

STATE OF WISCONSIN

PERSONNEL COMMISSION

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SUSAN MEREDITH,
 Complainant,
 v.
 President, UNIVERSITY OF
 WISCONSIN SYSTEM (LaCrosse),
 Respondent.
 Case No. 90-0170-PC-ER

* * * * *

ORDER

After having reviewed the Proposed Decision and Order and the arguments of the parties, and after having consulted with the hearing examiner, the Commission adopts the Proposed Decision and Order except as detailed below. The changes made below in roman numerals I, III and IV, are made to better reflect the decision rationale. The change made below in roman number II, is made to reflect the record information that complainant did have some insurance coverage prior to accepting the coaching position. The changes made in roman numeral V, are made for purposes of organization and to better clarify the decision rationale.

I. On page 4, Finding of Fact #11 is amended to add the following sentence at the end of the existing paragraph:

She would not have qualified for a 1.0 FTE position under respondent's usual hiring practices because she did not have a master's degree yet.

II. On page 3, the second sentence in Finding of Fact #12 is deleted and replaced with the following:

Subsequent appointment letters (2) reflected an adjustment in status, providing an improved insurance package for complainant.

III. On page 3, Finding of Fact #13 is amended to add the following sentence at the end of the existing paragraph:

Mr. Handel, therefore, was paid more than either Mr. Timm or Ms. Meredith.

IV. On page 3, Finding of Fact #19 is amended to add the following sentences at the end of the existing paragraph:

Respondent set the position percentage at less than 1.0 FTE, as partial repayment of the position debt referred to in paragraph 6 above. The salary was established at \$9,000 (less than paid to Mr. Timm) in response to budget problems and the woman's basketball coach position was not the only position so affected. Furthermore, respondent could not have changed Handel's position because he was in the second year of a three year contract; whereas the female basketball coach position was vacant.

V. On pages 5-7, the Opinion section is deleted and replaced with the following:

Complainant brought this action under the Wisconsin Fair Employment Act (WFEA), ss. 111.31-111.37, Stats., alleging that respondent discriminated against her because of her sex by paying her less than her male predecessor (Daniel Timm) and a male holding a counterpart position (Randy Handel), and by not offering her a full-time position which each of those males had. Her first claim is referred to as the "equal pay claim" and her second as the "disparate treatment claim".

The pertinent part of the WFEA is s. 111.36(1)(a), Stats., which provides as shown below:

Employment discrimination because of sex includes ... any of the following actions by any employer... Discrimination against any individual in promotion, compensation paid for equal or substantially similar work, or in terms, conditions or privileges of employment or licensing on the basis of sex where sex is not a bona fide occupational qualification.

Disparate Treatment Claim

In interpreting the WFEA, the Commission has looked to the federal courts in Title VII actions for guidance. While the court in American Motors v. ILHR Dept., 101 Wis. 2d 337, 353, 305 N.W. 2d 62, 69 (1987), said: "There is no ipso facto incorporation of the Federal Civil Rights Act in the WFEA", the court went on to confirm that Wisconsin courts have looked to Title VII actions for guidance in sex

discrimination, at least in respect to order and nature of proof. Accordingly, the Personnel Commission has consistently used the analysis used by the U.S. Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 5 FEP 965 (1973).

Under the McDonnell Douglas model, the burden is first on the complainant to show a prima facie case. The burden then shifts to respondent to rebut the prima facie case by articulating a legitimate, non-discriminatory reason for its action. The burden then shifts back to complainant to show that respondent's offered reason is a pretext for discrimination.

The Complainant here would establish a prima facie case by successfully showing the following elements: 1) She is a member of a protected group, 2) She was treated differently in the terms and conditions of her employment than members outside her protected group, and 3) The different treatment existed under circumstances giving rise to an appearance of discrimination.

Complainant has established the first two elements of her prima facie case. First, she is female and sex is a protected basis under the WFEA. Second, she was not given a 1.0 FTE position in the first academic year (1989-90) or the second academic year (1990-91), whereas Mr. Timm was given a 1.0 FTE position in the first academic year and Mr. Handel was given a 1.0 FTE position in both academic years.

