

STATE OF WISCONSIN

PERSONNEL COMMISSION

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LINDA SCHULTZ,
Appellant,

v.

Secretary, DEPARTMENT OF
EMPLOYMENT RELATIONS,
Respondent.

DECISION
AND
ORDER

Case Nos. 83-0119-PC,
84-0252-PC, &
85-0029-PC-ER

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LINDA SCHULTZ,
Appellant,

v.

Secretary, DEPARTMENT OF
EMPLOYMENT RELATIONS, and
Secretary, DEPARTMENT OF
INDUSTRY, LABOR AND HUMAN
RELATIONS,
Respondent.

Case No. 84-0015-PC-ER

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NATURE OF THE CASE

These matters were heard on a consolidated basis by agreement of the parties.

Case No. 83-0119-PC is an appeal pursuant to §230.44(1)(b), Stats., of a reallocation following a survey. Case No. 84-0252-PC is an appeal pursuant to §230.44(1)(b), Stats., of the subsequent denial of a reclassification. As to these classification matters, the parties agreed that at

this point the Commission should address only the question of whether or not the appellant's position should be categorized as professional in the context of the personnel transactions in question, with the understanding that if it were to be determined that the positions are in the professional category, the parties would seek to agree on an appropriate classification in the professional series.

Case No. 84-0015-PC-ER is a charge of discrimination pursuant to §230.45(1)(b), Stats., which alleges that respondents Department of Employment Relations (DER) and Department of Industry, Labor and Human Relations (DILHR) discriminated against complainant on the basis of sex in violation of the Fair Employment Act (FEA) (Ch. 111, Subch. II, Stats.) in connection with the reallocation of her position. No. 85-0029-PC-ER is a charge of discrimination pursuant to §230.45(1)(b), Stats., which alleges that respondent DER discriminated against complainant on the basis of sex in violation of the FEA in connection with the denial of the request for reclassification of her position. In both cases, an investigator issued pursuant to §PC 4.03(1), Wis. Adm. Code an initial determination finding "no probable cause" to believe that such discrimination had occurred. Complainant appealed that finding pursuant to §PC 4.03(3), Wis. Adm. Code.

The following were the issues noticed for hearing, subject to the aforesaid proviso that as to the matter of the proper classification of complainant's position, the Commission at this point would address only the question of whether it should be considered professional in nature:

Case No. 83-0119-PC:

Whether or not Respondent's decision reallocating the Appellant's position to Research Technician 3 (PR 06-10), effective June 12, 1983, was correct. If not, whether Appellant's position would more properly be

reallocated to the Research Analyst 2 (PR 08-13) or Research Analyst 3 (PR 08-04) level.

Subissue: Whether Appellant's position is professional or technical in the context of this transaction.

Case No. 84-0252-PC:

Whether or not Respondent's decision denying reclassification of Appellant's position from Research Technician 3 (PR 06-10) to Research Analyst 3 (PR 08-04) by memo of November 27, 1984 was correct.

Subissue: Whether Appellant's position is professional or technical in the context of this classification transaction.

Case No. 84-0015-PC-ER:

Whether there is probable cause to believe that Respondents discriminated against complainant on the basis of sex in violation of the Fair Employment Act (FEA) in connection with the reallocation of her position to Research Technician 3 (PR 06-10).

Case No. 85-0029-PC-ER:

Whether there is probable cause to believe that Respondent discriminated against complainant on the basis of sex and retaliation in violation of the FEA in connection with the denial of her request for reclassification from Research Technician 3 (PR 06-10) to Research Analyst 3 (PR 08-04).

FINDINGS OF FACT

1. At all material times, the complainant has been employed in the classified civil service by DILHR in a position in the Bureau of Employment

Programs, Labor Market Section, and her position has in summary been responsible for analyzing, editing, and compiling employment and wage data for the quarterly ES-202 report on unemployment compensation covered employment.

2. In February, 1981, DER began a personnel management survey of planning and research positions throughout state service. The survey became effective on June 12, 1983.

3. As a result of this survey, complainant's position was reallocated from Research Analyst 3 (RA 3) (PR 08-03) to Research Technician 3 (RT 3) (PR 06-10), effective June 12, 1983. This transaction involved a move to a counter-part pay range and from a classification in a professional series to a technical classification.

4. The DER employe primarily responsible for the conduct and implementation of the survey was Anthony Milanowski. He was primarily responsible for drafting the new position standards which emerged from the survey. Ms. Dotti Jacob, a DILHR personnel employe on loan to DER to help with the survey, was involved in some editing of the position standards. Mr. Milanowski field audited complainant's position before causing its reallocation.

5. The RT series involved a new concept in this vocational area, and resulted partially from Mr. Milanowski's concern as he conducted the survey that there were a number of positions which, while they did not appear to be at a professional level, appeared to warrant classification above the clerical level.

6. The survey covered approximately 550 filled or vacant research or planning positions throughout state service. Of approximately 500 filled

positions, there were 441 professional, 38 technical or paraprofessional, and 21 clerical.

7. Of all the filled positions involved in the survey, a greater percentage of women went up one or more pay ranges than men and a smaller percentage of women went down one or more pay ranges than men.

8. There were 118 positions in state service that were either in the RA series prior to the implementation of the survey, or brought into the research analyst series as a result of the survey. With respect to this group, the survey produced a mean change of +.65 pay range. The mean change for males in the group was +.75 and for females +.46.

9. The complainant adduced evidence which demonstrated that neither the factor of agency (DHSS, DILHR, or other) nor the factor of pay range prior to the survey (ranges 10-12 versus ranges 13-15) had significant influence on the experience of males versus females as to mean change in pay range. However, there were a number of other factors which could have accounted for the different experience of males and females which were not analyzed on this record. These factors included length of service with the state, the classification history of the vocational groups in question, including the prior distribution of employes by sex in certain job areas, and the value from a classification standpoint of the particular jobs involved.

10. As a result of the survey, the complainant and another woman in her section (Ms. Schiro), as well as a male employe of the Public Service Commission, were reallocated from the RA series to the RT series.

11. As a result of budget cuts and reorganizations prior to the implementation of the survey, a number of employes in DILHR had bumped or transferred into different positions, having different program

responsibilities, in lieu of layoff. As a result of the survey, it was determined that many of these employees, who nominally were in professional classifications, had not mastered their new jobs and were not performing at the level of complexity set forth in their position descriptions, or had not been assigned professional level duties and responsibilities.

12. DER and DILHR agreed that certain of these and other employees would be given what later came to be known as "grace periods," during which their classification levels would not be reduced and during which they would attempt to bring their levels of duties and responsibilities up to the level specified in their position descriptions, or, in some cases, during which higher level duties and responsibilities would be added to their position descriptions. With respect to some employees, DILHR arranged transfers to positions with more secure professional classifications.

13. There were six male employees in DILHR identified on this record who were given grace periods -- Messrs Betthausen, Dalby, Beutel, Harper, Marquis, and Siemers. Ms. Nichols was allowed to remain at her pre-survey pay range due in part to the intervention of her supervisor, Mr. Jackson, and the union. Ms. Schroeder was allowed to remain at her pre-survey pay range due in part to the intervention of the U.S. Bureau of Labor Statistics regional office. Both Ms. Schultz's and Ms. Schiro's positions were reallocated from RA 3 to RT 3 and they were not given grace periods.

