § 3.23(10)(c). It has further authorized MEOC to create its own rules for that purpose, MGO § 3.23(10)(b)7, and MEOC have done so. The procedures the City and MEOC have established are not the same as those contained in WIS. STAT. §§ 68.07 through 68.12, although both do contain an evidentiary hearing. *Cf.* WIS. STAT. § 68.11(2) and MGO § 3.23(10)(c)2. Neither MEOC nor Sam's Club addresses why the entirely distinct procedures the City and MEOC have adopted do not constitute an election not to be bound by WIS. STAT. ch. 68 in proceedings on discrimination complaints, even if the chapter might otherwise apply.

¶20 However, if we assume for purposes of discussion that WIS. STAT. ch. 68 does apply to proceedings such as that in Maier's complaint, and also assume that the City has not elected to opt out of the chapter, we nonetheless do not agree with MEOC and Maier that Sam's Club may not seek judicial review under WIS. STAT. § 68.13. In their argument that the MEOC Decision and Final Order is not a "final determination" as provided in § 68.13(1), both MEOC and Maier overlook WIS. STAT. § 68.12, which defines a "final determination":

> **Final determination. (1)** Within 20 days of completion of the hearing conducted under s. 68.11 and the filing of

> briefs, if any, the decision maker shall mail or deliver to the appellant its written determination stating the reasons therefor. Such determination shall be a final determination.
>
> **(2)** A determination following a hearing substantially meeting the requirements of s. 68.11 or a decision on review under s. 68.09 following such hearing shall also be a final determination.

¶21 Instead, MEOC and Maier rely on cases decided in the context of appeals to this court from the circuit court under WIS. STAT. § 808.03(1). *See, e.g.,* ***Harding v. Kumar***, 2001 WI App 195, ¶10, 247 Wis. 2d 219, 633 N.W.2d 700 (Ct. App. 2001) ("final" as that term is used in § 808.03(1) means a judgment or order that disposes of the entire matter in controversy as to one of the parties; this depends on whether the circuit court contemplated the judgment or order to be final at the time it was entered). We conclude these cases are not applicable in construing WIS. STAT. ch. 68. In WIS. STAT. § 68.12, the legislature has plainly chosen to define "final determination" as the determination resulting from a prescribed process rather than in terms of whether the content of the determination does or does not contemplate further proceedings. The Decision and Final Order issued by MEOC is a written determination stating reasons for the determination issued after a hearing that substantially conforms to the requirements of WIS. STAT. § 68.11.[3] We see no indication in the language of § 68.12, § 68.13, or any other provision of the chapter that MEOC's Decision and Final Order is not a "final determination" within the meaning of § 68.13, assuming that ch. 68 is applicable.

¶22 Alternatively, if we assume for purposes of discussion that WIS. STAT. ch. 68 is not applicable to Maier's complaint, either because it is not

[3] We note that, according to rules adopted by MEOC, the hearing examiner's findings of fact, conclusions of law and order are recommendations that may be appealed to MEOC. MEOC Rule 11.1.

covered under WIS. STAT. § 68.02 when read in light of WIS. STAT. § 68.001, or because the City has elected not to be bound by ch. 68, we do not agree with Maier that common law certiorari is not available. Common law certiorari is available to review legal questions involved in an administrative agency's decision where statutory appeal is not available.[4] ***Franklin v. Housing Auth.***, 155 Wis 2d 419, 424, 455 N.W.2d 668 (Ct. App. 1990). We reject Maier's contention that if a party does not specifically allege in its complaint that it is seeking review by common law certiorari, that method of judicial review is unavailable. Maier asserts that ***Thorp v. Town of Lebanon***, 2000 WI 60, ¶55-56, 235 Wis. 2d 610, 643, 612 N.W.2d 59, supports her position, but we conclude it does not.

