STATE OF WISCONSIN PERSONNEL COMMISSION

PHYLLIS J. HENRY,
Petitioner,

v.

Secretary, DEPARTMENT OF EMPLOYMENT RELATIONS,
Respondent.

Case Nos. 01-0062-PC, 01-0107-PC-ER

RULING ON MOTIONS

Respondent filed a motion to dismiss Case No. 01-0062-PC for lack of subject matter jurisdiction. Petitioner agrees that the subject of that case is respondent's decision to place the Payroll and Benefits Specialist – Confidential classification in broadband pay range 81-05 rather than in 81-04.

Respondent has also filed a motion for summary judgment in Case No. 01-0107-PC-ER. The parties agreed to the following statement of issue in that case:

> Whether respondent's decision to place the Payroll and Benefits Specialist – Confidential classification in broadband 81-05 rather than either 81-04 or 81-03 had a disparate impact on petitioner based on her sex.

The parties have filed written arguments. The following facts are undisputed, unless specifically noted to the contrary.

FINDINGS OF FACT

1. Petitioner is employed at Lincoln Hills School.

2. Prior to May 6, 2001, petitioner's position was classified at the Payroll and Benefits Specialist 3 – Confidential level, assigned to pay range 01-12 with a pay range maximum of $44,384 per year.

3. Females occupy most of the PBS positions, while males occupy most of the Correctional Officer (CO) and Youth Counselor (YC) positions.

4. PBS positions received comparable worth pay increases in 1987 and 1988 as a result of a study done by respondent. These increases were based on a finding that the PBS positions were doing work of equal value as that of youth counselors and correctional officers and were, therefore, given increases to make their pay comparable.

5. The CO/YC classified positions received pay range reassignments in 1996, 1999, and 2000 as the result of negotiated agreements with the WSEU (Wisconsin State Employees' Union), which have brought the pay range of these classes above the PBS series. The pay range reassignments were the result of substantial recruitment and retention problems with these classifications. PBS, CO and YC positions all have some retention and recruitment problems, but PBS positions to a lesser extent, which accounts for the current difference between the pay of the female-dominated PBS classifications versus the male-dominated CO and YC classifications.

6. In 1997 representatives of the Payroll Council asked respondent to conduct a survey of the payroll and benefits occupational area. Respondent agreed to conduct and implement a new structure only if the proposed structure received the support of the State Human Resources Management Council (SHRMC). A committee of payroll and benefits specialists throughout the state (consisting mostly of females) studied the scope, impact and complexity of positions and developed a proposed new structure for consideration by SHRMC. SHRMC (also consisting mostly of females) approved the adopted the proposal and recommended that respondent implement it. Respondent adopted SHRMC's recommendation with modifications not relevant to these cases.

7 Respondent negotiated wage increases for payroll and benefit positions represented by a union. Respondent then recommended parity pay adjustments for unrepresented positions (including confidential positions such as petitioner's) which were approved by the Legislative Joint Committee on Employment Relations (JCOER).

8. Respondent implemented the survey in two phases. The first phase was implemented when new classification specifications were created and the old specifications abolished, effective May 6, 2001 The new specifications had 5 levels for Payroll

and Benefits Specialist- Confidential (PBS-C) positions, with level 5 being the highest. Petitioner's position was reallocated to the new PBS-C-3 level and remained in pay range 01-12 with a maximum annual salary of $44,384. The petitioner did not receive a pay increase with this transaction.

9. The second phase of the survey, called "broadbanding," was implemented effective May 20, 2001, and affected only confidential (unrepresented) positions. PBS-C positions were separated into two categories as follows: a) positions previously classified as PBS-C levels 1-3, were reallocated to PBS-C at pay range 81-05, with a pay range maximum of $48,658 annually; and b) positions previously classified as PBS-C levels 4-5, were reallocated to PBS-Advanced-C at pay range 81-04, with a higher pay range maximum than 81-05. New classification specifications were developed to reflect the change and the old specifications were abolished.