14. Although the complainant's position had been identified for downward reallocation from RA to RT, she had been doing the work for some time and was not working below the level of the duties and responsibilities set forth in her position description. Due to the demands and heavy workload of maintaining the ES 202 reporting system, Ms. Schultz's supervisor felt he could not add any more duties and responsibilities to her

position. Management did not actively pursue a transfer for her because of concerns about being able to replace her with someone who could step into the job and be able to keep up with the heavy workload demands of the position. The foregoing also was basically the case with respect to Ms. Schiro.

15. When the grace periods were originally agreed to in June, 1983, the understanding between DILHR and DER was that Ms. Jacob of DILHR personnel would review the affected positions in October 1983 to determine either whether the particular incumbent had brought his work up to the professional level as set forth in the position description, or whether the added duties and responsibilities in fact were in place. However, during this period, Ms. Jacob had to take an unexpected extended medical leave, Mr. Milanowski transferred out of the DER classification unit, and this review was never done.

16. At the time the classification of the positions held by Ms. Schroeder, Ms. Nichols, Ms. Schiro and Ms. Schultz was being discussed by the respondents in or about June 1983, Mr. Jackson, the immediate supervisor, referred to these employes as "affirmative action" promotions as part of his argument to retain them at the professional level. All four of these employes had been in clerical classifications prior to their promotions to the professional ranks as research assistants. None of them possessed college degrees, and therefore they would not have been eligible for these professional classifications prior to a change in the civil service law which took effect in 1978 and which prohibited the requirement of a college degree as a condition of application for a position in the classified service, with certain exceptions not here relevant. §230.14(3m), Stats., Laws of 1977, Ch. 196. They obtained their promotions following

examinations that were limited to DILHR employees, in part because of affirmative action concerns.

17. During the course of the survey, it was determined that two male employees (Dalby and Alexander) in effect shared a position, thus weakening their professional classification. It ultimately was decided to allow them to remain as professional and to equalize their position at the higher pay range, causing Mr. Dalby's position to receive a one range upgrade.

18. Ms. Nichols and Ms. Schultz were to a large extent sharing job functions, with Ms. Nichols analyzing multi-unit employees, while Ms. Schultz did all other employees. Ms. Schultz's position was reallocated from RA 3 (PR 08-03) to RT 3 (PR 06-10) while Ms. Nichols' position was reallocated from RA 3 (PR 08-03) to RA 2 (PR 08-03). Of 37 RA's employed in DILHR prior to the survey (14 females, 23 males) complainant and Ms. Schiro were the only ones reallocated out of the professional ranks.

19. The Research and Analysis position standard which was developed as a result of the survey, Exhibit #28, contains the following:

I.B. Inclusions

1) The Research Analyst series encompasses positions which have the primary purpose of conducting research, performing statistical analysis, or developing and maintaining statistical information reporting systems. Positions must be professional, as defined in s. 111.81(11), Stats., and typically require a professional knowledge of statistical or other quantitative research or analysis methods, or of the specific research methodology of a professional discipline such as history, demography, or psychology. Positions in this series provide information, interpretations, and analysis to program planners, evaluators, administrators, or the public, with the common feature of enabling these users to know or forecast key features of the environment of their activities....

* * *

C. Exclusions

Excluded from classes described in this position standard are:

1. Positions which do not meet the criteria set forth in s. 111.81(11) for identification as professional;
2. Positions in which research or analysis activities are subsidiary or incidental to carrying out other responsibilities such as provisions of direct services to clients or patients, the administration of a program of direct or administrative services, enforcement of regulations or assurance compliance, development of plans for programs or facilities, or the evaluation and recommendation of action on programs, proposals, or policies;
3. Positions with the primary purpose of performing computer programming and systems analysis, fiscal analysis, budget analysis, or similar analytic functions identified in other classification series;
4. Positions performing applied or theoretical research in the natural or medical sciences, or which are identified in other classification series which are based on the specific discipline in which knowledge is required (e.g., economists);
5. All positions which are better defined in other classes or class series.

20. The Research Technician position standard which was developed as a result of the survey, Exhibit #27, contains the following:

I.B. Inclusions

This position standard encompasses positions with the primary purpose of collecting, compiling, and manipulating statistical information, operating statistical information reporting systems or performing other research support work which is considered "technical," rather than clerical or professional in nature. In most instances, these positions will be located in specialized research or statistical information reporting units, and will be providing technical support to professional research staff or to the users of the data. In performing this work, these positions typically apply knowledge of basic statistical concepts and techniques, package computer programs and basic data processing concepts, and/or established guidelines or procedures for the collection, analysis, or reporting of specialized quantitative information, as well as skill in performing statistical or mathematical calculations.

21. When complainant's position was reallocated as a result of the effectuation of the survey on June 12, 1983, DER utilized her position description dated May 5, 1982, Exhibit #22, which contained the following:

Position Summary:

Responsible for analyzing and interpreting of the employment and wage data for the quarterly ES-202 report on employment and wages. Discuss with management and computer programmers alterations to improve the system.

Goals and Worker Activities:

60% Goal A. Analysis and review of employment and wage data.

Worker

Activity A1. Examine data processing printouts to recommend changes in design of computer programs.

Worker

Activity A2. Review statistical data to determine accuracy according to established procedures and guidelines.

Worker

Activity A3. Evaluate changes in the law and departmental policies affecting employment and wage data to determine effect on the economic and social aspects of the population strata and communities in the state.

Worker

Activity A4. Use statistical techniques and formulas to analyze collected data.

Worker

Activity A5. Use mini-computer and terminals to aid in the analysis of statistical data.

25% Goal B. Collection of employment wage statistical information.

Worker

Activity B1. Study and research publications related to unit research activities to develop background and understanding of issues and new projects.

Worker

Activity B2. Confer with departmental and interdepartmental personnel to explain programs and receive assistance in determining procedures for gathering and monitoring statistical information.

15% Goal C. Respond to requests for employment and wage data.

Worker

Activity C1. Analyze trends and deviations in employment and wage data to answer correspondence from outside agencies.

Worker

Activity C2. Evaluate ideas and provide interpretation of employment and wage data to outside agencies.

IMPACT STATEMENT

This position is responsible for estimating, compiling, and analyzing the quarterly employment and wages report. This report is used extensively by other units for benchmarking of employment data as well as by the federal government for fund allocations.

PART B

I. KNOWLEDGE AND SKILLS REQUIRED BY THIS POSITION

Extensive knowledge of the employment and wages review procedure
A-3, B-1, A-1.

Extensive knowledge of employment/wage relationships
A-2, A-4.

Considerable knowledge of communication skills
C-3.

Working knowledge of computer terminals.
A-5.

II. PERSONAL CONTACTS AND THEIR PURPOSE

Describe the nature, purpose, and frequency of required contacts with others for acceptable performance of the work.

Several times a month with employers to obtain missing employment data.

Several times a month with other agency staff to provide data upon their request.

III. DISCRETION AND ACCOUNTABILITY

A. Describe the extent to which the objectives and priorities of the work assignments are prescribed or defined for the position and the extent to which they may be modified by an incumbent of the position.

Objectives and priorities are clearly defined by the ES-202 Bureau of Labor Statistics manual.

- B. Considering all available guidelines, specific instructions, and assistance; describe the extent to which they define or control the work methods, operational sequences, and decision-making authority of the position and the extent to which these controls may be modified by an incumbent of the position.

This position can alter daily work schedules and modify procedures within the manual procedures.

- C. Describe the nature and extent of the work review.

Review consists of checking the accuracy and timeliness of the quarterly report.

