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ELECTED TO DECIDE: IS THE DECISION-AVOIDANCE DOCTRINE OF GREAT WEIGHT DEFERENCE APPROPRIATE IN THIS COURT OF LAST RESORT?

THE HONORABLE PATIENCE DRAKE ROGGENSACK*

I. INTRODUCTION

The Wisconsin Supreme Court, the state court of last resort for claims made in Wisconsin forums, provides review “only when special and important reasons are presented.”¹ In order to control its docket, the court selects approximately ten percent of the cases presented to it for review each year.² It accepts those cases that it determines contain significant issues of federal or state constitutional law,³ where the court is considering establishing a new policy,⁴ where decisions of the court of appeals appear to be in conflict or show a need to harmonize the law,⁵ or where the court determines that the issue presented is otherwise of statewide concern.⁶ The court limits its docket because it sees itself as a law-declaring, not an error-correcting, court.⁷

The Wisconsin Supreme Court, like other Wisconsin appellate courts, uses a variety of doctrines, such as deferential standards of review and waiver, to restrict its ability to fully review the merits of decisions made by other

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1. See WIS. STAT. § 809.62(1) (2003–2004).

2. See Supreme Court Statistical Reports, 1994–2004.

3. See *Dane County Dep’t of Human Servs v. P.P.*, 2005 WI 32, 279 Wis. 2d 169, 694 N.W.2d 344.

4. See *In re Jerrell C.J.*, 2005 WI 105, 283 Wis. 2d 145, 699 N.W.2d 110 (concluding that interrogations of juveniles that are conducted in a secure setting will not be admissible unless recorded); *State v. Dubose*, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 592 (concluding that most show-up, eye-witness identifications are no longer admissible).

5. See *State v. Higginbotham*, 471 N.W.2d 24 (Wis. 1991).

6. See § 809.62.

7. See WIS. CONST. art. VII, § 3; *State v. Ward*, 2000 WI 3, ¶ 39, 231 Wis. 2d 723, ¶ 39, 604 N.W.2d 517, ¶ 39.

tribunals.⁸ These doctrines do not arise from any constitutional limitation on the court's powers or from legislative proscriptions. Rather, they are judicially created rules of administration employed in deciding legal issues that have no underlying factual questions to resolve. They often are driven by concerns for the efficient use of judicial resources, the finality of judgments, and the asserted expertise of other tribunals.⁹

The use of decision-avoidance doctrines has grown dramatically over the last twenty-five years, to the extent that the Wisconsin Supreme Court routinely defers to the decisions of other tribunals, without examining and explaining how the law requires the result reached.¹⁰ In this Article, I frame appellate review, generally outline the effect of decision-avoidance, and focus more specifically on its use by the Wisconsin Supreme Court in the review of state agency decisions. I also suggest that because the Wisconsin Supreme Court's members were elected to decide what the law is, and because the court restricts its own docket in order to maintain its law-declaring status, it may be appropriate for the court to re-examine whether decision-avoidance is too often replacing the court's full consideration of the issues raised on appeal, at least in regard to state agency decisions to which the highest level of deference, great weight deference, is accorded.

II. APPELLATE JUDICIAL REVIEW

Appellate review is provided to afford the parties the benefit of a collective judicial opinion to more effectively assure a fair and equitable result that follows relevant legal principles.¹¹ In a court of last resort, judicial review also has a law-declaring function because of the court of last resort's position as the final arbiter of the legal question presented. Thorough appellate review is a time-consuming process. It involves review of factual records that are often voluminous; extensive legal research of the laws of Wisconsin, of federal laws, and the laws of other states; careful attention to briefs and to oral arguments of the parties; thorough discussion among members of the court; and the synthesis of a written opinion that distills the facts and the law and comes to a reasoned conclusion that is both understandable and useable by the parties, other tribunals, and the public.

8. See Appendix A, *infra*, for examples of the judicially created decision-avoidance doctrines and examples where the Wisconsin Supreme Court has used them.

9. See *Beecher v. Labor & Indus. Review Comm'n*, 2004 WI 88, ¶¶ 23-25, 273 Wis. 2d 136, ¶¶ 23-25, 682 N.W.2d 29, ¶¶ 23-25; *Maclin v. State*, 284 N.W.2d 661, 664-65 (Wis. 1979).

10. See Appendix B and Appendix C, *infra*, for the use of judicial decision-avoidance doctrines in opinions the Wisconsin Supreme Court released in the 2003-2004 and 2004-2005 terms.

11. See KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1960).

A well-written appellate opinion of the type that the public expects from the Wisconsin Supreme Court is a carefully forged tool. It is firm, understandable, and user-friendly when the need arises to apply it in the future. The court accomplishes these objectives by analyzing the relevant facts and law and then clearly explaining why it reached the result that it did. It takes a great deal of work to complete a well-reasoned, effective appellate opinion. And while some would argue that the court has many other tasks in addition to completing the reviews of the cases the court accepts,¹² it is its law-declaring function evidenced in its written opinions that the public most associates with the work of the court and through which the court makes its most lasting contribution to the development of the rule of law.

In Wisconsin, appellate review is not a constitutional right, but rather an opportunity afforded through legislation. The type of appellate review that is given depends upon the forum in which the claim is first brought, the statutory provisions that apply to the appeal, judicial interpretations of those provisions and judicially created doctrines of administration. For example, in civil cases and criminal cases first filed in circuit court,¹³ appellate judicial review is accorded under sections 808.03 and 974.02 of the Wisconsin Statutes. Termination of parental rights cases are provided appellate review under section 809.105 of the Wisconsin Statutes, and appeals in proceedings related to parental consent to perform abortions are subject to section 809.105 of the Wisconsin Statutes. On the other hand, cases that are filed with an agency, such as contested cases brought before the Department of Workforce Development (DWD)¹⁴ under the Wisconsin Fair Employment Act (WFEA), are generally appealed first to an agency-commission such as the Labor and Industry Review Commission (LIRC). LIRC's decision on a WFEA claim may be reviewed in the circuit court under section 111.395 of the Wisconsin Statutes, subject to the provisions of chapter 227. The agency decision is further reviewed when the circuit court's final decision is appealed under section 808.03 of the Wisconsin Statutes.¹⁵ However, LIRC's decisions that relate to worker's compensation and unemployment compensation are subject

12. The court also acts as the superintending authority of the judicial branch of Wisconsin government, WIS. CONST. art. VII, § 3, cl. 1, and the supervisory authority for lawyers practicing in Wisconsin, WIS. SUP. CT. R. 21 preamble.

13. In Wisconsin, circuit courts provide the trial venue for the majority of cases that do not begin as an assignment to a state agency. *See* WIS. CONST. art. VII, § 2; WIS. STAT. § 753.03 (2003–2004). A statutory right of review is provided in the court of appeals.

14. The Department of Workforce Development was known as the Department of Industry, Labor, and Human Relations from 1967 to 1996.

