

STATE OF WISCONSIN

PERSONNEL COMMISSION

**GWENDOLYN ANN PERSON,**  
*Complainant,*

v.

**Secretary, DEPARTMENT OF  
COMMERCE,**  
*Respondent.*

**RULING ON MOTION  
TO DISMISS**

Case No. 00-0083-PC-ER

This is a complaint alleging discrimination on the bases of color, race, and sex, in regard to a failure to reclassify complainant's position. On September 8, 2000, respondent filed a motion to dismiss this complaint as moot. The parties were permitted to brief the motion, and the schedule for doing so was completed on November 3, 2000. The following findings are based on information provided by the parties, appear to be undisputed, and are made solely for the purpose of deciding this motion.

#### FINDINGS OF FACT

1. The basis for complainant's charge is the alleged failure by respondent to recommend, process, or approve the reclassification of complainant's position from Program Assistant 2 (PA 2) to PA 3 between February 16, 1999, and July 6, 2000, the date the charge was filed.

2. Effective March 12, 2000, complainant's position was reallocated to the PA 3 classification and she was regraded.

3. During the time period relevant to this matter, complainant's supervisor advised her that he did not intend to submit a request for the reclassification of her position due to performance issues.

4. During the time period relevant to this matter, complainant did not submit a request for the reclassification of her position pursuant to the employee-initiated reclassification request process.

5. Complainant continues to be employed by respondent.

#### CONCLUSIONS OF LAW

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

2. An issue is moot when a determination is sought which can have no practical effect on a controversy. *See, e. g., State ex rel. Ellenburg v. Gagnon*, 76 Wis. 2d 532, 536, 251 N. W. 2d 773 (1977).

3. This case is not moot.

#### OPINION

In *Burns v. UW [UWHCA]*, 96-0038-PC-ER, 4/8/98, the Commission discussed the concept of mootness as follows:

An issue is moot when a determination is sought which can have no practical effect on a controversy. *State ex rel. Jones v. Gerhardstein*, 135 Wis. 2d 161, 169, 400 N.W.2d 1 (Ct. App., 1986), citing *Warren v. Link Farms, Inc.*, 123 Wis. 2d 485, 487, 368 N.W.2d 688, 689 (Ct. App., 1985). The focus, generally, is upon the available relief in relation to the individual complainant (*see, e.g., Lankford v. City of Hobart*, 36 FEP Cases 1149,1152 (10<sup>th</sup> Cir., 1996) and *Martin v. Nannie and the Newborns*, 68 FEP Cases 235, 236 (W.D. Okla., 1994)) but may shift to a consideration of others in the workplace when an overt policy of discrimination is alleged to impact on a category of employees (*see, e.g., Kennedy v. D.C.*, 65 FEP Cases 1615, 1617 (D.C. Cir., 1994), involving review of a grooming code.)

In *Watkins v. DILHR*, 69 Wis. 2d 782, 12 FEP Cases 816 (1975), it had been concluded that the complainant had been discriminated against by her state agency employer on the basis of her race when she was denied a requested transfer to a different position in 1969 and in 1970. The Wisconsin Supreme Court ruled that the controversy was not moot even though the complainant had been transferred to the position

she sought in 1971 (which was after she had filed her complaint of discrimination). The basis for the Court's ruling was that, since the complainant remained an employee of DILHR, an order could be entered which would have the practical, legal effect of requiring that the complainant be considered for all future transfers on the basis of her qualifications and ability, and without regard to her race; that the complainant was entitled, having suffered frustration in her employment over an extended period of time, to know whether or not this was due to race discrimination; and that it would foster, not eliminate, discrimination if employers in such situations could escape liability by simply waiting until enforcement proceedings were begun and then remedying the subject adverse action.

Since complainant is still employed by respondent, the decision of this matter could have the practical, legal effect, within the meaning of *Watkins, supra*, of requiring that the complainant be considered for all future reclassifications without regard to her race, color, or sex. As a result, it is concluded that this controversy is not moot.

It should also be noted that, even though not argued by the parties, it appears that, were complainant to prevail here, the effective date of a reclassification ordered as a possible remedy could be earlier than the effective date of the reallocation of complainant's position, i.e., March 12, 2000. As a consequence, this is further support for the conclusion that the decision of this matter could have a practical effect and the controversy is not moot.

ORDER

Respondent's motion to dismiss is denied.

Dated: November 15, 2000

STATE PERSONNEL COMMISSION

Laurie R. McCallum / prin  
LAURIE R. McCALLUM, Chairperson

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Judy M. Rogers  
JUDY M. ROGERS, Commissioner