- D. Describe the extent to which accountability for the work is shared with other positions or entities outside of the formal supervisory chain of command.

Responsibility is shared with other unit staff.

22. In performing the aforesaid duties and responsibilities, the complainant did not develop statistical information reporting systems, and did not decide what data would be sampled and how it would be collected. The basic framework of the data reporting system involved in the ES-202 report is set forth by the federal government. The complainant had to analyze reported data for accuracy based on her experience in working with the report and her knowledge of the employers, economic trends, and changes in relevant laws, and to determine whether to seek additional information from employers, whether to make changes in the reported data without further inquiry, or whether to accept the reported data. She also was required to analyze the reported data to develop a narrative for the report to explain unusual variations in trends or shifts in the employment and wage data for particular industries or federal agencies. In performing her job, she did not use research, mathematical, or statistical techniques or, methods of analysis of a professional level of complexity. The work

performed did not require knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning.

23. At the time of the reallocation on June 12, 1983, complainant's position was not professional in nature in the context of the reallocation transaction here in question.

24. The complainant's position description thereafter was revised, and as of August 18, 1983, reflected the following (Exhibit #24):

POSITION SUMMARY

Responsible for analyzing, editing, and compiling of the employment and wage data for the quarterly RS-202 report on UC covered employment. Performs analysis and verification of summarized data to be presented in a statistical format for publication. Provides a written narrative analysis to explain outstanding wage and employment deviations to the regional and federal offices and as a basis for Wisconsin industry analysis and research. Results are used in all aspects of economic policy from microanalysis of individual industries in individual counties to estimating the U.S. Gross National Product.

GOALS AND WORKER ACTIVITIES

- 60% Goal A. Analysis, review, and publication of UC covered employment and wage data in various formats. (See attached example.) Editing and correction of individual establishment data.
- A.1. Review computer reports of statistical employment and wage deviations, and of other selected potential individual establishment reporting errors. Use judgement and knowledge of current labor market conditions, statistical techniques, computer edit formulas, and workload schedules to determine which individual reports to edit further and by what method.
 - A.2. Analyze employment and wage data for industries between two consecutive months and between two quarters using judgement and knowledge of each industry's seasonal patterns, current economic trend, and past relationships between wages and employment to determine whether microcredits of data within each industry is warranted. With over

100,000 reports to edit we must insure that we allocate our priorities first to the potential errors which have the greatest significance for later analysis.

A.3. Analyze internally available data for individual establishments. Use computer terminals to access UC employer Master File and Transaction File to obtain the latest data. Coordinate with Current Employment Statistics survey edit to compare UC reported information with their survey information for establishments in question. Examine reports of lay off and work stoppages, and reports in business news. Analyze relations between total and taxable wages. Check with Standard Industrial Classification unit to determine whether there were industry code changes and whether such changes were economic or noneconomic. Use judgement to determine whether to accept the questionable information as reported or whether editing is necessary. If editing is necessary, use judgement in weighing the priorities and workload schedule to determine which firms to contact for the correction and when to substitute a judgemental estimate.

A.4. Telephone employers to inquire concerning probable errors in reporting. Explain the question to the employer who often has forgotten the report. Obtain corrected information and provide information which will educate the employer to respond correctly in the future. Either answer questions the employer has about UC or arrange to have someone else answer the questions raised by the employer during the telephone contact.

A.5. See that corrections are accurately made to employer accounts using computer terminals. Verify the data entry when necessary.

A.6. Request computer runs to obtain revised industry employment and wage totals. Review revised totals to determine whether results appear to be satisfactory in the light of all other available information, or whether more editing is necessary.

A.7. Identify and develop other methods of obtaining data for verification of employer reporting and analysis of industry employment for the state and counties.

25% Goal B. Prepare detailed ES-202 narrative to analyze individual industry business and economic trends. (See attached.)

B.1. Review publications, manuals and other reference material to become familiar with the ES-202 report content, objectives, and guidelines. The above includes the ES-202 manual, Standard Industrial Classification manual, and the Unemployment Tax and Accounting System Users Manual.

B.2. Analyze and interpret employment and wage trends by Standard Industrial Classification using knowledge obtained during the editing process, knowledge of current economic trends and of seasonal patterns within the industry, information from other sources, and judgement. Prepare written comments for submittal to the U.S. Department of Commerce explaining deviations from statistical norms.

B.3. Provide technical consultation for users of employment and wage data to explain reasons for statistical deviations and to interpret the information in terms of industry, area, and economic trends or noneconomic changes.

10% Goal C. Analyze and compile lay off data.

C.1. Maintain an up to date record keeping system of employe lay offs and labor disputes. Work closely with other bureaus and local labor market analysts to gather up to date information. Analyze this information as pertains to ES-202 industry employment trends, and relay it to the Labor Area Unemployment Statistics unit.

C.2. Secure employment and wage information from news media to aid in examining discrepancies.

5% Goal D. Liaison with Data Processing

D.1. Create and provide necessary data for input to computer programs applying thorough knowledge of various RS-202 computer programs and file formats.

D.2. Direct Data Processing systems control to run various computer programs as required.

D.3. Coordinate related ES-202 control activities, conferring with and advising Data Processing staff members and other UI related work units; using knowledge of data processing functions and terminology to solve problems and improve the system.

D.4. Interpret, analyze, correct, and verify data resulting from computer program runs. Validate accuracy of new programs and program changes.

IMPACT STATEMENT

This position is responsible for accuracy of the ES-202 report of UC covered employment and wages, and for the narrative comments used in interpreting and analyzing this information. The resulting reports are used in the development of the insured unemployment rate which triggers extended benefits, in the solvency tax rate, in the weekly benefit rate, in experience rating, in workload forecasts, and in UC budget estimates. It is used in studies of the economy by the Wisconsin Department of Development, Department of Transportation, and DILHR, and by the US Bureau of Labor Statistics, Employment and Training Administration, and Department of Commerce. It is used to benchmark a wide variety of employer surveys including the estimates of Wisconsin total employment. It is input into the Gross National Product and Personal Income Estimates used for federal revenue sharing.

PART B

I. KNOWLEDGES AND SKILLS REQUIRED BY THE POSITION

Extensive knowledge of Wisconsin industry, employers, seasonal patterns, business and economic analysis, and relationships between employment and payrolls
A1, A2, A3, B2, B3

Extensive knowledge of UC laws and tax and accounting operations
A3, B2

Extensive knowledge of employment and wage review procedures, and of statistical methods for establishing tolerances for deviations and in automating estimates for missing cells
A1, A2, A3, B2, B3

Considerable knowledge of oral and written communication skills
A4, B2

Working knowledge of data processing files, procedures, and capabilities, and computer terminal operation
A5, D1, D2, D3, D4

Working knowledge of the way data is used by different users and requirements of the users
B2, B3, C1

II. PERSONAL CONTACTS AND THEIR PURPOSE

Several times a week with employers by telephone to tactfully determine obtain corrections to previous reports.

Several times a month with data processing to request computer runs, or solve problems.

Several times a month to exchange business and economic information about Wisconsin firms with other LMI units.

Several times a month to answer requests for data or technical assistance from national or regional office staff, staff from other agencies, or other analysts.

