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STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 16

DANE COUNTY

JOAN LAZARUS,

Petitioner,

vs.

STATE OF WISCONSIN and
PERSONNEL COMMISSION,

Respondents.

RECEIVED

JUN 10 1993

Personnel
Commission

DECISION AND ORDER
Case No. 92 CV 4252

This case involves a claim of religious discrimination filed by Petitioner Joan Lazarus against the Department of Employee Trust Funds (DETF). Lazarus is an Associate Professor at the University of Wisconsin - Madison and an adherent of the Christian Science religion. Lazarus claimed that she had been discriminated against by DETF because the health insurance benefits available to her as a state employee did not provide coverage for Christian Science practitioner expenses.

A Personnel Commission investigator issued an initial determination, holding that there was probable cause to believe that DETF discriminated against Lazarus by declining to pay for her Christian Science treatments. The examiner issued a proposed decision containing detailed Findings of Fact numbered 1-26. Those Findings of Fact were relied on by the Personnel Commission in its decision, are agreed to by all parties, and are relied on by this court. A copy of these Findings is attached hereto, labeled Exhibit A, and is incorporated herein by reference.

On September 21, 1992, the Personnel Commission entered a final decision and order, concluding that Petitioner Lazarus failed to meet her burden of proof to establish by a preponderance of the evidence that respondent discriminated against her on the basis of creed

in violation of the Wisconsin Fair Employment Act and concluding that respondent was not guilty of such discrimination.

Petitioner then filed this petition for judicial review pursuant to sec. 227.53, Wis. Stats. On a petition for review under Chap. 227, Stats., the court must consider separately:

- (1) Issues of agency procedure;
- (2) Interpretations of law;
- (3) Determinations of fact;
- (4) Determinations of policy within scope of agency's delegated discretion.

No question has been raised about the agency procedure utilized in this case, nor about relevant questions of fact.¹ There is no question raised about an agency determination of policy. This matter falls under the record category, review of a question of law. The application of a statute to a particular set of facts is a question of law. Frito-Lay, Inc. v. LIRC, 95 Wis. 2d 395, 290 N.W.2d 551 (Ct. App. 1980).

This issue is governed by sec. 227.57(5), Wis. Stats., which states:

The court shall set aside or modify the agency action if it finds that the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action, or it shall remand the case to the agency for further action under a correct interpretation of the provision of law.

The weight to be given to the decision of the Personnel Commission is clear because the Personnel Commission is charged by the legislature with the duty of hearing and deciding

¹ A factual dispute does not exist about whether it would be an "undue burden" on respondent to provide the coverage requested. It is not necessary to resolve that dispute in order to resolve this matter.

discrimination claims and applying the provisions of the act to particular cases. See sec. 111.375(2), Wis. Stats. Thus "great weight" must be accorded to the Commission's interpretation of the act, and the court will uphold that interpretation unless it is clearly contrary to legislative intent. Lisney v. LIRC, 165 Wis. 2d 628, 633, 478 N.W.2d 55, 56 (Ct. App. 1991). Indeed, the court is bound to affirm the Commission's interpretation if it is reasonable, even if another conclusion is equally reasonable. DILHR v. LIRC, 161 Wis. 2d 231, 245, 467 N.W.2d 545, 550 (1991).

The parties agree that prohibited discrimination can occur in several ways. The first would exist if DETF has failed, because of her creed, to provide Lazarus with the same terms and conditions of employment that all other employees enjoy. This type of discrimination is prohibited by sec. 111.322, Wis. Stats. Discrimination of this type can be described as disparate treatment discrimination and requires that the complainant show that the employer treats some people less favorably than others because they belong to a protected class. It requires proof of discriminatory intent. International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335-36, n. 15 (1977). The Commission's decision in this regard is as follows:

Respondent has not denied complainant a fringe benefit that is available to any other employee. All employees, including complainant, are eligible for group insurance coverage that encompasses medical treatment. Furthermore, respondent has not made available any form of non-medical treatment to any employees. Therefore, there does not appear to be any form of disparate treatment with respect to complainant. See Phillips v. Wis. Personnel Commission, 167 Wis. 2d 205, 482 N.W.2d 121 (Ct. App. 1992)

Not only is this interpretation reasonable, it appears to be the only reasonable interpretation. Although petitioner argues that this type of discrimination took place, there is

no evidence whatsoever that employees who are Christian Scientists receive any different treatment or benefits from the employer than employees who are not Christian Scientists. It would be unreasonable to conclude that disparate treatment discrimination took place.