¶23 The complaint in ***Thorp*** alleged equal protection and due process claims as a result of that municipality's decision not to rezone the plaintiffs' property. The court concluded the complaint did not state a claim for a violation of procedural due process because the plaintiffs had an adequate post-deprivation remedy available to them—certiorari review under WIS. STAT. § 68.13. The court rejected the Thorps' argument that the complaint they filed commenced a review by writ of certiorari stating:

> In this case, the Thorps alleged that they were denied the right to a fair and impartial hearing, in violation of their procedural due process rights. There is no indication in the complaint that the Thorps sought certiorari review under either the statute or the common law. The complaint neither cited to Wis. Stat. § 68.13, nor did it state that certiorari review was requested. Moreover, the Thorps failed to comply with the requirements of § 68.13 because they did not seek review within 30 days of the final determination.

[4] No party has suggested that there is a statute providing for judicial review of MEOC's Decision and Final Order other than WIS. STAT. § 68.13.

Id. at ¶55. The point in ***Thorp*** is that the complaint there did not indicate in any way that the plaintiffs sought either statutory or common law certiorari review of the municipality's decision. In contrast, in this case Sam's Club's complaint plainly sought judicial review of MEOC's Decision and Final Order and it alleged the specific factors for certiorari review as the proper scope of the circuit court's review.[5] It is true the complaint alleged that judicial review was sought under § 68.13(1) and did not mention common law certiorari, but neither ***Thorp*** nor any other case of which we are aware requires that the complaint assert the specific source of certiorari review. MEOC evidently understood that certiorari review was sought, because it filed a return of the record. Maier cannot reasonably argue that she did not have notice that Sam's Club sought judicial review by certiorari: whether § 68.13 or common law certiorari is the proper method for judicial review in this case is a question of law and is not dependent on which of the two Sam's Club asserted in its complaint.

¶24 Maier's second objection to allowing review by common law certiorari is that it is available only to review a final determination of an agency, and MEOC's Decision and Final Order was not final because damages remained to be determined. For this proposition, Maier relies on ***State ex rel. Czapiewski v. Milwaukee Service Commission***, 54 Wis. 2d 535, 539, 196 N.W.2d 742 (1972). However, neither ***Czapiewski*** nor the cases it cites analyze the requirement of finality for common law certiorari review in a way that supports the conclusion that MEOC's Decision and Final Order is not final.

[5] The standards for common law certiorari are the same as for certiorari review provided by statute, unless the statute expands the scope of review, which WIS. STAT. § 68.13 does not. ***Hanlon v. Town of Milton***, 2001 WI 61, ¶23, 235 Wis. 2d 597, 607, 612 N.W.2d 44.

¶25 In ***Czapiewski***, the issue was whether the petition for certiorari review filed within the six months was applicable when no statute defined a time period. This, the court said, depended on when "[the] right to relief accrue[d]." ***Id.*** at 539. The plaintiff argued that he could not have sought review of an order suspending him until he obtained a medical clearance because, he argued, the suspension might have been lifted based on the medical clearance. ***Id.*** at 540. The court agreed with the plaintiff that "[c]ertiorari … lies only to review a final determination…," ***id.*** at 539, but concluded that the order was final because the grounds on which the plaintiff alleged the order should be set aside existed on the date the order was entered and nothing happened after the order was entered to change those grounds. ***Id.*** at 540. Maier cites only the court's statement that "[c]ertiorari … lies only to review a final determination," ***id.*** at 539, and does not develop the argument by applying the reasoning of ***Czapiewski*** to this case. In our view, that reasoning may well support Sam's Club's position in this case. Nothing was to occur or did occur after the date of MEOC's Decision and Final Order to alter the grounds upon which Sam's Club seeks judicial review: that MEOC erred in its determination that Sam's Club discriminated against Maier based on personal appearance.

¶26 Although Maier does not refer to them, we have also read the cases the court in ***Czapiewski*** cites for the proposition that "[c]ertiorari … lies only to review a final determination." ***Id.*** at 539. In each case, the administrative action held not final for purposes of certiorari review bears no resemblance to MEOC's Decision and Final Order. ***McKenzie v. Brown***, 174 Wis. 498, 182 N.W. 602, 604 (1921) (no determination had yet been made by the superintendent); ***Meissner v. O'Brien***, 208 Wis. 502, 243 N.W. 314 (1932) (review sought of a ruling on an objection to the authority of the hearing officer before the hearing was concluded);

St Mary's Hosp. v. Indus. Comm'n, 250 Wis. 516, 518, 27 N.W.2d 478 (1947) (review sought of a ruling on the relevancy of evidence before the hearing was concluded). In this case, in contrast, the administrative hearing was concluded, the examiner issued a written decision concluding that Sam's Club had discriminated against Maier based on physical appearance by terminating her because of her eyebrow ring and ordered Sam's Club to cease discriminating; MEOC adopted that decision and order in a document entitled Decision and Final Order; and MEOC attached to that document a notice advising Sam's Club that the "Final Order of the MEOC" was attached.