III. DISCRETION AND ACCOUNTABILITY

- A. Objectives and priorities are generally established by contract with the Bureau of Labor Statistics. The incumbent can modify procedures and daily goals within the broad scope of the program. The position must often use judgement in trade offs between timeliness and accuracy.
- B. This position establishes own daily work schedules and sometimes schedules data processing runs for the unit. This position must use judgement in selecting the degree of editing that can be done and the best methods to use, and in interpreting reasons for deviations.
- C. The accuracy and timeliness of the quarterly report are reviewed by Bureau of Labor Statistics and Department of Commerce staff. Comments are reviewed for completeness. However, complete review for accuracy is not possible so that any errors or oversights may not show up until the data is later being used in analysis.
- D. Timeliness of the ES-202 statistical reports is shared with co-workers and data processing. Accuracy of a majority of the industry segments, and or the comments are predominantly this person's responsibility.

IV. PHYSICAL DEMANDS

None

V. WORK ENVIRONMENT

None

25. The complainant's position description was further revised and as of July 9, 1984, contained the following (Exhibit #23):

Position Summary.

Responsible for analyzing, editing, and compiling of the employment and wage data for the quarterly ES-202 report on UC covered employment. Performs analysis and verification of summarized data to be presented in a statistical format for publication. Provides a written narrative analysis to explain outstanding wage and employment deviations to the regional and federal offices and as a basis for Wisconsin industry analysis and research. Results

are used in all aspects of economic policy from microanalysis of individual industries in individual counties to estimating the U.S. Gross National Product. Coordinates with other units and exchanges information related to analysis of this and other data. Schedules data processing and recommends improvements to programs.

Time % GOALS AND WORKER ACTIVITIES

- 60%
- Goal A. Analysis, review and publication of UC covered employment and wage data in various formats. Editing and correction of over 100,000 individual establishment data.
- A.1. Schedules cut-off dates with Tax and Accounting to have as many reports and corrections into the computer as possible prior to the edit, and still meet reporting due dates. Schedules computer runs to fit into editing schedules.
- A.2. Analyze individual firm reports, county summaries, and industry totals to determine if there are unusual patterns using knowledge of past trends, seasonal differences, industry economic conditions, relationships between wages and employment including seasonal effects, product or service changes, changes in ownership or industry classification, UC law changes and judgment concerning reasonable deviations. Also obtains computer error listings based upon present statistical tolerances. Determines the editing that will be done and the editing methods to use depending upon the amount and nature of the errors and the workload schedule.
- A.3. Determines whether to telephone employers to verify data, to obtain information from other sources, or to estimate corrections. Uses tact and persuasion to obtain corrected information from employers by telephone.
- A.4. Maintains cooperation with Current Employment Statistics (CES) unit to verify reports against their survey results.
- A.5. Obtains information on layoffs and labor disputes from Local Area Unemployment Statistics (LAUS) unit. If data cannot reasonably be obtained, uses judgment to estimate corrections based upon industry economic trends, seasonal patterns, and current business news.
- A.6. Examines automated estimates prepared by computer checking for prescribed kinds of deviations for

firms in specified industry size group cells. Makes judgmental adjustments as necessary based upon knowledge of the statistical deviation criteria and estimating method as well as upon current business conditions in the industry.

- A.7. Verifies that employment and wage corrections are entered into ES-202 files. Provides information to Tax and Accounting to correct data in the UC Master File. Schedules report runs, and sees that computer reports and tapes are sent to the Bureau of Labor Statistics, U.S. Department of Commerce and Wisconsin state agencies as necessary.
 - A.8. Telephones employers to ascertain probable errors in reporting. Obtain corrected information and provide information which will educate the employer to respond correctly in the future. Either answer questions the employer has about UC or arrange to have someone else answer the questions raised by the employer during the telephone contact.
 - A.9. Survey that corrections are accurately made to employer accounts using computer terminals. Verify the data entry when necessary.
 - A.10. Request computer runs to obtain revised industry employment and wage totals. Review revised totals to determine that results are satisfactory in the light of all other available information, or whether more editing is necessary.
 - A.11. Identify and develop other methods of obtaining data for verification of employer reporting and analysis of industry employment for the state and counties.
- 25% Goal B. Prepare detailed ES-202 narrative to analyze individual industry business and economic trends. Prepared special reports.
- B.1. Review publications, manuals and other reference material to become familiar with the ES-202 report content, objectives, and guidelines. The above includes the ES-202 manual, Standard Industrial Classification (SIC) manual, and the Unemployment Tax and Accounting Systems Users Manual.
 - B.2. Analyze and interpret employment and wage trends for submittal to the U.S. Department of Commerce in written comments explaining deviations from statistical norms.

- B.3. Provide technical consultation for users of employment and wage data to explain reasons for statistical deviations and to interpret the information in terms of industry, area, and economic trends or noneconomic changes.
- B.4. Analyze individual firms, industry, and county data to determine if there are unusual patterns. Records reasons for any atypical occurrences based upon firm and industry trends, business news and economic conditions, product or service changes, changes in classification, industry combinations or divisions, and UC law changes affecting the relationship of contributions to total and taxable payroll.
- B.5. Reviews Bureau of Labor Statistic's (BLS) computer generated statistical quarterly error listings (by ownership and industry for the state, BLS multiple quarter edit listing, and UC Bureau of Economic Analysis personal edit listing by county, ownership, and SIC) to determine whether errors need to be corrected, sees that necessary corrections are made, and comments upon the corrections.
- B.6. Provide written analysis on each ES-202 report to BLS - Washington, Regional Office, U.S. Department of Commerce, Milwaukee City Development, and Wisconsin Recreational Resource Department.
- B.7. Analyze detailed edit listings and any industry-area tabulations prepared for state use.
- B.8. Analyze covered employment data to determine if covered employment Supplemental Report is needed. Process report, if needed.
- B.9. Prepare report of noneconomic code changes. Noneconomic code changes should be made effective only at the beginning of a calendar year.
- B.10. Coordinate with SIC unit and data processing as to timing computer runs to prepare magnetic tape for BLS and to update the Employer Master File. Analyze computer printout sent to BLS for corrections, if necessary.
- B.11. Prepare Voluntary Contributions Supplement. Analyze computer generated Voluntary Contributions Supplement to assure data is correct.

Write cover letter and send Voluntary Contributions Supplement to Unemployment Insurance Service, Division of Actuarial Services.

- B.12. Direct data processing to prepare unemployment insurance address file tape and submit it to BLS.
- 5% Goal C. Schedule data processing runs, oversee day-to-day activities and recommend program improvements.
 - C.1. Schedule about 30 different computer runs. Review results of runs to determine if reruns are necessary. Advises supervisor of any problems which endanger deadlines.
 - C.2. Distributes computer error listings among other unit staff to share edit workloads. Trains co-workers as necessary in edit methods or in system changes.
 - C.3. Recommends improvements in computer edit programs based upon experience, knowledge of statistical methods, and upon knowledge of the processes and workloads.
 - C.4. Create and provide necessary data for input to computer programs applying thorough knowledge of various ES-202 computer programs and file formats.
 - C.5. Direct data processing systems control to run various computer programs as required.
 - C.6. Coordinate related ES-202 control activities, conferring with and advising data processing staff members and other units to solve problems and improve the system.
 - C.7. Analyzes and verifies data resulting from computer program runs. Validate accuracy of new programs and program changes.
- 5% Goal D. Provides technical consultation to users.
 - D.1. Consults and disseminates data for users.
 - D.2. Applies judgment to determine the amount of consultation warranted based upon the user's project, the user's ability to absorb the information, and unit work schedules.
- 5% Goal E. Analyze and compile layoff data.
 - E.1. Maintain an up-to-date record-keeping system of employer layoffs and labor disputes. Analyze labor market information as it pertains to ES-202 industry employment trends, and relay it to the LAUS unit.