The heart of petitioner's complaint is really that the policies of the state, while facially neutral, had a disparate impact on her because of her adherence to Christian Science beliefs. See Griggs v. Duke Power Co., 401 U.S. 424 (1971). Petitioner need not prove intent to discriminate to prove this type of discrimination. Racine Unified School Dist. v. LIRC, 164 Wis. 2d 567, 476 N.W.2d 707 (Ct. App. 1991). Petitioner contends that in order to avoid a disparate impact of the health insurance policies, the state is required to provide Lazarus with insurance coverage which would pay for the services of a Christian Science Practitioner. The state is, in some circumstances, required to accommodate an employee's religious observance under sec. 111.337(1), Wis. Stats.:

Employment discrimination because of creed includes, but is not limited to, refusing to reasonably accommodate an employee's or prospective employee's religious observance or practice unless the employer can demonstrate that the accommodation would pose an undue hardship on the employer's program, enterprise or business.

The parties and the Commission agree that an accommodation case is one in which the court is to determine an employer's obligation where arguably there is a conflict between an employee's religious practices and the employer's personnel and management procedures. American Motors Corp. v. DILHR, 101 Wis. 2d 337, 370, 305 N.W.2d 62 (1981)

(dissenting opinion). The Commission's decision in this regard is as follows:

In the instant case, it does not appear to the Commission that there could be a potential conflict of this nature. Rather, complainant is seeking a fringe benefit (coverage for treatment by Christian Science practitioners) that is outside the scope of the fringe benefits respondent provides. The employer's

failure to grant a religiously-motivated request for a fringe benefit not provided for by its "personnel and management procedures" to any employee does not create a "conflict between an employee's religious practices and the employer's personnel and management procedures."

Again, this is a reasonable conclusion. A disparate impact might be shown if the employer allowed time off for employees to attend medical appointments, but not to attend prayer sessions which are a particular employee's choice of healing method. Petitioner's religious practices are not in conflict with any personnel procedure. She is free to practice her creed and to obtain whatever type of healing treatment she chooses. That does not, however, entitle her to demand reimbursement from the employer.

Sec. 40.51(6), Wis. Stats., requires the state to offer to its employees at least 2 health care coverage plans providing hospital and medical benefits. It does not require the provision of any other sorts of healthcare benefits. Certainly state employees employ a wide variety of methods of healing including acupuncture, homeopathy, and herbal remedies. Undoubtedly, virtually all state employees who have a religious faith, at times, employ prayers for their own or other's health, and some, such as members of Native American tribes, may have a religious belief in alternative forms of healthcare; such as the use of medicine men. Nothing in state law requires the state to pay for these forms of healthcare, all of which are alternatives to the hospital and medical benefits they are mandated to provide. Lazarus is in no different position than many other employees, of many different or no religious persuasions, who do not receive reimbursement for their chosen alternative healthcare practices. In fact, the state is right to question whether, if it attempted to accommodate the requests of Christian Scientists raised here by Ms. Lazarus, it might, in fact, be creating a situation where it is guilty of religious discrimination for favoring one

religion over another.

CONCLUSION

The conclusion of the Personnel Commission finding that petitioner failed to prove discrimination and concluding that respondent did not discriminate is reasonable and is hereby affirmed.

