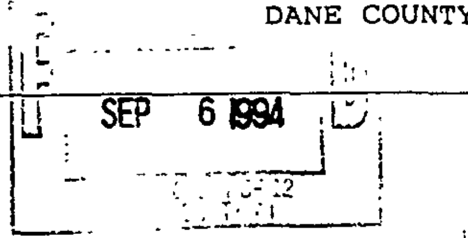
STATE OF WISCONSIN | CIRCUIT COURT BRANCH 12 | DANE COUNTY



SUSAN L. MEREDITH,

Petitioner,

v. Case No. 93-CV-3986 D36

WISCONSIN PERSONNEL COMMISSION,

Respondent.

ORDER AFFIRMING PERSONNEL COMMISSION DECISON

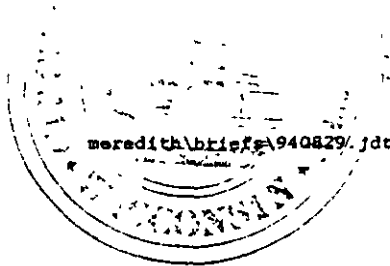
On August 29, 1994, the Dane County Circuit Court, the Honorable Mark A. Frankel, presiding, heard oral argument from the parties in the above-captioned case, petitioner Susan L. Meredith being represented by Hale, Skemp, Hanson & Skemp, Attorney Thomas S. Sleik, and the respondent Wisconsin Personnel Commission being represented by Attorney General James E. Doyle and Assistant Attorney General Bruce A. Olsen. The court, having considered the written and oral arguments of counsel and having rendered an oral decision in this matter, hereby enters the following order:

It is ORDERED that the decision of the Wisconsin Personnel Commission, dated September 15, 1992, be and the same hereby is, affirmed in its entirety, and the appeal in this matter is hereby dismissed.

Dated this 6 day of September, 1994.

BY THE COURT:

Mark A. Frankel
Circuit Court Judge



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STATE OF WISCONSIN | CIRCUIT COURT Branch 12 | DANE COUNTY

SUSAN L. MEREDITH, *

Petitioner, *

vs. * Case No. 93 CV 3986

WISCONSIN PERSONNEL COMMISSION, *

Respondent. *

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PERSONNEL COMMISSION

DATE: August 29, 1994

BEFORE: Honorable MARK A. FRANKEL, Circuit Judge

APPEARANCES: Petitioner Susan L. Meredith in person and by THOMAS S. SLEIK & MARGARET AHNE of Hale, Skemp, Hanson & Skemp, Attorneys at Law, 505 King Street, Ste. 300, La Crosse, Wisconsin 54602-1927;

Respondent Wisconsin Personnel Commission by BRUCE A. OLSEN, Assistant Attorney General, Department of Justice, 123 W. Washington Avenue, Madison, Wisconsin 53707.

PROCEEDINGS: Oral Arguments Hearing (Court's Ruling)

Diane K. Scott, RPR-CP
Official Reporter, Br. 12

1 SUSAN L. MEREDITH V.
WISCONSIN PERSONNEL COMMISSION 93 CV 3986

2

August 29, 1994

3

4 (EXCERPT OF TRANSCRIPT - COURT'S RULING)

5 * * *

6 (A recess is held from 11:27 a.m. to 12 p.m.)

7 THE COURT: My decision in this case is as follows.

8 As to the facts in the case, I would find them to

9 be as found by the Personnel Commission in its order

10 except as otherwise noted in this oral decision.

11 The Petitioner Susan Meredith was hired as a

12 graduate student at the U.W. La Crosse to a .38 FTE

13 position as women's basketball coach at a pay of $8,500

14 for 7.5 months commencing October 15, 1989. She was

15 rehired for the 1990/'91 season at $9,000 for a nine

16 month employment at a .38 FTE position. She brought

17 claims of sex discrimination before the Wisconsin

18 Personnel Commission which were denied by an order dated

19 9/15 of '93. This appeal followed.