E.2. Secure employment and wage information from news media to aid in examining discrepancies.

IMPACT STATEMENT

This position is responsible for accuracy of the ES-202 report of UC covered employment and wages, and for the narrative comments used in interpreting and analyzing this information. The resulting reports are used in the development of the insured unemployment rate which triggers extended benefits, in the solvency tax rate, in the weekly benefit rate, in experience rating, in workload forecasts, and in UC budget estimates. It is used in studies of the economy by the Wisconsin Department of Development, Department of Transportation, and DILHR, and by the U.S. Bureau of Labor Statistics, Employment and Training Administration, and Department of Commerce. It is used to benchmark a wide variety of employer surveys including the estimates of Wisconsin total employment. It is input into the Gross National Product and Personal Income Estimates used for federal revenue sharing.

PART B

I. KNOWLEDGE AND SKILLS REQUIRED BY THE POSITION.

Extensive knowledge of Wisconsin industry, employers, seasonal patterns, business and economic analysis, and relationships between employment and payrolls.

A.2, A.3, B.2, B.3

Considerable knowledge of UC laws and tax and accounting operations.

A.1, A.2, A.4, B.4, B.7

Extensive knowledge of employment and wage review procedures, and of statistical methods for establishing tolerances for deviations and in automating estimates for missing cells.

A.2, A.3, B.2, B.3

Considerable knowledge of oral and written communication skills.

A.3, A.4, A.5, B.6, B.7, B.8, B.9

Working knowledge of the way data is used by different users and requirements of the users.

B.8, B.9, B.10, C.1, C.2, C.3, C.4

II. PERSONAL CONTACTS AND THEIR PURPOSE.

Several times a week with employers by telephone to tactfully determine or obtain corrections to previous reports.

Several times a month with data processing to request computer runs, or solve problems.

Several times a month to exchange business and economic information about Wisconsin Firms with other LMI units.

Several times a month to answer requests for data or technical assistance from national or regional office staff, staff from other agencies, or other analysts.

III. DISCRETION AND ACCOUNTABILITY

- A. Objectives and priorities are generally established by contract with the Bureau of Labor Statistics. The incumbent can modify procedures and daily goals within the broad scope of the program. The position must often use judgment in tradeoffs between timeliness and accuracy.
- B. This position establishes own daily work schedules and sometimes schedules data processing runs for the unit. This position must use judgment in selecting the degree of editing that can be done and the best methods to use, and in interpreting reasons for deviations.
- C. The accuracy and timeliness of the quarterly report are reviewed by the Bureau of Labor Statistics and Department of Commerce staff. Comments are reviewed for completeness. However, complete review for accuracy is not possible so that any errors or oversights may not show up until the data is later being used in analysis.
- D. Timeliness of the ES-202 statistical reports is shared with co-workers and data processing. Accuracy of a majority of the industry segments, and of the comments are predominantly this person's responsibility.

26. The major change that occurred in complainant's position between the times of these position descriptions was a new computer program used to generate the ES-202 report. The complainant was required to work closely with the computer programmers in this period to ensure that the ES-202 data was being produced accurately and in the proper format.

27. In October 1983, Ms. Wil Tomer of DER re-reviewed complainant's and a number of other positions. She did not recommend any changes in classification.

28. Ms. Jacob, who had returned to DILHR personnel, conducted a further audit of complainant's position and in August 1984 recommended its reclassification to RA 3. Since DILHR did not have delegated authority

from DER for RA 3 reclassifications, DER had to make the final decision on this transaction. Ms. Jacob felt that it was a borderline case as to whether the position in fact was professional but decided to give the incumbent (complainant) the benefit of the doubt because of Ms. Jacobs' understanding of her role as a personnel analyst for the employing agency.

29. Subsequently, Mr. Joseph Pellitteri of DER reviewed the matter and audited the position. He denied the reclassification request on November 20, 1984, because he concluded the position was not professional in nature.

30. At the time of this reclassification denial, complainant's position had not substantially changed from the time of the reallocation, and it still was not professional in the context of the reclassification denial.

31. Pursuant to the RA position standard, a decision is supposed to be made as to whether or not a position was professional before applying the Factor Evaluation System (FES), which gives rise to a point ranking following the assignment of points for each of a number of factors.

32. The position that had previously been filled by Ms. Nichols was filled by Mr. Duane Frisch via a transfer. The position had been approved for rehire at the RA 2 level on August 18, 1984.

33. Mr. Frisch's position was compared to complainant's position by both the complainant and her supervisor, Mr. Jackson. Subsequently, on January 10, 1985, Mr. Pellitteri caused the classification of Mr. Frisch's position to be changed to RT 3.

34. Both Mr. Betthausen and Ms. Nichols had worked on the ES-202 program in positions in a professional classification. As noted above, the classification of Ms. Nichols' position ultimately was changed to RT 3

after Ms. Schultz filled the position. Mr. Betthausser was an RA 4 who served as a lead worker over both the ES-202 subunit and the Occupational Employment Statistics (OES) subunit.

35. During the period March 1981 - August 1983, Mr. Milanowski approved 28 reclass requests for female employes and denied 15 (34.9%). He approved 29 male reclass requests and denied 20 (40.8%).

36. During the period February 1984 - May 1985, Mr. Pellitteri approved 36 female reclass requests and denied 4 (10%). He approved 69 for males and denied 10 (13%).

37. At the time Mr. Pellitteri denied the request for reclassification of complainant's position, he was aware of her appeal of the reallocation (83-0119-PC) but he was not aware of her discrimination complaint with respect to said reallocation (84-0015-PC-ER).

38. Ms. Nichols filed an appeal with the Commission of the reallocation of her position to RA 2. DER attempted to introduce as an issue in the appeal the question of whether or not her position was professional and should be classified as an RT. The Commission rejected this issue on legal grounds, holding that DER lacked standing to raise this issue. Exhibit #30.

CONCLUSIONS OF LAW

1. These matters are properly before the Commission pursuant to §§230.44(1)(b) (83-0119-PC, 84-0252-PC) and 230.45(1)(b), stats. (85-0029-PC-ER, 84-0015-PC-ER).

2. The complainant has the burden of proof as to all issues for hearing.

3. The complainant has failed to sustain her burden as to all issues.

4. The complainant's position was not professional in nature in the context of the reallocation and reclassification transactions here in question, and respondent DER's decisions reallocating appellant's position to RT 3 (PR 06-10), effective June 12, 1983, and denying the subsequent request for reclassification of her position to RA 3 (PR 08-04) by memo of November 27, 1984, was not incorrect.

5. There is no probable cause to believe respondents discriminated against complainant on the basis of sex in violation of the FEA in connection with the reallocation of her position to RT 3 or in connection with the denial of her request for reclassification from RT 3 to RA 3.

DISCUSSION

ALLOCATION/RECLASSIFICATION ISSUES (83-0119-PC, 84-0252-PC)

Pursuant to agreement among the parties, the commission will address only the question of whether the complainant's position was "professional" in the context of the personnel transactions in question.

The definition of "Professional" at the time of these transactions was provided by §111.81(11), stats. (1981-1982):

"Professional employe" means:

(a) Any employe engaged in work:

1. Predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical or physical work;
 2. Involving the consistent exercise of discretion and judgment in its performance;
 3. Of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time;
 4. Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual or physical processes; or intellectual instruction and study described in par.(a) 4; and
2. Is performing related work under the supervision of a professional person to qualify himself to become a professional employe as defined in par. (a).

