

STATE OF WISCONSIN

PERSONNEL COMMISSION

**REENA ROUF,**  
*Complainant,*

v.

**President, UNIVERSITY of WISCONSIN  
SYSTEM (OSHKOSH),**  
*Respondent.*

FINAL DECISION AND  
ORDER

Case No. 99-0148-PC-ER

#### NATURE OF THE CASE

This charge of discrimination involves an allegation that respondent, University of Wisconsin (Oshkosh), discriminated against complainant because of complainant's age, race/color and sex, in violation of the Wisconsin Fair Employment Act (WFEA), Subchapter II, Ch. 111, Stats. when respondent offered her a substantially reduced contract in May 1999. A hearing has been held and both parties have filed post-hearing arguments.

#### FINDINGS OF FACT

1. Complainant is an Asian female whose date of birth is July 4, 1938. Complainant worked for respondent beginning in 1988 as an academic staff lecturer teaching courses in the English Department.

2. Respondent's policy has been that academic staff members like complainant work under fixed term contracts, and respondent informed them each year in form appointment letters that there was no intent to renew their contract. They were required to reapply each year when their contract term expired if they wished to be considered for re-employment. Complainant was employed in this fashion in a series of one year contracts from 1988 through the 1998-1999 academic years, teaching primarily, but not entirely, freshman composition courses.

3. In 1988, the department was the subject of a very critical outside audit. At least in part as a result of this audit, an effort was begun to effect significant changes in the department's operation. Several years into this process, in 1994, a new chairperson, Estella Lauter, began initiating changes in the teaching of first year students. Prior to that time, instructors in the first year program independently controlled the content and delivery of their courses. The first year program lacked any common focus, and failed to incorporate pedagogical changes. As an example of the disarray of the program, one academic staff member was teaching a course in a completely different subject--astrology.

4. Following substantial discussion and planning, which included many meetings among faculty, academic staff, and the director of composition, Marguerite Helmers, an ongoing process occurred to reorganize the program to focus around specific goals and "thematic clusters." For example, composition goals included:

College English I will emphasize the conventions of academic discourse, the common language, styles, genres and rhetorical situations of the university. Students are entering a complex and sophisticated discourse and should develop a sensitivity to the intellectual context of their work.

College English I will enable students to develop skills in critical evaluation and decision-making. In College English I this involves evaluating one's own writing and the writing of peers and professionals. Students will also be faced with evaluating alternative sources of information ranging from print media to film to technology. (Respondent's Exhibit 1, "COMPOSITION GOALS," Department of English Composition Home Page)

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Instructors choose to work within one thematic cluster and select fiction or nonfiction works or a textbook that expands on the theme. The first part of [sic] semester is organized around the *Odyssey*/New Student Orientation text.

Fall 1999 Themes:

Freedom and Citizenship

Life Stories

Issues in Contemporary Culture

Time, Memory, and Event

(Respondent's Exhibit 2, "The Practices of Everyday Life: College English I Thematic Course Titles," Department of English Composition Home Page)

5. Lauter notified the academic staff via an April 13, 1998, memo (Respondent's Exhibit 19) that a system had been implemented to provide for regular raises for them as they were rehired from year to year, but that the department would need to implement a better process for evaluating performance. In this regard, she stated that, starting that year, as part of the reemployment process she wanted staff members to submit more formal application letters including "some reflection on your teaching (ideas you have tried, results of experiments, changes in perspective on teaching, etc.), along with a syllabus for each course you teach."

6. Another part of the changes that were occurring involved the department's "Technology Resolution" dated November 5, 1998 (Respondent's Exhibit 3), which included the following:

The Composition Committee resolves that by May 1999 all faculty and academic staff will demonstrate basic competency in these areas:

1. Using email.
2. Generating texts with current Windows-based word processing programs: Word or Word Perfect
3. Locating information on the World Wide Web using Netscape . . .
4. Locating and using the Polk Library's on-line resources
5. Locating and using the home pages of the English Department
6. Evaluating the content and credibility of electronic sources

Implementation of these competencies would be through workshops presented by campus computing personnel, by Charlie Hill, and through peer mentoring. In line with stressing the technology requirement, all instructors should include the English home page address ([www.english.uwosh.edu](http://www.english.uwosh.edu)) on their syllabi.

7. Another development during this period was that the supply of English majors seeking positions increased considerably, resulting in a "buyer's market" from the department's perspective of hiring academic staff.

8. Lauter took sabbatical leave in early 1999. At about that time, it was indicated to complainant she had been tentatively reappointed for the 1999-2000 period school year. Complainant's name appeared in respondent's publication of the fall timetable of classes, indicating she was to teach 9 credits for the fall 1999 semester. At the time this schedule was published, the assignments for the academic staff were not firm—i. e., contracts had not been finalized. The names of the instructors were nonetheless printed because of publication deadline considerations.