20 The petitioner raises essentially three issues.

21 First, she asserts that she was discriminated against in

22 the form of pay under the Equal Pay Act relative to the

23 men's basketball coach, Randy Handel, and her predecessor

24 as coach of the women's team, Daniel Timm. The

25 petitioner asserts that the Commission's decision

1 dismissing this claim erroneously interpreted the Equal
2 Pay Act.
3 Her second claim is that she was subject to
4 disparate treatment in violation of Title VII based on
5 her sex. Specifically she alleges that the University's
6 failure to hire her to a full time position in her second
7 year constituted unlawful sex discrimination. She bases
8 this claim on the fact that both the men's coach as well
9 as her predecessor as women's basketball coach were hired
10 to full time positions while she was only offered a .38
11 time position. She acknowledges that her claim is limit-
12 ed only to her second year of employment because she was
13 academically ineligible for full time employment in her
14 first year. She posits that the Commission erroneously
15 accepted the University's justification for not hiring
16 her to a full time position.
17 And the third issue presented in this appeal is
18 that the petitioner argues that the Personnel Commission
19 erroneously concluded that it had no jurisdiction to hear
20 her claims under Title IX.
21 As to the appropriate standard of review, the
22 standard of review of an administrative decision depends
23 on whether the issues presented involve questions of law
24 or fact. The Court must separate the factual findings
25 from the conclusions of law and apply the appropriate

1 standard of review to each. Citing Badger State
2 Agri-Credit v. Lubahn, 122 Wis.2d 718, at 723, a 1985
3 Court of Appeals decision. A court must give due weight
4 to the experience, technical competence, and specialized
5 knowledge of the administrative agency, as well as to the
6 discretionary authority conferred upon it. Citing
7 section 227.57(10) of the Wisconsin Statutes. A court
8 cannot exercise powers conferred upon an agency and
9 substitute its judgment for that of the agency. Citing
10 Wisconsin Central Ltd. v. Public Service Commission, 170
11 Wis.2d 558, at 568, a 1992 Court of Appeals decision.
12 An agency's findings of fact are conclusive as long
13 as they are supported by credible and substantial
14 evidence. Citing section 227.57(6) of the Wisconsin
15 Statutes, and Wehr Steel Company v. ILHR Department, 106
16 Wis.2d 111, at 117, a 1982 Supreme Court decision.
17
18 Substantial evidence is "'such relevant evidence as
19 a reasonable mind might accept as adequate to support a
20 conclusion.'" Citing Bucyrus-Erie Company v. ILHR
21 Department, again at page 418, quoting here from Bell v.
22 Personnel Board, 259 Wis. 602, at 608, a 1951 Supreme
23 Court case. It is not required that the evidence be
24 subject to no other reasonable, equally plausible
25 interpretations. Citing -- strike that.

1 In the case of Robertson Transporation Company v.
2 Public Service Commission, 39 Wis.2d 653, at 658 (1986),
3 the Supreme Court said: "Substantial evidence is not
4 equated with a perponderance of the evidence. There may
5 be cases where two conflicting views may each be sustain-
6 ed by substantial evidence. In such a case, it is for
7 the agency to determine which view of the evidence it
8 wishes to accept." All from Hamilton v. ILHR Department,
9 94 Wis.2d 611, at 617 (1980). Mere conjecture is not
10 sufficient. Princess House, Inc. v. DILHR, 111 Wis.2d
11 46, 54 (1983).
12 "The question is not whether there is credible
13 evidence in the record to sustain a finding the
14 commission did not make, but whether there is any
15 credible evidence to sustain the finding the commission
16 did make." Unruh v. Industrial Commission, 8 Wis.2d 394,
17 at 398 (1959). Nor is an explanation required for action
18 not taken: The burden would simply be too onerous if an
19 agency would be required to substantiate its reasons for
20 not adopting all alternatives urged upon it. Citing
21 Wisconsin Environmental Decade v. Public Service
22 Commission, 98 Wis.2d 682, at 702, a Court of Appeals
23 decision of 1980.
24 The construction of a statute and its application
25 to a particular set of facts is a question of law. Eau

1 Claire County v. WERC, 122 Wis.2d 363, at 365, Court of
2 Appeals 1984. A reviewing court is not bound by an
3 agency's conclusions of law; however, if the agency's
4 legal conclusions are reasonable, the reviewing court
5 will sustain the agency's view even though an alternative
6 view may be equally reasonable. Citing Kenwood
7 Merchandising Corporation v. LIRC, 114 Wis.2d 226, at
8 230, a 1983 Court of Appeals decision. And, lastly,
9 where the agency is charged by the legislature with the
10 duty of applying the statute being interpreted, the
11 agency's interpretation is entitled to great weight.
12 Citing Phillips v. Wisconsin Personnel Commission, 167
13 Wis.2d 205, 215, a 1992 Court of Appeals decision. In
14 that Phillips case, the court found at page 215 that the
15 personnel commission is charged by the legislature with
16 the duty of hearing and deciding discrimination claims
17 and applying the provisions of the act to particular
18 cases. We thus accord "great weight" to the commission's
19 interpretation of the act and will hold that interpreta-
20 tion, will uphold that interpretation unless it is
21 clearly contrary to legislative intent.
22 All right. Moving on then to the first issue, the
23 petitioner's Equal Pay Act claim. Wisconsin Statute
24 111.36(1)(a) prohibits discrimination in compensation on
25 the basis of sex for equal or substantially equal work.