In the Commission's view, while arguments can be made both ways, the complainant has not produced a preponderance of the evidence that would support a finding that her position was professional in the context of the reallocation and the reclassification denial.

One major factor as to this issue is that the framework for the ES-202 system has been set up by the federal government. While the complainant has to exercise considerable discretion and make many "judgment calls" with respect to the data that is submitted by employers, she is not "developing and maintaining" (Exhibit #28) statistical information reporting systems as set forth in the RA inclusions, a professional series. Rather, she is "operating [a] statistical information reporting system", "including planning activities need to collect and compile data, modifying procedures, working with data processing unit staff to further automate the system, and interpreting results." (Exhibit #27, pp. 1, 6) as set forth in the position standard for RT 3, a paraprofessional classification. This was reinforced by the testimony of Ms. Jacob of DILHR who recommended to DER that the reclassification be granted:

Q What's a professional? For purposes of research analyst, what's professional?

A What is considered professional work?

Q Yes

A This is going to be jargon, but typically we look to see professional research analysts doing things like conceptual design of research -- designs, going so far as designing computer programs, selecting survey samples, conducting a survey, conducting a statistical analysis on that survey, having an extensive field of program knowledge of whatever area it is that they're researching, be that education, or agriculture, or in this case, bureau of labor statistics, whatever. And the ability to then analyze that data once they gather that data and draw certain trends or predictions or analyses of that data.

While Ms. Jacob did recommend to DER that the reclassification be granted, she also testified that she thought it was a borderline case and that she should give complainant the benefit of the doubt as a DILHR employe:

Q And after all of these discussions, and all of the things that you just indicated, it was still your conclusion that it was a very close decision?

A Yes. I felt it was a very close case and as an agency employe at that time, in DILHR, my responsibility and my role was to advocate to DER the positions that I have transactions pending on, so that I make the best technical decision I can make and then I market it to DER, and, in this particular situation, I was on the fence, and it was like, well, there's a lot of things hinging on this decision and I don't want to be the person to deny this because maybe somebody else will see it's 52% rather than 50%. So, because it was a non-delegated action, it was -- and because we had the pending controversies on the positions, and the appeal, it was felt that, let's give the employe the benefit of the doubt and we'll take the risk of a reversal of our decision, and we'll send it to DER. And so that is the attitude with which it was passed on to DER and recommended.

Also, the complainant has not established on this record that her work requires "knowledge of an advanced type in a field of science or learning customarily required by a prolonged course of specialized intellectual instruction and study in an institution of higher learning ...," §111.81(11)(a)4., stats. (1981-1982), as required for professional status. While complainant asserts in her post-hearing brief that her position "...involves statistics and statistical methodology that are customarily taught in an intellectual institution..." p.51, she has not established that she uses statistics and statistical methodology "of an advanced type ... customarily required by a prolonged course of specialized intellectual instruction and study..." §111.81(11)(a)4., stats. (1981-1982) (emphasis supplied). Nor has she established that her work involves any other advanced type of knowledge in some other field.

Complainant further argues that when Ms. Jacob evaluated her position through the use of FES it scored in a professional range, and that this is a more "objective" and accurate indicator of the professional nature of her job than the use of the aforesaid statutory test. However, the position standard dictates threshold application of the statutory test to determine whether a position is professional, and only then is the FES analysis applied. Mr. Milanowski testified that the FES involves certain assumptions about positions, and it can be misleading to apply the FES analysis to a non-professional position. Finally, Mr. Pellitteri scored complainant's position using the FES analysis and came up with a much lower score than Ms. Jacob's (90 vs. 250), see Exhibit #43. The complainant did not establish on this record that Ms. Jacob's FES evaluation was more accurate than Mr. Pellitteri's.

Complainant also attempted to point to ES 202 positions in other states that were considered professional, and to the opinion of a federal employe working with the ES 202 program that her position was professional. However, this evidence lacked probative value because it was not established that the other state positions were that similar to complainant's, that they utilized the same meaning as Wisconsin of the term "professional," or, similarly, that the federal official was in a position to evaluate whether her position was professional in the instant context.

Finally, complainant asserts that Mr. Pellitteri said that no one involved in the ES-202 program could be professional, and yet Mr. Milanowski had placed Mr. Betthauser and Ms. Nichols, both of whom worked on the ES 202 program, in the professional category. However, even if Mr. Milanowski and Mr. Pellitteri were in disagreement on these two positions, it would not render Mr. Pellitteri's analysis of complainant's position

arbitrary, as complainant asserts. In any event, the record indicates that Mr. Betthausser was a leadworker over both the ES-202 and OES programs, while Ms. Nichols' professional status was maintained due to the intervention of DILHR management who argued, among other things, that she was in effect a lead worker with respect to the ES 202 program.

SEX DISCRIMINATION-REALLOCATION (84-0015-PC-ER)

The issue here is whether there is probable cause¹ to believe that respondents discriminated against complainant on the basis of sex in violation of the FEA in connection with the reallocation of her positions to RT 3. Complainant asserts reliance, in the alternative, on theories of disparate treatment and disparate impact.

With respect to the disparate impact theory, complainant never really carries through an analysis using this model. This may be related to the fact that the circumstances of this case do not lend themselves to this theory. As discussed in Winters v. DOT, supra, the disparate impact theory only is available with respect to "practices, procedures or tests."² In this case, we are dealing with a personnel survey and the development of new position standards, followed by hundreds of reallocation decisions, not a particular practice, procedure or test which is alleged to have had a disparate impact on females.

¹ §PC 4.03(2), Wis. Adm. Code; Winters v. DOT, Wis. Pers. Comm. No. 84-003, 0199-PC-ER (9/4/86), pp. 14-17: "'Probable cause is not synonymous with 'preponderance,' being somewhere between 'preponderance' and 'suspicion.'"

² For a general discussion of this point, see EEOC v. Sears, Roebuck & Co., 39 FEP Cases 1672, 1681-1685 (N.D. Ill., 1/31/86).

In any event, even if we assume that a disparate impact theory is available, the complainant did not satisfy her burden of proof, although going through this exercise illustrates the inherent difficulty of applying the adverse impact theory to a case of this nature.

If it is assumed that at this probable cause stage, complainant established a prima facie case, the respondent satisfied its burden of proceeding in the context of the circumstances of this case. Personnel surveys are authorized by statute, §230.09(2)(am). The survey in question was conducted in the normal course of business by DER, with the assistance of DILHR. Information was gathered, position standards were developed and approved, and the positions covered by the survey were analyzed and reallocated into the new classifications. Thus it can be said respondent DER has met its burden of proceeding by demonstrating that the "employment practice" in question was justified by "business necessity." At this point, the complainant has to demonstrate that some other "employment practice" could have been utilized that would not have had such an adverse impact on female employees. This has not been done.

With respect to disparate treatment, complainant has established a prima facie case. She is in a protected class (female), she suffered an adverse employment action (reallocation from a professional to a paraprofessional classification), and this occurred under circumstances which, if unexplained, give rise to an inference of discrimination. The latter element could be drawn from the fact that of 37 RA's employed in DILHR prior to the survey (14 females, 23 males) the only ones ultimately reallocated out of the professional ranks were two females, the complainant and Ms. Schiro.

At this point, the respondents have satisfied their burden of proceeding by articulating a legitimate, non-discriminatory rationale for the adverse employment action -- complainant's position was determined to be paraprofessional versus professional, and hence not eligible for an RA classification, as discussed with respect to the preceding issue as to complainant's civil service appeals.