9. Paul Klemp became Acting Chair of the English Department when Lauter went on sabbatical. Klemp requested more information from all academic staff members applying for fixed term positions than had been requested in the past. In a March 9, 1999, memo (Respondent's Exhibit 4), he requested a letter of application, including teaching preferences and qualifications to teach those courses, a current curriculum vitae, all syllabi and student evaluations from 1998, a recent peer review, and:

Statement of your teaching philosophy and role in the department: how has your teaching evolved over the past five years? What are your strengths and weaknesses as a teacher? What are your pedagogical goals for the coming year? Which goals of the UW Oshkosh English Department's Composition Program, General Education Program, and literature program (as appropriate) are closely connected to your teaching? How do you plan to address other program goals in the future? What have you done and what will you do to meet the Technology Resolution that the UW Oshkosh English Department passed in November 1998? How do the texts you have selected for your courses create a context for student learning and how do they support the goals of the [department]? How would you describe the logic of your syllabi?

He also stated that "Although class assignments have been made for the fall semester, they are always tentative until contracts are approved."

10. Via a March 30, 1999, letter, (Respondent's Exhibit 6) complainant applied for employment for the next (1999-2000) academic year. In her letter, she stated she wanted to teach three sections in the fall and spring semesters, and that "I am qualified to teach College English I including Project class, Advanced Composition and World Literature." She included with her letter a curriculum vitae, a statement of teaching philosophy, syllabi for College Composition courses she taught in Fall 1998 and Spring 1999, student evaluations of her teaching, peer evaluations, two graded student writing samples, and the following "NOTE":

I am currently attending French and Spanish classes. I have always been interested in language and I hope to pursue my interest. I am also enrolled in computer classes.

As for my other activities, I have done colleague class coverage for Anji Roy and Manjuri Chatterjee. Every year for Asian heritage month in April I help out the Asian Student Association every way I can. I cook food for the kickoff day and contribute articles of cultural interest for display and I encourage my students to attend these functions.

Since the time University of Wisconsin Oshkosh started freshman orientation, I have taken part in it every year. I have led discussion groups as well as incorporated these books in my syllabus.

11. Complainant's statement of teaching philosophy and course syllabi were essentially unchanged from the ones she had submitted in previous years. Her statement of teaching philosophy included the following:

I do not have a set philosophy of teaching. My teaching philosophy is not a rigid one; it varies according to the course, the text, and student body. I do, however, have certain principles of teaching. I believe in helping students to be the best they can be—bringing out the best in them through guidance and understanding. I like to give attention to each and every student and treat all of them with the same respect I expect from them. I respect their opinions, understandings and feelings.

I believe in being a guide and friend to the students in order for them to gain in knowledge. One cannot thrust knowledge upon a person; the desire to learn and know has to come from within. My effort as a teacher is to try to kindle that desire of inquiry and wonder.

On a more concrete note, I like to try a variety of assignments with the students in order to bring out their best reading, writing and understanding ability leading to their personal growth as individuals. I am in favor of diversity and variety in every aspect of human life including education. Therefore, I select assignments accordingly. I choose some short in class writings, journals, quizzes and some long out of class formal papers for everybody's benefit as well as input, but I give my students the freedom to choose their own topics because I believe students write best when they write about what they know and feel like writing. I allow students to rewrite their papers because they are here to improve their writing skill. I value student response; therefore, we have class discussions on a variety of topics. Students are a community of learners, so I encourage them to share their knowledge through class discussions and presentations. We use visual aids wherever possible.

A teacher needs to be a sensitive listener as well. I try to pay attention to every student's individual needs and problems. My job is to help them grow. School is all about growth, in knowledge, sensitivity and understanding. Teachers and students alike take part in it. My aim is to broaden student's horizon beyond boundaries. I, as a teacher, strive to take my students there. I am available to my students most of the time, in office and at home.

For my freshman composition class my primary objective is for the students to improve their comprehension and writing skills. We discuss the reading materials and students write short responses. As for grammar, in the past I tried to teach through lectures, examples and exercises. My experience has been that students learning grammar theoretically does not help them to

become better writers. Therefore, now I have chosen a different approach. I pick out examples from their papers and discuss the grammatical implications within the context. That way I find students internalize the grammatical rules better.

For my upper level classes, I have tried a variety of texts including literature, art, music, civilization, history, health and nutrition. For humanities, I prefer the short stories, which give me and the students the opportunity to better understand the diversity of culture that exist in this country as well as the rest of the world.