¶27 In her argument that common law certiorari review is not available because MEOC's Decision and Final Order is not final, Maier also points to the cases we have referred to above governing appeals to this court under WIS. STAT. § 808.03(1). However, she does not develop an argument relating our construction and application of that statute to the case law discussing the purposes of common law certiorari. Particularly in view of the statutory method available for seeking permissive review of non-final circuit court orders in this court, *see* § 808.03(2), it is not at all self-evident that our construction of the term "final" as used in § 808.03(1) should define the availability of common law certiorari review of agency actions.

¶28 In short, Maier has not presented us with persuasive authority for her argument that the MEOC's Decision and Final Order is not final for purposes of common law certiorari review.

¶29 Accordingly, we conclude that, under either statutory certiorari as provided in WIS. STAT. § 68.13 or under common law certiorari, the circuit court

had the authority to review MEOC's Decision and Final Order under the standards for certiorari review.[6]

Construction and Application of MGO § 3.23(2)(bb)

¶30 On an appeal from a circuit court's decision reviewing the decision of an administrative agency, we apply the same standard as the circuit court and do not defer to the circuit court. ***City News & Novelty, Inc. v. City of Waukesha***, 231 Wis. 2d 93, 102, 604 N.W.2d 870 (Ct. App. 1999). Because this is a certiorari review of MEOC's Decision and Final Order, we, like the circuit court, are limited to determining whether: (1) MEOC kept within its jurisdiction; (2) MEOC acted according to law; (3) MEOC acted in an arbitrary manner that represented its will and not its reasoned judgment; and (4) the record contains evidence such that MEOC might reasonably make the Decision and Final Order. *See* ***Klinger v. Oneida County***, 149 Wis. 2d 838, 843, 440 N.W.2d 348 (1989).

¶31 Sam's Club challenges MEOC's construction of MGO § 3.23(2)(bb), contending that MEOC erred in placing the burden on Sam's Club to prove it had a "reasonable business purpose" for prohibiting eyebrow rings and erred in the construction and application of the phrase "reasonable business purpose." These challenges implicate the second and third factors above.

¶32 The construction of an ordinance, like the construction of a statute, presents a question of law, and we apply the rules of statutory construction. ***Schroeder v. Dane County Bd. of Adjustment***, 228 Wis. 2d 324, 333, 596 N.W.2d

[6] We recognize it is unusual not to decide whether WIS. STAT. ch. 68 applies, but instead to assume both that it does and that it does not and to address the objections under each scenario. We choose this course because there are important issues concerning the applicability of ch. 68 that have not been briefed or argued.

472 (Ct. App.1999). Although we are not bound by an administrative agency's conclusion of law, we may accord it deference. ***UFE, Inc. v. LIRC***, 201 Wis. 2d 274, 284, 548 N.W.2d 57, 61 (1996). We give great weight deference only when:

> (1) the agency was charged by the legislature with the duty of administering the statute; (2) … the interpretation of the agency is one of long-standing; (3) … the agency employed its expertise or specialized knowledge in forming the interpretation; and (4) …. The agency's interpretation will provide uniformity and consistency in the application of the statute.