10. The petitioner's position was reallocated to PBS-C as a result of the broadbanding decision noted in the prior finding. The maximum of petitioner's new pay range (81-05) was $48,658 vs. $44,384 for her old pay range (01-12).

11. Respondent's rationale for the broadbanding decision set forth in finding 9 was that positions comparable to petitioner's (formerly classified as PBS 1-C through 3-C, reclassified as PBS-C, and broadbanded to PR 81-05) involve administrative support work, while positions formerly classified as PBS 4-C or 5-C (reclassified as PBS-Advanced-C and broadbanded to PR 81-05) primarily include entry level professional staff, staff that perform para-professional duties a majority of the time while supervising administrative support and/or blue collar employees, and supervisors of advanced technical staff, specialized and para-professional administrative support staff, other paraprofessional staff and/or subordinate supervisory positions.

12. Respondent has the authority under the civil service code (specifically s. ER 1.02(7), Wis. Adm. Code) to designate pay ranges or groups of pay ranges in different pay schedules to be in counterpart pay ranges for purposes of determining personnel transactions. This means that an employee in a position in one pay range can move to a position in a different pay range with a higher pay range maximum, but in

the same counterpart pay range, without the transaction constituting a demotion or promotion, but rather constituting a lateral movement or transfer. Respondent's decisions about which pay ranges to counterpart must take into consideration whether an individual transferring between two positions would likely possess the knowledges, skills, and abilities to perform the work involved in the new position.

13. Concurrently with the decision to broadband certain classifications into PR 81-04 and PR 81-05 as set forth in finding 6, respondent authorized counterpart pay range designations for the non-represented classifications in each of these pay ranges. The counterpart pay ranges for 81-05 were 01-07 through 01-11, and for 81-04 were 01-12 through 01-14. One consequence of the new structure is that petitioner no longer has the right to transfer into positions at pay range 01-12, a right she did have prior to implementation of the broadbanding decision at issue here. Petitioner does not claim that she was treated differently than males whose positions also became classified at the PBS-C level pursuant to broadbanding.[1]

14. Respondent's decision was made in response to agency concerns that otherwise the impacted non-represented employees would no longer have the ability to laterally move to classifications assigned to more traditional pay ranges due to the maximum of the broadband pay ranges. If respondent had not taken this action, many of the transfer opportunities that had previously existed would have been characterized as demotions because the traditional pay range maximums are significantly lower than the broadband pay range maximums, and this situation would have had a negative impact on management's flexibility with regard to employee deployment, and on employee morale.

15. On June 25, 2001, petitioner filed a sex discrimination complaint with the Commission (Case No. 01-0107-PC-ER. The narrative portion of the complaint form included the following language:

[1] The final page of exhibit 4 attached to respondent's motion shows five males occupied positions classified the same as the petitioner's position.

> This survey was implemented on May 6, 2001. As a result, many payroll and benefits specialists did not receive an increase in pay range. Those located in central offices and at UW satellite facilities went up one pay range. Broadbanding was then implemented on May [20], 2001. As a result, all payroll and benefits specialists who did not receive anything under the survey were allocated to the lowest broadband (81-05). We were pay range 01-12 and because the broadband is a counterpart pay range are now equivalent to pay range 01-11 We were demoted!![2]
>
> Since the end of 1996 youth counselors and officers and supervising youth counselors and supervising officers, who are predominately male, have gone up three pay ranges with no change in class specifications for their positions and, as far as I am aware, no survey. We were equivalent to the supervising youth counselors before their positions went up the pay ranges. The payroll and benefits specialists, who are predominately female, after a four-year survey, received one pay range or nothing. Many were, in fact demoted, due to broadbanding. On the basis of sex, I feel we have been discriminated against.
>
> The payroll and benefits specialist classification should receive equal treatment as that showed to the youth counselors and officers. This classification should also receive an increase of three pay ranges. The classification should then be broadbanded in the higher broadband of 81-03 the same as the supervising youth counselors and supervising officers.