Complainant did not establish the third element of her prima facie case for the first academic year. She did not have a masters degree and therefore, was not eligible for a 1.0 FTE appointment. Therefore, the circumstances do not give rise to an appearance of discrimination.

Complainant did establish the third element of her prima facie case for the second academic year because she had earned her master's degree by then. The circumstances arguably are sufficient, therefore, to give rise to an inference of discrimination for the second academic year.

The respondent offered a legitimate, non-discriminatory reason for its actions. Specifically, a portion of the woman's basketball coaching position (a vacant position) was used to repay position debt. Furthermore, the same option was not available as to Mr. Handel's position because he was in the second year of a three-year contract. The complainant did not show that this was pretextual.

Equal Pay Claim

Complainant alleges she was paid less because of her sex than similarly situated males. In Hiegel v. LIRC, 121 Wis. 2d 205, 259 N.W. 2d 405 (1989), the Wisconsin Supreme Court said the equal wage concept is "clearly embodied" in both the WFEA and the Federal Equal Pay Act (EPA). The Commission, therefore, also will look to federal cases adjudicated under the EPA for guidance. Specifically, the prima facie test established in Corning Glass Works v. Brennan, 417 U.S. 188, 9 FEP 919 (1979), a lead equal pay case, will be used here. Accordingly, to establish a prima facie case for wage discrimination, complainant must prove she was paid less than males for performing substantially the same work measured in terms of skill, effort and responsibility. The EPA cases make it clear that it is actual job content, not job title or

descriptions, which are controlling. Brennan v. Victoria Bank & Trust Co., 493 F2d 896, 9 FEP 932 (5th Cir. 1974).

Complainant's equal pay claim involves four comparisons, as follows: 1) Mr. Handel v. complainant in the first academic year, 2) Mr. Handel v. complainant in the second academic year, 3) Mr. Timm v. complainant in the first academic year, and 4) Mr. Timm v. complainant in the second academic year. Each comparison is discussed below.

In the first and second academic years, Mr. Handel received a higher salary for his coaching duties than complainant received. Complainant (as noted in the proposed decision) failed to show that her position required substantially the same work, skills and effort as required for Mr. Handel's position.

As an additional matter, the Commission notes that courts will find jobs to involve substantially the same work, skills and effort even where job duties differ but only where the differences are inconsequential or insubstantial. See, Corning Glass Works v. Brennan, 417 U.S. at 203, 94 S.Ct. at 2232, fnt. 24; and Vol. II, Employment Discrimination 2nd Ed., Sullivan, Zimmer & Richards, s. 17.8.

A significant amount of Mr. Handel's position involved professional lecturing duties in addition to the part-time coaching. Complainant was expected to perform part-time coaching only. The job differences cannot be characterized as inconsequential or insubstantial where, as here, two separate professional skills are involved with one job (Mr. Handel's), and not with the other (complainant's).

The analysis above also has potential application to any comparison between Mr. Timm's and complainant's positions. Mr. Timm's position involved administrative duties in addition to coaching. Complainant's position involved only coaching. Such an analysis is not detailed here because of the following alternative rationale.

In the first academic year, complainant's monthly salary of \$1,333.33, was more than Mr. Timm's monthly salary of \$1,055.55. This equal pay claim fails because complainant was paid more than Timm.

In the second academic year, complainant's salary of \$9,000 was less than the \$9,500 paid to Mr. Timm in the first academic year. Respondent, however, took such action for a reason unrelated to complainant's sex; to wit: budget problems.

It appears that the subject complaint primarily involves perceived inequities between the resources devoted to women's and men's athletic programs. Those issues, however, cannot be resolved under the WFEA and, therefore, are not before the Commission.

Dated: September 15, 1993 STATE PERSONNEL COMMISSION

JMR


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

Parties:

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La Crosse, WI 54601

Katharine Lyall
President
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Madison, WI 53706

NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served per-

sonally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

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 *
 Respondent. *
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 Case No. 90-0170-PC-ER *
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PROPOSED
DECISION
AND
ORDER

This matter is before the Commission on a complaint of discrimination on the basis of sex. The following findings of fact, conclusions of law, opinion, and order are based on the evidentiary record made at a hearing on the merits. To the extent any of the discussion constitutes a finding of fact, it is adopted as such.