Id. at 284. When we accord great weight deference, we uphold the agency's construction if it is not contrary to the clear language of the ordinance, even if another interpretation is more reasonable. ***Id.*** at 287. We give a lesser amount of deference—due weight—when the agency has some experience in the area, but has not developed the expertise that necessarily places it in a better position than the court to make judgments regarding the interpretation of the statute. ***Id.*** at 286. Under this standard, if the agency's construction is reasonable, we uphold it unless there is a more reasonable construction. ***Id.*** at 287. Finally, we give no deference to the agency and review the issue de novo when the issue before the agency is one of first impression or the agency's position has been so inconsistent as to provide no real guidance. ***Id.*** at 285.

a. *Burden of proof on the exception.*

¶33 We consider first the question of where the burden of proof lies on the issue of whether a requirement of cleanliness, uniforms, or prescribed attire is "for a reasonable business purpose." In MEOC's decision, it placed the burden on the employer to prove "a legitimate, nondiscriminatory reasonable business purpose for the no-facial jewelry policy." In their briefs, both MEOC and Maier contend that this is correct because, they assert, the exception in MGO

§ 3.23(2)(bb) for a requirement of cleanliness, uniforms, or prescribed attire is an affirmative defense. They also contend that MEOC's construction of the ordinance on this point is entitled to great weight deference. Sam's Club responds that the claimant must prove the exception does not apply as part of her case and that MEOC's decision on this point is inconsistent with prior decisions and therefore entitled to no deference.

¶34 For the reasons we explain later in this decision, we conclude it is not necessary to decide whether Maier must prove as an element of her claim that the exception to the definition of physical appearance does not apply or Sam's Club must prove it does apply. However, because the parties have argued at length whether MEOC decisions have been consistent on this point, and because it may be of assistance, we choose to take up the issue of whether MEOC's decisions have been consistent on this question. We conclude they have not been consistent.

¶35 In the first MEOC decision brought to our attention, ***Marks v. Rennebohm Drug Stores, Inc.***, MEOC Decision (October 29, 1975), MEOC appears to have required the employer to prove a "reasonable business purpose," because it found that the employer "had not demonstrated 'a reasonable business purpose' for the hair length rule or for the denial of the Complainant's request to wear a hair net." However, MEOC's subsequent complaint against Rennebohm Drug Stores concerning that same employee was dismissed because, the circuit court ruled, under the language of MGO § 3.23(2)(bb) (then numbered MGO § 3.23(2)(k)), the plaintiff had to plead and prove that the employer's conduct did not come within the exception stated in the definition of physical appearance. ***City of Madison v. Rennebohm Drug Stores, Inc.***, CV179P319 (Dane County Ct.,

July 19, 1977).[7] The court dismissed the complaint because the facts alleged were insufficient to state a cause of action under this construction of the ordinance. This construction of the ordinance apparently has never been applied by MEOC and is, indeed, the construction that Sam's Club advocates.

¶36 Subsequently in ***Karaffa v. McDonald's Restaurant***, MEOC Final Order, Case No. 2752 (April 15, 1982), MEOC adopted the hearing examiner's decision that the burden of proof is the same as that established in ***Texas Department of Community Affairs v. Burdine***, 450 U.S. 248 (1981), a Title VII sex discrimination case. Under this approach, once the employee has established a prima facie case of discrimination, the employer has the burden of articulating a legitimate nondiscriminatory reason for its allegedly unlawful actions, which must be legally sufficient and supported by admissible evidence, but need not persuade the decision maker; if the employer does so, the employee then has the burden of persuasion that the articulated reason is pretextual or unworthy of credence. ***Id.*** at 254-56. Applying this approach, MEOC decided that McDonald's no-beard rule constituted discrimination based on physical appearance because its asserted concerns of health and safety and a public image of cleanliness were pretextual. ***Karaffa***, MEOC Final Order, Case No. 2752. The circuit court reversed this decision, and this court affirmed. ***State ex rel. McDonald's Restaurant v. MEOC***, 82-CV-2423 (Dane County Cir. Ct., July 6, 1983) *aff'd* 83-1571 (Ct. App.,

[7] It is not clear from the court's decision in ***City of Madison v. Rennebohm Drug Stores, Inc.***, City Docket CV179P319 (Dane County Ct., July 19, 1977), why MEOC was initiating an action against Rennebohm Drug Stores, or the precise procedural relationship of the court action to MEOC's October 29, 1975 decision in favor of the employee. However, the title of the court's decision, as identified in the MEOC Digest, indicates the complaint in court concerned the same employee involved in MEOC's decision against Rennebohm Drug Stores.