1 In this area, Wisconsin courts have looked to the Equal
2 Pay Act, 29 U.S.C. section 206(d)(1), for guidance rather
3 than Title VII. Citing Hiegel v. LIRC, 121 Wis.2d 205 at
4 215, Court of Appeals 1984.
5 The plaintiff bears the burden of showing that the
6 jobs being compared have equal skill, effort and
7 responsibility, and that men and women were paid
8 differently. Citing Ferguson v. E.I. duPont, 560 F.
9 Supp. 1172, at 1192, D.C. Delaware, 1983.
10 If the jobs held by men required different skill,
11 effort and responsibility than the job compared by the
12 woman petitioner, there is no Equal Pay Act violation.
13 Citing Wirtz v. Dennison Manufacturing Company, 265 F.
14 Supp. 787, D.C. Massachusetts (1967).
15 In a case of genuine differences of job classifi-
16 cation, these cases are beyond the scope of the Equal Pay
17 Act because different work would necessarily entail
18 different compensation. Citing Schultz v. Wheaton Glass,
19 421 F.2d 259, a third circuit case from 1970.
20 In this case, the Commission found that the work of
21 Mr. Timm and Mr. Handel was not substantially equal to
22 that of petitioner because their work entailed other
23 noncoaching duties including lecturing and administrative
24 duties; whereas petitioner's job was exclusively
25 basketball coaching. The Commission concluded these

1 differences were not inconsequential.

2 The petitioner argues that these additional duties
3 can be ignored and the pay for the coaching fraction of
4 the men's overall salary compared with the petitioner's
5 salary for purposes of Equal Pay Act analysis. This
6 suggestion is contrary to established Equal Pay Act case
7 law. The case law makes clear that additional duties
8 held by other employees may take them out of the Equal
9 Pay Act analysis even if they share some duties in common
10 with the petitioner. For this, I cite the case of
11 <u>Molthan v. Temple University of Commonwealth System of</u>
12 <u>Higher Education</u>, 442 F. Supp. 448, a 1977 Eastern
13 District of Pennsylvania case. In that case, the
14 district court found that an equal pay act suit by an
15 associate professor in the department of medicine, who
16 was also director of a blood bank in which it was alleged
17 that her position was comparable to higher paying jobs of
18 director of hematology and director of pathology, was
19 properly dismissed under a summary judgment motion where
20 no specific facts indicated that individuals in question
21 performed equal work nor was there any indication that
22 apart from all three positions being directorships any
23 similarity much less equality of job content existed
24 among the three positions, assuming arguendo that factual
25 issues existed as to the comparability of the three

1 directorships, per se. Any potential for comparability
2 vanished when diverse additional responsibilities of
3 individuals who held those positions were taken into
4 account. Plaintiff seeking to survive a summary judgment
5 motion must do more than show that she and another
6 employee each devoted some part of their workweek to jobs
7 that are equal, unless portions of their pay attributable
8 to that portion of overall responsibilities can be
9 determined. In this case, plaintiff did not allege that
10 responsibilities over and above the directorship were
11 comparable or equal to extra responsibilities of the
12 other directors, nor did the plaintiff allege that
13 portions of her salary that reflected responsibilities as
14 director were lower than portions of other directors'
15 salaries attributable to their directorship
16 responsibilities.

17 Further, the case of <u>Brennan v. Prince William</u>
18 <u>Hospital Corporation</u>, 503 F.2d 282, a fourth circuit 1974
19 case, stands for the proposition that performance of
20 extra tasks may support wage differential between male
21 and female employees if they create significant
22 variations in skill, effort and responsibility between
23 otherwise equal jobs.

