

STATE OF WISCONSIN

PERSONNEL COMMISSION

SHARON A. WALKER,
Complainant,

v.

**President, UW-SYSTEM (PLATTE-
VILLE),**
Respondent.

DECISION AND ORDER
ON PROBABLE CAUSE

Case No. 98-0168-PC-ER

NATURE OF THE CASE

This case is before the Commission following the issuance of a proposed decision and order on probable cause issued by a hearing examiner pursuant to §227.46, Wis. Stats. The parties have filed written objections and arguments with respect to the proposed decision. The Commission has considered these submittals and consulted with the examiner, and now adopts the attached proposed decision and order, with some changes¹, as its final disposition of the question of probable cause. The Commission first addresses respondent's attempt to bring in new evidence.

Respondent submitted as attachments to its objections copies of several articles from Montana newspapers concerning events which occurred early in 2002 related to Kevin Emerick, a witness called by complainant who was employed in the University of Wisconsin Platteville (UWP) athletic department during part of complainant's tenure, and who subsequently obtained employment in a university in Montana. These articles report on events involving Mr Emerick at Montana State University-Northern, where he has been serving as women's basketball coach. They report on a player boycott of practice and games in connection with their complaints of verbal abuse by Mr. Emerick, and court proceedings related to his suspension by the school in connection with allegations of a relationship with a former player, which was being litigated in the Montana courts.² Respondent argues that the Commission should

¹ Significant changes in the proposed decision and order are indicated by alphabetical footnotes.

² According to the media, a court had ordered the school to reinstate Mr. Emerick, and the school was trying to get the Montana Supreme Court involved in the proceeding.

“take judicial notice of this public fact and of media articles (enclosed) describing the circumstances surrounding Emerick’s suspension. As Mark Molesworth’s [the UWP athletic director] testimony indicates, and Emerick’s behavior and checkered employment history since departing UW-Platteville clearly shows, the Commission should not credit Emerick’s allegations about Chancellor Markee as even ‘attenuated’ evidence of pretext.” Respondent’s objections, p. 16.

The Administrative Procedure Act provides that an administrative agency “may take official notice of any generally recognized fact or any established technical or scientific fact.” §227.45(3), Stats. Clearly, the newspaper articles in question do not fall into this category, and the Commission declines to take official notice of them.

A somewhat related matter involves a comment in complainant’s reply to respondent’s objections. Complainant indicates that subsequent to the close of the hearing record, the then acting replacement for complainant, who is a white male, was appointed to the position on a permanent basis. The Commission has not considered this assertion in its resolution of this case.

The Commission has considered all of the parties’ arguments on the merits of this case. There is a lot of conflicting evidence, and reaching a conclusion has not been easy. Obviously, all the evidence must be considered in the context of the probable cause standard of proof.

Boldt v. LIRC, 173 Wis. 2d 469, 496 N. W. 2d 676 (Ct. App. 1992), the most significant precedent on this subject, includes the following:

The concept set out in Wis. Adm. Code sec. Ind 88.01(8)³ focuses on probabilities, not possibilities. *Pucci v. Rausch*, 51 Wis. 2d 513, 519, 187 N. W. 2d 138, 142 (1971), discusses the difference between these terms. Sec. Ind 88.01(8) adopts the viewpoint of a prudent, rather than a speculative, imaginative or partisan person. As such, it contemplates ordinary, everyday concepts of cause and effect upon which reasonable persons act. It is LIRC’s duty to consider the facts of each case and determine whether they meet this fluid concept.

Boldt asserts that LIRC required him to prove by the preponderance of the evidence that he was the victim of discrimination. This is incorrect. LIRC nowhere uses the term “preponderance of the evidence.” LIRC required Boldt to

³ The Commission uses an essentially identical rule. §PC 1.02(16), Wis. Adm. Code.

prove that probable cause existed. But not even Boldt asserts that General Motors was required to prove absence of probable cause. Though the standard of proof at a probable cause hearing is low, the burden of showing probable cause rests on Boldt. (citation omitted) 173 Wis. 2d at 475-76.

In its objections to the proposed decision, respondent characterizes the standard of proof as follows:

Probable cause “focuses on probabilities, not possibilities.” *Boldt v. LIRC*, 173 Wis. 2d 469, 475, 476 N. W. 2d 676, 678 (Wis. Ct. App. 1992). The probability standard “requires a conviction of the mind or that degree of positiveness” that the “belief is correct to a reasonable . . . certainty.” *Pucci v. Rausch*, 51 Wis. 2d 513, 519, 187 N. W. 2d 513, 519, 187 N. W. 2d 138, 142 (1971). Respondent’s objections, pp. 2-3.

In *Pucci*, the Court addressed an issue involving the degree of certitude a physician had to have in his or her opinion in order for it to be admissible in evidence. The sentence quoted from *Pucci* does not use the word “certainty,” as might be inferred from respondent’s quotation. Rather, it reads: “his belief is correct to a reasonable medical *probability*.⁴” *Pucci*, 51 Wis. 2d at 519 (emphasis added). The difference between “probability” and “certainty” is not insignificant in the instant context, where the Commission is attempting to apply distinctions in standards of proof that are inherently difficult. If *Boldt* is interpreted to require for a conclusion of probable cause that the trier of fact have the degree of certitude associated with “reasonable certainty,” as respondent contends, this would be inconsistent with *Boldt*’s emphasis that a complainant under the WFEA (Wisconsin Fair Employment Act; Subchapter II, Chapter 111, Wis. Stats.) is *not* required to prove his or her case by a preponderance of the evidence.

The Commission has utilized a preponderance of the evidence standard since its inception in all contexts save for probable cause issues. This approach stems from a Supreme Court decision involving the Commission’s predecessor agency. In *Reinke v. Personnel Board*, 53 Wis. 2d 123, 137, 191 N. W. 2d 833 (1971), the Court held that “the standard to be used by the Personnel Board in making its findings should be that used in ordinary civil actions, to a *reasonable certainty*, by the greater weight of the credible evidence standard.” (emphasis

⁴ The word “certainty” does not appear in *Pucci* following this quoted sentence until the last paragraph in the decision, which is four paragraphs later on page 520.

added) (citation omitted) The Commission does not interpret *Boldt* as interpreting the probable cause standard as requiring reasonable certainty. In *Boldt*, the court cites *Pucci* for its language distinguishing probabilities: “The concept set out in [§PC 1.02(16), Wis. Adm. Code] focuses on *probabilities, not possibilities*. *Pucci v. Rausch*, 51 Wis. 2d 513, 519, 187 N. W.2d 138, 142 (1971), discusses the difference between these terms.” 173 Wis. 2d at 475 (emphasis added)

In its objections to the proposed decision, respondent also contends that the “Commission is limited to determining if Chancellor Markee’s reasons for terminating Complainant were a pretext, i. e., a lie, concealing intentional discrimination.” Respondent’s objections, p. 3. This contention is inconsistent with *Puetz v. LIRC*, 126 Wis. 2d 168, 175, 376 N. W. 2d 372 (Ct. App. 1985):

A complainant may establish pretext either directly by showing that a discriminatory reason more likely motivated the employer or indirectly by showing the employer’s proffered explanation to be unworthy of credence. That a reason is pretextual does not mean it is false; the facts asserted may in fact be true but not the actual reason for the action taken. (citations omitted)

Furthermore, the law in Wisconsin is that an employment action constitutes unlawful discrimination under the WFEA if based in whole or in part on a discriminatory reason. *Hoell v. LIRC*, 186 Wis. 2d 603, 611, 522 N. W. 2d 234 (Ct. App. 1994). The Commission does not conclude that the complainant’s contract was not renewed solely because of an impermissible reason, but rather that there is probable cause to believe that the complainant’s contract was non-renewed in part because of impermissible reasons, and in part because of other factors.⁵

Respondent’s objections include many citations to federal cases. Federal Title VII and ADEA cases can be useful in analyzing WFEA cases, but they are not controlling. *See, e. g., Jim Walters Color Separations v. LIRC*, 226 Wis. 2d 334, 346, 595 N. W. 2d 68 (Ct. App. 1999). None of those decisions address the issues in the context of a probable cause level of proof, as opposed to a preponderance of the evidence level of proof. The type of evidence that

⁵ The question of whether the nonrenewal would have occurred in the absence of the impermissible factors will be addressed, if at all, at the hearing on the merits.

a federal court has found unpersuasive in a trial may have some probative value in the context of a probable cause determination.