16. On July 2, 2001, petitioner filed an appeal with the Commission (Case No. 01-0062-PC) relating to the May 20th transaction.

CONCLUSIONS OF LAW

1. The Commission does not have subject matter jurisdiction over Case No. 01-0062-PC.

2. The Commission has subject matter jurisdiction in Case No. 01-0107-PC-ER pursuant to §230.45(1)(b), Stats.

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[2] Petitioner was not demoted under the civil service code because she was not appointed to a position in a classification in a lower salary range than her previous position. S. ER 1.02(8), Wis. Adm. Code.

3. In Case No. 01-0107-PC-ER there are no disputes of material fact and respondent is entitled to summary judgment because the undisputed facts demonstrate that respondent has not violated the WFEA (Wisconsin Fair Employment Act, Subch. II, Ch. 111, Stats.) as petitioner has alleged.

OPINION

I. Case No. 01-0062-PC

Only certain actions taken by the Secretary of the Department of Employment Relations are appealable to the Commission. Those decisions are enumerated in §230.44(1)(b), Stats., and include decisions made pursuant to §230.09(2)(a) and (d), Stats., which provide:

> (2)(a) After consultation with the appointing authorities, the secretary shall allocate each position in the classified service to an appropriate class on the basis of its duties, authority, responsibilities or other factors recognized in the job evaluation process. The secretary may reclassify or reallocate positions on the same basis.
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> * * *
>
> (d) If after review of a filled position the secretary shall determine whether the incumbent shall be regraded or whether the position shall be opened to other applicants.

Neither the decision to assign classifications to pay ranges nor the decision to designate pay ranges as counterpart pay ranges for purposes of personnel transactions was based on the authority provided by either s. 230.09(2)(a) or s. 230.09(2)(d), so the Commission lacks jurisdiction over this matter as an appeal. *See, e. g., Kaminski et al. v. DER*, 84-0124-PC, 12/6/84. Therefore, the Commission must dismiss this appeal for lack of subject matter jurisdiction.

II. Case No. 01-0107-PC-ER

A. Summary Judgment Procedure

Respondent moved for summary judgment on Case No. 01-0107-PC-ER. The Commission may summarily decide a case when there is no genuine issue as to any material fact and the moving party is entitled to judgment as matter of law. *Balele v. Wis.*

Pers. Comm., 223 Wis.2d 739, 745-748, 589 N.W.2d 418 (Ct. App. 1998). Generally speaking, the following guidelines apply. The moving party has the burden to establish the absence of any material disputed facts based on the following principles: a) inferences to be drawn from the underlying facts contained in the moving party's material should be viewed in the light most favorable to the party opposing the motion; b) doubts as to the existence of a genuine issue of material fact should be resolved against the party moving for summary judgment; c) if there are disputed facts, but these facts would not affect the final determination, these factual issues are immaterial and insufficient to defeat the motion. *See Grams v. Boss*, 97 Wis.2d 332, 338-9, 294 N.W.2d 473 (1980); *Balele v. DOT*, 00-0044-PC-ER, 10/23/01. Generally speaking, the non-moving party may not rest upon mere allegations, mere denials or speculation to dispute a fact properly supported by the moving party's submissions. *Balele, id.*, citing *Moulas v. PBC Prod.*, 213 Wis.2d 406, 410-11, 570 N.W.2d 739 (Ct. App. 1997). If the non-moving party has the ultimate burden of proof on the claim in question, that ultimate burden remains with that party in the context of the summary judgment motion. *Balele, id.*, citing *Transportation Ins. Co. v. Huntziger Const. Co.*, 179 Wis.2d 281, 290-92, 507 N.W.2d 136 (Ct. App. 1993)

The Commission has determined that it is appropriate to apply the above guidelines in a flexible manner, after considering at least the following five factors (*Balele, id.*, pp. 18-20):

1. *Whether the factual issues raised by the motion are inherently more or less susceptible to evaluation on a dispositive motion.* Subjective intent is typically difficult to resolve without a hearing whereas legal issues based on undisputed or historical facts typically can be resolved without the need for a hearing.