I have come to recognize through my teaching experience that my personality and my teaching philosophy especially helps students who are at a disadvantage, such as the project [dyslexic] students, multicultural students and international students. I have been teaching the project students for several years and I believe I have achieved some measure of success there. These students feel comfortable in my class and therefore are motivated to try their best. The same goes for multicultural and international students. I am attaching two samples of writing by an international student. This student can hardly speak English and had only one year's experience of reading and writing English. He is a very intelligent and highly motivated student. At first he was writing at D level and I actually advised him to take 100 level composition course, but he requested me if he could stay in my class. He promised that he would try very hard and do everything I ask him to do in order for him to improve his English. By the end of the semester he was getting A's. I do not claim all the credits for this student's success but I believe I had something to do with it. As for American students I feel it is beneficial for them to have a teacher who has a different cultural perspective on things.

Respondent's Exhibit 6, pp. 3-5.

12. Complainant's statement of teaching philosophy did not address many of the items set forth in Klemp's March 9, 1999, letter (Respondent's Exhibit 4)—i. e., how her teaching had evolved over the past five years, what her pedagogical goals were for the coming year, which goals of the composition program were closely related to her teaching, how she planned to address other program goals in the future, how the texts she had selected for her courses create a context for student learning and how they supported the goals of the composition program, and she did not describe the logic of the syllabi. Also, her statement neither identified nor addressed any weaknesses.

13. Complainant's application was one of 19 academic staff applications. Klemp evaluated all of these documents in the same manner. After this review, Klemp determined

that complainant's application and supporting documents were inadequate. Klemp's rationale for his conclusion is exemplified by the following excerpts from his hearing testimony:

[T]he opening cover letter didn't begin to reflect what Dr. Lauter had asked for a year before and that was, however she worded it, something more full than academic staff members had been prone to submitting in the past. It was a mere few sentences, and it doesn't explain any context as to why these particular courses met, suited the needs of the Mrs. Rouf or the experience or the training of Ms. Rouf. It seemed to me just a statement of a request and not much more than that. .

The second criterion was to look at the teaching philosophy and see what, if anything, it had to say that indicated that the applicant . . . was on board with the department's goals, and to what extent, if any, the applicant addressed questions that I raised in my call for applications. As I read it, though I see much here that's laudable in terms of caring about students in terms of wanting to see them achieve, these are things we all do; it's part of the profession. We don't even state them under the English Department 101 goals because they're assumed. We want our students to achieve, we want them to improve, so I was startled to hear that improvement was a goal on the website. It's not even mentioned anywhere on the website as a goal. It's an assumption that in our courses you will improve.

But as I read this I'm struck by how out of step this is with where the department was going in 1996-1998. If there was a transition underway it's very hard to see where this transition is. This is very much the kind of statement, the kind of philosophy, the kind of approach to writing that was very much dated by then and was the kind of thing the department was actively discouraging people from using. The goal statements on the website suggest something far more sophisticated, more self-reflective, more involving colleagues, that is, fellow students, reading, understanding each others' work and not as much going on here. I was also [struck] by the lack of specificity; there's no particular classroom referred to. It's hard to see where courses might be identified and there are a lot of specifics that just aren't present.

. . . Does she discuss the logic of course syllabi? . . . I see no commentary on that whatsoever. What is the relationship of the texts being utilized in her course to the goals of the department and the program? . . . it never gets addressed. Does she plan to address other program goals in the future? And again we're in a transition so there's room for people to grow and develop, and that's what we're here for; we want people to improve and change. . . . there's nothing in this letter that tells me anything of the sort. T I, 97-99.<sup>1</sup>

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<sup>1</sup> The transcript of the hearing is in two volumes. Citations to the transcript include the volume number (I or II), and the page numbers. Where there are differences between quotes from the transcript in this decision and the original text of the transcript as prepared by the transcriber, this reflects changes made by the hearing examiner following listening to the hearing tape.

14. Klemp also concluded that complainant's course syllabi were inadequate:

I see nothing in 101 that reflects the transition that was going on in the department. The syllabus is very much out of touch with what we're doing. I see no email address and that's not an important concern; that's hardly critical, hardly fatal. What I think is crucial and is absolutely important to where the department is going at this point is I am absolutely baffled as to what thematic cluster this might be addressing. I can't emphasize enough that on the website when it lists four thematic clusters, argument is not one of them; argument is not a theme. Argument is a rhetorical strategy that we use in order to prove points.

its [1999 syllabus] is almost a word-for-word reproduction [of the 1998 syllabus].<sup>2</sup> T. I, 100-102.