Respondent contends that complainant's very favorable evaluations under Chancellor Culbertson, and the positive evaluation of her program by the North Central Accrediting Association, are essentially meaningless when considering Chancellor Markee's subsequent nonrenewal decision. Respondent cites, *inter alia*, *Cenr v. Fusibond Piping Systems, Inc.*, 135 F. 3d 445, 453 (7th Cir 1998), an ADEA case where the Court held that past raises and bonuses "do not prove that [plaintiff] was meeting [defendant's] expectations *at the time of his discharge*. 'the fact that an individual may have been qualified in the past does not mean he is qualified at a later time.'" (citations omitted) In the instant case, complainant's very favorable performance evaluations under Chancellor Culbertson do not mean that she was doing a good job under Chancellor Markee, but they do have probative value. While some of complainant's performance issues relate to changed expectations under Chancellor Markee, the nonrenewal decision was based on four factors. Two of these—morale problems among student affairs employees, and failure to address performance problems of a subordinate—are more generic issues. It is reasonable to question why such issues were not reflected in earlier views of her performance. For example, according to Chancellor Markee, he observed morale problems in Student Affairs early in his tenure. Poor morale presumably does not develop overnight, and that these problems were not reflected in either Chancellor Culbertson's or the accrediting association's evaluations is probative of pretext.

Respondent also objects to the comparison between Chancellor Markee's handling of complainant and Mr. Schumacher, citing, *inter alia*, *Shank v. Kelly-Springfield Tire Co.*, 128 F. 3d 474, 480 (7th Cir 1997). The Court held that a comparison of the employer's treatment of the plaintiff and a younger employee could not support a reasonable inference of pretext because "his situation was not comparable to [plaintiff's], and in any event, one example of better treatment is not enough to support an inference of discrimination, *Kuhn v. Ball State Univ.*, 78 F. 3d 330 (7th Cir 1996)." In *Kuhn*, the Court upheld a grant of summary judgment to the defendant. The plaintiff had relied in part on the fact a younger employee had been promoted. The Court pointed out that one example like this was meaningless, and that what plaintiff had

to do was "subject all of the employer's decisions to statistical analysis to find out whether age makes a difference." 78 F. 3d at 332.

In the instant case, complainant compared respondent's treatment of her and Schumacher on the basis of their specific situations. As respondent points out, it is common to rely on comparative treatment of other employees as evidence of discrimination. *See, e. g., Troupe v. The May Department Store Co.*, 20 F. 3d 734, 736, 739 (7th Cir. 1994) (circumstantial evidence of discrimination under Title VII can include "evidence, whether or not rigorously statistical, that employees similarly situated to the plaintiff received systematically better treatment. . . [plaintiff] would be halfway home if she could find one nonpregnant employee who had not been fired when about to begin a leave similar in length to hers.") While the Commission has acknowledged there are numerous differences between Mr. Schumacher's situation and complainant's situation, the Commission is not concerned simply with the fact that complainant's contract was nonrenewed, and Mr. Schumacher was not subjected to formal discipline. There is no indication that Chancellor Markee took action of any sort with regard to Mr. Schumacher or even spoke to him about his behavior, notwithstanding his assurances to complainant that he would talk to him. Furthermore, Mr. Schumacher was actually rewarded during this period when Chancellor Markee raised his salary increase from the level 1 raise (consistent with performance as expected) complainant recommended, to level 2 (consistent with performance above expectations). The only action that was taken was ultimately to remove him from student affairs, which is what he had been lobbying for all along. There is enough evidence here of a double standard, when combined with the other evidence previously discussed, to support a probable cause conclusion.

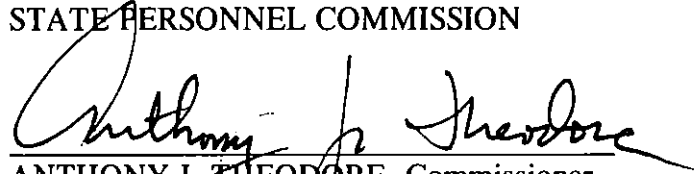
The Commission emphasizes that this is *not* a determination that there was discrimination. Rather, this is a decision, on the basis of all the evidence, that the definition of probable cause found in §PC 1.02(16), Wis. Adm. Code, has been satisfied, and complainant is entitled to a hearing on the merits.

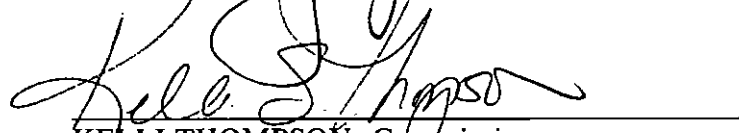
ORDER

The attached proposed decision and order, as amended, is adopted as the Commission's final determination on probable cause.

Dated: May 29, 2002.

STATE PERSONNEL COMMISSION


ANTHONY J. THEODORE, Commissioner


KELLI THOMPSON, Commissioner

AJT:980168Cdec3

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SHARON A. WALKER,
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**President, UW-SYSTEM
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Respondent.

**PROPOSED DECISION
AND ORDER**

Case No. 98-0168-PC-ER

NATURE OF THE CASE

This case is before the Commission on the following stipulated issue for hearing:

Whether there is probable cause to believe that respondent discriminated against complainant because of her race, sex or marital status¹ with respect to respondent's decision of June 30, 1998 that her contract would not be renewed and, accordingly, her last day of work would be June 30, 1999.²

FINDINGS OF FACT

1. Complainant is an African American woman.
2. Effective January 1, 1994, UW-Platteville (UWP) Chancellor Robert G. Culbertson (white male) appointed complainant to the position of Assistant Chancellor for Student Affairs (ACSA) with a starting annual salary of \$75,000.00. This appointment followed a competitive selection process, and a check of complainant's references which produced very good results. This was a limited academic staff appointment, which is defined in the Wisconsin Administrative Code as " a special appointment to a designated administrative position. A person in this type of appointment serves at the pleasure of the authorized official who made the appointment." §UWS15.01, Wis. Adm. Code.

¹ Complainant withdrew her marital status claim in her post-hearing brief.

² As is not uncommon in cases under the WFEA (Wisconsin Fair Employment Act [Ch. 111, Subch. II, Stats.]), a good deal of the evidence related to the work and performance of various employees besides the principals in this case. It should be kept in mind that these people were not on trial in this case, and they did not participate as parties with standing to respond directly to negative material concerning them.

3. The "General Statement of Responsibilities" for the ACSA position is set forth in the position description (Exhibit C12) as follows:

The [ACSA] is the chief administrative officer of the division of student affairs and as such manages and directs the various services, programs, and policies for students that contribute to and/or support the educational objectives of UW Platteville. The ACSA is expected to define and organize these services and programs and ensure that they are managed and delivered effectively in a manner that supports the mission of the institution. The ACSA represents the division on the institutional management and leadership team (cabinet).

4. Chancellor Culbertson was chancellor from August 13, 1993, to September 23, 1996. He then remained at UWP as a member of the faculty.

5. Chancellor Culbertson gave complainant outstanding performance evaluations, and merit-related salary increases which contributed to her salary of \$82,417, for academic year 1996-97

6. Chancellor Culbertson notified complainant of a one year contract extension via a letter dated October 30, 1994 (Exhibit C-4), which included the following:

You have done an outstanding job for this University in the short time you have been with us. Your expectations are clear, your concern for civility is outstanding, and your serving as a role model for our students is deeply appreciated by faculty, academic staff and myself.

7 In a memo dated June 23, 1995 (Exhibit C-5), Chancellor Culbertson stated:

This is to inform you that when you receive your salary letter you will receive the full 1% of base. I deeply regret it cannot be more this year. You have done a spectacular job and I consider you a valuable person, colleague and friend.

Your contract, by this letter is extended to June 30, 1997 Keep up the good work!

8. In 1996, Chancellor Culbertson advised complainant to request a multi-year appointment, rather than the normal one year appointment, which she did. On February 26, 1996, after reviewing her performance, goal statements and related documents, Chancellor Culbertson extended complainant's contract to June 30, 1999. In the contract extension letter (Exhibit C-8), Chancellor Culbertson thanked complainant for her "hard work, dedication to task and effort to bring our student affairs units to standards expected in university settings."

9. On August 14, 1996, David Markee (white male) succeeded Culbertson as Chancellor after Culbertson resigned.

10. On or about June 3, 1996, Katherine Lyall, President of the University of Wisconsin System, received a letter from a Platteville citizen, James R. Boll, complaining about Dr. Walker. (Exhibit R-20.) Among other things, Mr. Boll complained about the failure of an individual named Todd Landrum to be appointed as Athletic Director at UWP. Along with his cover letter to Katherine Lyall, Mr. Boll included a copy of a letter addressed to complainant. In the letter addressed to complainant, Mr. Boll accuses Dr. Walker of being at odds with the members of the Search and Screen Committee with regard to whether or not Mr. Landrum should have received the athletic director appointment. President Lyall responded to Mr. Boll by letter dated June 13, 1996, informing him that she had turned the matter over to Chancellor Culbertson to review the interview process for the UWP Athletic Director.