15. Even though the appeal is taken from the circuit court's decision, it is the agency decision that remains the focus of the appellate review. *See* Wis. Pub. Serv. Corp. v. Pub. Serv. Comm'n, 457 N.W.2d 502 (Wis. Ct. App. 1990).

to judicial review under the provisions of chapter 102 and not those of chapter 227.¹⁶ Review of the agency decision is then subject to further appellate review by the Wisconsin Court of Appeals under section 808.03 of the Wisconsin Statutes on an appeal from the circuit court's decision,¹⁷ and the decision of the court of appeals is subject to discretionary review by the Wisconsin Supreme Court.¹⁸

The court of appeals provides the statutory review of right under Wisconsin law, in that most claimants in Wisconsin forums have a legislatively created right to bring claims as far as the court of appeals.¹⁹ It is an intermediate appellate court that has an extremely heavy workload, deciding approximately 3500 cases annually.²⁰ The court of appeals has had a 300% increase in appeals since it was created in 1978, with only a 33% increase in judicial resources by which to process its docket.²¹ Therefore, because it has no control over its docket and the need to expeditiously process a heavy workload, the court of appeals' use of doctrines that limit the extent of appellate review may be driven by necessity rather than by choice.²² Accordingly, the court of appeals' use of decision-avoidance doctrines is not examined in this Article.

However, since the creation of the Wisconsin Court of Appeals in 1978, the Wisconsin Supreme Court has set its appellate docket through the cases it selects for review pursuant to the criteria set out in section 809.62 of the Wisconsin Statutes, deciding approximately 100 appeals per term.²³ When the court decides to grant a petition for review²⁴ or for bypass,²⁵ or to accept a certification²⁶ from the court of appeals, it is the perception of the public that the court has taken the case to decide the substantive issues presented, not to avoid deciding them by judicially created avoidance doctrines. In addition, while I have noted that the scope of judicial review is limited by statute in some categories of appeals, such as that set out in section 102.23(1)(e) of the

16. WIS. STAT. § 102.23(1)(a) (2003–2004).

17. § 808.03(1).

18. § 808.10.

19. § 808.03(1).

20. See Wisconsin Court of Appeals Statistical Reports, 1978–2004.

21. See *id.*

22. In some instances, the Wisconsin Supreme Court also has restricted the court of appeals' ability to review certain issues. See, e.g., *State v. Schumacher*, 424 N.W.2d 672, 679 (Wis. 1988) (restricting the court of appeals' review of a claimed error in jury instructions when the issue was not first raised in the circuit court).

23. See Supreme Court Statistical Reports, 1994–2004.

24. § 809.62.

25. § 809.60.

26. § 809.61.

Wisconsin Statutes and the directive given in section 227.57 of the Wisconsin Statutes, my focus is not on those or other statutory limitations. Rather, it is solely on judicially created doctrines that are employed in lieu of providing a reasoned decision on the merits of the issues presented. These are doctrines that preclude a declaration of what the law is by the very court that chose to accept the cases for review.

III. DECISION-AVOIDANCE IN THE SUPREME COURT

Over time, the Wisconsin Supreme Court, like many other appellate courts, has created a number of decision-avoidance doctrines that, when applied to cases under review, prevent the court from reaching the merits of the legal questions presented. These doctrines are formalistic approaches to decision making that have been developed without persuasively explaining why their use in each case where they are employed better serves the public interest than does a well-reasoned opinion that describes how the application of the law to the facts of the case or the interpretation of a statute causes the result reached. As doctrines of judicial administration, they are refused²⁷ or employed²⁸ based solely on the choice of the court. Examples of commonly applied decision-avoidance doctrines are deferential standards of review²⁹ and waiver.³⁰ There are times when decision-avoidance doctrines are employed to dispose of an ancillary issue presented by a case that the court accepted as a vehicle to address a different issue.³¹ The use of such doctrines is more understandable there. However, decision-avoidance doctrines are routinely applied to decide key issues for which judicial review was granted.³² When

27. See *Lisney v. Labor & Indus. Review Comm'n*, 493 N.W.2d 14, 15-23 (Wis. 1992) (declining to defer to LIRC's interpretation of section 102.42(1) of the Wisconsin Statutes and instead clearly explaining why the law required the result the court reached).

28. See *Harnischfeger Corp. v. Labor & Indus. Review Comm'n*, 539 N.W.2d 98, 103 (Wis. 1995) (applying great weight deference to LIRC's interpretation of section 102.555(8) of the Wisconsin Statutes).

29. For example, deferential standards of review are employed in the reviews of circuit court decisions that the court determines are "discretionary" and of agency decisions. See *State v. Crochiere*, 2004 WI 78, ¶ 10, 273 Wis. 2d 57, ¶ 10, 681 N.W.2d 524, ¶ 10; *Jicha v. Dep't of Indus., Labor & Human Relations, Equal Rights Div.*, 485 N.W.2d 256, 258-59 (Wis. 1992).

30. When the issue was not raised in the court below, the court may deem the litigant's right to raise it on appeal as having been waived by the litigant. See *Maclin v. State*, 284 N.W.2d 661, 664 (Wis. 1979).

31. See *State ex rel. Jacobus v. State*, 559 N.W.2d 900, 901, 902 n.6 (Wis. 1997) (explaining that whether Jacobus waived his right to contest his incarceration by entering an Alford plea was a side issue to the court's deciding whether the state could criminally prosecute Jacobus for bail jumping when he violated a condition of his bond).

32. See *Hutchinson Tech., Inc. v. Labor & Indus. Review Comm'n*, 2004 WI 90, ¶ 24, 273 Wis. 2d 394, ¶ 24, 682 N.W.2d 343, ¶ 24; see also *id.*, ¶¶ 50-52, 273 Wis. 2d 394, ¶¶ 50-52, 682

they are used in this fashion, the public is not provided with an appellate review that actually examines whether the law was correctly interpreted or applied by the other tribunal.

What decision-avoidance doctrines accomplish is to relieve the court of the real work of judicial review, what has been described as the "burden of reasoned decisionmaking."³³ Reasoned decision making requires an appellate court to understand the facts found, to assess the law that may be applied to those facts given the questions presented for review, and to explain why the application of the law to the facts produced the decision of the court. It is in explaining the "why" that an appellate court does its real work because it is that part of the decision that will best assist the public's understanding of its rights and responsibilities under the law. However, when deferral to another tribunal on a question of law controls the decision of the Wisconsin Supreme Court, the court merely recites a mantra invoking some level of deference that is then used as a substitute for analyzing the merits of the legal question presented. There is no discussion of the facts and how the relevant statutes bear on them. There is no explanation of why the agency decision accords with the intent of the legislature in enacting the law under consideration. Therefore, there is no reasoned decision about whether the law was correctly applied or interpreted. Indeed, some writers who have examined judicially created decision-avoidance doctrines have stated that when "the scope of review is too limited, the right to review itself becomes meaningless."³⁴

For example, if the decision is one that has been ascribed to the circuit court's discretion, little if any actual review is provided.³⁵ Circuit court decisions on the admissibility of evidence,³⁶ the structure of jury instructions,³⁷ sentencing,³⁸ requests for bail,³⁹ child custody,⁴⁰ the award of maintenance or property division in a divorce,⁴¹ and the award of costs⁴² are all reviewed deferentially by deciding whether the circuit court properly

N.W.2d 343, ¶¶ 50-52 (Roggensack, J., dissenting).