15. Klemp consulted with the director of composition, Marguerite Helmers, who agreed with his evaluation.

16. Respondent submitted application materials from three other academic staff members who were hired for 1999-2000—Pamela Gemin (Respondent's Exhibit 12), Cary Henson (Respondent's Exhibit 13), and Mary Capillari (Respondent's Exhibit 14). All of these were more extensive than complainant's and addressed the changes Klemp had called for, and the technology resolution, more significantly than complainant, although none addressed all the goals. For example, Gemin explained in more detail why the courses she had requested fit her training and experience, she discussed her evolution as a teacher, she explained in some detail her use of information technology (IT), and she addressed the role in the classroom of the thematic cluster. Henson addressed how his training and experience fit the courses he requested, the role of the thematic clusters in his teaching philosophy, and the role of IT in his classes. Capillari addressed how her training and experience were related to the courses she taught, her strengths and weaknesses, her evolution as a teacher, how her courses work with the department's education goals, and how she has satisfied the technology resolution. She also addressed and defined the thematic cluster used in her courses.

17 Complainant submitted two College English I syllabi of other academic staff (Pamela Gemin and Maureen Mertens) for Fall 1998. (Complainant's Exhibits P and Q).

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<sup>2</sup> This syllabus was also essentially the same as syllabi of 1995 and 1997. Respondent's Exhibits 8 and 9.



Gemin's syllabus includes her email address and what is apparently a hyperlink to the English Department website and addresses the thematic cluster of "Life Stories." There is no mention of quizzes in the document, and it advises that final grades would be based on papers, other assignments, attendance and participation. There are detailed comments on the importance of attendance and the attendance policy. Mertens' syllabus includes her email address but not the address of the department website. It addresses the thematic cluster of "Freedom and Citizenship." It refers to quizzes as part of the grading structure, and there are detailed comments on the importance of attendance and the attendance policy.

18. Klemp also was concerned about the absence of a current peer evaluation. Complainant had submitted peer evaluations from 1995 and 1996, and noted in her application letter that she did not include a current peer evaluation, that Helmers had not scheduled one for her because she would be retiring in a year, and that "last year Charlie Hill evaluated my class but he never sent me a copy."<sup>3</sup> Respondent's Exhibit 6, p. 1. In Klemp's opinion, it was the responsibility of the academic staff member to obtain a current evaluation, and that complainant's attitude was inconsistent with the departmental goal of academic staff members being more professional and taking responsibility for their professional advancement.

19. Klemp determined that at least one of the reasons complainant seemed so out of touch with the changes in the department's goals and program was the fact that, unlike most of the other academic staff members, she attended very few department meetings and served on no departmental committees. However, complainant had attended some composition staff meetings.

20. After considering complainant's application, Klemp briefly met with complainant in his office on May 12, 1999, and advised her of what he found deficient in her application materials, and that she would only be offered one 3-credit course (College English I Project)<sup>4</sup> to teach for the fall of 1999, and no courses for the spring semester 2000. Complainant refused the offer to teach only one course.<sup>5</sup> He told her she that if she later applied for the spring semester it was possible she would be given more courses if, in the interim, she took

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<sup>3</sup> Complainant subsequently contacted Hill, who had prepared an evaluation, but had overlooked it and left it on his hard drive. Complainant then obtained the evaluation and submitted it to Klemp.

<sup>4</sup> This was a course for dyslexic students. While most teachers disliked teaching this course, Klemp offered it to complainant in part because she had identified it as a strength in her application materials.

<sup>5</sup> Complainant had taught 9 to 12 credits each semester prior to that time.

advantage of the opportunities to bring herself more in line with the department's current pedagogical orientation. However, there usually were fewer available composition courses in the spring semester

21. During this meeting Klemp had his feet propped on his desk. This was consistent with a long-standing habit, and also was a posture he adopted because he felt it helped him deal with the tension that he was experiencing with regard to this meeting.

22. With regard to the 1999-2000 academic year, Klemp was responsible for hiring 23 academic staff. Of these, there were 60% over age 40, 40% under 40, and the average age was 44; 15 were female and 8 were male; and 3 were members of racial minority groups.<sup>6</sup>

#### CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter of this case pursuant to s. 230.45(1)(b), Wis. Stats.

2. The complainant has the burden of proof and must establish by a preponderance of the evidence the facts necessary to show respondent discriminated against her as she alleged.

3. Complainant did not satisfy her burden of proof.

4. Respondent did not discriminate against complainant on the basis of her age, race/color or sex in violation of the WFEA when it offered her a substantially reduced contract for the 1999-2000 academic year in May 1999.

#### OPINION

In a case of this nature, the initial burden of proceeding is on the complainant to show a prima facie case of discrimination. If the complainant meets this burden, the employer then has the burden of articulating a legitimate, nondiscriminatory reason for the action taken which the complainant then attempts to show was a pretext for discrimination. The complainant has the ultimate burden of proof. See *Puetz Motor Sales Inc. v. LIRC*, 126 Wis. 2d 168, 172-73, 376 N. W.2d 372 (Ct. App. 1985).

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<sup>6</sup> Neither party provided any analytical basis that would tend to show that these statistics are or are not statistically significant, or for that matter, even made such an argument. These statistics are not accorded any weight in this decision.

