

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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HELEN P. WASMER, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF JUSTICE, Respondent.

Case ID: 10.0002

Case Type: PA

DECISION NO. 36176

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**Appearances:**

Helen P. Wasmer, 6118 West Madison Street, West Allis, Wisconsin, appearing on her own behalf.

Rachel L. Bachhuber, Assistant Attorney General, Department of Justice, 17 W. Main Street, P.O. Box 7857, Madison, Wisconsin, appearing on behalf of State of Wisconsin, Department of Justice.

**DECISION AND ORDER ON MOTION TO DISMISS**

Helen P. Wasmer was employed as a Special Agent – Senior by the State of Wisconsin Department of Justice. On October 15, 2013, she was advised that she would be transferred to a Program and Policy Analyst – Advanced position with the same Division of Criminal Investigation. Both positions have a civil service pay schedule range of 07-03. Wasmer’s pay increased from \$36.01 to \$38.73. The gist of Wasmer’s appeal to the Wisconsin Employment Relations Commission is that her “transfer” is in fact a demotion made without just cause and therefore reviewable by us per §§ 230.44(1)(c) and 230.45(1)(a), Stats.<sup>1</sup>

Wasmer alleges that by virtue of the transfer she lost her right to a secretary and will lose her law enforcement certification. She also claims that while she received a pay increase, her loss of overtime availability results in a net loss of income. Wasmer claims all of the foregoing was in fact disciplinary in nature designed to punish her for past transgressions. The

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<sup>1</sup> Wasmer’s 4-page *pro se* appeal recites a variety of issues but the “demotion” issue is at the center of this claim. Her employment discrimination constructive discharge, § 230.44(2), Stats. and § 230.80, Stats., claims are not viable and are hereby dismissed.

DOJ argues that transfers are beyond our jurisdiction and therefore the claim must be dismissed.

While Chapter 230 does not define the term “demotion,” the WERC and the Personnel Commission before it have relied on the identical definitions set forth in Wis. Admin. Code § ER-MRS 1.02 and § ER 1.02.<sup>2</sup> The code provisions include the following definitions:

"Demotion" means the permanent appointment of an employee with permanent status in one class to a position in a lower class than the highest position currently held in which the employee has permanent status in class ...

"Lower class" means a class assigned to a lower pay range.

"Lower pay range" means the pay range which has the lesser pay range dollar value maximum when comparing pay ranges not designated as counterparts.

The term “transfer” is defined as “the permanent appointment of an employee to a different position assigned to a class having the same or counterpart pay rate or pay range as a class to which any of the employee's current positions is assigned.” Wis. Admin. Code § ER-MRS 1.02(33) and ER 1.02(46).

On its face, Wasmer’s move was a “transfer” not a “demotion” as those terms are used by the respective agencies.

The Commission in *DHFS & DMRS (Warren)*, Dec. No. 31215-A (WERC, 12/2005), and *Thiel v. DOT*, Dec. Nos. 31725-A and 31726-A (WERC, 12/2009), wrestled with the question of whether a reviewable demotion may exist in a transfer situation. The decisions are confusing but do provide guidance.

We recognize there may be circumstances where an employee is transferred to a new position and the transfer is truly punitive and in fact amounts to a *de facto* demotion. The Commission in *Thiel* narrowly defined such a “demotion” and required the employee to establish that the duties of the new position in reality would place her in a lower classification. Additionally, the employee would be required to establish that the change was punitive. That strikes us as a difficult hurdle but it has been the position of the Commission for a number of years and we are not inclined to adopt a new approach on a motion to dismiss.

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<sup>2</sup> The definitions are set forth in the rules applicable to the Administrator of the Division of Personnel Management and the Merit Recruitment Division of Personnel Management.

That having been said, Wasmer at least deserves the opportunity to meet the burden of proof described in *Thiel*. She has argued that the change was punitive and suggested that the duties in the new position are far beneath those in her former position.

To summarize we will deny the motion to dismiss as to Wasmer's demotion claim. In order to succeed on it, Wasmer will have the burden of proving that her new duties in the position she has been transferred to would warrant a lower classification. She will also carry the burden of proving that the transfer was punitive in nature. All of her other claims as set forth in her complaint are dismissed.

**ORDER**

The motion to dismiss is granted in part and denied in part consistent with this opinion.

Signed at the City of Madison, Wisconsin, this 29th day of February 2016.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

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James R. Scott, Chairman

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Rodney G. Pasch, Commissioner

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James J. Daley, Commissioner