DATED: June 7, 1993

BY ORDER OF THE COURT:



Sarah B. O'Brien, Judge
Circuit Court, Branch 16

cc: Atty. Gordon E. McQuillen, 20 N. Carroll St., Madison WI 53703
AAG. Stephen M. Sobota, PO Box 7857, Madison WI 53707-7857

STATE OF WISCONSIN

PERSONNEL COMMISSION

JOAN LAZARUS,
 Complainant,
 v.
 Secretary, DEPARTMENT OF
 EMPLOYE TRUST FUNDS,
 Respondent.
 Case No. 90-0014-PC-ER

PROPOSED
DECISION
AND
ORDER

This matter arises from a complaint of discrimination based on creed. The parties agreed to the following issue for hearing:

Whether the respondent discriminated against the complainant based on creed with respect to the provision of health insurance as alleged in the complainant's charge of discrimination.

At the commencement of the hearing, the parties filed a stipulation of facts. That stipulation, along with subsequent testimony, provides the basis for the following findings of fact.

FINDINGS OF FACT

1. Complainant is an adherent of the Christian Science religious faith.
2. One of the tenets of Christian Science religion is a belief in the treatment of disease through spiritual means; accordingly, Christian Scientists do not ordinarily subscribe to the medical treatment of disease or injury. However, as required by law, a doctor or mid-wife may attend childbirth; the use of a surgeon to set broken bones is not objected to; the use of stitches in the case of a severe laceration is not objected to; diagnostic x-rays are not objected to; and other laboratory methods of diagnosing disease are not objected to, for example, if required for employment, for insurance purposes (such as workers compensation) or to show immunity to a particular disease.
3. Materials prepared by the First Church of Christ, Scientist in Boston Massachusetts and by the Christian Science Publishing Society (Respondent's Exhibits 3 and 4) offer the following information regarding Christian Science care and treatment:

Christian Science Practitioners

Christian Science practitioners treat their patients solely by spiritual means through prayer, excluding all physical or medicinal remedies....

A directory of Christian Science practitioners is published every month in The Christian Science Journal, the official organ of The Mother Church, The First Church of Christ, Scientist in Boston, Massachusetts. Practitioners are allowed to list their cards in the Journal only after they have proved they possess the necessary qualities to do successful healing through prayer as understood in Christian Science, and are members of The Mother Church. They are self-employed, devote full time to this work and can engage in no other gainful employment (unless they are working for The Mother Church in another capacity). They determine their own charges, and are paid by their patients. Payment made to a Christian Science practitioner for treatment of a physical problem is recognized as a legitimate "medical" deduction by the Internal Revenue Service in the United States and by Revenue Canada.

* * *

Freedom of Choice

Christian Scientists acknowledge the right of each individual to choose the method of healing which seems to be the most efficacious -- including the right of the individual to elect to have medical treatment, even though Christian Scientists see a sharp distinction between medical treatment and Christian Science treatment. Experience has shown that under usual circumstances the two healing methods cannot be effectively combined. Christian Science treatment consists entirely of prayer based on a spiritual, systematic study of God, and man's relationship to Him, and the application of underlying spiritual truths to the healing of disease, sin, and other human discords.

THE PRACTITIONER, THE PATIENT, AND PRAYER

While there can be different forms of treatment rendered by medical doctors, there is only one kind of treatment given by Christian Science practitioners. It consists entirely of prayer, a method of spiritual healing described in the New Testament and systematically relied upon by Christian Scientists for over a century. For this reason, it is unrealistic for insurance companies to require that Christian Science treatment be given in the physical presence of the patient to qualify for insurance benefits.

In the public practice of Christian Science healing, practitioners regularly receive requests from Christian Scientists and others for healing of all types of sickness and bodily injury. Contact may be made by telephone, cable, telegram, letter, or personal visit. Unlike a medical doctor who must see his patient in order to make a diagnosis and prescribe some form of treatment, a Christian Science practitioner does not need to see the patient since Christian Science treatment does not include physical examination, diagnosis or material remedies. Christian Science treatment is by prayer alone and it is simply not necessary for the practitioner to be physically present with the patient for treatment to be effective. In practice, most healing work

done by Christian Science practitioners today is done in response to a phone call for help. [Pages 3, 4 and 7 of Respondent's Exhibit 3, "Information About Christian Science Care and Treatment."]