11. This matter was looked into by Chancellor Culbertson, who concluded that the Search Committee members had been unanimous in concluding that Todd Landrum had not met the minimum requirements, and that complainant had had no involvement in the committee deliberations.

12. On or about August 12, 1996, President Lyall sent a note to newly-appointed Chancellor Markee enclosing a letter she had recently received from Carolyn Hansen of Peoria, Illinois, dated August 2, 1996. In that letter, in addition to expressing her approval of the selection of Chancellor Markee, a former classmate of hers at UWP in the 1960's, Hansen complained about Dr. Walker. (Exhibit R-24 and Exhibit R-21.) The letter stated that, although she had "no first-hand knowledge of the situation," she had been informed that Dr. Walker's "presence has caused a number of resignations and that many professionals are wishing for her resignation/replacement." (Exhibit R-21.) The note from President Lyall to Chancellor Markee stated as follows: "I've gotten about a half dozen letters expressing this same concern about Dr. Walker. You may want to look into this." President Lyall never provided those "half dozen letters" to Chancellor Markee, and they are not part of this record.

13. Chancellor Markee interpreted Katherine Lyall's August 12, 1996, memo to him as requesting him to "[t]ake a look and see if it's a good match, good fit, if things are working

as they should because there are some concerns that had been shared.” (Tr. Vol. I, 69³). After receiving this memo from Katherine Lyall, Chancellor Markee did not review Dr Walker’s performance evaluations. Respondent never provided a copy of this letter to complainant or apprised her of its contents.

14. The only evidence in the record of anyone having resigned due to complainant prior to this point involved Daryl Leonard. Ms. Leonard was the Director of Athletics from July 1, 1992 to June 30, 1996. In a May 19, 1997, “affirmative action exit questionnaire,” Daryl Leonard accused Dr. Walker of having “no management skills” and “no communication skills.” (Exhibit R-12.) Chancellor Culbertson in 1995 had investigated personnel problems in Daryl Leonard’s office, and reached the conclusion that the personnel problems in Ms. Leonard’s office, and any resulting stress, were attributable not to complainant but to Ms. Leonard. Chancellor Markee did not consider Ms. Leonard’s situation in his decision not to renew complainant’s contract.

15. Chancellor Markee came to UWP with extensive expertise in student affairs, with an emphasis on “enrollment management.” Enrollment management involves establishing target goals for the enrollment of university students—including certain demographic goals—and then engaging in effective recruitment and retention activities to meet those targets. Chancellor Markee had also done award-winning work in establishing educational programs for African American, Native American and Hispanic students. In addition, he was an experienced administrator, having supervised and mentored a number of minority group members and women.

16. Upon assuming office, Chancellor Markee was confronted with the problem that UWP was below its enrollment management targets, and he determined to take steps, including organizational changes, to address this issue. Based on his long-standing educational philosophy, he believed that enrollment management should be part of student affairs, and that top

³ The hearing transcript is in four volumes. The court reporter made an error in page numbering, in that Vol. II includes pp. 250-475, but Vol III starts with p. 437, and thus there are two different sets of pp. 437-475. To avoid confusion, all citations to the transcript include both volume and page references.

UWP officials (including himself) should be involved in outreach efforts and the “marketing” of the institution.

17 Shortly before his appointment became effective, Chancellor Markee met with the administrative cabinet and the deans, following which he met with complainant. He indicated to her that he wanted her to do something with recruitment and asked complainant about the relationship between the Division of Student Affairs and the Department of Admissions and Enrollment Management. Chancellor Markee also commented to complainant that Ralph Curtis, the Provost (white male), who had never served as complainant’s supervisor, had said she “micromanaged.”

18. Chancellor Markee met with complainant several times subsequently in 1996, to discuss how her division could be realigned or reorganized. Chancellor Markee spoke about his concern that complainant had too many program directors reporting directly to her, including some who were part-time and had relatively small-scale programs, thus involving complainant in dealing with too many relatively minor issues. He indicated that he wanted to move Admissions and Enrollment Management from the Division of Academic Affairs to the Division of Student Affairs, and that he wanted Career Planning and Placement to become part of that Admissions and Enrollment Management group, as well as other organizational changes.

19. Complainant expressed reservations about the restructuring, including her concern that the structure Chancellor Markee described would result in all white males reporting to her, which amounted to a reversion to the structure that had existed in the Division of Student Affairs prior to her arrival. In 1994, complainant had implemented a reorganization of the Division of Student Affairs that Chancellor Culbertson had approved. The new organizational structure complainant had instituted included a number of women and a person of color reporting directly to her.

20. In the course of planning the reorganization in the fall of 1996, Chancellor Markee asked complainant to solicit information from personnel in the Division of Student Affairs who would be affected. One of the individuals who responded to complainant’s request for feedback was Mahi Tandon, the Director of the Office of Foreign Students Services. Among other things, the reorganization would eliminate her direct reporting relationship to the com-

plainant. In a memo to complainant dated December 15, 1996, (Exhibit C-42), Ms. Tandon objected to the proposed changes, in particular a proposed merger of the Offices of Multicultural Services, Foreign Student Services and the Women's Center, for several reasons.

21. In a personal note to complainant, Ms. Tandon further commented on the proposed changes as follows: "I am very disappointed and discouraged because I had finally found a supervisor who is knowledgeable, fair and sincere and now I am faced with the prospect of going back to a very stressful, unsuccessful and unproductive merger. If given a choice, I would like to stay where I am and report to you. "

22. In a memo to complainant dated December 16, 1996, (Exhibit C-49), Jane Spinti, the director of the program serving students with disabilities, who also would be losing her direct reporting relationship to the complainant, raised a number of concerns about the proposed restructuring of the Division of Student Affairs. One of the concerns was the reduction in diversity in management ranks that would result. Ms. Spinti added, "I feel it will be difficult and destructive to my morale, to be directed by a co-worker that until now I have been on equal footing with."

23. In early December 1996, the North Central Accrediting Association, a college accrediting organization, completed its ten-year review of UWP. North Central is one of the primary accrediting organizations for UWP. North Central's final report included a favorable review of the Division of Student Affairs. No deficiencies were noted by North Central in regard to the programs and services included in the Division of Student Affairs. Although some areas of the UWP were found to need improvement by North Central, none of the areas identified as needing improvement were within the Division of Student Affairs.

24. On December 17, 1996, the top administrators at UWP attended a retreat called by Chancellor Markee. At the retreat, Chancellor Markee outlined the changes that were to take place in the Division of Student Affairs. He announced, among other things, that the Department of Admissions and Enrollment Management would be moved to Student Affairs, and that Career Planning and Placement would become part of the Department of Admissions and Enrollment Management.

25. The reorganization of the Division of Student Affairs announced by Chancellor Markee at this retreat was effective February 1, 1997. As one of the consequences of the reorganization, faculty member Dick Schumacher, in his capacity as Director of Admissions and Enrollment Management, took over the direct supervision of the Office of Career Planning and Placement headed by Sandra Stacy. Prior to the reorganization, complainant had served as Sandra Stacy's immediate supervisor. Another result of the reorganization was that Mr. Schumacher reported to complainant rather than to Provost Curtis. Mr. Schumacher was adamantly opposed to the move, and complained about it frequently to both complainant and Dean Markee. He refused to attend scheduled meetings with complainant and he was significantly overdue completing reports and assignments. Complainant approached Chancellor Markee for assistance in supervising Mr. Schumacher, but he (Markee) took no action until finally, in June 1998, she asked him to reassign him (Schumacher), and Chancellor Markee assigned Mr. Schumacher to report directly to him.[^] During this period, Mr. Schumacher received a Step 2 salary increase, consistent with a rating of performing above expectations, when Chancellor Markee overruled complainant's recommendation of a Level 1 raise, consistent with performance as expected.

26. On February 13, 1997, complainant completed the calendar year 1996 performance evaluation of Sandra Stacy in her capacity as her (Stacy's) immediate supervisor during that period (Exhibit C-74) Complainant recommended a Level 3 (highest) raise for Ms. Stacy at that time. Among the accomplishments noted in Ms. Stacy's evaluation were a 7.6% increase in the number of companies interviewing on campus; a 16.1% increase in the number of interviews; a 10.8% increase in the number of students registered with the Office of Career Planning and Placement; a 100% increase in the number of co-op interviews; a 7.6% increase in the number of intern interviews; a 36.5% increase in the number of resumes sent to employers; and a slight decrease in the budget. On March 19, 1997, Chancellor Markee approved the Level 3 raise for Ms. Stacy.