The Commission now must analyze the question of pretext, keeping in mind that the complainant's burden is less at the probable cause stage than at a hearing on the merits.

Each party has pointed to certain statistics that arguably bear on the issue of pretext. The complainant points out that there were 118 positions in state service that were either in the RA series (excluding management and supervisory classifications) prior to the implementation of the survey, or brought into the RA series as a result of the survey. As to these positions, the survey produced a mean change of +.65 pay range. The mean change for males was +.75 and for females, +.46.

On the other hand, DER points to the fact that as to all the filled positions involved in the survey (500), which includes other series besides the rank and file RA's, a greater percentage of women went up one or more pay ranges than men, and a smaller percentage of women went down one or more pay ranges than men.

In the Commission's view, it is inappropriate to focus solely on the rank and file RA's to the exclusion of the other positions covered by the survey, as complainant urges. It must be remembered that the issue in a disparate treatment case is whether the employer intentionally discriminated against the complainant because of membership in a protected category. In such a case, statistics can be probative circumstantial evidence of

whether the employer took an adverse employment action against the complainant because of, for example, the complainant's gender as opposed to the purported reason articulated by the employer.

For example, in a discharge case, if there is a statistically significant pattern, with appropriate controls, that shows that the appointing authority has a tendency to take harsher disciplinary action against females, this tends to show that in discharging the complainant the appointing authority intentionally discriminated against her on the basis of sex.

Now, if the appointing authority in this example supervised employees in three different classifications, it would seem that it would make sense to analyze his disciplinary actions for all three classifications, in the absence of some persuasive explanation of why it would be likely he would discriminate against female employees in one classification but not in another. See, e.g., Sengupta v. Morrison-Knudsen Co., 42 FEP Cases 535, 539 (9th Cir. 1986).

Similarly, in the instant case, it would seem that if one wanted to analyze the employer's actions statistically with an eye to determining whether there was a pattern probative of gender bias, one would look at how the employer (here, in effect Mr. Milanowski, allegedly aided and abetted by DILHR) treated all the employees affected by the survey, in the absence of some kind of showing that this would not produce an accurate picture of the employer's attitude.

The only reason complainant advances to limit the statistical analysis to the RA classification is summarized in her post-hearing brief as follows:

"...Gleason testified that the substantially different classification histories of the three series would obscure rather than illuminate an analysis of the affects [sic] of the survey. He gave the example that it would be false to conclude that since an Employer has an equal proportion of male and female employees, that no employment discrimination exists. It would be necessary to decompose the work force into like occupational groups in order to analyze whether females were concentrated in lower groups (for instance, clerical versus professional).

In this case, the issue concerns precisely the demotion of a female from a professional to a nonprofessional job. To lump the Research Analysts in with other, dissimilar series would simply obscure the undisputed fact that male RA's received significantly better treatment than female RA's. It was precisely DER's action to demote complainant which contributed to this disparity." p. 23

In the Commission's opinion, while this argument could have some application in a disparate impact analysis, it essentially begs the question of why the Commission should not look at the survey results with respect to other classifications in evaluating whether the employer has a tendency to treat females less favorably because of their gender. Furthermore, if the classification histories of the various occupational categories covered in the survey account for the fact that the pay range results for females as compared to males tended to be better for PA's and paraprofessionals than for RA's, this in turn would appear to provide a non-discriminatory reason for the male-female pay range disparity in the RA series.³

Laying to one side the question of whether it is more appropriate to consider the results of the entire survey or just the RA rank and file, the

³ Gleason's testimony about the classification history of these series was not inconsistent with Milanowski's testimony that the disparity between male and female RA pay range movements as a result of the survey could probably be attributed in large part to the classification history which, for example, resulted in a concentration of males in project leader positions which benefited particularly from the survey.

probative value of complainant's data is lessened by its failure to control for certain variables, particularly seniority.

Respondent DER has pointed out through the testimony of Mr. Milanowski that there were a number of factors that could have accounted for the difference in mean pay range movements for males and females that were not examined by the complainant, primarily seniority and historical patterns of concentration of males and females in certain job categories. In her post-hearing brief, complainant argues, in effect, that it was up to DER to have analyzed these specific elements and to have provided the resultant data. However, nothing compelled DER to have gone through this analysis. Had it done so, and had it demonstrated, for example, that seniority explained the difference in results for males and females, its overall case would have been strengthened. That it did not do so does not somehow estop it from arguing that the complainant's statistical showing is weakened by failing to have controlled for seniority. See, e.g., Pegues v. Miss. State Employment Svc., 31 FEP Cases 257, 265 (5th Cir. 1983), where the Court declined to infer discrimination from statistics propounded by plaintiffs which showed that "average wages for black and female referrals were exceeded, in statistically significant proportions by average wages for white and male referrals....," because the plaintiff's analysis did not take into account "the relative qualifications of persons referred during the relevant period." In EEOC v. Hartford Fire Ins. Co., 31 FEP Cases 531 (D. Conn. 1983), plaintiff's statistics considered some but not all of the non-discriminatory variables, and the court found there was no prima facie case because of the possibility of non-discriminatory explanations for the salary differentials. In neither case was the defendant required to demonstrate through its own statistical analysis that the potentially

non-discriminatory variables in fact accounted for the disparate results before the Court would take into account the fact that the plaintiff had not conducted an analysis of these factors.

In this case, Mr. Milanowski testified that greater seniority tended to enhance an employee's capability to perform added duties and responsibilities and that such an employee is in general more likely to benefit in a classification transaction than a less senior employee. He also testified that certain factors contributed to concentrations of males and females in certain job categories that in turn probably enhanced the likelihood that males in the RA series would benefit disproportionately from the survey. The absence of any attempt to analyze these factors detracts from the probative value of complainant's statistical showing.

In addition to the statistical evidence, the complainant has adduced other evidence as to pretext or which purportedly shows unequal treatment.

The complainant was not given a "grace period" or other form of dispensation such as the addition of more advanced level duties and responsibilities or a transfer to a better job that would have permitted her to have retained a professional classification. However, the complainant was not situated like the other employees who were given "grace periods." She was not in the posture of being unfamiliar with the requirements of her job due to a relatively recent "bump" or transfer into an unfamiliar program, and did not need a period of time to bring her work up to the level set forth in her position description. Her job could not be restructured due to the exigencies of the ES 202 program, including a substantial backlog. As Mr. Jackson pointed out, she was too busy taking care of the day-to-day demands of getting out the ES 202 program to take on more sophisticated responsibilities. For similar reasons, a transfer would

have been problematical because of the immediate problems that would have been created while the complainant's replacement learned the new job. Further, Mr. Jackson testified he was not aware of any vacancies to which she could have transferred. Finally, the fact that in some cases, employees were given special consideration because of personal problems may or may not have constituted good management, but in and of itself it is not indicative of pretext, since there has been no showing that complainant was similarly situated. It must also be noted that Ms. Nichols and Ms. Schroeder were originally in danger of losing their professional status, but eventually were able to keep their classifications. Complainant notes that this occurred due to the intervention of males (Mr. Erhart from the Bureau of Labor Standards and Mr. Gleason from the Union), but the Commission is unable to attach much significance to that point. The fact remains that Mr. Milanowski ultimately had to approve the transactions.