* * *

13. Must a person have faith in Christian science in order to be healed by it?

Not necessarily. Some people have been healed when they turned to Christian Science as a last resort, though with very little hope that it could help them. But faith is a valuable asset -- faith not so much in Christian Science as in God's willingness and power to save humanity from evil of every kind. The Bible tells us that he who comes to God must believe that God is and that He is a rewarder of those who diligently seek Him. But Christian Science teaches that faith, to be really firm and effective, must rest not on blind belief but on an understanding of the present perfection of God's spiritual creation. This is the crucial difference that separates Christian Science from "faith healing."

* * *

15. Is a Christian Scientist allowed to go to a doctor?

A Christian Scientist, like anyone else, is a free moral agent. When he joins the Church of Christ, Scientist, it's understood that he will rely on God instead of drugs for healing. He voluntarily chooses this as his way of life, and usually because he has found this kind of healing more effective than any other. But if in extreme circumstances or under heavy family pressure he resorts to material means, he won't be treated as an outcast by the Church. The point to remember is that Christian Scientists choose spiritual means because such healing not only makes the body well but also brings the individual closer to God in his living, thinking, and acting.

16. Why not combine Christian Science with medical treatment?

Well, you see, they start from opposite standpoints. Christian Scientists appreciate the humanitarian work of doctors -- for those who wish to rely on their form of treatment. But the Christian Science method is purely spiritual; it calls for a mental and moral change, for finding one's true relationship to God. This just doesn't mix well with a system that looks into the body for causes and treats disease on a physical and chemical basis. It really isn't fair to either method to try to mix them. [Respondent's Exhibit 4, Questions and Answers on Christian Science, The Christian Science Publishing Society, Boston, 1974, pages 8-11. Footnote omitted.]

4. Bed rest is a medically recognized form of convalescent medical care for certain illnesses or conditions.

5. The services of a Christian Science practitioner are made available to all persons, regardless of their religious beliefs. Christian Science practitioners must be members of a branch church and of the Mother Church. They do not distribute religious materials from

their offices and, as a general matter, do not proselytize. However, practitioners may loan religious materials to a patient in order to help the patient reach an understanding so as to bring about healing. Practitioners are not required to pay any money to the Mother Church other than a charge based upon the number of lines of their listing in the *Christian Science Journal*.

6. If a Christian Scientist decides to be treated for a medical condition by a physician rather than by a Christian Science practitioner, the patient will remain a Christian Scientist in good standing and there will be no repercussions by the Church.

7. The State of Wisconsin does not regulate or license Christian Science practitioners.

8. At all relevant times, the complainant has been employed by the University of Wisconsin-Madison as an Associate Professor.

9. The State of Wisconsin offers optional group health insurance coverage to its employes in the form of 34 group health insurance plans, including one "standard plan." The other 33 plans are generally referred to as the "insured plans." The theory behind group coverage is to spread out risks within the entire group.

10. The "standard plan" is a health insurance plan offered to state employes and administered by the Wisconsin Physicians Service (WPS) for the Group Insurance Board (GIB) on a self-insured basis. The standard plan covers approximately 11,000 state employes at an average cost of between \$200 and \$300 per month for each employe. With family members, the plan covers approximately 27,000 people. Claims paid under the plan average approximately \$2,000 per year per person. The benefits under the standard plan are established by state law and the Group Insurance Board exercises limited authority to modify these benefits.

11. The total cost to the state for the standard plan is between \$50 million and \$60 million per year, including administrative expenses of approximately \$3 million to \$5 million.

12. The Department of Employee Trust Funds implements decisions made by the Group Insurance Board. Claims paid for standard plan participants are paid from state trust funds.

13. The health insurance coverage made available to the complainant under the standard plan did not provide for payment for treatments administered by Christian Science practitioners but did, nevertheless, cover the cost of confinement in Christian Science sanatoriums under conditions set forth in the standard plan. WPS, which administers the standard plan, takes the position that Christian Science practitioners are not payable under

the plan because, at a minimum, the Christian Science practitioner is not a payable provider and the treatment is not medically recognized as being consistent with the diagnosis and treatment of an illness. Therefore, even if a physician recommended treatment by a Christian Science practitioner, the cost of that treatment would not be reimbursed under the standard plan.