24 And, lastly, the case of <u>Soble v. University of</u>
25 <u>Maryland</u>, 778 F.2d 164, a fourth circuit case from 1984,

1 found that female assistant professors at dental schools
2 did not perform work substantially equal in skill, effort
3 and responsibility to that performed by male assistant
4 professors in the same department where she held academic
5 degrees only in fields of sociology and social work while
6 all other assistant professors in her department had
7 degrees of dentistry or business administration, teaching
8 dental management and carrying considerably heavier
9 teaching loads.
10 In this case, the university made no allocation of
11 compensation to coaching duties only, either in the
12 appointment letter or otherwise. Petitioner's attempt to
13 do so by mathematical extrapolation from the percentage
14 of job responsibilities is not supported in the record.
15 Because petitioner sought comparison with male employees
16 who in this case had significant different and additional
17 job responsibilities, the Personnel Commission was
18 justified in dismissing petitioner's Equal Pay Act claim.
19 As to the second issue, petitioner claims that her
20 rights to treatment on the basis of sex under Title VII
21 were violated when she was not offered a full time
22 position her second year of employment, acknowledging
23 that her first year she was otherwise ineligible because
24 of an absence of a master's degree, as compared to her
25 male predecessor and male counterpart who did have full

1 time positions. In this context, a disparate treatment
2 case under Title VII, a petitioner or a plaintiff has the
3 burden of proving by the preponderance of the evidence a
4 prima facia case of discrimination. The plaintiff can
5 satisfy that burden by showing four elements. First, the
6 plaintiff is a member of a protected class. Second, the
7 plaintiff applied and was qualified for the position
8 which the employer was seeking to fill. Third, that
9 despite such qualifications, the plaintiff was rejected.
10 And, fourth, that the plaintiff's, that after the plain-
11 tiff's rejection, the position remained open and the
12 employer continued to seek similarly qualified applicants
13 under the McDonnell Douglass analysis at 411 U.S. 792,
14 802, 1973.
15 Once established, the prima facie case gives rise
16 to a presumption of discrimination which the defendant
17 may then refute by articulating some legitimate
18 nondiscriminatory reason for the employee's rejection,
19 under the Ferguson case that I cited earlier at 560 F.
20 Supp. 1192. Should the defendant carry this burden, the
21 plaintiff must then have an opportunity to prove by a
22 perponderance of the evidence that the legitimate reasons
23 offered by the defendant were not its true reasons but
24 rather were a pretext for discrimination. The plaintiff
25 must also carry the burden of proving discriminatory

1 intent or motive.

2 In this case, the Commission found that as to her

3 second year that the petitioner was a member of a

4 protected class, that she was treated differently in

5 terms of terms and conditions of employment than members

6 outside her protected group, and, number 3, that it gave

7 rise to an appearance of discrimination. However, the

8 Commission also found that the University offered

9 legitimate nondiscriminatory reasons for its actions, and

10 that the petitioner failed to show this reason to be

11 pretextual. I believe the record supports the

12 Commission's conclusions.

13 As to the legitimate nondiscriminatory reasons, the

14 dean in this case testified that the reason petitioner

15 was not offered a full time position was budgetary

16 problems experienced by the University even prior to the

17 time the petitioner was hired, and the record in this

18 case reflects the following testimony at pages 389 and

19 390 from Dean Hastad, H-a-s-t-a-d.

20 Mr. Tallman asks: Why was it decided to authorize

21 at .38 and not 1.00, at this time prior to the recruit-

22 ment of Timm's replacement? And Dean Hastad replies:

23 As I mentioned earlier in my testimony, there was an FTE

24 on loan to the unit -- Intercollegiate Athletics from

25 Central Administration to the tune of approximately 1.25

1 FTE. It was made perfectly clear to me upon my -- upon
2 interviewing for the position and upon my arrival and
3 made also quite clear to the Director of Intercollegiate
4 Athletics that that particular debt needed to be repaid.
5 At the recommendation of the Director of Intercollegiate
6 Athletics, I authorized return of that fraction of Mr.
7 Timm's position and did indeed agree that we should
8 commence searching for a .38 FTE to be the head women's
9 basketball coach. Question by Mr. Tallman: If those
10 were the circumstances in which a .38 time position was
11 authorized for the basketball coach position, Mr. Timm, I
12 believe you've previously testified, had performed those,
13 had performed those administrative duties for the balance
14 of his 1.0 FTE. What happened to those administrative
15 duties? Dean Hastad: I can only assume that they were
16 absorbed back within the -- within the unit. Mr.
17 Tallman: Was there an additional position allocation
18 given to the university in order for those duties to be
19 performed? Dean Hastad: No, there was not.
20 Not only was this testimony not challenged on
21 cross-examination or by way of countervailing evidence,
22 but petitioner herself largely acknowledged these
23 problems in her testimony at pages 259 and 260 of the
24 transcript. The petitioner's attack on this testimony
25 here and in her brief amount to an attack on the