In a failure to hire case such as this, the complainant may establish a prima facie case by showing: (1) she is a member of a group protected by the WFEA, (2) she applied and was qualified for a job which the employer was seeking to fill, (3) despite her qualifications she was rejected, and (4) the employer continued with its attempt to fill the position. *See, e.g., McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L. Ed. 2d. 668, 93 S. Ct. 1817, 5 FEP Cases 965 (1973).

Complainant established a prima facie case. She is a member of three groups protected by the WFEA—age (60 at the time in question), race/color (Asian), and sex (female). She was qualified for the teaching assignments she sought based on her education and previous experience teaching these courses. She was rejected in the sense that she was offered a substantially reduced contract. Respondent eventually hired staff to teach all the courses respondent had sought to fill.

Respondent has articulated a legitimate, nondiscriminatory rationale for its decision to offer complainant a substantially reduced contract--complainant's application did a poor job of meeting Klemp's March 9, 1999; call for applications (see Finding 9, above), as set forth in Findings 13, 14, and 15, above. At this point, complainant has the burden of proof to establish that respondent's proffered rationale is really a pretext for discrimination.

One frequent means used by a complainant to attempt to show pretext is to try to rebut the factual foundation for the employer's rationale for its action—i. e., to try to show that the factual foundation is not supported by the evidence. Complainant relied in part on this approach by trying to show that respondent's criticism of her application materials was in fact unfounded.

Before examining this effort, it should be noted that in a case of this nature, the employer violates the WFEA only if it intentionally discriminates on the basis of race/color, age, or gender—i. e., if its agent is motivated by such a factor in making the decision in question. *See, e. g., Kovalic v. DEC International*, 186 Wis. 2d 162, 167, 519 N. W. 2d 351 (Ct. App. 1994) An employer may make a mistake and/or make a personnel decision the Commission might not make if it substituted its judgment for that of the employer, but that does not compel a finding that there was intentional discrimination. However, generally, the less support there is for management's decision, the more likely it is that the employer will be found guilty of

discrimination, *see, e. g., Pollard v. Rea Magnet Wire Co.*, 824 F. 2d 557, 559 (7<sup>th</sup> Cir. 1987):

It is easy to confuse “pretext for discrimination” with “pretext” in the more common sense (meaning any fabricated explanation for an action), and to confound even this watery use of “pretext” with a mistake or irregularity. This is what happened here. The district judge did not conclude that [the employer] had advanced a “pretext for discrimination;” the court found instead that [the employer] did not have good cause to fire Pollard. Such a finding does not show pretext in any use of that term, which requires hiding the truth. If you honestly believe the reasons behind your decision, but the decision was ill-informed or ill-considered, your explanation is not a “pretext.”

*See also, Debs v. NE Ill. U.*, 153 F. 3d 390, 396 (7th Cir 1998) (“Debs cannot prevail if [the employer] ‘honestly believed in the nondiscriminatory reasons it offered, even if the reasons are foolish or trivial or even baseless.’”[citation omitted]); *Russell v. DOC*, 95-0175-PC-ER (4/24/97):

If these [disciplinary] charges could be shown to be relatively flimsy, this would be probative of pretext. A conclusion that there was no just cause for the discharge does not equate to a conclusion that respondent was illegally motivated. An employer’s mistaken belief or inability to prevail at a hearing or arbitration is not necessarily inconsistent with a good faith belief, independent of complainant’s arrest record, that discipline was warranted. However, the less support there is for the charges, the more likelihood there is of pretext. (citation and footnote omitted)

Turning to the case before the Commission and complainant’s attempts to undermine the factual basis for respondent’s rationale for its action, some of respondent’s criticisms of complainant’s application materials are arguably disputable, but for the most part there can be little question that these materials did not successfully address the factors respondent sought. This can be illustrated by a few excerpts from complainant’s testimony:

Q Can you tell me how your spring 1999 syllabus incorporates or recognizes either the goals or the themes expressed in these two documents [Respondent’s Exhibit 1, composition goals; Respondent’s Exhibit 2, English I thematic course titles]?

A I taught argumentation and that fell into the cluster of citizenship.

Q [C]an you explain to me how argumentation fits in with freedom of citizenship?

A In order for somebody to be a good citizen, one has to know how to argue one's point of view and to find reasoning in matters. So that's what argumentation was about, and I wasn't the only one who was teaching argumentation; other teachers used the same book.

Q Can you identify on your syllabus the theme of argumentation anywhere?

A The textbook reading and writing short arguments is, the very book says it's about argumentation. . And also my whole syllabus shows it's all about argumentation.

Q Okay. Can you tell me how you expressed any of the composition goals in [Respondent's] Exhibit 1 in your syllabus?