2. *Whether a particular petitioner could be expected to have difficulty responding to a dispositive motion.* An unrepresented petitioner unfamiliar with the process in this forum should not be expected to know the law and pro-

cedures as well as a petitioner either represented by counsel or appearing *pro se* but with extensive experience litigating in this forum.

3. *Whether the petitioner could be expected to encounter difficulty obtaining the evidence needed to oppose the motion.* An unrepresented petitioner who either has had no opportunity for discovery or who could not be expected to use the discovery process, is unable to respond effectively to any assertion by respondent for which the facts and related documents are solely in respondent's possession.

4. *Whether (in the context of a discrimination case) an investigation has been requested and completed.* A petitioner's right to an investigation should not be unfairly eroded.

5. *Whether the petitioner has engaged in an extensive pattern of repetitive and/or predominately frivolous litigation.* If this situation exists it suggests that use of a summary procedure to evaluate his/her claims is warranted before requiring the expenditure of resources required for hearing.

The Commission now turns to applying the above factors to this case. Petitioner appears *pro se* (without an attorney) in this matter. Nothing before the Commission indicates she is familiar with proceedings before the Commission or in other similar forums. Petitioner waived the investigation of her claim so she could proceed directly to hearing. There is nothing in the record to suggest that petitioner has conducted any discovery relating to her claim or that she is familiar with the discovery options available to her as a party to a proceeding before the Personnel Commission. Petitioner does not have a history of having engaged in an extensive pattern of repetitive or predominately frivolous litigation.

In *Balele v. Wis. Pers. Comm.*, 223 Wis. 2d 739,747, 589 N. W. 2d 418 (Ct. App. 1998), the Court set forth the following discussion from the Commission's decision:

> "Certain factors must be kept in mind in evaluating such a motion in a case of this nature. First, this case involves a claim under the Fair Employment Act with respect to which petitioner has the burden of prov-

> ing that a hiring decision, which typically has a multi-faceted decisional basis, was motivated by an unlawfully discriminatory intent. Second, petitioner is unrepresented by counsel who presumably would be versed in the sometimes intricate procedural or evidentiary matters than can arise on such a motion. Third, this type of administrative proceeding involves a less rigorous procedural framework than a judicial proceeding. Therefore, particular care must be taken in evaluating each party's showing on the motion to ensure that petitioner's right to be heard is not unfairly eroded by engrafting a summary judgment process designed for judicial proceedings."

In this case, where there is no indication Ms. Henry would have the capacity to conduct the kind of discovery one could expect from a more experienced practitioner or an attorney, it would be inappropriate to require her to provide a detailed factual showing supported by affidavits in advance of a hearing. On the other hand, as the Commission indicated in *Balele v. DOT*, 00-0044-PC-ER, 10/23/01, one of the main purposes of utilizing summary judgment is to avoid the requirement of a hearing when the case can only be decided in one way:

> A key question in analyzing a motion for summary judgment is whether an evidentiary hearing would add anything to the adjudicative process:
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> > In general, pinpointing the location of an issue on the factual-legal spectrum is essential for assessing the appropriateness of summary judgment. In non-jury situations, however, the decision maker's role shifts from identifying the type of issue to appraising the value of full adjudication. In other words, in non-jury situations , including administrative evidentiary hearings, the critical question for determining summary judgment is: Would a complete adjudicative proceeding improve the decision maker's ability to resolve effectively the disputed factual or legal issue? R. Cammon Turner, Note, Streamlining EPA's NPDES Permit Program with Summary Judgment: Puerto Rico Aqueduct and Sewer Authority v. Environmental Protection Agency, 26 Environmental Law 729, 733 (1996) (footnote omitted)
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> This article goes on to discuss the materiality and genuineness requirements as follows:

> [A] non-moving party must advance a "material" factual dispute to avert a motion for summary judgment. If resolution of a factual dispute would not affect the final determination of the claim, the issue is immaterial and summary judgment is appropriate. . the materiality requirement applies equally to administrative summary judgment.
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> In addition to fulfilling the materiality requirement, a nonmoving party must also establish a genuine issue to avoid summary judgment. summary judgment is precluded when the dispute over a material fact is genuine. A genuine issue exists when a reasonable decision maker could render a favorable verdict to either party under the applicable standard of proof. Accordingly, the test for genuineness has become the applicable standard for assessing summary judgment proof. If it is clear that the nonmoving party cannot prevail at trial, summary judgment should be granted for the moving party The nonmoving party in the administrative context must also establish a genuine issue to avoid summary judgment. Id., 734-35. (footnotes omitted)

See also Puerto Rico Aqueduct and Sewer Authority v. United States Environmental Protection Agency, 35 F.3d 600, 605 (1st Cir 1994):

> To force an agency fully to adjudicate a dispute that is patently frivolous, or that can be resolved in only one way, or that can have no bearing on the disposition of the case, would be mindless, and would suffocate the root purpose for making available a summary procedure. Indeed, to argue--as does petitioner--that a speculative or purely theoretical dispute--in other words a non-genuine dispute--can derail summary judgment is sheer persiflage.

Balele v. DOT, pp.13-14.

In conclusion on this point, the Commission will construe petitioner's submissions with great liberality, and not require her to submit competent evidence on each point in the respondent's case she disputes. On the other hand, where it seems clear that petitioner is relying solely on a conclusory allegation of discrimination to oppose respondent's attempt to show it did not discriminate, or that her position rests on a position that is untenable as a matter of law, these issues will be decided in favor of respondent.

B. Analysis of the Motion

Analysis of this motion is complicated by, among other things, the fact that the parties stipulated to an issue in this (equal rights case) --"Whether respondent's decision to place the Payroll and Benefits Specialist-Confidential classification in broadband 81-05 rather than either 81-04 or 81-03 had a disparate impact on petitioner based on her sex"--that appears to shoehorn petitioner's case into a place which the Commission believes is, to some extent, inappropriate. This is because petitioner's case involves a comparable worth theory of liability, which is usually considered to involve a claim under the disparate treatment theory *See, e. g., Briggs v. City of Madison,* 536 F. Supp. 435, 443 (W D. Wis. 1982); *AFSCME v. Washington,* 578 F. Supp. 846 (W D. Wash. 1983); 2 Charles Sullivan, Michael Zimmer & Rebecca White, *Employment Discrimination Law and Practice*, s.7.08[F] (Third Edition, 2002). Also, the Commission must construe liberally petitioner's pro se appeal and complaint and other submissions. *See, e. g., Loomis v. Wis. Pers. Comm.*, 179 Wis. 2d 25, 30, 505 N W 2d 462 (Ct. App. 1993) (Pleadings are to be treated as flexible and are to be liberally construed); notwithstanding that the employee may have taken a position that is subsequently inconsistent with the way the case evolves, *see, e. g., Hiegel v. LIRC*, 121 Wis. 2d 205, 359 N. W 2d 405 (Ct. App. 1984) (Where the petitioner raised an issue at hearing that was outside both the scope of her complaint and the notice of hearing, both of which were drafted by her while she was pro se, and with some input from the Equal Rights Division, fundamental fairness required that the hearing be adjourned in midstream to allow for the new issue to be addressed). Accordingly, the Commission will not limit its analysis to disparate impact.

In *Racine Unified School Dist. v. LIRC,* 164 Wis. 2d 567, 594-95, 476 N. W 2d 707 (Ct. App. 1991), the court discussed the disparate treatment and disparate impact categories of claims as follows:

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[3] "Whether respondent's decision to place the Payroll and Benefits Specialist-Confidential classification in broadband 81-05 rather than either 81-04 or 81-03 had a disparate impact on petitioner based on her sex."