33. The Honorable Mary M. Schroeder, *Appellate Justice Today: Fairness or Formulas the Fairchild Lecture*, 1994 WIS. L. REV. 9, 10 (1994).

34. Bernard Schwartz, *Some Recent Administrative Law Trends: Delegations and Judicial Review*, 1982 WIS. L. REV. 208, 227 (1982).

35. See Schmid v. Olsen, 330 N.W.2d 547, 551-52 (Wis. 1983) (stating that reviewing courts should search the record for reasons to sustain a discretionary decision).

36. See *State v. Alsteen*, 324 N.W.2d 426, 428 (Wis. 1982).

37. See *Meurer v. ITT Gen. Controls*, 280 N.W.2d 156, 161-62 (Wis. 1979).

38. See *State v. Gallion*, 2004 WI 42, ¶¶ 1-3, 270 Wis. 2d 535, ¶¶ 1-3, 678 N.W.2d 197, ¶¶ 1-3.

39. See *State v. Achterberg*, 548 N.W.2d 515, 518-19 (Wis. 1996).

40. See *Burger v. Burger*, 424 N.W.2d 691, 693 (Wis. 1988).

41. See *id.*

42. See *Kolupar v. Wilde Pontiac Cadillac, Inc.*, 2004 WI 112, ¶ 19, 275 Wis. 2d 1, ¶ 19, 683 N.W.2d 58, ¶ 19.

exercised its discretion. Those decisions will not be overturned if a reasonable court could have made them.⁴³ Often on review the court will note that if it had been the first tribunal to decide the issue, it would not have reached the same conclusion as the first decision-maker.⁴⁴ And, even when the court says that it expects the exercise of discretion to be expressed on the record and to describe both the law and the facts the circuit court relied upon, the Wisconsin Supreme Court has also held that if the circuit court has not done so but the record supports the exercise of discretion in the way in which it appears that the circuit court may have exercised it, the court will affirm the decision.⁴⁵ Applying a deferential standard of review permits the Wisconsin Supreme Court to affirm a wide variety of circuit court decisions on the same issue.⁴⁶

Additionally, even though the court reviews issues of law *de novo* when a circuit court's decision is at issue,⁴⁷ it generally takes a very deferential approach to an agency's decision on a question of law.⁴⁸ During reviews where the court gives deference to an agency's statutory interpretation or the application of a statute to the facts found, the court applies either (1) due weight deference, where an agency's conclusion of law is affirmed if it is reasonable and the court does not deem another conclusion more reasonable,⁴⁹ or (2) great weight deference, where an agency's conclusion of law is affirmed even if the court decides that an alternate conclusion is more reasonable.⁵⁰ However, applying an unambiguous statute to a given set of facts and interpreting a statute can be two very different tasks. For example, an agency may repeatedly apply the criteria of section 102.18(1)(b) of the Wisconsin Statutes to determine whether an employer has exercised bad faith in refusing to pay benefits,⁵¹ and in so doing, develop a level of expertise that may warrant deference. However, when an ambiguous statute is interpreted, the task is to determine the meaning of the legislative enactment. Declaring what a statute means is a core function of the courts for which an agency has no greater level of expertise.⁵² Therefore, the reasons for giving deference to

43. See *State v. Robinson*, 431 N.W.2d 165, 170-71 (Wis. 1988).

44. See *Hartung v. Hartung*, 306 N.W.2d 16, 20-21 (Wis. 1981).

45. See *State v. Pharr*, 340 N.W.2d 498, 502 (Wis. 1983).

46. See generally Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635 (1971).

47. See *Tahtinen v. MSI Ins. Co.*, 361 N.W.2d 673, 677 (Wis. 1985).

48. See *UFE Inc. v. Labor & Indus. Review Comm'n*, 548 N.W.2d 57, 61 (Wis. 1996).

49. See *id.* at 62-63.

50. See *id.*

51. See *Brown v. Labor & Indus. Review Comm'n*, 2003 WI 142, ¶¶ 9, 17, 267 Wis. 2d 31, ¶¶ 9, 17, 671 N.W.2d 279, ¶¶ 9, 17.

52. See *Johnson v. Blackburn*, 595 N.W.2d 676, 685 (Wis. 1999).

one type of decision may not support granting deference to the other.⁵³

IV. DECISION-AVOIDANCE IN AGENCY REVIEWS

Nowhere are restrictions that avoid a reasoned judicial decision on the merits more apparent than in the court's review of state agency decisions. In some instances, the level of deference granted depends on the statutory scheme for the context in which the case arose. For example, deference is different for an agency's rule-making decision⁵⁴ as compared with an appeal arising from a contested case hearing⁵⁵ held by an agency. In a rule-making review, the court examines the scope of the rule-making authority the legislature granted to the agency and whether the rule was enacted in conformity with the statutory rule-making procedures.⁵⁶ However, on review of a contested case that resulted from a hearing before an agency, the court routinely defers to an agency's decision on questions of law, even when the court concludes that there is another conclusion that is more reasonable than that chosen by the agency. This is known as great weight deference.⁵⁷

As an attempt to initiate discussion of the use of judicially created decision-avoidance doctrines, a topic that can be extremely broad in scope, I will narrow my inquiry by focusing on reviews of contested cases where great weight deference has been applied by the Wisconsin Supreme Court. Because the use of great weight deference in the review of contested cases has evolved over time, it is helpful to consider some early decisions where agency conclusions of law were reviewed fully by the Wisconsin Supreme Court.

In *Pabst v. Department of Taxation (Pabst II)*,⁵⁸ the court interpreted a statute, then section 227.20 of the Wisconsin Statutes,⁵⁹ to determine what type of an approach it should use when reviewing an agency decision on a question of law. Section 227.20 of the Wisconsin Statutes contained the legislative directive about appeals subject to chapter 227. The statute addressed the standard of review to be applied to factual findings. The court explained that questions of fact were to be affirmed if the finding of fact was

53. I recognize that it may not always be apparent when an agency is applying an unambiguous statute and when it is interpreting an ambiguous statute.

54. See WIS. STAT. §§ 227.01(13), 227.40 (2003–2004).

55. See §§ 227.01(3), 227.42.

56. *Brown County v. Dep't of Health & Soc. Servs.*, 307 N.W.2d 247, 251 (Wis. 1981).

57. See *UFE Inc. v. Labor & Indus. Review Comm'n*, 548 N.W.2d 57, 63 (Wis. 1996).

58. 120 N.W.2d 77, 81–83 (Wis. 1963). I refer to the 1963 decision as *Pabst II* because of the 1961 decision, *Dep't of Taxation v. Pabst (Pabst I)*, 112 N.W.2d 161 (Wis. 1961).