A [The goal in Respondent's Exhibit 1 is] English I will develop students' sense of writing as an ongoing process of invention, decision making, drafting, revising and editing For every paper, my students submitted a rough draft. After I had looked at the rough draft then the final copy; after I looked at that they sat in groups and they looked at each others' papers and they made these changes.

Q Where does it say that on your syllabus?

A You see, wherever I have the discussion this was discussion about the papers.

Q Did you discuss that at all in your cover letter to Dr. Klemp or your teaching philosophy, the process of revising and the fact that you had students submitting drafts and they—

A No, I did not. T I, 30-31.

Complainant also admitted that she did not provide her email address or the department website on her syllabus, and also did not address several other points that Klemp had requested, e. g.:

Q Is there anywhere on your [spring 1999] syllabus that it's identified, the theme of freedom of citizenship?

A No it doesn't.

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Q Can you tell me where in your statement of teaching philosophy you identify your weaknesses as a teacher?

A Well, I have not clearly stated my weaknesses.

Q Okay. Can you tell me where in your teaching philosophy you discuss how your teaching has evolved over the past five years?

A Well, as I have said, I tried different approaches.

Q Okay. Have you, did you identify anywhere in your teaching philosophy what your pedagogical goals were for the coming year?

A Well, as I said, I have tried different approaches and the ones I felt I came out better, I was more successful, those are the ones that I would be following in teaching.

Q Did you identify anywhere in your teaching philosophy specifically what were your pedagogical goals?

A No, I have not. T I, 41-43.

While complainant's main effort to establish pretext was to argue that her application materials were adequate, she also contends she did not compare unfavorably with other academic staff applicants, and she was not treated the same as other applicants. For example, she states in her post-hearing brief that:

Dr. Klemp made a big issue that I did not mention the thematic cluster in my syllabus. If you look at Cary Henson's syllabus, you will see that he does not mention the cluster that his theme fits in. ([Respondent's] Exhibit 13)

My application may not be as elaborate as some of the others (I have not seen all of them), but I do believe I have all the necessary information. Complainant's post-hearing brief, p. 1.

However, in his syllabus for College English I, Spring 1999, Henson begins, under the heading of "Themes/Issues," as follows: "Through a variety of materials (a novel, short essays, an historical/critical text, articles and film), we shall explore different conceptions of time and memory and the ways in which these can be used to construct personal, familial, cultural and

collective narratives.” (Respondent’s Exhibit 13, p. 15) This appears to correspond to the theme of “Time, Memory, and Event.” (Respondent’s Exhibit 2) He also at least briefly mentions the role of the thematic clusters in his statement of teaching philosophy.

Klemp acknowledged in his testimony that the three application packets in evidence (Gemin, Henson, and Cappellari) do not address all of the elements of his March 9, 1999, call for applications (Respondent’s Exhibit 4), but the Commission agrees with respondent’s assertion that they all make more of an effort to address these points, and are more successful, than complainant’s (Respondent’s Exhibit 6), which was essentially a reiteration of previous applications that preceded Klemp’s March 9, 1999, call for applications. The syllabi that complainant presented in evidence (Complainant’s Exhibit P and Q) also did a better job of this.

Complainant’s pretext case includes a number of contentions disputing respondent’s version of what occurred prior to the decision in question. Many of these involve matters that are peripheral to the pretext issue. For example, she asserts that contrary to Lauter’s opinion, they were not friends. Lauter testified: “I thought we were friends. We got together for various events and talked a good deal about our health and, you know, lots of conversations in the hallway and that sort of thing.” T II, 33. In her post-hearing brief, complainant asserts that:

Dr. Estella Lauter’s testimony is a nicely made up story, because none of it is true. She claims that we were friends and had lots of conversations in the hallway. The English Department is mostly on the second floor of the building. Few offices were located on the third floor . . . For the most part my office was on the third floor. So people rarely saw me in the hallway unless I came down to the department office for some reason. I certainly did not come down to chat with Estella. Even when I made an appointment to see her for any reason, she kept me waiting half an hour outside of her office door, while she talked on the phone. She was the department chair and I was academic staff. When we met any place we were polite to each other. Complainant’s post-hearing brief, p. 2.

However, complainant did not include these assertions in her testimony<sup>7</sup> during the hearing, and the Commission can not consider the assertions in her brief as evidence. Furthermore, even if their relationship were as characterized by complainant rather than by Lau-

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<sup>7</sup> Complainant testified on her own behalf in her case in chief, and also in rebuttal after respondent rested its case.

ter, the differences between their views could be attributed to some extent to a difference of opinion, and in any event the issue would have little bearing on the outcome of this case.

Another example is that complainant asserts that she had never told Lauter that she had wanted to retire in 1998 when her husband did, but that "Dr. Lauter obviously had picked up some gossip from somewhere." *Id.* She also denies that she (complainant) had said she was going to learn computer skills from her daughter, pointing out that it was her son who had computer skills. Again, these questions have little if any bearing on the outcome of this case.