1 credibility of this testimony, and that is a function
2 reserved exclusively to the Personnel Commission and not
3 to this Court on review. Rather, for me ~~the~~ question is
4 one of whether the Commission's decision is supported by
5 substantial evidence, and I conclude that it was.
6 Lastly, as to the third issue, that ~~being~~ whether
7 or not the Personnel Commission had legal authority to
8 consider petitioner's claims under Title IX of the
9 Education Amendments Act of 1972, the Personnel
10 Commission's discrimination jurisdiction is limited to
11 complaints of employment discrimination under the
12 Wisconsin Fair Employment Act, particularly articulated
13 in section 230.45(1)(b) of the Wisconsin Statutes.
14 Administrative agencies in this state have only those
15 powers conferred upon them by statute, and doubts as to
16 the existence of an implied power should be resolved
17 against the exercise of such authority. Citing
18 Kimberly-Clark Corp. v. Public Service Commission, 110
19 Wis.2d 455, at 461, 462, 1983 State Supreme Court case.
20 The relationship between the Federal Civil Rights
21 Act and the state Fair Employment Act shows that the
22 remedies under each jurisdiction are to be pursued
23 separately. Citing American Motors Corp. v. DILHR, 101
24 Wis.2d 337, at 353, 1981. Interpretations of Title VII
25 have provided some guidance in applying the Wisconsin

1 Fair Employment Act, again citing Hiegel v. LIRC, 121
2 Wis.2d 205, at 216, Court of Appeals, 1984. However,
3 there is no ipso facto incorporation of the Federal Civil
4 Rights Act into the Wisconsin Fair Employment Act. Again
5 American Motors Corp. at 101 Wis.2d 353, Hilmes v. DILHR,
6 147 Wis.2d 48, at 52-53, Court of Appeals 1988.
7 Accordingly, the fact that standards developed by the
8 federal courts in Title VII actions have been applied by
9 Wisconsin courts when deciding certain claims under the
10 Wisconsin Fair Employment Act (i.e., sex discrimination
11 in the terms, conditions, or privileges of employment)
12 does not import all the provisions of the Civil Rights
13 Act into state law absent some appropriate action by the
14 state to incorporate the provisions of the federal law.
15 See American Motors Corporation, 101 Wis.2d at 353.
16 Thus, by analogy, there has been no incorporation
17 of Title IX under the Wisconsin Fair Employment Act
18 absent some express incorporation by the State. Further,
19 petitioner cites no case law, nor was I able to locate
20 any case law, indicating that Wisconsin courts have ever
21 looked to Title IX standards or case law when interpret-
22 ing the Wisconsin Fair Employment Act.
23 For these various reasons, I believe the Commission
24 was correct in its interpretation of law and supported by
25 substantial evidence in the conclusions it reached, and

1 the petitioner's appeal would have to be denied for the
2 reasons indicated here on the record.
3 I would ask Mr. Olsen to submit a proposed order
4 affirming the decision and dismissing the appeal.
5 Thanks, counsel. I appreciate your input.
6 MR. SLEIK: Thank you, Your Honor.
7 MR. OLSEN: Thank you.
8 (Proceedings concluded at 12:25 p.m.)
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1 SUSAN MEREDITH V.
WISCONSIN PERSONNEL COMMISSION 93 CV 3986

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3 STATE OF WISCONSIN)
4)ss.
COUNTY OF DANE)
5

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7 I, Diane K. Scott, hereby certify that I am the duly
8 qualified and officially appointed Court Reporter for the
9 Circuit Court for Dane County, Branch 12; that on the 29th day
10 of August, 1994, I stenographically reported the proceedings
11 had before said Court; and that the attached foregoing is a
12 true, correct and partial transcript of the Court's ruling
13 taken thereof.
14 Dated this 1st day of September, 1994 at Madison,
15 Wisconsin.
16
17
18

Diane K. Scott
19 Official Reporter, RPR-CP
20
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