59. Section 227.20 is now section 227.57 of the 2003–2004 Wisconsin Statutes.

supported by substantial evidence.⁶⁰ However, the court held that questions of law, such as the application of a statute to the facts found, were “always reviewable by the reviewing court.”⁶¹ The court then went on to explain that section 227.20 of the Wisconsin Statutes required the court to use an “analytical approach” on review of agency decisions on questions of law because of the difference in treatment that the statute required for agency factual findings as compared with agency legal conclusions.⁶²

In *Pabst II*, the court contrasted the analytic approach, where factual questions are first separated from legal questions, with the “practical” or “policy” approach that was sometimes used by the United States Supreme

60. *Pabst II*, 120 N.W.2d at 82. Sections 227.20(1)(b) and (d) of the 1961–1962 Wisconsin Statutes established this standard for reviews conducted under chapter 227. Those sections provided the following:

(1) The court may affirm the decision of the agency, or may reverse or modify it if the substantial rights of the appellant have been prejudiced as a result of the administrative findings, inferences, conclusions or decisions being:

...

....

(b) In excess of the statutory authority or jurisdiction of the agency, or affected by other error of law; or

....

(d) Unsupported by substantial evidence in view of the entire record as submitted.

WIS. STAT. §§ 227.20(1)(b), (d) (1961–1962).

Section 227.57(5) and (6) of the 2003–2004 Wisconsin Statutes continue a similar standard of review. The 2003–2004 version of the statutes provide in relevant part:

(5) The court shall set aside or modify the agency action if it finds that the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action

(6) If the agency’s action depends on any fact found by the agency in a contested case proceeding, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. The court shall, however, set aside agency action or remand the case to the agency if it finds that the agency’s action depends on any finding of fact that is not supported by substantial evidence in the record.

WIS. STAT. §§ 227.57(5), (6) (2003–2004).

61. *Pabst II*, 120 N.W.2d at 81–82.

62. *Id.* at 82. The analytical approach to which the court referred is that set out in the administrative law treatise by Kenneth Culp Davis. See generally KENNETH CULP DAVIS, 4 ADMINISTRATIVE LAW TREATISE 189 (1958).

Court.⁶³ The court explained that when the United States Supreme Court used the practical approach for agency decisions on questions of law, it appeared to choose to avoid deciding the question that was presented.⁶⁴ The Wisconsin Supreme Court eschewed the practical approach because it interpreted the relevant statute⁶⁵ as requiring “Wisconsin courts to employ the analytical approach when reviewing agency decisions.”⁶⁶ However, notwithstanding the strong statement in *Pabst II* that an agency’s decision on a question of law is “always reviewable,” the court also indicated, in dicta, that deference to an agency’s legal decision was possible for certain types of legal questions. The court explained that

in fields in which an agency has particular competence or expertise, [a] court[] should not substitute [its] judgment for the agency’s application of a particular statute to the found facts if a rational basis exists in law for the agency’s interpretation and [the interpretation] does not conflict with the statute’s legislative history, prior decisions of this court, or constitutional prohibitions.⁶⁷

In so doing, the court seemed to indicate the potential to follow the United States Supreme Court’s practical approach where the Court defers to one type of agency legal decision, the application of a statute to a set of facts, in an appropriate case.⁶⁸ However, the court’s statement showed it would do so only after analyzing the legislature’s intent, the relevant constitutional provisions, and whether the agency was “more competent than this court” to apply the facts found to the law under consideration.⁶⁹ The court also said nothing about another type of legal question that commonly arises: the

63. The “practical approach” gives deference to agencies to make significant policy choices. See *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2699 (2005). When applying the law to the facts found, the United States Supreme Court long ago explained that when the factual record permits the agency to draw a particular conclusion the court’s review is concluded. See *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 146 (1939). Currently, the Court also defers to an agency’s interpretation of an ambiguous statute, if the statute is within the agency’s jurisdiction to administer and the agency interpretation is reasonable. See *Nat’l Cable*, 125 S. Ct. at 2699.

64. *Pabst II*, 120 N.W.2d at 81-82.

65. See *Brown v. Labor & Indus. Review Comm’n*, 2003 WI 142, 167 Wis. 2d 31, 671 N.W.2d 279.

66. *Pabst II*, 120 N.W.2d at 82.

67. *Id.*

68. *Id.*

69. *Id.*

interpretation of an ambiguous statute.⁷⁰

The question presented in *Pabst II* was whether the facts taken as a whole proved that the trust was “administered” in Wisconsin pursuant to then section 71.08(8) of the Wisconsin Statutes. The court, using the analytical approach that required separating the questions to be decided into questions of fact and questions of law, labeled the issue a question of law.⁷¹ Ida Pabst had created the trust at issue, just as she created the trust that had been addressed by the court in an earlier decision, *Department of Taxation v. Pabst (Pabst I)*.⁷² However, in *Pabst I* the court labeled the same question, whether the trust had been administered in Wisconsin, a question of fact.⁷³ In *Pabst II*, the court noted the difference in the labels, but it gave no reason for its differing assessments. Instead, the *Pabst II* court decided the legal question, independently, coming to the same conclusion as had the agency.⁷⁴

As the law continued to develop, the court repeated versions of statements similar to, yet remarkably different from, those it made in *Pabst II*: that an agency’s application of a statute to found facts was a question of law that was always subject to review. In *Bucyrus-Erie Co. v. Department of Industry, Labor & Human Relations, Equal Rights Division*,⁷⁵ where the question presented was factual, that is, whether there was substantial evidence in the record to support the department’s finding that the prospective employee was physically able to safely and efficiently perform the duties of the job which he sought,⁷⁶ the court quoted the dicta from *Pabst II* but with a significant difference. The *Bucyrus-Erie* court instructed the following:

The construction of a statute or the application of a statute to a particular set of facts is such a question of law. . . . Although the court is not bound by the agency’s interpretation, some deference must be given the agency in those areas in which it has specialized knowledge and

70. It should be noted that it is only an interpretation of an ambiguous statute to which courts defer because if the meaning of the statute is plain on its face there is no “interpretation” needed. See *Lisney v. Labor & Indus. Review Comm’n*, 493 N.W.2d 14, 15-16 (Wis. 1992).

71. *Pabst II*, 120 N.W.2d at 81. No one contended that the term “administered” was ambiguous.

72. *Pabst I*, 112 N.W.2d 161, 162 (Wis. 1961).

73. *Id.* at 164-65.

74. *Pabst II*, 120 N.W.2d at 83 (“Having determined the scope of judicial review applicable in the instant case, we may now review the board’s conclusion of law. . . . [U]pon review of such facts we reach the same conclusion of law as did the board when it determined that the trust was administered in Wisconsin . . .”).

75. 280 N.W.2d 142 (Wis. 1979).

76. *Id.* at 146.

expertise. The court will hesitate to substitute its judgment for that of the agency on a question of law if “. . . a rational basis exists in law for the agency’s interpretation and it does not conflict with the statute’s legislative history, prior decisions of this court, or constitutional prohibitions.”⁷⁷

The above quotation was also dicta in *Bucyrus-Erie*, as was the passage quoted earlier from *Pabst II*, but *Bucyrus-Erie* broadened the statement from *Pabst II* in two ways. The court said deference must be given to the agency on legal issues for which the agency has specialized knowledge and expertise, and it said that both the interpretation of an ambiguous statute and the application of the law to the facts found were subject to deference. As I noted above, *Pabst II* spoke only to an agency’s application of a statute to the facts found.