Complainant also points to the fact that she was one of the employees identified by Mr. Jackson as having received an "affirmative action" promotion. She argues that this is indicative of "attitudes and assumptions about female research analysts and their capabilities. It implies that without the affirmative action program, women would not be research analysts nor would these women be professional." Post-hearing brief p. 36. However, the record does not support the implication that this comment was indicative of a negative attitude about women. Mr. Jackson testified that these women were hired as part of an affirmative action effort, and to that end the competition for the positions had been limited to internal promotions. Furthermore, Mr. Jackson lobbied for the retention of complainant's professional classification and raised questions

about sex discrimination on a number of occasions as part of that effort, and this remark may be seen as included in that endeavor.

Another alleged example of unequal treatment has to do with the situation uncovered in the survey whereby Mr. Dalby and Mr. Alexander were in effect sharing a position. According to a May 20, 1983 memo from Ms. Jacobs, Exhibit #7, this weakened both positions. However, ultimately both positions were equalized at the higher level of the two. Complainant contends that it was discriminatory that she and Ms. Nichols did not receive comparable treatment. However, in order for this to follow, the situations of Mr. Dalby and Mr. Alexander and that of Ms. Nichols and Ms. Schultz must be comparable. However, this was not shown. Mr. Jackson testified that Mr. Dalby and Mr. Alexander had identical position descriptions. While the jobs of Ms. Nichols and Ms. Schultz were similar, Ms. Nichols handled multi-unit employees while Ms. Schultz handled the rest. Ms. Schultz testified that while the original concept when she transferred into the ES 202 program was that she and Ms. Nichols would split the duties and responsibilities connected with the program in half, this never eventuated.

The complainant further contends that the rereview done by Ms. Tomer of DER in October 1983 was superficial and essentially rubber-stamped the original decisions. Even if this were true, the Commission fails to see how this would constitute unequal treatment of complainant because of her sex or is indicative of pretext with respect to the original reallocation.

There is not sufficient evidence for the Commission to conclude with respect to Case No. 84-0015-PC-ER that probable cause is present, as that term is defined, §PC 4.03(2), Wis. Adm. Code; Winters v. DOT, Wis. Pers. Comm. No. 84-003, 0199-PC-ER (9/4/86).

SEX DISCRIMINATION/RETALIATION WITH RESPECT TO RECLASSIFICATION

(85-0029-PC-ER)

With respect to the reclassification decision which was made by Mr. Pellitteri, it is somewhat questionable whether a prima facie case of sex discrimination has been established, because while Ms. Schultz suffered an adverse employment action at the hands of DER, it is doubtful whether this occurred under circumstances giving rise to an inference of discrimination. However, since the case has been fully tried, the Commission will simply assume that complainant's arguments with respect to pretext would be adequate to establish a prima facie case, and proceed to consider whether respondent's articulated basis for denying the reclassification request should be considered pretextual in this probable cause context.

Complainant argues that Mr. Pellitteri did not follow the normal procedure for handling a non-delegated reclassification request. He sent Ms. Jacob a memo indicating he found no foundation for the approval of the request. Ms. Jacob testified that normally, as a matter of professional courtesy, if the DER analyst felt the request was problematical, he or she would call the DILHR analyst before putting anything in writing in order to discuss the matter, and then would give DILHR a chance to withdraw the request if it appeared it would be denied. However, this difference in the handling of the reclassification request had to do with the working relationship between the two agencies, not the substantive question of the classification of complainant's position. The Commission fails to see how this is probative of pretext.

Complainant also argues that respondent's downgrading of Mr. Frisch's position (Ms. Nichols' old position) was an attempt to eliminate a favorable basis for comparison to complainant's position and was done "in animus

to the interests of Ms. Schultz." Post-hearing brief, p. 63. This argument basically rests on the premise that Mr. Pellitteri had no reasonable grounds to deny the complainant's reclassification request, and therefore downgraded Frisch's position merely to shore up his case against Ms. Schultz. As discussed above, the Commission does not accept this premise, and on this record the downgrading of Mr. Frisch's position is merely a logical consequence of his legitimate assessment of complainant's position.

Complainant further argues that Mr. Pellitteri's reclass log (Exhibit #61) evidences a bias against females, in that it does not reflect any reclassifications of female-occupied positions to the professional level, while all the denials of reclassification to professional classifications involve females.

The Commission cannot confirm all of this from the record. The chart does not indicate which of the classifications besides the ones involved in the survey are professional. Mr. Pellitteri did testify that he did not grant any professional reclassifications, and the chart reflects that three of these denials involved females and reclassification requests from the RT to the RA series, which would have involved movement into the professional ranks. However, it was not established that none of the reclassification denials involving males involved requests for reclassification into professional classifications. In any event, the figures involved here, whether one looks at the known professional reclassification requests, or the overall statistics, involved relatively small numbers, and there is nothing in the record as to whether the data has any statistical significance.

With respect to retaliation, again it is questionable whether there is a prima facie case, because there is no real evidence that Mr. Pellitteri was aware of complainant's first FEA charge. He testified that at the time

he handled the reclassification request he was aware of the pending appeal of the reallocation but he was not aware a discrimination complaint had been filed. Complainant argues it should be inferred from Mr. Pellitteri's acknowledgement of awareness of the appeal that he also was aware of the discrimination complaint, because the two cases had been consolidated for processing by the Commission. While this inference strikes the Commission as questionable, it will proceed to analyze the retaliation claim as if this element of the prima facie case has been established. At this point, discrimination can be inferred from the fact that the reclass request was denied shortly after Mr. Pellitteri became aware of the complaint.

As discussed above, the respondent than has articulated a legitimate, non-discriminatory rationale for denying the reclassification request. In addition to the contentions as to pretext already discussed, the complainant has raised DER's handling of Ms. Nichol's appeal of the reallocation of her position to RA 2. DER attempted to introduce an issue as to whether Ms. Nichols' position was professional and should be classified as an RT, and this was rejected by the Commission, Exhibit #30. Complainant now argues that DER raised this issue in an attempt to retaliate against Ms. Nichols for having filed her appeal, and that this not only was an example of "animus towards the women in the series," but also "was clearly retaliatory for Ms. Nichols' challenge to DER's decision." Post-hearing brief, p. 55. To the extent that this argument might be considered to bear on the complainant's retaliation claim, as evidence of DER's readiness to retaliate, it is not convincing.

While it is possible that DER attempted to add the issue of whether Ms. Nichols' position was professional as an attempt at retaliation against Ms. Nichols for having filed her appeal, there is no evidence to support

this. Complainant points out that when Ms. Nichols' position subsequently was filled by a male, it was retained in a professional (RA) classification. However, this is not particularly inferential of a retaliatory motive behind the prior attempt in Ms. Nichols' appeal to raise the issue of professionalism. DER had been unable to raise the issue of whether the position was professional, so presumably the Frisch transaction was in keeping with the resultant status quo. Furthermore, this is the same position, still occupied by a male incumbent, that Mr. Pellitteri ultimately downgraded when he examined it.

Therefore, with respect both to sex discrimination and retaliation, there is insufficient evidence for a conclusion of probable cause.

ORDER

The Commission having determined there is no probable cause to believe respondents discriminated against complainant, and having determined that respondent DER's decisions to reallocate complainant's position and subsequently to deny the request for reclassification of her position were not incorrect, these matters are dismissed.

Dated August 5 1987.

STATE PERSONNEL COMMISSION

Dennis P. McGilligan
Dennis P. McGilligan, Chairperson

Laurie R. McCallum
Laurie R. McCallum, Commissioner

Donald R. Murphy
Donald R. Murphy, Commissioner

LRM:jmf/baj
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