FINDINGS OF FACT

1. In the 1989-90 academic year, Susan Meredith, complainant, was enrolled as a full-time graduate student at the University of Wisconsin - La Crosse (UWL).

2. Prior to the start of the 1989-90 academic year, in July 1989, Daniel Timm was rehired as the women's head basketball coach, with a salary of approximately \$25,000.

3. Timm's 1989-90 contract with UWL provided for a 100% (1.00) Full-Time Equivalent (FTE) position consisting of 38% (.38 FTE) as women's head basketball coach and 62% (.62 FTE) as athletic administrative duties, the same terms as his previous contract. The .38 FTE portion accounted for \$9,500.00 of Timm's \$25,000.00 salary. (\$1,055.55 per month for each of the 9 months of the academic year.)

4. Timm was first hired as UWL's women's head basketball coach for the 1988-89 academic year to replace Terri Sheridan, who resigned. Sheridan, a female, served in that position 4 years.

5. After the academic year began, Timm submitted a letter of resignation of his new appointment and it was acknowledged and accepted on

August 28, 1989, by Douglas N. Halstad who was newly appointed on August 4, 1989, as Dean of the College of Health, Physical Education and Recreation.

6. Prior to recruitment for the position vacated by Timm, Halstad and Tom Wonderling, the Director of Intercollegiate Athletics, had discussions about the .62 FTE part of Timm's former position. It was decided to return it to central administration as partial repayment of a 1.25 FTE position debt.

7. On October 10, 1989, Wonderling began recruiting for an interim women's head basketball coach, a .38 FTE position for 1 academic year only.

8. Recruitment was conducted by posting the announcement of the position vacancy at various places on campus and advertising the same in a local newspaper.

9. Complainant applied for the position in issue. Her background included the following: Education: B.S., conferred in Physical Education with a coaching concentration from the University of La Crosse in May of 1976. Experience: Employed at West Bend High School in West Bend, WI, coaching varsity volleyball and basketball from 1976-1979. Professional women's basketball player in 1979. Employed at John Marshall High School from 1979-1987, coaching volleyball (1979-1985) and serving as the assistant basketball coach (1979-1987). College Achievements: Dean's List for five semesters, Who's Who Among Students in American Universities in 1975, Outstanding College Athletes of America in 1976, Delta Psi Kappa (Honors Fraternity) from 1973-1976, Ratom - Senior Women's Honorary Organization in 1975, Member of the State Volleyball Champion Team in 1972, Member of the State Basketball Champion Team for 4 years (Co-captain 2 years and captain 1 year), Midwest Consolation Championship in 1974, Midwest Championship (qualified for National Tournament) in 1976, Member of the State Track Team in 1973, Member of the Field Hockey Team for 3 years, National Field Hockey Tournament in 1974 and 1975. Awards: Selected to University of Wisconsin La Crosse Wall of Fame in 1986.

10. Wonderling recommended appointing complainant to the vacant coaching position at a salary of \$9,400 for 10 months.

11. Effective October 13, 1989, complainant was appointed to the .38 FTE position for the remainder of the academic year (for 7.5 months beginning October 15, 1989, and ending May 30, 1990), at a wage of \$8,500.00 (\$1,133.33 per month).

12. At the time of appointment, complainant had a graduate assistantship. Subsequent appointment letters (2) reflected an adjustment in status, which afforded insurance coverage for complainant.

13. During the same academic year (1989-90) UWL appointed Randy Handel, a male, to the position of men's basketball coach on a 3-year contract, which provided for a 1.00 FTE position including .47 FTE as men's basketball coach, .46 FTE as lecturer and .07 FTE from women's athletics at a salary of \$35,000 per year.

14. In December of 1989, a "Gender Equity Report" was published by a committee appointed by the UWL chancellor to study athletic equity at the university. Concerns about coaching were expressed in the report relating to compensation, the decreasing number of women coaches, and ad hoc positions. Coaching was designated as an area for further study.

15. After the equity report was published, Halstad and Wonderling discussed the women's head basketball coach status and agreed to defer action until February of 1990, pending plans to implement the equity report recommendations.