[^] The last three sentences are added to this finding to make an explicit finding regarding information found in the opinion.

27. Chancellor Markee and others in the administration had received informal complaints about Ms. Stacy's performance, including that she was not available to students, that she spent too few hours at work, and that while in her office she was often occupied with knitting.

28. Chancellor Markee never asked complainant to do an evaluation of Ms. Stacy after February 1, 1997, because of the contrast between her view of Stacy's performance and Mr. Schumacher's opinion of her (Stacy's) performance.

29. Towards the end of 1997, Ms. Stacy went to Ms. Kelley with a complaint that she had been sexually harassed by Mr. Schumacher with regard to a comment he had made to her about "hitching up her girdle." This complaint was handled at an informal meeting involving the chancellor, Ms. Kelley, Mr. Schumacher, and Ms. Stacy, where Chancellor Markee verbally reprimanded Mr. Schumacher, who apologized for his remark. Ms. Stacy requested that someone other than Mr. Schumacher do her 1997 performance evaluation⁴ because she was concerned about possible retaliation, and Chancellor Markee gave this assignment to Judy Paul, associate vice chancellor, and Steve Zielke, assistant chancellor for business affairs. Their ensuing evaluation was consistent with the complaints about Ms. Stacy mentioned above, and inconsistent with complainant's general view of Ms. Stacy's performance.

30. Chancellor Markee met with complainant in June 1997, for an evaluation conference for academic year 1996-97. He told her that the year had gone well. He did not suggest any areas of needed improvement, nor did he give any indication to complainant that her job was in jeopardy. He also did not question any of the significant accomplishments listed by complainant in her self-evaluation.

31. An organizational chart complainant prepared for the Division of Student Affairs reflecting the changes that had taken effect on February 1, 1997 (Exhibit C-44) shows 12 program directors reporting directly to the complainant.

32. On November 7, 1997, Chancellor Markee wrote to complainant informing her that she would receive a salary increase for the 1997-1998 year in the amount of \$3,297.00,

⁴ Mr. Schumacher had taken over her supervision on February 1, 1997

which included an \$824.00 base adjustment.⁵ (Exhibit C-41). As Dr Markee pointed out to her, that brought her annual base salary to \$86,538.00. The letter contains no critical comments or suggestions for improvement in her performance.

33. On or about October 8, 1997, Elise Rogers (African American female) resigned after about five (5) weeks of employment as Director of Multicultural Services, which was part of the Division of Student Affairs. She had replaced Al Thompson (African American male). When Al Thompson had been the Director of Multicultural Services, he had reported directly to Chancellor Markee, whereas when Ms. Rogers was hired the position no longer reported directly to Chancellor Markee but to complainant, a fact which Ms. Rogers complained about to Chancellor Markee.

34. Ms. Rogers' father died in late September 1997. Shortly after she returned from a subsequent one-week leave, Ms. Rogers expressed her dissatisfaction with her job to complainant, saying that she wasn't happy being in Platteville, that she had been to see the Chancellor, and that she was planning to leave at the end of the academic year.

35. In meetings with Chancellor Markee on September 25, 1997, and Affirmative Action Officer/Personnel Manager Kate Kelley on October 1, 1997, Ms. Rogers complained about "micromanaging" by complainant, which was part of a conflict of management styles, as two of the reasons, among others, for her abrupt decision to leave. She also said she was in a difficult situation due to her father's death and the fact she also was working on her dissertation. Ms. Kelley asked her if her decision would change if there were less micromanaging, and she said it would not.

36. Shortly after Ms. Rogers made her decision to leave, an article (Exhibit C-28) appeared in a local paper, which attributed her departure to "a disagreement over management styles" with complainant. Complainant felt that this reference was derogatory to her professionally. The article had been based on a press release (Exhibit C-30) written by Rich Fujita, the Director of Information Services. Chancellor Markee had no role in this press release, for which Mr. Fujita subsequently apologized (Exhibit C-31).

⁵ Based on the salary process at UWP, this raise would be considered at least in part a merit increase.

37 At the beginning of the 1997-98 academic year, an issue arose with regard to a request by Shelley Till (white female), the head women's basketball coach, for a revised work schedule in connection with her pregnancy. This situation grew to include Title IX issues regarding funding and staffing the women's basketball program.

38. When the Athletic Director, Mark Molesworth (white male), mentioned the Title IX issues to complainant, she went to Chancellor Markee and asked for permission to consult directly about these issues with UW System legal counsel in Madison. Chancellor Markee told her not to do this.

39. Chancellor Markee denied complainant's request in keeping with his decision to have Mr. Molesworth be the main liaison between the UWP and its counsel on the Title IX matters raised by Ms. Till, who filed a complaint in Dane County Circuit Court on November 12, 1998, in which she named Chancellor Markee and Mr. Molesworth as defendants. Chancellor Markee's philosophy on such matters was that the individuals who had the information directly related to matters involved in litigation should be the ones who worked with counsel. Mr. Molesworth as Athletic Director was in the best position to function in that role. He did tell Mr. Molesworth to keep both him (the Chancellor) and complainant informed about what was going on.

40. Kevin Emerick (white male) was the assistant women's basketball coach and took over as interim head coach for the 1997-98 season when Ms. Till was on leave in connection with her pregnancy. He was involved in a dispute with Mr. Molesworth in connection with the handling of the search for a full-time coach to replace Ms. Till on a permanent basis for the 1998-99 season, Ms. Till never having returned to UWP after her leave. Ultimately, Mr. Emerick was not hired.

41. In a July 10, 1998, letter to Chancellor Markee (with copies to complainant and Mr. Molesworth) (Exhibit C-62, last page), Mr. Emerick raised a number of matters concerning the Shelley Till proceeding and his own employment situation:

I was told by our A.D. to not discuss Shelley Till's situation with Dr Walker at all during this past year as she was a black female and might be sym-

pathetic to her complaint⁶ I was also told that Athletics was going to be removed from Dr Walker's area of control and that he (Mr. Molesworth) was reporting directly to Dr Markee. I was told instead to go directly to the Chancellor and that he was in full support of the retaliation against Ms. Till and that he (the Chancellor) was directing the process of removing her from employment because of her stance on gender equity. I discussed this situation with Mr. Molesworth after he met several times with the Chancellor and became convinced that this indeed was the case.

I realize now after meeting with Dr. Markee that he most likely was not aware entirely of what Mr Molesworth was doing to retaliate against Ms. Till and that Mark [Molesworth] was simply using the Chancellors' name to lend credibility to the retaliation.

I believe Shelley Till was mistreated for her stance on Women's rights and Title IX. I also have been retaliated against since March when I stood up for these issues. Recently I have been offered a contract for \$3,000 less than was previously agreed to I believe as a result of my willingness to voice these concerns. I also believe money is being moved illegally from one account to the next in an attempt to hide things from the investigators and that this has been going on for some time as a regular practice in his department.

I look forward to working here next year on the previously agreed to contract of \$14,000.

42. There is sufficient evidence in this record to support a finding in the context of the probable cause standard of proof that Mr. Molesworth made statements to Mr. Emerick that are consistent with Mr. Emerick's characterization in this letter

43. Al Thompson (black male) was the Director of Multi-Cultural Services from July 1988-June 30, 1997, who preceded Elise Rogers. He completed an exit survey on May 19, 1997 (Exhibit R-12A), that was very critical of complainant. Some of the remarks include:

Over the past three years, I feel the support from my immediate supervisor (Dr. Walker) has at times been hostile and non-supportive. At times, I have feared my job security. The lack of support from Dr. Walker is the one area that bothered me over time. Her stripping me of signing authority last summer and a "constant" feeling of everything I or MCS [multi-cultural services] was not good enough. Complainant has no management skills and makes life miserable for her directors.

⁶ Since Ms. Till is a white female who was raising issues about gender-based discrimination, it is not apparent how complainant's race figures in to this situation.

Sometime in 1997, Ms. Kelley discussed Mr. Thompson's exit interview with Chancellor Markee.

44. Chancellor Markee met with complainant in mid-December 1997. Chancellor Markee told her they were not getting along, that she was micro-managing, that she hadn't taken leadership in dealing with issues concerning Ms. Stacy, and that Mr. Thompson had complained about her management. He also told her he wanted her to do something with recruitment. Her response included a statement that she was not interested in being a recruiter.