In *Dairy Equipment Co. v. Department of Industry, Labor & Human Relations, Equal Rights Division*, where statutory interpretation was the legal issue, the court remarked that it “should not upset the department’s judgment concerning questions of law if there exists a rational basis for the department’s conclusion.”⁷⁸ However, the court conducted an independent review to interpret the statutory term. In *Milwaukee County v. Department of Labor, Industry & Human Relations, Equal Rights Division*,⁷⁹ where any deference that could be accorded to an agency decision appeared to be grounded in some special expertise that the agency had and the court lacked in regard to applying the statute at issue, “special expertise” was held not to be present. Therefore, the court gave no deference to the agency’s legal conclusion that involved the interpretation of an ambiguous statute.⁸⁰ The court has also conducted an independent review of the legal issue and concluded that the way in which the agency construed a statute had no rational basis.⁸¹ Overall, the court continued to state that in a chapter 227

77. *Id.* at 147 (quoting *Pabst II*, 120 N.W.2d at 82) (citations omitted).

78. *Dairy Equip. Co. v. Dep’t of Indus., Labor & Human Relations, Equal Rights Div.*, 290 N.W.2d 330, 334 (Wis. 1980) (concluding after an independent review, notwithstanding the court’s repetition of the deference-mantra, that the court’s interpretation of the statutory term “handicap,” used in the Wisconsin Fair Employment Act, includes conditions others perceived as limiting an employee’s ability to work, even if those conditions did not do so).

79. *See Milwaukee County v. Dep’t of Indus., Labor & Human Relations, Equal Rights Div.*, 180 N.W.2d 513, 517 (Wis. 1970).

80. *See id.* (concluding that no expertise is needed to conclude whether the undisputed facts constitute inexcusable delay in making workers compensation payments; therefore, the court gave no deference to the agency’s statutory interpretation).

81. *See Am. Motors Corp. v. Labor & Indus. Review Comm’n*, 350 N.W.2d 120, 126 (Wis. 1984) (concluding that a woman of four feet ten inches in height was not handicapped within the meaning of the WFEA, therefore LIRC’s conclusion to the contrary had no rational basis).

review an appellate court may set aside or modify an agency's legal conclusion after the court's independent review of the question of law.⁸²

Then in *Harnischfeger Corp. v. Labor & Industry Review Commission*,⁸³ the court set out the expansive statement of deference to an agency's legal conclusions that is currently used and it did so by re-characterizing the legal issue presented. *Harnischfeger* presented the court with an agency's interpretation of an ambiguous statute.⁸⁴ In setting the frame for broad deference to agencies, the court described the legal issue before the court as deciding what level of deference it should accord LIRC's decision. It did not characterize the legal issue as the interpretation of an ambiguous statute. The court said,

Whether or not a court agrees or disagrees with LIRC's methodology, however, is not the issue in this case. Instead, the central question is what standard of review the courts of this state should apply when called upon to evaluate an agency's interpretation of a statute.⁸⁵

The court repeated its past phrases about it not being bound by an agency's legal conclusion, but in reaching its decision, the court explained that deference to an agency decision on a question of law "is appropriate" if the decision meets all of the following four factors: (1) the statute was one the agency was charged by the legislature with administering; (2) the interpretation of the agency was one of long-standing; (3) the agency used its expertise or specialized knowledge in deciding the legal question presented; and (4) the agency's interpretation provided uniformity in the application of the statute.⁸⁶ Gone from the court's recitation was *Pabst II*'s requirement that the application of the statute not conflict with the statute's legislative history.⁸⁷ Instead the court concluded that great weight deference, where an agency decision "must be affirmed" if it is "reasonable," should be applied, instead of interpreting the statute to give it the meaning the legislature intended.⁸⁸ In one brief sentence, the court supported its decision to employ a decision-avoidance device by reference to section 102.23(1)(e) of the Wisconsin Statutes⁸⁹ and to *Lisney v. Labor & Industry Review*

82. See *id.* at 122.

83. 539 N.W.2d 98 (Wis. 1995).

84. *Id.* at 101.

85. *Id.* at 102.

86. *Id.*

87. See *Pabst II*, 120 N.W.2d 77, 83 (Wis. 1963).

88. *Harnischfeger*, 539 N.W.2d at 102.

89. *Id.* Section 102.23(1)(e) of the 1993–1994 Wisconsin Statutes provided the following:

Commission.⁹⁰ However, in *Lisney* the court explained that no deference is given to LIRC's interpretation of a statute if that interpretation "contravenes the words of the statute, is clearly contrary to legislative intent, or is otherwise unreasonable or without a rational basis" as such an interpretation would be "in excess of" LIRC's powers.⁹¹ Additionally, section 102.23, which was employed in *Harnischfeger*, is applicable to judicial review of decisions rendered under the worker's compensation act, which decisions are not subject to review under chapter 227.⁹²

The difference between a chapter 102 review and a chapter 227 review could have been significant because section 102.23(1) of the Wisconsin Statutes⁹³ permits a more limited review, in contrast to that set out in section 227.57 of the Wisconsin Statutes.⁹⁴ In a chapter 102 review of legal decisions

(e) Upon such hearing, the court may confirm or set aside such order or award; and any judgment which may theretofore have been rendered thereon; but the same shall be set aside only upon the following grounds:

1. That the commission acted without or in excess of its powers.
2. That the order or award was procured by fraud.
3. That the findings of fact by the commission do not support the order or award.

WIS. STAT. 102.23(1)(e) (1993–1994).

90. 493 N.W.2d 14 (Wis. 1992).

91. *Id.* at 16.

92. WIS. STAT. § 102.23(1) (2003–2004).

93. Section 102.23(1)(e) of the Wisconsin Statutes states in relevant part:

[T]he court may confirm or set aside such order or award; and any judgment which may theretofore have been rendered thereon; but the same shall be set aside only upon the following grounds:

1. That the commission acted without or in excess of its powers.
2. That the order or award was procured by fraud.
3. That the findings of fact by the commission do not support the order or award.

WIS. STAT. § 102.23(1)(e) (2003–2004).

94. Section 227.57 of the Wisconsin Statutes states in relevant part:

(3) The court shall separately treat disputed issues of agency procedure, interpretations of law, determinations of fact or policy within the agency's exercise of delegated discretion.

(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

. . . .

(6) If the agency's action depends on any fact found by the agency in a contested case proceeding, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. The

by an agency, the court examines only whether the commission acted without or in excess of its powers, while in a chapter 227 review the court examines whether the decision of the agency contravenes a constitutional or statutory provision. However, as will be shown below, the differences in the scope of review under chapter 102 and that provided under chapter 227 have been melded into a broad grant of deference to state agency final decisions.