> Wisconsin law recognizes two theories of employment discrimination—the disparate impact theory and the disparate treatment theory. The disparate impact theory is invoked to attack facially neutral policies which, although applied evenly, impact more heavily on a protected group. Under the disparate treatment theory, the petitioner must show that the employer treats some people less favorably than others because they belong to a protected class. Thus, a petitioner asserting a disparate treatment theory must prove a discriminatory intent to prevail, while a petitioner asserting a disparate impact theory need not offer any such proof. (citations and footnote omitted)

The parties' filings reflect that in the late 1980's the PBS series, which is comprised predominately of female employees, received pay increases as a result of a DER comparable worth survey, to bring them up to parity with the YC and CO series, which are predominately male. Petitioner makes the point that subsequently the YO/CO series received increased pay ranges, while the PBS series did not:

> Since the end of 1996 youth counselors and officers and supervising youth counselors and supervising officers, who are predominately male, have gone up three pay ranges with no change in class specifications for their positions and, as far as I am aware, no survey. We were equivalent to the supervising youth counselors before their positions went up the pay ranges. The payroll and benefits specialists, who are predominately female, after a four-year survey, received one pay range or nothing. Many were, in fact demoted, due to broadbanding. On the basis of sex, I feel we have been discriminated against.
>
> The payroll and benefits specialist classification should receive equal treatment as that showed to the youth counselors and officers. This classification should also receive an increase of three pay ranges. The classification should then be broadbanded in the higher broadband of 81-03 the same as the supervising youth counselors and supervising officers. Finding of Fact 8.

The Fair Employment Act (FEA) contains the following two statutory provisions, which have potential relevance here:

> 111.322(1) [I]t is an act of employment discrimination to do any of the following:
> (1) To discriminate against any individual in compensation

> 111.36(1) Employment discrimination because of sex includes (a) Discriminating against any individual in compensation paid for equal or substantially similar work

Section 111.36(1)(a), Stats.

Wisconsin courts have likened the above-cited portion of §111.36(1)(a), Stats., to the federal Equal Pay Act, *Hiegel v. LIRC* 121, Wis.2d 205, 215, 359 N.W.2d 405 (Ct. App. 1984), and so has the Commission, *Plummer v. UW-Madison*, 97-0170, 980153-PC-ER, 3/6/01. Accordingly, in *Plummer*, the Commission considered an equal pay claim filed by a female professor regarding her wage as compared to male professors in the departments where she worked. The petitioner here is not comparing her wage to the wage of males in the same classification, or performing equal or substantially similar work, and, accordingly, she does not raise a claim under §111.36(1)(a), Stats.

The petitioner in effect raises a comparable worth claim that the PBS positions have lost the salary gains previously achieved with regard to the CYO and CO positions. In addition to the section of her complaint quoted above, she states in her October 2, 2001, letter to the Commission,

> My understanding of comparable worth was equal pay for equal work. This was specifically for the female dominated or clerical positions. It was found that clerical was doing work of *equal value* as that of youth counselors and correctional officers and were, therefore, given increases to make pay comparable. That is why correctional officers and youth counselors did not receive comparable worth increases. (emphasis added)

Thus while petitioner uses the term "equal pay for equal work," she is not claiming the work of PBS employees is equal or substantially similar to the YO/CO series, but rather that these classifications are of equal value—of comparable worth.

In *Hiegel v. LIRC,* 121 Wis. 2d 205, 359 N. W 2d 405 (Ct. App. 1984), the court, in discussing this issue, looked to Title VII cases for guidance in interpreting the FEA:

> Title VII has been construed to be broader than the Equal Pay Act, permitting proof of discrimination in compensation between two jobs without proving that the jobs are substantially similar. *See County of Washington v. Gunther*, 452 U.S. 161 (1981). *See also Goodrich v. International Brotherhood of Electrical Workers, AFL-CIO*, 712 F.2d 1488, 1490 n. 2 (D.C. Cir. 1983). In *Gunther* the United States Supreme Court decided that the claimants' failure to satisfy the equal work standard of the Equal Pay Act did not preclude their proceeding under Title VII. 452 U.S. at 166 n. 8, 181. While the *Gunther* case was not based on the controversial concept of "comparable worth," *id.* at 166, it appears that [the employer in *Hiegel*] fears that applying Title VII standards to the WFEA's prohibition against sex discrimination in compensation could result in interpreting the WFEA as proscribing unequal compensation based on sex for jobs having a comparable worth.