14. The standard plan provides for payment for services which are 1) medically necessary; 2) consistent with the diagnosis and treatment of an illness; and 3) provided by or under the supervision of a physician. The exception to these general requirements are statutorily mandated coverage for chiropractic services, for mammograms and for certain HIV treatment. The standard plan does not provide coverage for cosmetic surgery, eye-glasses exams, acupuncture, certain types of organ transplants, procedures determined by the medical community to be investigative or experimental in nature and treatments that are not generally recognized by the medical community. The standard plan contract, between WPS and GIB provides, in part:

Except as otherwise specifically provided in this CONTRACT, BENEFITS of this CONTRACT... shall not include:

* * *

P. Services, care, drugs and supplies, etc., that are not medically recognized in the treatment of an illness, or are considered experimental in nature, or are not consistent with and necessary for the admission, diagnosis, and treatment of the illness or injury, all as determined by WPS.

15. The Group Insurance Board also establishes guidelines covering the various insured plans which serve as alternatives to the standard plan. The insured plans include health maintenance organizations and preferred provider organizations. While the GIB guidelines set the minimum levels of coverage for the insured plans, the plans themselves determine, in large part, the benefits they will provide. None of the insured plans provide for payment for treatments administered by Christian Science practitioners. Even if an insured plan sought to provide payment for Christian Science practitioners, it is unlikely that the GIB, which determines whether a plan falls within the guidelines, would approve the plan.

16. During the latter part of 1988, the Group Insurance Board met for the purpose of considering a request for revision in the standard plan contract language so that the contract would, for the purposes of determining health care expenses:

a. consider Christian Science practitioners listed in the current issue of the Christian Science Journal to be physicians;

b. consider "absent treatment" to be treatment by a physician.

17. Information regarding this proposal was communicated to Thomas C. Korpady of the Wisconsin Department of Employee Trust Funds by letter from Norman L. Jones, of the actuarial and consultant firm of Gabriel, Roeder, Smith and Company. Mr. Jones served as the consulting actuary for DETF. The letter stated in part:

A number of major health insurers as well as Part A of Medicare recognize Christian Science treatment - at least to some degree. Some of them have incorporated all of the provisions of the proposal in their standard contracts. Most have some restrictions, including one or more of the following:

1. Limit coverage to care in sanitoriums and nursing homes (e.g. Medicare Part A covers certain costs while in a sanitorium). Adoption of this restriction would dramatically reduce exposure - there is currently only one relatively small facility in Wisconsin (Clearview Sanitorium in Delafield).
2. Reserve the right to require physical and diagnostic examinations.
3. No coverage for passive confinement (e.g. for rest and study).
4. Exclude any parallel medical care.
5. Require that treatment must be for a sickness or injury that would require treatment by a physician for a patient who is not a Christian Scientist.

Unknowns concerning this proposal include:

- Number of plan participants who are Christian Scientists and the present coverage of those persons.
- Potential charges for "absent treatment".
- Experience of other health care plans with this type of coverage.
- Whether or not inclusion of Christian Science treatment generally leads to similar requests from other groups.

Approval of the proposal would result in additional claims under the plan (as opposed to the substitution of one type of treatment for another). Based on the limited information available, we estimate that claims would increase by less than 0.1% and that no near-term premium adjustment would be required. Therefore, consideration of the proposal revolves around good benefit design and proper public policy rather than expected near-term financial consequences.

18. Mr. Jeffrey provided to the Group Insurance Board a list of approximately 40 insurance companies which:

are among those which customarily offer benefits [for] Christian Science treatment and care in their group health and accident insurance plans when asked to do so by employers. Available benefits may cover treatment by a Christian Science practitioner, confinement [in] a Christian Science sanatorium, and/or care by a graduate Christian Science nurse, and must be spelled out in a rider or policy statement issued by the company. Underwriting rules may vary with smaller group plans.

19. Effective September 1, 1988, the complainant had enrolled in the group health insurance plan in hopes that coverage would be extended to treatment by Christian Science practitioners.