The Wisconsin Supreme Court's use of great weight deference, an extraordinary level of deference by a law-declaring court to another tribunal's conclusion of law, has grown over time. For example, in *Hutchinson Technology, Inc. v. Labor & Industry Review Commission*⁹⁵ and also in *Crystal Lake Cheese Factory v. Labor & Industry Review Commission*,⁹⁶ the court cited *Harnischfeger*, a chapter 102 worker's compensation case, as support for applying great weight deference to chapter 111 WFEA claims that are reviewed under chapter 227. The court provided no discussion of why the reviews completed under different chapters of the statutes should be treated the same.⁹⁷

In *Crystal Lake Cheese*, the court examined a claim brought under the WFEA by a woman who said she was discriminated against because she was disabled.⁹⁸ It was undisputed that, even with modifications to the workplace, the claimant could not do all the tasks that the job required.⁹⁹ However, because other workers volunteered to do the tasks she could not do, LIRC determined that was a reasonable accommodation under section 111.34(1)(b) of the Wisconsin Statutes, resulting in the legal conclusion that the Crystal Lake Cheese Factory had discriminated against the employee due to a disability, contrary to the provisions of section 111.34(2)(a) of the Wisconsin Statutes.¹⁰⁰

court shall, however set aside agency action . . . if it finds that the agency's action depends on any finding of fact that is not supported by substantial evidence in the record

. . . .

(8) The court shall reverse or remand the case to the agency if . . . [the agency's exercise of discretion] is otherwise in violation of a constitutional or statutory provision

WIS. STAT. § 227.57 (2003–2004).

95. 2004 WI 90, 273 Wis. 2d 394, 682 N.W.2d 343.

96. 2003 WI 106, 264 Wis. 2d 200, 664 N.W.2d 651.

97. See *Hutchinson Tech.*, 2004 WI 90, ¶ 22, 273 Wis. 2d 394, ¶ 22, 682 N.W.2d 343, ¶ 22; *Crystal Lake Cheese*, 2003 WI 106, ¶ 28, 264 Wis. 2d 200, ¶ 28, 664 N.W.2d 651, ¶ 28.

98. *Crystal Lake Cheese*, 2003 WI 106, ¶¶ 73–74, 264 Wis. 2d 200, ¶¶ 73–74, 664 N.W.2d 651, ¶¶ 73–74.

99. *Id.*, ¶ 78, 264 Wis. 2d 200, ¶ 78, 664 N.W.2d 651, ¶ 78.

100. *Id.*, ¶ 81, 264 Wis. 2d 200, ¶ 81, 664 N.W.2d 651, ¶ 81.

As noted above, reviews of LIRC decisions arising from contested case hearings on WFEA claims are conducted under chapter 227, yet the *Crystal Lake Cheese* opinion cited *Harnischfeger*, a chapter 102 case, and chose its highly deferential standard of review.¹⁰¹ By way of explanation for the deference given, the court said that LIRC's decision would "be given great weight [deference] due to [its] knowledge and experience in application of Wis. Stat. § 111.34."¹⁰² The court did not explain why LIRC's interpretation of the terms "reasonable accommodation" in section 111.34(1)(b) to include a plan by which the employee did not have to do all the tasks the job required was based on "specialized knowledge" that LIRC had or that its interpretation in that regard was of long standing, as *Harnischfeger* originally required.¹⁰³ Because the court chose to apply great weight deference, the court acknowledged that even if it concluded that another interpretation of the statute at issue was more reasonable than that chosen by LIRC, it would still be obligated to accept LIRC's decision.¹⁰⁴ The court did not explain why the public interest is better served by LIRC's determination than by the Wisconsin Supreme Court's analysis of the facts and the law or why this self-imposed limit on the court's analysis supported the court's major function: to declare what the law is. In so doing, the court continued a trend of applying great weight deference more and more often, thereby construing statutes less and less frequently.

Furthermore, no case has discussed the different tasks an agency performs when it applies the facts found to an unambiguous statute as compared with an agency's interpretation of an ambiguous statute and then the application of that interpretation to the facts found. Yet, there is a difference. Query: what gives an agency greater expertise than the courts to determine the meaning of a statute? In addition, there are times when that "expertise" is illusory at best.

For example, when deference is given to an agency decision, it is applied to the last decision by that agency, often an agency-commission with specific responsibility for certain types of appeals.¹⁰⁵ For example, deference generally is not given to the DWD; instead, deference is given to decisions of LIRC, which is authorized to hear appeals involving issues arising from contested cases heard by the DWD.¹⁰⁶ Furthermore, no deference is granted to the decisions of the Department of Revenue but rather, it is accorded to the

101. *Id.*, ¶ 28, 264 Wis. 2d 200, ¶ 28, 664 N.W.2d 651, ¶ 28.

102. *Id.*, 264 Wis. 2d 200, ¶ 28, 664 N.W.2d 651, ¶ 28.

103. See *Harnischfeger v. Labor & Indus. Review Comm'n*, 539 N.W.2d 98, 102 (Wis. 1995).

104. *Crystal Lake Cheese*, 2003 WI 106, ¶ 30, 264 Wis. 2d 200, ¶ 30, 664 N.W.2d 651, ¶ 30.

105. See WIS. STAT. § 227.52 (2003–2004).

106. See *id.*; *Beecher v. Labor & Indus. Review Comm'n*, 2004 WI 88, ¶ 22, 273 Wis. 2d 136, ¶ 22, 682 N.W.2d 29, ¶ 22.

Wisconsin Tax Appeals Commission's decisions.¹⁰⁷ However, there are times when the court applies the greatest level of deference to the legal conclusions of a single hearing examiner of unknown experience or expertise. For example, the court has held that because the Family Medical Leave Act provides a direct appeal of the hearing examiner's decision to the circuit court, the hearing examiner's decision is the final agency decision. After noting this in *Jicha v. Department of Industry, Labor & Human Relations, Equal Rights Division*¹⁰⁸ the Wisconsin Supreme Court granted great weight deference to a single person, the hearing examiner. The oft-cited foundation for deferring to agency decisions, administrative expertise,¹⁰⁹ is not readily apparent in *Jicha* because there was no way of knowing whether that particular hearing examiner had any experience at all, yet deference due to agency experience and expertise was part of the court's rationale.¹¹⁰

This trend of deferring to the legal conclusions of a single hearing examiner, rather than to a commission or commissioner with specialized agency knowledge, has a troublesome potential for expansion because appeals from the decisions of at least four different administrative agencies may be brought before a hearing examiner in the Division of Hearings and Appeals of the Department of Administration.¹¹¹ Division hearing examiners do not have the usual agency expertise in applying facts to a statutory standard or in interpreting the controlling statute. However, a factor in all supreme court decisions to defer to an agency is the presumed expertise that the agency has in a specialized area.¹¹² Hearing examiners working in the Division of Hearings and Appeals are required by statute to be assigned to differing subject areas on a rotating basis to the extent practicable, although the Division may have "pools" of examiners that hear certain subjects.¹¹³ Hearing examiners have no policy authority for any given agency, but rather provide certain adjudicative functions.¹¹⁴ On more than one occasion, the court of appeals has refused to defer to the legal conclusion of a Division

107. See *Am. Family Mut. Ins. Co. v. Dep't of Revenue*, 586 N.W.2d 872, 875 (Wis. 1998).

108. *Jicha v. Dep't of Indus., Labor & Human Relations, Equal Rights Div.*, 485 N.W.2d 256, 258-60 (Wis. 1992).