16. During the first 6 months of 1990, no plans were formed to implement the recommendations of the equity report.

17. By letter dated June 9, 1990, complainant applied for the position of women's head basketball coach at UWL with the assumption that it was a full time (1.00 FTE) position, similar to the position held by her predecessor and the position held by the men's head basketball coach.

18. The FTE percentage for the women's head basketball coach position, similar to other part-time positions in that college, had not increased and remained at .38 FTE.

19. On June 26, 1990, Wonderling offered complainant a .38 FTE academic staff position as the women's head basketball coach for 1990-91, at a salary of \$9,000, beginning August 29, 1990, through May 29, 1991.

20. Complainant rejected Wonderling's offer. Shortly afterwards, Wonderling initiated a local search to fill the position and it was filled by Ms. Tory Knispel at the same terms offered complainant.

21. In August and September of 1990, complainant wrote Halstad and Jennifer Wilson, Director of Affirmative Action, UWL, regarding her belief that there were inequities between women's and men's basketball coaching positions.

22. During this same period, UWL formed a Plan of Action Committee (Committee) to prioritize recommendations and to establish timelines for implementation of the recommendations set forth in the Women's Athletic Equity Report.

23. The Committee recommendations were issued on October 20, 1990, and included a recommendation to establish full-time positions for head coaching assignments for women's basketball, softball and volleyball.

24. On November 8, 1990, complainant filed with the Personnel Commission a complaint of sexual discrimination against UWL, alleging inequitable treatment in relation to appointment and rate of pay.

CONCLUSIONS OF LAW

1. This matter is appropriately before the Commission pursuant to §230.45(1)(b), Stats.

2. Complainant has the burden of to prove that she was discriminated against by respondent on the basis of sex with regard to her employment at UW-La Crosse.

3. Complainant has failed to sustain this burden.

4. The evidence adduced is insufficient to cause the Commission to conclude that complainant was discriminated against by respondent as alleged.

OPINION

Complainant brought this complaint under the Wisconsin Fair Employment Act (WFEA), §§111.31-111.37, Wisconsin Statutes, alleging that respondent discriminated against her because of her sex by paying her less than her male predecessor (Daniel Timm) and a male holding a counterpart position (Randy Handel), and by not offering her a full-time position which each of those males had. Her first claim is referred to as the "equal pay claim" and her second as the "disparate treatment claim".

The pertinent part of the WFEA is §111.36(1)(a). It provides:

Employment discrimination because of sex includes ... any of the following actions by any employer... Discrimination against any individual in promotion, compensation paid for equal or substantially similar work, or in terms, conditions or privileges of employment or licensing on the basis of sex where sex is not a bona fide occupational qualification.

In interpreting the WFEA, the Commission has looked to the federal courts in Title VII actions for guidance. While the court in American Motors v. ILHR, Dept., 101 Wis. 2d 337, 353, 305 N.W. 2d 62, 69 (1987), said, "There is no ipso facto incorporation of the Federal Civil Rights Act in the WFEA." The court went on to confirm that Wisconsin courts have looked to Title VII actions for guidance in sex discrimination, at least in respect to order and nature of proof. Accordingly, the Personnel Commission has consistently used the McDonnell Douglas Corp. v. Green model. 411 U.S. 792, 5 FEP 965 (1973).

Under the McDonnell Douglas model, a prima facie case of discrimination is established where it is shown that a member of a protected group was qualified for a job, applied for the job, was not hired and the employer continued its search for applicants for the vacant position. In Fumco Construction Co. v. Waters, 438 U.S. 567, 575, 17 FEP 1082, 1065 (1978), the court said the McDonnell Douglas approach to proving disparate treatment in discrimination cases under Title VII was not intended to be an inflexible rule and that the legal analysis must be tailored to the facts of the individual case.