45. In a January 8, 1998, memo to complainant (Exhibit C 51) concerning the "Management Plan for the Second Semester," Chancellor Markee stated:

Key issues that need to be addressed include establishing relationships within the community, region, and public schools. Particular attention to those relationships that relate to the quality of the student experiences on the campus and those that encourage applications from individuals who may have a concern about the quality of the experiences on the campus and those that encourage applications from individuals who may have concerns about the quality of the experiences at Platteville.

I believe you are perfectly positioned to address off-campus issues related to these areas. Our relationship with key state high schools, including our target high schools, is extremely important. Increasing the matriculation rate at Platteville from these schools must be a high priority.

I know this is a management style change, but I think it is what the institution needs and the division of student services is well positioned to handle the change. There are many strong managers within the division who can address the day-to-day operational issues and directions.

46. In response to this memo, complainant in her January 16, 1998, memo (Exhibit C-55) raised strong reservations about participating in these activities in the way Chancellor Markee desired. She prefaced her specific remarks with a statement that included the following: "I remain hopeful that you will carefully consider the issues which I raise, and be willing to negotiate a plan which honestly reflects the needs of the University of Wisconsin-Platteville, and genuinely demonstrates value for me as a professional, and as a person." Later in this memo she responded to the specific area of establishing relationships in the community, re-

gion, and public schools, by first enumerating her activities in the community (Platteville) and the region, and then continuing as follows:

Public schools—this section of your letter is of great concern to me. I believe that I am being directed to become the minority or rather African-American recruiter for the University. This is not a position which I have ever held, not a position for which I accepted employment at this institution, and not a role I am interested in assuming.

This request appears to blatantly overlook the obvious responsibility of the Dean of Admissions and Enrollment Management [Schumacher] for establishing the very contacts which you describe.

In my more than twenty-one consecutive years of employment at colleges and universities in five (5) different states, there have been few occasions when I have been asked or had to assume responsibility for a task within the position description of one of my employees. Those occasions have included illness, vacancies caused by resignation or termination, or absence due to length of contract. I have never been asked to perform the work of a sitting employee hired and paid to perform a job.

Is this directive based on my ethnicity? If not, why has this assignment been given to me.?

I look forward to finalizing my work plan for the semester and bringing closure to this matter

In addition to her statements in this memo, complainant told Chancellor Markee in discussions that she would not participate in the recruitment activities in which he wanted her to engage.

47 As of the time of her memo, complainant had not participated in any efforts in support of recruitment in high schools outside the Platteville region.

48. The complainant and the chancellor met on January 21, 1998. At this meeting they discussed these memos. Chancellor Markee said he had considered what she had said, but that there would be no changes in the points he had made in his memo.

49. At a March 4, 1998, meeting, Chancellor Markee told complainant he had decided not to renew her contract beyond its current expiration date of June 30, 1999.

50. Complainant was replaced by Mick Viney, a white male, serving on an acting basis. He only visited schools once or twice in 18 months.^B

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §230.45(1)(b), Stats.
2. The complainant has the burden of proof to establish there is probable cause to believe that respondent discriminated against complainant on the basis of race or sex with respect to the decision not to renew complainant's contract beyond June 30, 1999.
3. Complainant has^C satisfied her burden of proof.
4. There is probable cause to believe respondent was motivated in part by considerations of race or sex with respect to the decision not to renew complainant's contract beyond June 30, 1999.

OPINION

This is a probable cause determination. "Probable cause" is defined as "a reasonable ground for belief, supported by facts and circumstances strong enough in themselves to warrant a prudent person to believe that a violation probably has been or is being committed as alleged in the complaint." § PC 1.02(16), Wis. Adm. Code. In a probable cause proceeding, the evidentiary standard applied is not as rigorous as that which is required at the hearing on the merits. *See Boldt v. LIRC*, 173 Wis. 2d 469, 496 N. W 2d 676 (Ct. App. 1992). Although the burden of showing probable cause is on the complainant, the "standard of proof at a probable cause hearing is low." 173 Wis. 2d at 476. The Court stated that the concept of probable cause "focuses on probabilities, not possibilities. [The rule] adopts the viewpoint of a prudent, rather than a speculative, imaginative, or partisan person. As such, it contemplates ordinary, everyday concepts of cause and effect upon which reasonable persons act. It is [the adjudica-

^B This finding is added to reflect information referred to in the opinion.

^C The word "partially" is deleted. Since a complainant can establish a claim by showing that respondent was motivated in part by reasons of race or sex, she has satisfied her burden of proof.

tive agency's] duty to consider the facts of each case and determine whether they meet this fluid concept." 173 Wis. 2d at 475-76⁷

In *Winters v. DOT*, 84-0003-PC-ER, 9/4/86, the Commission characterized the concept of probable cause as "'not synonymous with 'preponderance,' being somewhere between 'preponderance' and 'suspicion.'" P. 17 (citation omitted) See also *Hintz v. Flambeau Medical Center*, Labor and Industry Review Commission (LIRC), 8/9/89 (Probable cause requires less than a preponderance of the evidence and can be characterized as somewhere between preponderance and suspicion, citing *Winters*.) In a probable cause proceeding, the Commission is to weigh all the evidence, and to consider the credibility of the witnesses, in making its determination. *Winters v. DOT*, 84-0003-PC-ER, 9/4/86; citing *McLester v. Personnel Commission*, 84-1715 (Ct. App. 1985) (unpublished), and "is not limited to merely examining whether the petitioner has presented evidence which, if believed, would be sufficient to support his claim." *Winters*, p. 16.

Under the Wisconsin Fair Employment Act (FEA), the initial burden of proof is on the complainant to show a prima facie case of discrimination. If complainant meets this burden, the employer then has the burden of articulating a non-discriminatory reason for the actions taken which the complainant may, in turn, attempt to show was a pretext for discrimination. *McDonnell-Douglas v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 5 FEP Cases 965 (1973), *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 25 FEP Cases 113 (1981). The *McDonnell-Douglas* framework is a useful tool in a probable cause proceeding, notwithstanding that the standard or level of proof required is less rigorous than in a hearing on the merits. *Larson v. DILHR*, 86-0019-PC-ER, 1/12/89.

Complainant alleges she was discriminated against based on her race and sex when her employment was effectively terminated when respondent decided that her employment would not be continued beyond her current contract.

In the case of a discharge, the elements of a prima facie case are that: 1) the complainant is a member of a group protected under the FEA, 2) the complainant was qualified for the

⁷ The findings of fact in this decision and the ultimate conclusion on probable cause are based on the standard of proof set forth in *Boldt*.

job, 3) the complainant was terminated, and 4) the complainant was replaced by someone not in the protected group, or others not in the protected group were treated more favorably. *Puetz v. LIRC*, 126 Wis. 2d 168, 173, 376 N. W. 2d 372 (Ct. App. 1985). In this case, the complainant is in protected groups on the bases of her race and gender, she was qualified for the job as shown by her hiring after a competitive process and her evaluations under Chancellor Culbertson, she was terminated from her employment with respondent as a result of having her contract non-renewed, and she was replaced on an acting basis by a white male. While the parties dispute whether the latter circumstance (replacement serving on an acting basis) is consistent with a prima facie case, it is enough to create an inference of discrimination in this probable cause proceeding, and, in any event, where the case has been tried fully, it is unnecessary to analyze whether a prima facie case has been established,⁸ and the Commission should go ahead and address the question of pretext. *See United States Postal Service Board of Governors v. Aikens*, 460 U. S. 711, 103 S. Ct. 1478, 75 L. Ed. 2d 403, 1983 U. S. LEXIS 141 (1983).

Respondent presented a non-discriminatory rationale for its decision not to renew complainant's contract, which was set forth in respondent's post-hearing brief as follows:

[R]espondent has articulated and proved legitimate, nondiscriminatory reasons for its decision to terminate her employment. As Chancellor Markee testified, he and he alone made the decision to terminate complainant, based on: (1) her failure to take part in the enrollment management activities and the necessary school and community relationship-building that enrollment management entails; (2) the morale problems in her work unit; (3) her failure to address effectively or appropriately performance problems with the placement office director; (4) her intra-office staff organization. Respondent's post-hearing brief, pp. 11-12.