August 23, 1984).[8] Both courts observed that the MEOC urged application of the ***Burdine*** approach and both applied that approach. However, the ***Burdine*** burden-shifting approach is inconsistent with placing the burden on the employer to prove a reasonable business purpose as an affirmative defense: under ***Burdine***, the employer need only present some evidence of a reasonable business purpose, and the employee then has the burden to persuade the decision maker that purpose is pretextual or unworthy of credence. ***Burdine***, 450 at 256.

¶37 MEOC also applied the ***Burdine*** burden-shifting approach in ***Quinn-Gruber v. Wisconsin Physicians Service***, MEOC Case No. 2877 (January 27 1983). There the hearing examiner's recommended decision was that a dress code prohibiting "too long" skirts discriminated based on physical appearance because it was vague and because the employer had presented no evidence to justify its articulated business purpose of safety; the hearing examiner's decision in essence required the employer to prove that its conduct fell within the exception. However, MEOC opined that the employer's articulation of safety was sufficient under ***Burdine*** and the complainant had not carried her burden of proving it was pretextual.[9]

---

[8] The court of appeals decision, unlike the circuit court, did not reach the issue of public image because it concluded the health and safety concerns alone constituted a "reasonable business purpose." ***State ex rel. McDonald's Restaurant v. MEOC***, 83-1571 (Ct. App., Aug. 23, 1984).

[9] MEOC also refers to two other decisions that we do not view as helpful in evaluating its past construction and application of MGO § 3.23(2)(bb) regarding which party has the burden of proof on the exception. ***Maxwell v. Union Cab Coop.***, MEOC Case No. 21028 (July 10, 1992) (reversing the examiner's conclusion that the complainant failed to prove his employer had discriminated against him based on physical appearance but not explaining reversal with reference to the exception); and ***Kessler v. Federated Rural Electric Ins. Co.***, MEOC Case. No. 2337 (March 10, 1983) (reversing examiner's conclusion that employer discriminated based on physical appearance because it determined the complainant's physical appearance was not a substantial factor in his discharge).

¶38 In this case, the decision adopted by MEOC explained that, although MEOC "has often utilized the ***Burdine-McDonnell-Douglas*** burden-shifting approach in employment discrimination cases," it did not need to be followed when, as here, the parties had "address[ed] the ultimate question of discrimination." In their briefs, MEOC and Maier argue that the ***Burdine*** burden-shifting approach applies only when the employer has denied that it has made an employment decision on a prohibited basis and does not apply when, as here, there is no dispute over the reason for the termination. Maier also argues that under federal case law, this approach has no relevance after a case proceeds to trial. These may well be valid reasons for not applying the ***Burdine*** burden-shifting approach in cases of this type, but they do not alter the fact that MEOC has followed that approach in the past in cases where, as here, the employer has admittedly terminated an employee because of failure to comply with a requirement concerning cleanliness or personal attire, and the parties have fully tried the issues. Neither MEOC nor Maier appears to recognize that the premise of the ***Burdine*** burden-shifting approach is that the complainant has the burden of persuasion to disprove the employer's articulated "reasonable business purpose," a premise that is irreconcilable with treating a "reasonable business purpose" as an affirmative defense that the employer must prove.[10]

¶39 We also observe that the MEOC Digest adds to the confusion on this issue. The MEOC Digest states:

[10] It is also true that Sam's Club advocates both the ***Burdine*** burden-shifting approach and construing the ordinance such that the complainant must prove as an element of his or her case that the exception does not apply. These, too, are inconsistent arguments. In the latter situation, if the complainant does not put on evidence that the exception does not apply, the employer is entitled to dismissal at the close of the complainant's case; the employer need not put on evidence to show the exception is applicable unless the complainant has first presented evidence that it is not.

> **612.3 Respondent's Burden to Articulate Legitimate, Non-Discriminatory Reason.** An employer need only articulate reasons why its regulation of employee's physical appearance meets the exception specified in the Ordinance for "reasonable business purpose"; the employee must then prove that those reasons are invalid. ***State ex rel. McDonald's Restaurant v. MEOC (Karaffa)***, supra [82-CV-2423 (Dane County Circuit Court, July 6, 1983) aff'd 83-1571 (Ct App August 23, 1984)]; also ***City of Madison v. Rennebohm Drug Stores (Marks)***, CV179P319 (Dane County Cir. Ct., 7/19/77).