109. See KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TEXT* 515-16 (3d ed. 1972).

110. *Jicha*, 485 N.W.2d at 259.

111. See WIS. STAT. § 227.43(1)(b) (2003-2004) (regarding the assignment of Division Hearing Examiners to appeals from the decisions of the Department of Natural Resources); § 227.43(1)(br) (regarding appeals from decisions of the Department of Transportation); § 227.43(1)(bu) (regarding appeals from decisions of the Department of Health and Family Services); § 227.43(1)(by) (regarding appeals from decisions of the Department of Workforce Development).

112. See *William Wrigley, Jr., Co. v. Dep't of Revenue*, 500 N.W.2d 667, 670 (Wis. 1993).

113. See § 227.43(1g).

114. See generally § 227.43.

hearing examiner, after analyzing whether deference was merited because of the lack of expertise and policy authority.¹¹⁵ However, when a line agency adopts the decision of a Division hearing examiner, the court of appeals has given deference similar to that which it would have granted if the decision had been issued from the agency.¹¹⁶ Thus far the Wisconsin Supreme Court has not addressed whether it will give deference to some, none, or all of the legal conclusions of the Division's hearing examiners.¹¹⁷ However, if *Jicha*¹¹⁸ is any indication, deference may be the rule, not the exception.

Additionally, the history of at least some of the agencies to which the court defers does not support the conclusion that agency expertise is superior to the court's expertise. For example, from 1979 to 2004, the average length of a commissioner's service on LIRC, an agency-commission to which deference is often given, was 3.7 years.¹¹⁹ In that capacity, three commissioners issue decisions for claims made under workers compensation, unemployment compensation, and WEFA, with an average total experience of only twelve years.¹²⁰

Going back to the beginning of my discussion and *Pabst II*, there, deference to an agency's conclusion of law was referenced in dicta as only a possibility, a choice that the court was not closing the door on for future opinions, which was not suitable for its decision in the case at hand. However, deference now appears to come very close to being required, under

115. See *Wis. Comm'r of Ins. v. Fiber Recovery, Inc.*, 2004 WI App 183, ¶15, 276 Wis. 2d 495, ¶15, 687 N.W.2d 755, ¶15 (concluding no deference is due to a decision of the Division because it has no expertise in interpreting chapter 605 of the Wisconsin Statutes or insurance contracts); *Artac v. Dep't of Health & Family Serv.*, 2000 WI App 88, ¶13, 234 Wis. 2d 480, ¶13, 610 N.W.2d 115, ¶13 (giving no deference to the Division's decision because the Division has no expertise in administering the Medical Assistance program); *Roehl Transp., Inc. v. Div. of Hearings & Appeals*, 570 N.W.2d 864, 868-69 (Wis. Ct. App. 1997) (giving no deference to a decision of the Division because it is neither the line agency that is charged by the legislature with administration and enforcement of section 341.45 of the Wisconsin Statutes nor the final administrative authority with responsibility for policy determinations of a line agency).

116. See *Sea View Estates Beach Club, Inc. v. Dep't of Natural Res.*, 588 N.W.2d 667, 672 (Wis. Ct. App. 1998) (concluding that because the Department of Natural Resources (DNR), by administrative rule, decided that when the DNR did not appeal a decision of the Division's hearing examiner, that decision became the decision of the DNR, great weight deference was due).

117. *But see Racine Harley-Davidson, Inc. v. Div. of Hearings & Appeals*, 2005 WI App 6, 278 Wis. 2d 508, 692 N.W.2d 670 (petition for review granted March 8, 2005, where the issue of the level of deference due a Division's decision is squarely presented).

118. See *Jicha v. Dep't of Indus., Labor & Human Relations, Equal Rights Div.*, 485 N.W.2d 256, 258-60 (Wis. 1992).

119. See Appendix D, *infra*, for a listing of the LIRC commissioners and the number of years each has served, 1979-2004.

120. As of 2005, the justices of the Wisconsin Supreme Court have been working as judges for a combined total of 132 years: Abrahamson, C.J., 29 years; Wilcox, J., 26 years; Bradley, J., 20 years; Crooks, J., 28 years; Prosser, J., 7 years; Roggensack, J., 9 years; and Butler, J., 13 years. Additionally, all of the justices have extensive legal experience beyond their experience as judges.

current supreme court cases. The decisions in *Crystal Lake Cheese* and *Hutchinson Technology* represent how the court is most apt to apply decision-avoidance doctrines in regard to agency legal conclusions.

The court's decision often is driven by the level of deference that is applied, and the level of deference may be pre-determined by how the court frames the central issue. For example, in regard to LIRC's interpretation of the statutes in *Crystal Lake*, the court set the issue as "whether LIRC reasonably interpreted [section 111.34(1)(b) and section 111.34(2)(a)] of the WFEA when it found that there was a reasonable accommodation Crystal Lake could have provided its former employee."¹²¹ Framing the issue in that manner presumes that great weight deference will be given, before the court even begins its analysis. That is, by asking whether LIRC's statutory interpretations were "reasonable," rather than asking if the plan proposed by the employee was sufficient to satisfy the requirements set by the legislature in both sections 111.34(1)(b) and (2)(a), the court further limits its own analysis of LIRC's statutory interpretation and application.

When the court employs a mantra rather than an analysis of the facts and the law, it never explains how the statutes at issue were meant by the legislature to further legislative purposes.¹²² Additionally, when analysis of whether the facts found reasonably meet the statutory standard was first articulated by the court, the legal conclusion had to be reasonable according to the language of the statute, the statute's legislative history, and consistent with prior judicial interpretations and relevant constitutional provisions.¹²³ All of the analysis that was anticipated in *Pabst II* if deference were to be granted is now forgone.¹²⁴ The mantra of great weight deference is substituted for the judicial reasoning that should tie the facts found to the law the legislature enacted.¹²⁵

This depth of deference to agency decisions leaves open several questions

121. *Crystal Lake Cheese*, 2003 WI 106, ¶ 22, 264 Wis. 2d 200, ¶ 22, 664 N.W.2d 651, ¶ 22.

122. See *Hutchinson Tech.*, 2004 WI 90, ¶¶ 50-52, 273 Wis. 2d 394, ¶¶ 50-52, 682 N.W.2d 343, ¶¶ 50-52 (Roggensack, J. dissenting).

123. *Pabst II*, 120 N.W.2d 77, 82-83 (Wis. 1963).