Complainant also denies Lauter's assertion that complainant essentially let the program assistant/technical assistant in the computer lab teach her class. The Commission does not understand that respondent contends that complainant allowed the PA to teach her course in a substantive fashion as complainant apparently characterizes respondent's assertion:

I'm hearing that I took the help of the program assistant in my classes when I brought my classes to the computer lab for them to work on the computer. Now this help was offered to us by the department, other teachers took their help too, and we were never told that we couldn't do that. Also spring of 1999, Sandy, program assistant, she never came down to my class. T., I-23.

She [Lauter] tries to say that Sandy Brucks, the program assistant, taught my class in the computer lab. Nothing could be further from the truth. Sandy does not even have the basic knowledge to teach my class, or that I would let her. Complainant's Post-Hearing Brief, p.2.

As the Commission understands respondent's case, it did not try to show that the PA taught complainant's course *per se*, but that she provided the IT instruction.

At various points in her arguments and exhibits, complainant questions respondent's failure to have produced more documents than it did, particularly as to application packets.

Respon-

dent entered three such packets (four, including complainant's), of a total of 19 applicants, into the record. Perhaps not surprisingly, these applications supported respondent's case. Complainant submitted correspondence from her then attorney<sup>8</sup> requesting information from the de-

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<sup>8</sup> Complainant was represented by counsel while this dispute was undergoing conciliation at UW-Oshkosh, prior to the filing of the original complaint (September 9, 1999), and at least through September 21, 1999, when he wrote to respondent's attorney that "we have not been provided [in response to earlier requests] with the syllabi of other instructors in [complainant's] department," (Complainant's



partment, including copies of the syllabi of the other academic staff, which failed to unearth these documents. Pursuant to s. PC 4.03, Wis. Adm. Code, “[a]ll parties to a case before the commission may obtain discovery as provided by ch. 804, Stats.” If complainant had interpreted her attorney’s September 29, 1999, letter (Complainant’s Exhibit D) as a discovery demand, i. e., a request for production and inspection of documents, *see* s. 804.09, Stats., she had the opportunity to have filed a request with the Commission to compel discovery. Since that letter was part of a series of correspondence that started prior to the date complainant filed her complaint here (September 9, 1999), it might not have been interpreted as a discovery request. In that case, complainant could have filed an explicit discovery request. If the Commission had reached the conclusion that respondent had improperly failed to have produced the documents in response to a discovery request, it could have entered a specific order requiring respondent to produce the documents. *See* s. 804.12(1), Stats. If the respondent were to have still failed to produce the documents, the Commission could have imposed a penalty, such as prohibiting respondent from using any of the documents on its behalf, or imposing a conclusive presumption with regard to the subject matter of the documents. *See* s. 804.12(2), Stats. Since such a process never occurred, it would not be appropriate to draw a negative inference from respondent’s apparent failure to have produced the documents in question following complainant’s attorney’s request in his September 29, 1999, letter, which was not denominated as a discovery request, and which was never addressed as a discovery request.

Complainant also argues that “the changes Dr. Klemp is talking about, it was my understanding that those had to be complied with from Fall 2000. The ‘technology resolution’ makes that quite clear.” Complainant’s post-hearing brief, p. 1. This is not consistent with the fact that the technology resolution called for all faculty and academic staff to demonstrate basic competency in the use of email, etc., by May 1999. Also, Klemp’s call for applications dated March 9, 1999, was quite specific in its request for applicants to address “what have you done and what will you do to meet the Technology Resolution passed in November 1998.” (Respondent’s Exhibit 4) The technology resolution also called for the inclusion of the English home page address on course syllabi, which complainant did not do.

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Exhibit D), and again requested the same. However, she has been unrepresented by counsel through-

Complainant characterizes composition director Helmers' notes made while observing her March 6, 1996, class (Respondent's Exhibit 28) as being critical of her for taking attendance, and then arguing that this was a standard practice in the department. However, Helmers' point was not that complainant kept track of attendance, but that if complainant had had enough familiarity with her students, she would not have needed to take attendance verbally: "many times that formal rote attendance procedure was not necessary because it was fairly obvious when somebody was missing because everyone knew each other quite well." T., II, 54. Complainant also objected to Helmers' observation about the related inference Helmers drew in her testimony from the fact that complainant used both the first and last names of her students: "We were already one month into the semester, and she had called up the first and last names of the students in her class. And usually by that time, based on other classes that I had observed, people all knew their students on a first name basis by then." *Id.* Complainant stated in her post-hearing brief: "This only shows Dr. Helmers' lack of knowledge of [sic] different culture. I have lived in this country for 30 years now, but still I cannot be totally devoid of my cultural background. . . . So called first name basis is uncomfortable to me." (Complainant's post-hearing brief, p.3.) Again, this was not part of the testimony complainant provided at the hearing, and the statement in her brief cannot be considered as evidence.