20. At its December 15, 1988, regular meeting, the Group Insurance Board addressed an agenda item entitled "Consideration of Requests for Inclusion of Christian Science Coverage in Standard Health Plan" after which the Board voted to continue the present practice of not including the coverage of Christian Science practitioners as provided under the Standard Plan. The minutes of the Board meeting reflect the following exchanges between the members of the Board and George Jeffrey of the Christian Science Committee on Publication for Wisconsin:

Mr. Frankel questioned whether or not inclusion of Christian Science treatment generally leads to similar requests from other groups. Mr. Jeffrey replied that he did not know.

Mr. Frankel also questioned how many plan participants are Christian Scientists and the present coverage of those persons. Mr. Jeffrey replied that approximately 30 state employees are Christian Scientists and they are, to his knowledge, currently covered by the Standard Plan.

In response to a question by Mr. Saylor regarding the problems that might be associated with Board approval of this group and other similar group requests, Mr. Korpady [Director, Health & Disability Benefits for DETF] stated that although absent treatment is unique to Christian Scientists, priests, rabbis, and ministers often provide counseling and that if similar services were provided by a psychiatrist, they would be reimbursable. Mr. Korpady noted that Mr. Jones also raised this issue on page two of his memorandum, and questioned if these groups might be encouraged to seek insurance reimbursement for their counseling activities.

Mr. Frankel asked if there were plans in other states, that offer coverage for Christian Science care to state employees. Mr. Jeffrey said there were not.

Mr. Merkel asked if insurance companies carry insurance for Christian Science practitioners [sic] for private individuals. Mr. Jeffrey replied that

just like any other provision in private insurance, if you pay the additional premium the insurance is available. At the present time the 30 state employees enrolled in the Standard Plan pay into the Standard Plan and receive part of the benefits of this plan through Christian Science Sanitoriums and Christian Science Nursing Homes but they are not covered for reimbursement of the services of Christian Science Practitioners.

Mr. Frankel clarified that the Standard Plan allows two of the three provisions and that Mr. Jeffrey is requesting the coverage for Christian Science Practitioners. Mr. Frankel also clarified that private insurance companies offer this coverage, but that no other state plans do. Mr. Jeffrey agreed.

* * *

Mr. Beil questioned whether Christian Scientist Practitioners are regulated in the State of Wisconsin. Mr. Jeffrey replied that they are not.

21. If the Group Insurance Board had adopted Mr. Jeffrey's proposal to extend coverage to include treatment by Christian Science practitioners under the standard plan, all participants in the standard plan would have been eligible for such reimbursement, regardless of their religious beliefs.

22. When the complainant learned of the Group Insurance Board action to continue to exclude Christian Science practitioners from the definition of "physician," she terminated her coverage in the group health insurance plan, effective February 1, 1989.

23. Complainant subsequently purchased major medical insurance from a private insurer for a 90-day period for which she paid a premium of \$129.50. Upon the expiration of that policy, the complainant purchased insurance from a second private insurer. For the approximate time period of November 1, 1989 through December 31, 1990, the complainant paid a total premium of \$544.23. Both policies had riders which specifically authorized payment for treatment provided by Christian Science practitioners.

24. Complainant re-enrolled in the Standard Plan and since December of 1990 has paid a monthly premium of \$141.00, even though the plan still does not provide coverage for treatment by Christian Science practitioners. During this period, the complainant adopted a child, obtained "family coverage" under the plan and has been reimbursed for "well baby checks" provided for her child by a physician.

25. In Wisconsin, the daily charge for treatment by Christian Science practitioners ranges from \$5.00 to \$12.00 per day, with the average such charge being \$8.50 and the most common such charge being \$10.00.

26. Since April 3, 1989, complainant has received Christian Science treatment from Kristin K. Fiuty, C.S.B., of Milwaukee, who charges \$10.00 for each treatment, in the total amount of \$1,900.00, for which the complainant has made full payments. The

complainant made one payment each month in the amount of \$100.00 for the 19 months beginning in April of 1989 and ending in October of 1990.