124. See *Hutchinson Tech.*, 2004 WI 90, ¶ 24 n.9, 273 Wis. 2d 394, ¶ 24 n.9, 682 N.W.2d 343, ¶ 24 n.9.

125. See *id.*, ¶¶ 23-24, 273 Wis. 2d 394, ¶¶ 23-24, 682 N.W.2d 343, ¶¶ 23-24 (setting out the mantra of deferral: "LIRC is charged with adjudicating appeals from the hearing examiner's decision on complaints under the WFEA . . . LIRC has developed experience and expertise in interpreting this section . . . Third . . . we will promote greater uniformity and consistency than if we did not do so. Fourth, this determination is intertwined with factual determinations. Fifth, this determination involves value and policy judgments about the obligations of employers and employees when an employee, or prospective employee, has a handicap. . . . [W]e reaffirm our conclusion in *Crystal Lake* that LIRC's determination regarding reasonable accommodation should be given great weight deference.").

that affect the public interest: Who will regulate the regulating agencies, if the Wisconsin Supreme Court defers? Who looks out for the public's interest in a fair decision, made according to the law, if the Wisconsin Supreme Court defers? And most importantly, is there any actual, meaningful review of an agency's legal decision when the Wisconsin Supreme Court applies great weight deference?

V. CONCLUSION

The Wisconsin Supreme Court is comprised of seven members who were elected by the people of Wisconsin to review the decisions of other tribunals and to determine whether a fair decision under the applicable rule of law was made. When the court employs judicially created doctrines that limit the scope of its review instead of applying the collective knowledge that the seven justices were elected to exercise, it avoids the real work of appellate decision making: explaining to the public why the application of the law to the facts of the case resulted in the court's decision and why that result is fair under the law. Because of the extraordinary deference that is currently accorded to agency legal decisions under the standard of great weight deference, I suggest that at least in this area, it may be appropriate for the court to re-examine its use of judicially created limits on its own review. After all, the members of the Wisconsin Supreme Court were elected to decide. The court has the depth of knowledge and diversity of perspectives that will benefit the public interest, if the court chooses to address the merits of the issues in more of the cases it accepts for review.

APPENDIX A

Doctrine	Example of When Employed	Decision
Deference to discretionary decision of circuit court	Receipt or exclusion of evidence	State v. Alsteen, 324 N.W.2d 426 (Wis. 1982).
	Sentencing	State v. Gallion, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197.
	Structure of jury instructions	Meurer v. ITT Gen. Controls, 280 N.W.2d 156 (Wis. 1979).
Great weight deference to agency	Conclusions of law	Crystal Lake Cheese Factory v. Labor & Indus. Review Comm'n, 2003 WI 106, 264 Wis. 2d 200, 664 N.W.2d 651.
Due weight deference to agency	Conclusions of law	Mallo v. Dep't of Revenue, 2002 WI 70, 253 Wis. 2d 391, 645 N.W.2d 853.
Waiver	Not raised at circuit court	State v. Carprue, 2004 WI 111, 274 Wis. 2d 656, 683 N.W.2d 31.
Mootness	Lack of legislative action	Wis. Env'tl. Decade, Inc. v. Joint Comm. for Review of Admin. Rules, 243 N.W.2d 497 (Wis. 1976).

APPENDIX B
WISCONSIN SUPREME COURT 2003–2004 TERM

Case name
and citation

AFFIRMANCE THROUGH
AVOIDANCE DOCTRINE

Brown v. Labor & Indus. Review
Comm'n, 2003 WI 142, 267 Wis.
2d 31, 671 N.W.2d 279.

Great weight deference to agency
decision

McCormick v. Schubring, 2003 WI
149, 267 Wis. 2d 141, 672 N.W.2d
63.

Deferral to circuit court's
discretion

Franke v. Franke, 2004 WI 8, 268
Wis. 2d 360, 674 N.W.2d 832.

Deferral to circuit court's
discretion

Town of Delafield v. Winkelman,
2004 WI 17, 269 Wis. 2d 109, 675
N.W.2d 470.

Waiver

State v. Walters, 2004 WI 18, 269
Wis. 2d 142, 675 N.W.2d 778.

Deferral to circuit court's
discretion

Rohde-Giovanni v. Baumgart, 2004
WI 27, 269 Wis. 2d 598, 676
N.W.2d 452.

Deferral to circuit court's
discretion

State v. Gary M.B., 2004 WI 33,
270 Wis. 2d 62, 676 N.W.2d 475.

Deferral to circuit court's
discretion

State v. Franklin, 2004 WI 38, 270
Wis. 2d 271, 677 N.W.2d 276.

Deferral to circuit court's
discretion

<u>Case name and citation</u>	<u>AFFIRMANCE THROUGH AVOIDANCE DOCTRINE</u>
State v. Gallion, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197.	Deferral to circuit court's discretion
Weber v. White, 2004 WI 63, 272 Wis. 2d 121, 681 N.W.2d 137.	Deferral to circuit court's discretion
State v. McDowell, 2004 WI 70, 272 Wis. 2d 488, 681 N.W.2d 500.	Deferral to circuit court's discretion
State v. Crochiere, 2004 WI 78, 273 Wis. 2d 57, 681 N.W.2d 524.	Deferral to circuit court's discretion
State v. Guerard, 2004 WI 85, 273 Wis. 2d 250, 682 N.W.2d 12.	Waiver
Hutchinson Tech. v. Labor & Indus. Review Comm'n, 2004 WI 90, 273 Wis. 2d 394, 682 N.W.2d 343.	Waiver and great weight deference to agency decision
State <i>ex rel.</i> Thorson v. Schwarz, 2004 WI 96, 274 Wis. 2d 1, 681 N.W.2d 914.	Waiver
Haase v. Badger Mining Corp., 2004 WI 97, 274 Wis. 2d 143, 682 N.W.2d 389.	Whether circuit court was "clearly wrong" in its decision to dismiss for insufficient evidence
State v. Deilke, 2004 WI 104, 274 Wis. 2d 595, 682 N.W.2d 945.	Deferral to circuit court's discretion

Case name
and citationAFFIRMANCE THROUGH
AVOIDANCE DOCTRINE

State v. Allen, 2004 WI 106, 274
Wis. 2d 568, 682 N.W.2d 433.

Deferral to circuit court's
discretion

State v. Carprue, 2004 WI 111, 274
Wis. 2d 656, 683 N.W.2d 31.

Waiver

Kolupar v. Wilde Pontiac Cadillac,
Inc., 2004 WI 112, 275 Wis. 2d 1,
683 N.W.2d 58.

Deferral to circuit court's
discretion

The court issued eighty-three authored decisions and applied a doctrine that limited its review of the merits of one or more issues in twenty (24%) of them.

APPENDIX C
WISCONSIN SUPREME COURT 2004–2005 TERM

Clean Wisconsin, Inc. v. PSC, 2005
WI 93, 282 Wis. 2d 250, 700
N.W.2d 768

Great weight deference to the
agency

APPENDIX D
LIRC COMMISSIONERS

YEARS SERVED	NAME	YEARS OF SERVICE
2	Hayon	1979–81
4	Hart	1979–83
3	Ausman	1979–82
8	Anderson	1983–84; 1989–93; 1993–96
4	Pearson	1983–87
6	Henderson	1983–89
6	Thompson	1985–91
2	Potter	1991–93
2	Meier	1993–95
4	Kreul	1993–97
7	Falstad	1997–2004
4	Rutkowski	1999–2003
2	McCallum	2001–03
1	Flynn	2003–04
1	Glaser	2003–04

56 years total ÷ 15 people = 3.7 years, average length of service

* * *