With regard to pretext, the first thing that stands out is former Chancellor Culbertson's evaluation of complainant's performance. His overall evaluation is diametrically opposed to Chancellor Markee's ultimate assessment. In Chancellor Culbertson's opinion, complainant

⁸ An exception to this approach is where there is a missing element of a prima facie case which is also an essential element for establishing liability. For example, if a person has not established that he or she is at least 40 years old and thus covered by the WFEA age discrimination provision, §111.33(1), Stats., it is not possible for that person to establish an age discrimination claim even if the employer's

did a superb job, while Chancellor Markee concluded that complainant's performance was problematical enough to warrant not renewing her contract. Obviously, different administrators can have different priorities and different criteria for evaluating employees. For example, Chancellor Culbertson had concurred in complainant's reorganization of her division, while Chancellor Markee favored a significantly different organization. But for an employee to go from "spectacular" in one administration to being so deficient and intractable as to lead to a decision of non-renewal under the succeeding administration, indicates pretext. Another related factor is the favorable evaluation complainant's unit received from the North Central Accrediting Association just before Chancellor Markee's arrival. On this record, this constitutes a well-informed opinion by a neutral party that bears directly on the matter of complainant's performance.

With respect to the specific reasons on which respondent relies, the parties differ as to the degree of complainant's recalcitrance to following Chancellor Markee's ideas concerning reorganization and recruiting or marketing activities. When he was appointed to his position, he had a long-standing and well-developed philosophy that enrollment management was very important to a university. A key precept of his approach was that top officials of the university (including himself) should be personally involved in recruiting and establishing relationships in the communities and the schools necessary to facilitate enrollment management goals. In a January 8, 1998, memo to complainant (Exhibit C-51) concerning the "Management Plan for the Second Semester," he stated:

Key issues that need to be addressed include establishing relationships within the community, region, and public schools. Particular attention to those relationships that relate to the quality of the student experiences on the campus and those that encourage applications from individuals who may have a concern about the quality of the experiences on the campus and those that encourage applications from individuals who may have concerns about the quality of the experiences at Platteville.

I believe you are perfectly positioned to address off-campus issues related to these areas. Our relationship with key state high schools, including our target

proffered reason for its action were pretextual, and there would be no reason for analyzing the question of pretext.

high schools, is extremely important. Increasing the matriculation rate at Platteville from these schools must be a high priority.

I know this is a management style change, but I think it is what the institution needs and the division of student services is well positioned to handle the change. There are many strong managers within the division who can address the day-to-day operational issues and directions.

In response to this memo, complainant expressed strong reservations about participating in these activities in the way Chancellor Markee desired. In her January 16, 1998, memo (Exhibit C-55) she prefaced her specific remarks with a statement that included the following: "I remain hopeful that you will carefully consider the issues which I raise, and be willing to negotiate a plan which honestly reflects the needs of the University of Wisconsin-Platteville, and genuinely demonstrates value for me as a professional, and as a person." Later in this memo she responded to the specific area of establishing relationships in the community, region, and public schools, by first enumerating her activities in the community (Platteville) and the region, and then continuing as follows:

Public schools—this section of your letter is of great concern to me. I believe that I am being directed to become the minority or rather African-American recruiter for the University. This is not a position which I have ever held, not a position for which I accepted employment at this institution, and not a role I am interested in assuming.

This request appears to blatantly overlook the obvious responsibility of the Dean of Admissions and Enrollment Management [Schumacher] for establishing the very contacts which you describe.

In my more than twenty-one consecutive years of employment at colleges and universities in five (5) different states, there have been few occasions when I have been asked or had to assume responsibility for a task within the position description of one of my employees. Those occasions have included illness, vacancies caused by resignation or termination, or absence due to length of contract. I have never been asked to perform the work of a sitting employee hired and paid to perform a job.

Is this directive based on my ethnicity? If not, why has this assignment been given to me.?

I look forward to finalizing my work plan for the semester and bringing closure to this matter

This memo evidences strong reluctance to comply with Chancellor Markee's wishes in this area. In her post-hearing brief, she characterizes this response as follows: "Dr. Walker did not state that she would refuse to do her part; she simply wanted clarification as to what the Chancellor was asking her to do." Complainant's post-hearing brief, p. 43. This is not a reasonable characterization of this memo. It goes a good deal beyond a request for clarification, and indicates the complainant was very reluctant to comply with what Chancellor Markee wanted done. It could reasonably be expected that he would be dissatisfied with such a response.

There is some evidence of pretext related specifically to this issue. In his hearing testimony, Chancellor Markee testified at some length about the importance of the student affairs unit, including the Assistant Chancellor for Student Affairs, going out to the schools and the community to do outreach work with the leaders of the schools and the community at large. For example, he testified:

I did not expect Dr. Walker, and we had this conversation very directly, we—I did not expect her to be sitting down with 20 students and recruit students. I expected her to be out maybe at the same time the recruiters go out and visit with those officials but not be sitting in the room. Tr. Vol. IV, 790.

However, complainant's replacement, Mick Viney, only went out to the schools once or twice in eighteen months of acting service. This suggests that respondent's characterization of its concern in this area was overstated.

Part of complainant's recalcitrance with regard to compliance with Chancellor Markee's administrative philosophy involved her failure to implement Chancellor Markee's concepts regarding the reorganization of Student Affairs. While complainant did make the specific organizational changes mandated by Chancellor Markee at the December 1996 retreat, she did not take the initiative to implement the Chancellor's organizational philosophy. Then, in her January 16, 1998, memo (Exhibit C-55) responding to his "Management Plan for Second Semester" (Exhibit C-51), she reiterated her belief that his approach was an unwise reversion to the type of system that had existed when she had started in January 1994, and which she had

changed with Chancellor Culbertson's concurrence. In light of the facts that Chancellor Markee had been talking to complainant for well over a year about his ideas regarding reducing the number of her direct reports, increasing the amount of delegation, and relieving complainant of a lot of what he considered to be detail work, and that complainant had done very little to implement his concepts beyond implementing the reorganization he had specifically directed, it would be a reasonable reaction for him to be dissatisfied with complainant's response. However, in her January 16, 1998, memo (Exhibit C-51) she did propose an approach she believed would address to some extent both of their points of view:

Because I am philosophically opposed to a return to the former structure, I wish to propose the use of three working groups—enrollment management, auxiliary operations and personal development services—with rotating chairpersons. This structure would create more leadership development opportunities for a larger number of directors. Each group would meet twice during the Spring Semester.

Your recommendation regarding staff meetings for Student Affairs Directors [ever 4-6 weeks] is somewhat baffling. Currently program directors meet twice each month from 1:30 p. m. to 3:00 p. m. (1 1/2 hours). This is less frequent than the weekly Dean's Council meeting or the weekly Cabinet/Deans meeting.

While I personally believe this request represents micro-management at its very worse, I am willing to propose a monthly meeting on a trial basis. I would also request the freedom to meet more frequently if the need arises.

Obviously, from Chancellor Markee's perspective, at that point in time the situation had passed beyond the point of negotiation, as in his response to her letter he told her he was willing to meet with her for a discussion, but his decision was not going to change. Given the background that had preceded this exchange of memos, his response, in and of itself, appears to have been reasonable. However, this aspect of the case must be considered in light of the totality of the circumstances, which includes the ultimate decision to deal with complainant's recalcitrance by not renewing her contract, rather than to make any more effort to attempt to work things out with her. As is discussed below, the approach respondent used differs significantly from the approach that was taken with regard to Mr. Schumacher's performance issues.

With regard to the personnel problems attributable to complainant's supervision, there is no reason to doubt that a number of people complained about Sandra Stacy's work habits

and overall performance, whereas complainant evaluated her as a good employee. In her testimony, complainant defended her views and disagreed with the Zielke/Paul evaluation of Stacy, calling it a "hatchet job." In a case of this nature, the Commission need not reach any ultimate conclusions regarding Ms. Stacy's performance. The record shows that respondent was aware of complaints about Ms. Stacy, and that it was reasonable to have been concerned about the situation. However, there are a number of factors related to this situation that are probative of pretext.

According to Ms. Kelley, she received some complaints about Ms. Stacy coming in to work late and leaving early, spending time in her office knitting, etc. She did not apprise complainant of these complaints, but did mention them to Mr. Schumacher after he assumed responsibility for the direct supervision of Ms. Stacy on February 1, 1997. Chancellor Markee testified that Mr. Schumacher decided there were relatively serious problems with Ms. Stacy's performance, and that he (Schumacher) went to complainant with his concerns and a recommendation that strong steps be taken to deal with the problem, but that complainant "stonewalled" (Tr Vol. I, 210) him and refused to take any action. Because of the differing opinions and complainant's refusal or failure to do a first-hand⁹ investigation of Ms. Stacy's performance as he had requested, he said he decided to bring in a third party to look at the situation. He testified that sometime later in 1997 he appointed Ms. Paul and Mr. Zielke to do an evaluation, and their assessment was basically the same as Mr. Schumacher's, and conflicted with complainant's.