Hiegel, 121 Wis. 2d 214, n. 4. The *Hiegel* court did not resolve the question of whether comparable worth claims were actionable under the WFEA, because it found Hiegel's claim to be clearly an equal pay claim. *Id.* at 215.

Since the *Hiegel* decision, the doctrine of comparable worth does not appear to have taken root under either the disparate treatment theory or the disparate impact theory 6-110 David Larson, *Larson on Employment Discrimination* s. 110.03 (2002), summarizes the situation as follows:

> To summarize, there is no serious indication at this writing that courts will strike down employer's pay systems based on their own, or plaintiffs' idea of the comparability of dissimilar jobs. Although there are a few district courts that have refused to dismiss such complaints, no claim based upon "pure" comparable worth theory has succeeded on the merits. (footnotes omitted)

2 Charles Sullivan, Michael Zimmer & Rebecca White, *Employment Discrimination Law and Practice*, s.7.08[F] (Third Edition, 2002), includes the following discussion:

> Cases in the wake of *Gunther*[4] have held that employer reliance on prevailing labor markets that are predominantly segregated by gender in particular job categories does not establish the requisite intent to discriminate to be characterized as disparate treatment. This view must draw heavily from the Supreme Court view that mere knowledge of the

[4] *County of Washington v. Gunther,* 452 U. S. 161 (1981)

> consequences of adopting an employment practice with an adverse effect on one gender —in this case, use of the market for setting wage levels for various occupations —is not by itself a sufficient basis to conclude that the employer intended to discriminate. (citations omitted)

This work also posits that comparable worth can not give rise to a viable disparate impact claim, citing *County of Washington v. Gunther,* 452 U. S. 161 (1981), and notes that even if it were assumed disparate impact could be applied, an employer's reliance on the market would constitute a business necessity, citing *International Union v. Michigan,* 886 F. 2d 766, 770 (6th Cir. 1989). In the case before this Commission, respondent has alleged reliance on the market, and petitioner has not come up with anything to suggest this was not a legitimate business necessity. She argues that the retention and recruitment problems for the CO and YC series cited by respondent were only short term problems due to the opening of new correctional facilities and the need to fill a significant number of positions in a short time. Assuming for the sake of resolving this motion the factual premise for her argument, this does not provide a basis for denying respondent's motion. So long as respondent acted on the basis of a good faith belief in this business justification, and petitioner has not contended otherwise, there can be no basis for a WFEA claim without a comparable worth premise, which is not a viable theory of discrimination for the reasons discussed below.

Employment Discrimination Law and Practice goes on to point out that while "pure" comparable worth cases, i. e., cases where the employer's salary schedule is driven solely by market considerations, have been precluded by these legal developments, the door is still open for cases where the employee alleges that although the employer *claims* it was driven by market considerations, it *in fact* was motivated by an intent to discriminate against females. In *American Nurses' Association v. Illinois,* 783 F. 2d 716 (7th Cir. 1986), the Court included hypothetical examples of such allegations.

In that case, the Court first cited several other Court of Appeals' decisions that support the conclusion that a mere failure to achieve or maintain comparable worth

does not give rise to a successful claim under Title VII.[5] Then, in its analysis of the complaint before it to decide whether it alleged more than that, the Court provided examples of claims that presumably would be viable under Title VII:

> Suppose the state has declined to act on the results of the comparable worth study not because it prefers to pay (perhaps is forced by labor market or fiscal constraints to pay) market wages but because it thinks men deserve to be paid more than women. This would be the kind of deliberate sex discrimination that Title VII forbids The only thing that would make the failure [to implement the comparable worth study] a form of intentional and therefore actionable sex discrimination would be if the motivation for not implementing the study was the sex of the employees —if for example, the officials thought that men ought to be paid more than women even if there is no difference in skill or effort or in the conditions of work A complaint that alleges intentional sex discrimination . cannot be dismissed just because one of the practices, indeed the principal practice, instanced as intentional sex discrimination—the employer's failure to implement comparable worth —is lawful. 783 F. 2d at 726-27

See also Loyd v. Phillips Brothers, Inc. 25 F.3d 518, 525 (7th Cir. 1994).