Complainant alleges she was paid less because of her sex than similarly situated males. In Hiegel v. LIRC, 121 Wis. 2d 205, 359 N.W. 2d 405 (1989), the court said the equal wage concept is "clearly embodied" in both the WFEA and Federal Equal Pay Act (EPA). The Commission, therefore, will also look to federal cases adjudicated under the EPA for guidance. Specifically, the prima facie test established in Corning Glass Works v. Brennan, 417 U.S. 188, 9 FEP 919 (1979), a lead equal pay case, will be used here. Accordingly, to establish a prima facie case for wage discrimination, complainant must prove that she was paid less than males for performing substantially the same work measured in terms of skill, effort and responsibility. EPA cases make it clear that it is actual job content, not job title or descriptions, which are controlling. Brennan v. Victoria Bank & Trust Co. 493 F 2d 896, 9 FEP 932 (5th Cir. 1974).

It is undisputed that complainant's duties as basketball coach were substantially the same as Timm's and the evidence established that complainant was paid more per month than Timm for this work. Complainant's monthly wage was \$1,333.33, as compared to Timm's wage of \$1,055.55. Therefore, complainant's equal pay claim regarding Timm as a comparison fails.

Regarding the disparate treatment claim, the evidence establishes that complainant is a member of a protected group under the WFEA and was qualified for the position. However, complainant failed to prove that unlike

her predecessor, she was offered less than a 1.0 FTE position because of her sex. The evidence shows that respondent made its decision to reduce the position to .38 FTE for a valid reason and prior to recruitment for the position. As a result, at the time this decision was made, the identity and hence the sex of the future appointee was unknown. Also, Timm's predecessor (Terri Sheridan) was a female and held that position 4 years as a 1.00 FTE (with the exception of the 1986-87 academic year).

With respect to complainant's other argument that Handel was paid significantly more than the complainant or her female predecessors as the women's head basketball coach, the Commission concludes that the evidence adduced does not establish a prima facie case. In EEOC v. Madison School Dist. 43 FEP Cases 1419 (7th Cir. 1987), the court said: "The [Equal Pay Act] is not a general mandate of sex-neutral compensation." Further, the court said the EPA did not enact "comparable worth".¹ Considering the principles expressed in referenced EPA cases starting with Corning Glass, the evidence presented fails to establish that complainant's position required substantially the same work, skills and effort as the men's basketball coaching position. Insufficient evidence was provided regarding the actual job content of these two positions. In addition, the evidence does not support a finding that women's head basketball coaching positions are generally held by women. To the contrary, empirical evidence is just the opposite.

Regarding complainant's equal pay claims pertaining to respondent's offer to her of a coaching contract of \$9,000 for the 1990-91 academic year, the Commission must conclude that complainant fails to sustain her burden of proof. Complainant makes essentially the same arguments here as previously made about the circumstances of her initial appointment and those arguments fail for basically the same reasons. With respect to the women's and men's basketball coaching positions for the 1990-91 academic year, again the evidence is insufficient to establish that these two positions were substantially the same. Furthermore, Wonderling offered the position to complainant, who declined. He later advertised and filled the position at the same salary offered complainant.

¹ Comparable worth is the principle that wages should be based on "objective" factors, rather than on market conditions of demand and supply, which may depress wages on jobs held mainly by women relative to wages in jobs held mainly by men. See American Nurses Assn. v. Illinois, 783 F 2d 716, 718-20, 40 FEP Cases 244 (7th Cir. 1986).

Finally, regarding complainant's disparate claim, respondent's reasons for not establishing a 1.00 FTE women's head basketball coaching position do not appear to be pretextual. Dean Halstad testified that, in the spring of 1990, he and Athletic Director Tom Wonderling, after many discussions about the women's head basketball coach position, national recruitment and the availability of resources, agreed that a .38 FTE position would be feasible for the 1990-91 academic year, given the athletic department's obligation to repay central administration a 1.25 FTE position and its anticipation of a budget deficit. In 1991, the women's head basketball team coaching position was made 1.00 FTE and a female was appointed to that position for the 1991-92 academic year.

It appears that the subject complaint primarily involves perceived inequities between the resources devoted to women's and men's athletic programs. Those issues, however, are not before the Commission.

ORDER

In accordance with the Findings of Fact, Conclusions of Law, and Opinion set out above, this complaint is hereby dismissed.

Dated: _____, 1993 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DRM:rcr

DONALD R. MURPHY, Commissioner

Parties:

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