Complainant testified that at no time after Mr. Schumacher assumed supervision of Ms. Stacy effective February 1, 1997, did Chancellor Markee ask her to evaluate Ms. Stacy. Furthermore, there was conflicting evidence from respondent's management team concerning this area. The first page of Ms. Stacy's evaluation for calendar year 1997 was signed by complainant and Ms. Stacy on May 13, 1998. (Exhibit C-73). Under the field for "Effectiveness in Assigned Duties," complainant wrote "Completed by Steve Zielke and Judy Paul." Attached to the first page is a two page unsigned, undated document that is prefaced by "Comments

⁹ He contends he wanted complainant to spend some time outside her (complainant's) office, observing Ms. Stacy and talking to witnesses.

from Judy Paul and Steve Zielke concerning the evaluation of Sandra Stacy.” With regard to the situation involving Mr. Schmacher and complainant concerning what action to take with regard to Ms. Stacy, Chancellor Markee testified:

[Mr. Schumacher] felt he was not getting anywhere in the discussions he had with Dr. Walker in that he felt that we needed to take very strong corrective action in the placement office to resolve that and move forward. And he felt he was being stonewalled there and the answer was that she was a fine employee and has a great record and that was it. Tr. Vol. I, 210.

However, this characterization is inconsistent with Mr. Schumacher’s testimony:

Q . Did you ever go Dr. Walker and ask her to do anything with respect to Sandra Stacy?”

A I don’t, I don’t recall specifically. We had talked about it, but I don’t remember if we, anything specific was asked.

Q You don’t recall going to Dr. Walker and saying Sandra Stacy ought to be terminated or suspended or put on probation and basically getting stonewalled by Dr. Walker?

A I don’t remember. I don’t recall that. Tr. Vol. II, 453.

Ms. Kelley, the affirmative officer and personnel manager for the university testified as follows:

Q Do you know of any specific steps Schumacher wanted to take that he went to Dr. Walker about and didn’t get support?

A No.

Q Do you know whether or not Schumacher was in favor of terminating Sandra Stacy?

A I never heard him talk in terms of termination.

Q And so you don’t know whether or not Dr. Walker turned down a request for the termination or suspension of Sandra Stacy?

A I don’t know that. Tr. Vol. III, 571.

Thus there is a conflict as to whether complainant refused to take action as requested by Mr Schumacher.

The testimony of Mr. Schmacher and Ms. Kelley is also inconsistent with the contention that Ms. Paul and Mr. Zielke were directed to do the evaluation of Ms. Stacy in 1997 because of the difference of opinion between complainant and Ms. Schumacher

The chancellor testified that because of the opposing views of Mr. Schumacher and complainant regarding Ms. Stacy, he appointed Ms. Paul and Mr. Zielke to perform an independent evaluation of Ms. Stacy's performance. This evaluation was consistent with what Mr. Schumacher had found, and essentially the opposite of complainant's evaluation of Ms. Stacy. Chancellor Markee denied that the reason Ms. Paul and Mr. Zielke were assigned to evaluate Ms. Stacy was because she had specifically requested in January 1998 that Mr. Schumacher not do her evaluation, because she feared retaliation because she had pursued a sexual harassment complaint against him. Mr. Schumacher testified that the reason Ms. Paul and Mr. Zielke had been brought in to evaluate Ms. Stacy was because he had been removed from the process because of Ms. Stacy's complaint against him, and her request that he not do the evaluation. Ms. Kelley testified that Ms. Stacy requested that someone other than Mr. Schumacher do her evaluation, because she (Stacy) was concerned about retaliation, and at that point Ms. Paul and Mr. Zielke were brought in to do the evaluation.

Another related area of inconsistency in respondent's case involves the fact that Provost Ralph Curtis, who had supervised Mr. Schumacher before he was reassigned to student affairs, stated in his 1996-97 evaluation of Mr. Schumacher that "During the year career planning and placement activities were added to [Schumacher's] responsibilities, and, simultaneously, his reporting line was changed to the Assistant Chancellor for Student Affairs. I believe he has performed well in this role and, from my observations, the Office of Career Planning and Placement has improved greatly during the past year." (Exhibit C-80)

Complainant argues that these conflicts provide evidence that Chancellor Markee was trying to assign more blame to complainant than was warranted for the Stacy situation, and that he was depicting the need to have the outside evaluation as a product of complainant's misassessment of Ms. Stacy's performance, rather than to the basically unrelated need to have someone else do Ms. Stacy's 1997 evaluation due to her sexual harassment complaint. The Commission agrees that the discrepancies in management portrayals of what occurred provide some evidence of pretext.

Two interrelated aspects of respondent's rationale for complainant's non-renewal involve the morale issues in the Division of Student Affairs, which allegedly were caused to a

large extent by complainant's management practices, including her alleged penchant for "micromanagement." It is clear that respondent received a significant number of complaints and comments from managers under complainant's supervision about complainant's management practices, including specifically micromanaging. Complainant's position here rests in part on the contention that the people in question who were complaining were disgruntled because complainant had come down on them due to performance or disciplinary problems. For example, Al Thompson (Director of Multi-Cultural Affairs), and an African-American, lost his signature authority for certain kinds of expenditures after a foulup by one of his subordinates resulted in the cancellation of promised summer jobs for some high school students in the pre-college program for minority students, which resulted in the loss of the university's good will with those students and their families. Another example involved Elise Rogers, Mr. Thompson's successor and also an African-American, who decided to leave after only five weeks on the job, complained about complainant calling her twice a day. Complainant asserts she had trouble getting organized, and needed close supervision.

In the Commission's opinion, there is little evidence of pretext here. Respondent had received several complaints about complainant which involved a common theme—micromanagement. These complaints were considered in a context of complainant's recalcitrance to implement the chancellor's concepts. This recalcitrance included complainant's insistence on keeping a large number of program managers reporting to her. Particularly in light of the fact that some of these people who complained were African-American, it provides little if any indication of pretext that respondent was influenced in its decision by these staff complaints.

Complainant also contends that respondent's decision that she would not be involved in dealing with Shelley Till's Title IX case constitutes evidence of pretext. Chancellor Markee explained in his testimony that he wanted Mr. Molesworth, the athletic director, to work directly on the case with UWP's attorney rather than to have to go through a layer of management (complainant), because he was the person who was most involved with that situation, and most knowledgeable about the facts of that situation. This is a reasonable position that does

not indicate pretext. However, there is evidence concerning Ms. Till's Title IX situation which is probative of pretext.

Kevin Emerick, the assistant women's basketball coach under Ms. Till who took over her job on an acting basis while she was gone, made allegations which are summarized in a July 10, 1998, letter (Exhibit C-62, last page) to Chancellor Markee:

I was told by our A.D. to not discuss Shelley Till's situation with Dr. Walker at all during this past year as she was a black female and might be sympathetic to her complaint. I was also told that Athletics was going to be removed from Dr. Walker's area of control and that he (Mr. Molesworth) was reporting directly to Dr. Markee. I was told instead to go directly to the Chancellor and that he was in full support of the retaliation against Ms. Till and that he (the Chancellor) was directing the process of removing her from employment because of her stance on gender equity. I discussed this situation with Mr. Molesworth after he met several times with the Chancellor and became convinced that this indeed was the case.

I realize now after meeting with Dr. Markee that he most likely was not aware entirely of what Mr. Molesworth was doing to retaliate against Ms. Till and that Mark was simply using the Chancellors' name to lend credibility to the retaliation.

If Mr. Emerick's statement in this letter (subsequently averred to under oath) about what Mr. Molesworth said is taken at face value, and his account of what Mr. Molesworth told him about Chancellor Markee's involvement in keeping complainant away from Ms. Till's Title IX complaint is credited, this would be strong evidence of pretext because it tends to implicate Chancellor Markee in a scheme improperly motivated by race and gender. In considering this matter, a number of things must be taken into consideration.

In his February 7, 2001, deposition in lieu of testimony (Exhibit C-62)¹⁰, Mr. Emerick's testimony included the following:

I became convinced in that meeting with Dr. Markee, that he didn't—he was not as in full support as Mark [Molesworth] had led me to believe, regarding the retaliation by Ms. Till. (Exhibit C-62, p. 23)

Mr. Molesworth denied making the statements attributed to him by Mr. Emerick, and Chancellor Markee denied telling Mr. Molesworth not to inform complainant about Ms. Till's litigation.