As our discussion of these cases already indicates, the sentence preceding the case citations is an accurate summary of ***McDonald's*** but not of ***Rennebohm Drug Stores***, and the two cases are inconsistent.[11]

b. *Construction and application of "for a reasonable business purpose."*

¶40 In its decision, MEOC stated that an employer's desire to convey a particular image could in certain circumstances constitute "a reasonable business purpose" for a dress code, but it determined Sam's Club's purpose of conveying a conservative image was not "a reasonable business purpose" within the meaning of MGO § 3.23(2)(bb) for three reasons: (1) a conservative image is based on Sam's Club's idea of what consumer's will find pleasing in an employee's appearance, and this is not acceptable for employment policies; (2) the traits that constitute a conservative image vary based on geography and setting, and cannot

[11] We recognize that the Introduction to the MEOC Digest cautions the reader that "the case summaries are not intended as official EOC interpretations," but rather as "a guide for directing the reader to the full text of pertinent cases." However, the Introduction also states that it is intended to "assist the public in general and the legal practitioner in particular" and "[i]n addition to being useful in the hearing and settlement processes, it is also intended to assist in the prevention of discriminatory practices." It is, in any event, confusing when the digest does not accurately summarize a case, as with ***Rennebohm Drug Stores***, or summarizes cases it does not follow without indicating this, as with both ***Rennebohm Drug Stores*** and ***McDonald's***.

be defined with certainty; and (3) Sam's Club is a general retailer, not an office.[12] Sam's Club contends that these reasons are based on an erroneous construction of "reasonable business purpose." MEOC and Maier assert that we should give great weight deference to MEOC's construction, while Sam's Club contends it is inconsistent with MEOC's prior decision in ***Quinn-Gruber*** and, therefore, we should accord it no deference.

¶41 We begin by reviewing MEOC's prior decisions to determine the appropriate level of deference. MEOC has addressed whether a requirement of cleanliness, uniforms, or prescribed attire is for a reasonable business purpose in ***Marks***, ***Karaffa***, and ***Quinn-Gruber***. However, MEOC's decision in ***Marks*** is of questionable validity after the court's dismissal of its complaint in ***Rennebohm Drug Stores*** and MEOC's decision in ***Karaffa*** was reversed by the circuit court, with this court affirming that reversal. It is true that these court decisions are not binding in other MEOC cases, but they do mean that MEOC's decisions in these two cases may not be relied on to show a consistent and long-standing history in construing for "a reasonable business purpose."

¶42 In ***Quinn-Gruber***, in addition to concluding that the employer had discriminated against the employee based on physical appearance because of the prohibition against "too long" skirts, the hearing examiner also upheld another aspect of the dress code. The examiner concluded that a dress code prohibiting jeans and tennis shoes, which the employer stated was for the purpose of "business image or public image" was proper, if applied in a uniform manner, "in an office

[12] Certain sentences of the decision suggest that a "reasonable business purpose" is limited to considerations of health and safety. However, at oral argument, MEOC counsel stated the decision does not say that, and we accept counsel's reading as the more reasonable reading of the decision. For purposes of clarity, however, we state that such a limitation on the meaning of "reasonable business purpose" would be an unreasonable construction of the phrase.

setting where there is even minimal public contact, regardless of whether or not the wearing of those items of clothing physically interferes with a person's ability to do their job." MECO Case No. 2877 at 12-13 (footnote omitted). MEOC, as we have noted above, disagreed with the examiner's recommended decision on the "too long" skirts prohibition and so vacated the conclusion that there was discrimination; however, it remanded for further proceedings on the issue of whether the employer had applied the "too long" skirts prohibition to retaliate against the employee for opposing allegedly discriminatory practices.