Another piece of evidence of pretext was the fact that Klemp had his feet propped on his desk when he called complainant into his office on May 12, 1999, to inform her of his decision to offer her only three credits for the following semester. In and of itself, this could constitute evidence of pretext, because it could be interpreted as an indication of disdain or lack of respect for persons of complainant's race/color, gender, or age bracket. However, both Klemp and Lauter testified that he habitually adopted this posture, and there was no contrary evidence. Therefore, it is concluded that he did not treat complainant any differently than anyone else with regard to having his feet propped on his desk.

Complainant also stresses in her post-hearing brief that the Commission's investigator reached the conclusion that there was probable cause to believe respondent discriminated

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out this proceeding before the Commission.

against her. Given the evidence in this record, there may well be probable cause to believe that discrimination occurred. However, at this point in the process, the Commission is not dealing with the issue of probable cause. This was a hearing on the merits, and complainant has the burden of proof and had to establish by a preponderance of the evidence (also referred to as the greater weight of the evidence) that respondent discriminated against her. *See, e. g., Currie v. State*, 210 Wis. 2d 380, 390, 565 N. W. 2d 253 (Ct. App. 1997). In *Reinke v. Personnel Board*, 53 Wis. 2d 123, 137-38, 191 N. W. 2d 833 (1971), the preponderance or greater weight of the evidence standard was characterized as follows: "The function of the board is to make findings of fact which it believes are proven to a reasonable certainty, by the greater weight of the credible evidence." In the instant case, the testimony and other evidence of record lead the Commission to conclude that complainant did not satisfy her burden of proof.

In conclusion, when complainant applied for an academic staff appointment for 1999-2000, she ignored for the most part what Klemp had directed in his call for applications (Respondent's Exhibit 4). While the other application materials of record reflects that the other applicants did not comply completely with Klemp's directive, they did so significantly more than complainant, and they support Klemp's testimony about how complainant's application compared to others:

No application is perfect and especially when you're in a transition year, 1998/1999. The most you can hope for or what you hope for is that people will be making a good faith effort to recognize the transition that's taking place and to address that transition in their teaching philosophy statement and in their syllabuses. So in the other applications that I saw, none of them was perfect, none of them addressed every goal that's stated on the department's website for a goal of 101, but they still addressed some of them and indicated that they knew that a change was going on. Not all of them addressed the many, many questions that my item No. 3 in my call for applications posed to the applicants, but many of them addressed a lot of these questions and tried to place themselves in a professional stance within the department. T. I, 117-18.

With the benefit of hindsight, after complainant's ten consecutive years of re-employment, respondent could have dealt with the decision to deny two-thirds of complainant's

requested course assignments in a more diplomatic fashion.<sup>9</sup> In particular, Klemp's action of summoning complainant to his office to break the bad news to her, and then having his feet propped on his desk, was an unfortunate lapse in judgment, albeit it is undisputed on this record that it was consistent with his habitual practice. In the Commission's opinion, this was a significant factor in the conclusions complainant reached:

So in light of all this I felt that I was discriminated [against]. If Dr Klemp wanted some change or modification in my syllabus he could have told me so without dismissing me the way he did. What I'm trying to say is that I had already decided to retire at the end of the year so I'm not really unhappy that I lost my job. But what I feel is that after having worked there for 11 years I did not deserve to be treated the way I was. T I, 25.

I worked there for 11 years. And so I was hired and rehired for 11 years. These contracts are issued at the recommendation of the chairperson of the department. But even though there may be some modification, I did not expect it to be totally thrown out, my application. All of a sudden, I became useless, that I knew nothing. I'm a bad teacher I certainly did not deserve to be treated the way I was after 11 years of service there. T. II, 88.

However, although respondent could have handled the matter better, there is no question that complainant's application materials did not comply with Klemp's directive, and the Commission concludes that complainant has not satisfied her burden of proving that respondent discriminated against as alleged.

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<sup>9</sup> This is somewhat ironic considering Lauter's testimony concerning the more senior academic staff that:

On the one hand, I was saying that the people who have been here and in a sense brought the department through this crisis of the end of the eighties and the early nineties were to be honored and their work was definitely to be respected on the one hand. On the other hand, we had a job to do. We had to make this into a credible department first. T II, 22-23.

ORDER


The Commission having concluded that complainant was not discriminated against as alleged, this complaint is dismissed.

Dated: NOVEMBER 13, 2002.

STATE PERSONNEL COMMISSION

  
ANTHONY J. THEODORE, Commissioner

AJT:990148Cdec

  
KELLI THOMPSON, Commissioner

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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 rehear-

ing 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