¹⁰ The videotape of this deposition is also in evidence as Exhibit C-62A.

tion, but said he told him to keep complainant informed about events in this area. According to Mr. Molesworth, Mr. Emerick was upset with the handling of the search for a full-time coach and what he considered as respondent renegeing on a commitment that he (Emerick) would be appointed to this position. Mr. Molesworth asserts that Mr. Emerick told him that his testimony regarding the Till situation would depend on whether Mr. Emerick received either the UWP position or another job at UW-Parkside. Mr. Molesworth also testified that after he had received his copy of Mr. Emerick's July 10, 1998, letter to the Chancellor (Exhibit C-62, last page), Mr. Emerick told him that "I told you if you F'd with my players,¹¹ 'expletive,' I was going to get you, and now I'm getting you." Tr., 712.

Mr. Emerick testified that in 1998 he had been upset about not getting the head coach's job, but that he was no longer upset, based on his subsequent experiences after he left UWP, including a job as an athletic director. Mr. Emerick also denied ever having indicated, as attributed to him by Mr. Molesworth, that he was "getting" Mr. Molesworth.

In evaluating the credibility of these witnesses, one significant factor is that Mr. Emerick admitted he had been upset by what he considered to have been Mr. Molesworth's duplicity, and, related to that, the fact that he did not get the head coaching job. Therefore, he had a motive to have fabricated a false statement. On the other hand, respondent's witnesses had a motive to deny what Mr. Emerick attributed to them, because the attributed statements would tend to show participation in discrimination. Also, even if Mr. Emerick had made the statement that he was "getting" Mr. Molesworth, this does not mean that he fabricated what he says Mr. Molesworth told him, as opposed to having revealed what Mr. Molesworth had told him. In a probable cause proceeding of this nature, the Commission is not "to make findings of fact which it believes are proven to a reasonable certainty, by the greater weight of the credible evidence." *Reinke v. Personnel Board*, 53 Wis. 2d 123, 138-39, 191 N. W. 2d 833 (1971). Rather, the Commission is to consider all the evidence and the credibility of the wit-

¹¹ This allegedly had to do with Mr. Emerick's impression that Mr. Molesworth had acted improperly by first assuring Mr. Emerick that he would get the UWP job, which apparently Mr. Emerick had relied on in representations he made to prospective players he was recruiting that he would be the coach. Also, Mr. Emerick objected to Mr. Molesworth allegedly talking to players outside his (Emerick's) presence.

nesses in determining whether there is probable cause to believe discrimination occurred. *Boldt v. LIRC*, 173 Wis. 2d 469, 496 N. W. 2d 676 (Ct. App. 1992) Utilizing this lesser standard, the evidence supports a finding consistent with Mr Emerick's allegations, which provides at least some, although attenuated, evidence of pretext.

Another factor relating to the matter of complainant's recalcitrance to accede to the Chancellor's organizational and functional policy directives, is how the complainant was dealt with as compared to Richard Schumacher, the head of the Admissions and Enrollment Management unit. He admitted in his testimony that he was strongly opposed to the move of his unit to the Division of Student Affairs, which was a key part of the chancellor's administrative philosophy. He testified he opposed it from a policy standpoint, believing that his unit should have been kept in Academic Affairs. He continued to oppose it after the decision on this aspect of the reorganization had been finalized and implemented effective February 1, 1997. After he was moved under complainant's immediate supervision, he continued to complain frequently, not only to complainant, but also to Chancellor Markee. He refused to attend scheduled meetings with complainant, and he was significantly overdue completing reports and assignments. Also, in January 1998, he was verbally reprimanded by Chancellor Markee for having made a remark¹² to Sandy Stacy that caused her to complain of sex harassment to the campus affirmative action officer and director of human relations, Kate Kelly.¹³ Complainant found that attempting to supervise Mr. Schumacher was so difficult that she brought the matter to Chancellor Markee's attention on more than one occasion. His response was to say things like "he would talk to Dick or you know Dick." (Complainant's testimony, Tr. Vol. II, 329) However, the situation did not improve, and finally, in June 1998,¹⁴ she asked Chancellor Markee to reassign Mr Schumacher to a different area, which he did. In a June 22, 1998, email

¹² In discussing a change in the unit's operation with Ms. Stacy, he said to her "to hang on to her girdle because it's going to be a fun ride. We're going to have a good time." Schumacher testimony, Tr. Vol. II, 425.

¹³ Ms. Stacy decided not to pursue a formal complaint, and the matter was resolved at a meeting involving Stacy, Kelly, Schumacher, and Markee, where Schumacher apologized and was reprimanded by Markee.

¹⁴ This was after she had been notified of her non-renewal.

email to Chancellor Markee (Exhibit C-68), in which she thanked him for the reassignment, she recapitulated the situation as follows:

Just a note to officially thank you for reassigning Dick Schmacher . . . As we discussed in December[1997]/January [1998], Dick was very angry about his assignment to this division in 1997. He demonstrated that displeasure by refusing to meet with me, complaining about every assignment, neglecting to share important information about programs in his core and seeing any effort to gather information from his staff as an attempt to discredit him. I am sure we will both be happier with the new arrangement.

We will continue to make every effort to work cooperatively with the departments in that core. Thank you again for honoring my request.

In her evaluation of Schumacher for calendar year 1997, complainant recommended that he receive a Level 1 salary increase.¹⁵ However, Chancellor Markee raised this to a Level 2 salary increase, notwithstanding all the extant issues concerning Mr. Schumacher's performance.

The comparison of respondent's treatment of Schumacher to respondent's treatment of complainant throughout this period is probative of pretext, notwithstanding the circumstances surrounding these individuals were certainly not completely parallel. The most significant difference is that Schumacher as a member of the faculty had substantial job security, while complainant served at the pleasure of the Chancellor. Also, the record reflects that Mr. Schumacher did well with some aspects of his job.¹⁶ In his testimony, Chancellor Markee tried to distinguish Mr. Schumacher's situation from complainant's, asserting that while Mr. Schumacher disagreed with, and complained about the reorganization, he at least made an effort to make things work and to do a good job. However, Mr. Schumacher was reassigned to academic affairs effective February 1, 1997. He never stopped complaining about the reassignment, both to complainant and to Chancellor Markee, until eventually, complainant asked the chancellor to reassign him to academic affairs in June 1998, and this request was granted.

¹⁵ Level 0 corresponds to no increase, a Level 1 increase is based on "performing as expected," and a Level 2 increase is based on "performing above expectations." (Exhibit C-67)

¹⁶ See, e. g., Exhibit C-80, which is Provost Curtis's undated evaluation of Mr. Schumacher for the academic year 1996-97. This reflects overall good performance, although it also states "I believe there are several areas that could, in my opinion, be improved."

Mr. Schumacher also refused to attend scheduled meetings with complainant, refused to complete assigned reports in a timely fashion, and otherwise balked at the changes. And not only did he resist doing his job in a number of ways, but also he was involved in an incident of alleged sex harassment that engendered a verbal reprimand. Yet, on this record, he suffered no adverse employment actions of any description (except the verbal reprimand with regard to Ms. Stacy's complaint, that presumably did not show up in his personnel file). Furthermore, he was rewarded with a Step 2 salary increase consistent with a rating of performing above expectations for the time period in question, when the Chancellor overruled complainant's recommendation of a Level 1 raise. Complainant, on the other hand, was non-renewed, which ended her employment at UWP.

When the Commission looks at the entire record in this case, it concludes that there is probable cause to believe that the decision not to renew complainant's contract involved race and sex discrimination, at least in part—i. e., this is a mixed motive case. The record reflects that based on Chancellor Markee's principles of academic administration, and input he was receiving from multiple sources, he had reason to be dissatisfied with complainant's performance, and his ultimate decision regarding non-renewal was not without some legitimate basis. However, there is significant evidence of pretext, most notably the contrast between how complainant was treated when compared to Mr. Schumacher, as discussed above. There also is other evidence probative of pretext, including Mr. Emerick's testimony and letter (Exhibit C-62). The Commission has considered evidence adduced by respondent that Chancellor Markee was committed to taking affirmative action with regard to minorities, in both the employment and educational contexts. However, the assessment of all the evidence, including witness credibility, and particularly respondent's treatment of another employee outside of complainant's protected categories, leads the Commission to conclude there is probable cause to believe that respondent's decision in this case not to renew complainant's contract at least partially involved discrimination on the basis of race and sex.

ORDER

This case is to be scheduled for a hearing on the merits.

Dated: _____, 2002.

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

JUDY M. ROGERS, Commissioner

ANTHONY J. THEODORE, Commissioner

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