¶43 In MEOC's decision in this case, MEOC rejected Sam's Club's argument that its decision in ***Quinn-Gruber*** was authority for the proposition that a business image was a reasonable business purpose when an employee has public contact on two grounds: (1) MEOC in ***Quinn-Gruber*** vacated the hearing examiner's conclusion of discrimination, and (2) the scope of the decision was limited to an office setting and did not apply to a general retailer. On this appeal, Maier, but not MEOC, advances the position that in ***Quinn-Gruber*** MEOC did not endorse the examiner's conclusion on business image because it vacated the entire decision and remanded. If Maier is correct, then MEOC's decision in ***Quinn-Gruber*** does not contribute much, if anything, to a history of MEOC's construction and application of "for a reasonable business purpose." However, we think the more reasonable reading of MEOC's decision in ***Quinn-Gruber*** is that, by commenting only on its disagreement with the examiner's conclusion regarding the "too long" skirts prohibition and remanding only for the purpose of determining if that were applied in a discriminatory manner, MEOC was, of necessity, agreeing with the hearing examiner's analysis of the tennis shoes and jeans prohibition—otherwise it would have concluded there was discrimination

based on personal appearance because a business image was not a "reasonable business purpose," and there would have been no reason for a remand.

¶44 Maier directs us to two additional decisions as an indication of MEOC's consistent and longstanding construction of "for a reasonable business purpose": ***Regan v. Lyons Mortgage Co***., MEOC Case No. 20846 (Jan. 31, 1989), and ***Maxwell v. Union Cab Coop.***, MEOC Case No. 21028 (July 10, 1992). The former is the decision of a hearing examiner ordering a remedy after finding an employer liable for discrimination based on physical appearance as a result of default and contains no discussion of the liability issue. The latter is an MEOC decision reversing the examiner and finding evidence of discrimination based on physical appearance; MEOC identifies the evidence it is relying on—references to the male employee's jewelry and make-up—but does not discuss "for a reasonable business purpose" at all.

¶45 We conclude that, although MEOC has construed and applied "for a reasonable business purpose" before this case, its unreversed decisions are not sufficiently explained and consistent to warrant great weight deference. On the other hand, because it has acquired some experience in deciding these cases and because we cannot say its decisions are so inconsistent as to provide no guidance, we conclude that due weight deference is appropriate. We therefore next consider whether MEOC's construction of "for a reasonable business purpose" is at least as reasonable as any other construction of this phrase, which requires first that we decide whether it is a reasonable construction.

¶46 The language of this phrase imposes three distinct conditions on "requirement of cleanliness, uniforms, or prescribed attire": (1) the employer must have a business purpose; (2) the business purpose must be reasonable; and

(3) the requirements must be "for" that reasonable business purpose. Beginning with the first condition, we conclude that a "business purpose" is an unambiguous term that means "a goal of benefiting the business." The word "reasonable" is a modification of "business purpose," and means, we conclude, that the business purpose must be that of a reasonable business person. Finally, the challenged requirement of cleanliness, uniforms, or prescribed attire must be "for" that reasonable business purpose, which plainly means that the requirement is intended to further the purpose.

¶47 Turning now to MEOC's construction of the phrase, we analyze each of the three reasons to determine whether they are based on reasonable constructions of the phrase. We conclude that none are.

¶48 First, we consider MEOC's exclusion of customer preferences for types of attire from "reasonable business purpose." The meaning of "business purpose" is broad, and plainly includes attracting and maintaining customers to one's business, which just as plainly depends upon customer preferences and customer satisfaction. In deciding this is not a "reasonable" business purpose, the MEOC decision relies on case law concluding that customer preferences do not justify employment practices that are themselves prohibited practices. *See, e.g.,* ***Gerdon v. Continental Airlines, Inc.***, 692 F.2d 602, 609 (9th Cir. 1982) (employer whose weight limit for female flight attendants is prohibited sex discrimination may not justify the weight limit by customer preference for slender female flight attendants).[13] However, under Madison's ordinance, discrimination

[13] The court in ***Gerdon v. Continental Airlines, Inc.***, 692 F.2d 602, 607 (9th Cir. 1982), also noted the agreement among federal courts that grooming rules for male and female employees were permissible if they did not significantly deprive either sex of employment opportunities and were even handedly applied to both sexes.

based on physical appearance does not include employment practices based on requirements of cleanliness, uniforms, and prescribed attire that are uniformly applied and are for reasonable business purposes. Therefore, if such requirements meet those two conditions, there is no prohibited practice. It is circular logic—that is, not logical, —to exclude customer preferences for certain types of employee attire from "reasonable business purpose" on the ground that otherwise employers will be engaging in the prohibited practice of employment discrimination based on physical appearance.