Illinois Nurses Assn. was preceded by a 1982 decision in the Western District of Wisconsin by Judge Crabb, *Briggs v. City of Madison,* 536 F. Supp. 345, which also rejected the viability of a pure comparable worth claim under Title VII:

> [The premise for comparable worth liability] suffers . .from its exclusive focus upon historical events and societal attitudes, rather than upon allegedly unlawful acts of the employer who is the defendant in the lawsuit. The plain language of Title VII indicates the Congressional intent to influence and affect the conduct of employers. The statute's prohibitions are directed at the employer who violates the prohibitions and engages in an unlawful employment practice. The statute's remedial purpose is not so broad as to make employers liable for employment practices of others or for existing market conditions.
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> * * *
>
> Under Title VII, an employer's extends only to its own acts of discrimination. Nothing in the act indicates that the employer's liability extends to conditions of the marketplace which it did not create. Noth-

[5] Wisconsin courts frequently look to Title VII cases for guidance on deciding WFEA (Wisconsin Fair Employment Act, Subch. II, Ch. 111, Stats.) cases. *See, e. g., Bucyrus-Erie Co. v. DILHR,* 90 Wis. 2d 408, 421, n. 6, 280 N. W 2d 142 (1979).

> ing indicates that it is improper for an employee to pay the wage rates necessary to compete in the marketplace for qualified job applicants. 536 F. Supp. at 445, 447

While the Commission concludes as a matter of law that this complaint does not present a viable claim to the extent it constitutes a "pure" comparable worth case, i. e., to the extent it relies on the contention that the work of the PBS series is of comparable worth to the employer as the work of the CO/YC series and respondent has violated the WFEA by not assigning both to the same salary ranges (and counterpart pay ranges), the complaint may be viable if it is construed as claiming more than comparable worth per se. *See, e. g., American Nurses' Assn. v. State of Illinois,* 783 F. 2d 716, 726 (7th Cir. 1986): "Suppose the state has declined to act on the results of the comparable worth study not because it prefers to pay (perhaps is forced by the labor market or fiscal restraints to pay) market wages but because it thinks men deserve to be paid more than women. This would be the kind of deliberate sex discrimination that Title VII forbids." (citation omitted).

As discussed above, the Commission must accord petitioner's allegations a flexible and liberal interpretation. However, the Commission finds nothing in petitioner's submissions that allege some form of intentional sex discrimination that goes beyond the comparable worth claim.

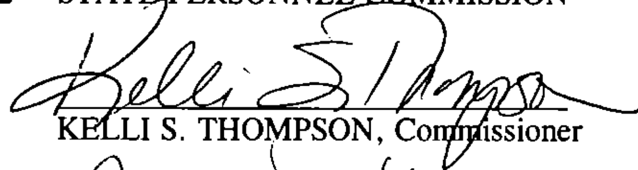
The Commission has also considered whether there is some aspect of petitioner's claim that is disadvantaged by dealing with it on a motion for summary judgment. However, the essential facts of this case are not in dispute, and it does not appear that a hearing on the merits would add anything that would lead to a different result.

ORDER

Respondents' motions are granted and these cases are dismissed.

Dated: September 10, 2002

STATE PERSONNEL COMMISSION



KELLI S. THOMPSON, Commissioner

ANTHONY J. THEODORE, Commissioner

KMS/JMR/AJT:010062Arul1.3

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Madison, WI 53707-7855

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 (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) 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 personally, 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.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.)

2/3/95