¶49 Next, we consider the requirement that the image an employer wants to project for his or her business must have a fixed content in order to be a reasonable business purpose. The fact that what is "conservative" and what is "trendy" varies based on the type of business and its geographical location and cannot be defined with precision has no rational connection to whether it is a reasonable business purpose for an employer to promote an image of "conservative" or "trendy." All it means is that the dress codes and other steps an employer takes to convey a particular image will vary depending on the type of business, where it is, and, perhaps, the particular employer.

¶50 Finally, we consider MEOC's distinction between a business image for a general retailer and for a business in an office setting. Beyond explaining that ***Quinn-Gruber*** concerned business image as a reasonable business purpose in an office setting, MEOC does not in its decision explain why it is not a reasonable business purpose for a general retailer to convey a particular image of its business. We can discern no rational basis for this distinction. As we have mentioned above, the image of its business an employer chooses to convey and how it chooses to convey that image may vary depending on the type of business, but that

variation has no bearing on whether conveying the image the employer chooses is a reasonable business purpose.

¶51 In short, MEOC's construction of "for a reasonable business purpose" imposes limitations on that phrase that are not reasonably conveyed by the language. We therefore do not adopt it. Instead, we adopt the construction of the phrase that we have stated above: A requirement of cleanliness, uniforms, or prescribed attire is "for a reasonable business purpose" when it is intended to further a goal that benefits the business, so long as the goal is that of a reasonable business person.[14]

¶52 Applying this construction of the phrase, we conclude that no reasonable decision maker could determine that the evidence did not establish that the prohibition against eyebrow rings was "for a reasonable business purpose." Accordingly, there is no need to remand to the MEOC. For the same reason, as we indicated earlier, it is not significant in evaluating the evidence whether Maier had the burden of proving the exception did not apply or Sam's Club had the burden of proving that it did apply. The undisputed testimony is that Sam's Club attempts to project and does project a conservative, no frills, no flash image for its business; it does so because Sam's Club wants to convey to customers that they are getting the best value for their money. The testimony is also undisputed that retailers commonly develop images for the benefit of their businesses and commonly have dress codes to further the chosen image. Finally, it is undisputed

[14] In construing this section of the ordinance, we are not considering the constitutionality of this or any other construction. Sam's Club raised certain constitutional challenges in its amended answer to Maier's complaint, but it is not pursuing those on this appeal and apparently did not do so in the circuit court.

that facial jewelry and eyebrow rings in particular do not convey a conservative image.[15]

¶53 Maier argues that there are inconsistencies in Sam's Club's dress code. For example, tattoos are not prohibited nor is orange hair, and multiple earrings are allowed; yet, Maier asserts, none of these convey a conservative image. We do not see the relevancy of this evidence. The issue is whether the prohibition against facial jewelry, which was the basis for Maier's termination, is "for a reasonable business purpose." Conceivably, evidence that other types of attire are allowed that are not conservative could raise a factual issue whether Sam's Club did have the purpose of conveying a conservative image; however, the fact finder in this case implicitly found that this was Sam's Club's purpose and the record supports this implicit finding.

¶54 Maier also argues that if we do not uphold MEOC's construction of "for a reasonable business purpose," the entire prohibition against hiring and firing based on physical appearance will be undermined. This argument overlooks the wording of MGO § 3.23(2)(bb): the exception applies only to "the requirement of cleanliness, uniforms and prescribed attire."

¶55 In summary, we conclude that, giving a reasonable construction to the phrase "for a reasonable business purpose," a reasonable decision maker could not conclude that Sam's Club's prohibition against facial jewelry did not come within that phrase, regardless of which party had the burden of proof.

[15] In evaluating the evidence presented in this case, we do not suggest that it is necessary that an expert testify in order to establish that a requirement of cleanliness, uniforms, or prescribed attire is "for a reasonable business purpose."

By the Court.—Order affirmed.

Not recommended for publication in the official reports.