EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
210 MONONA AVENUE
MADISON, WISCONSIN

Mary Louise Quinn-Gruber 3806 Petterle Place, #3 Madison, WI 53704 Complainant vs. Wisconsin Physicians Service Post Office Box 8190 Madison, WI 53708 Respondent	ORDER FROM APPEAL OF EXAMINER'S RECOMMENDED DECISION Case No. 2877

BACKGROUND

The Hearing Examiner of the Madison Equal Opportunities Commission (MEOC) issued the Recommended Decision dated September 27, 1982 (and technical corrections dated October 6, 1982). Timely exceptions were filed, written arguments were submitted and oral arguments were heard by eleven (11) members of the Madison Equal Opportunities Commission.

Based upon a review of the record in its entirety, the Madison Equal Opportunities Commission issues the following:

ORDER

That Recommended Conclusion of Law #3 of the attached Recommended Decision (including technical corrections) is hereby vacated; that the Recommended Order of said Recommended Decision is hereby vacated in its entirety; and that this matter be remanded to the Hearing Examiner for reconsideration (in light of the Commission Opinion, below), including the taking of further evidence if deemed appropriate and necessary. The Examiner is then to enter any further Recommended Findings of Fact, Conclusions of Law or Order(s) as appropriate and necessary.

Commissioners Abramson, Cobb, Fineman, Galanter, Hisgen, Lee, Mendez and Ware all join in entering the ORDER above. Commissioners Goldstein and Swamp dissented. Commissioner Cox did not join in the ORDER but did not dissent.

COMMISSION OPINION
(For the Majority)

The MEOC is of the opinion that the Respondent's articulation of "safety" as a business purpose justification for establishing its rule proscribing the wearing of "extreme hemlines - those which are ... too long ..." was a sufficient articulation under Burdine.[1] The Commission further finds that the Complainant failed to carry her burden of proof to show that the Respondents articulated reason (safety) for the adoption of said rule was by itself pretextual of discrimination on the basis of physical appearance.[2]

In light of the MEOC view, the case is being remanded to the hearing examiner to re-examine the issues of alleged retaliation for opposition to discriminatory practices.[3]

Signed and dated this 27th day of January, 1983.

EQUAL OPPORTUNITIES COMMISSION

Betsy Abramson
MEOC President

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[1]Texas Department of Community Affairs vs. Burdue, 101 S. Ct. 1084, 25 EPD par. 31,544 (1981). See discussion of Burdine in Footnote 8 of the attached Examiner's Recommended Decision.

[2]While the Commission finds the adoption of the rule to be non-discriminatory (although there is evidence on the record that employees had worn longer dresses than the Complainant without mishap prior to the adoption of the "extreme hemlines" rule, the Commission does not find that evidence alone sufficient to rebut the Respondent's concern for safety and avoiding a future accident), the Respondent's application of the rule to this employee may have been discriminatory. Consequently, the case is being remanded to Examiner as further explained in the remainder of the Commission opinion.

[3]The Commission refers specifically to the discussion in footnote 18 of the Examiner's attached Recommended Decision as well as to the issue of whether or not her discharge constituted discriminatory retaliation in violation of Sec. 3.23 (7)(e), Madison General Ordinances.

October 6, 1982

Atty. James Engmann
WOOD, ENGMANN and DEMOPOULOS-RODRIGUEZ
110 East Main Street
Madison, WI 53703

Atty. Ward Johnson
JENSWOLD, STUDT, HANSON, CLARK and KAUFMAN
16 North Carroll Street
Madison, WI 53703

Re: Quinn-Gruber v. WPS, #2877: TECHNICAL CORRECTIONS

Please make the following technical corrections in the Recommended Decision (dated September 27, 1982) for the above-entitled case.

1. That the date in the first sentence of Finding of Fact 16, "December 28, 1982," be deleted and the date "December 28, 1981" be substituted therefor.
2. That on page 13, the third line under Roman Numeral III, the word "prescribing" should be deleted and the word "proscribing" substituted therefor (...standards of specificity proscribing...).
3. That on page 13, the last word in the last (seventh) line under III. A. Vagueness should be "proscribed" and not "prescribed" (...each particular item of clothing proscribed.).

These technical corrections are clarifications of typographical errors and do not in any way extend any appeal deadlines in this matter.

Allen T. Lawent
Hearing Examiner

cc: Mary Louise Quinn-Gruber
Wisconsin Physicians Service

EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
210 MONONA AVENUE
MADISON, WISCONSIN

Mary Louise Quinn-Gruber 1509 Trailsway, #7 Madison, WI 53704 Complainant vs. Wisconsin Physicians Service Post Office Box 8190 Madison, WI 53708 Respondent	RECOMMENDED DECISION Case No. 2877

A complaint of discrimination was filed on October 9, 1981 with the Madison Equal Opportunities Commission (MEOC) alleging discrimination on the basis of physical appearance in regard to employment. Said complaint was investigated by Human Relations Investigator Mary Pierce and an Initial Determination dated December 11, 1981 was issued concluding that there was probable cause to believe that the Respondent discriminated against the Complainant as alleged.

Conciliation failed or was waived and the matter was certified to public hearing. The hearing was held commencing on May 20, 1982. Attorney James Engmann (then a law student advocate) appeared on behalf of the Complainant who also appeared in person; Attorney Ward Johnson of JENSWOLD, STUDT, HANSON, CLARK AND KAUFMANN appeared on behalf of the Respondent.

Pursuant to a review of the record and upon consideration of the written arguments submitted by the parties, the Examiner proposes the following Recommended Findings of Fact, Conclusions of Law and Order:

RECOMMENDED FINDINGS OF FACT

1. The Complainant, Mary Louise Quinn-Gruber, is an adult female residing in the State of Wisconsin.
2. The Respondent, Wisconsin Physicians Service (WPS), is a corporation doing business and employing persons at 1617 North Sherman Avenue in the City of Madison, State of Wisconsin.
3. The Complainant began working for the Respondent on May 4, 1981 as a Claims Processor I. She had moved to Madison from Chippewa Falls, Wisconsin with her husband and two children and applied for work with the Respondent during approximately the third week in April, 1981 in response to a newspaper want ad.
4. Upon starting work with the Respondent, she began a two-week training period. She and two other employees excelled in the training and were brought onto the "floor" prior to the completion of the customary two-week training period.
5. At the time of the Complainant's hire, the Respondent had formulated a tentative dress code policy which later became effective on August 1, 1981.
6. After the implementation of the dress code on August 1, 1981, the Complainant changed the style of dress she wore to work, including, but not limited to, the wearing of nylons. The Complainant had invested approximately $46.00 in the purchase of new items of clothing in anticipation of the dress code becoming effective.
7. The WPS dress code in effect after August 1, 1981 read as follows:

   PERSONAL APPEARANCE AND DRESS POLICY

   Appropriate dress and personal appearance of an individual contributes to personal pride and self confidence. Your favorable image helps attract other competent employees to WPS and contributes to the value customers place on our services.

   Men and women at WPS are expected to follow acceptable dress standards established for your job assignment, as well ass, good grooming and personal hygiene habits.

   Examples of proper, WPS business attire for women, consist of a dress or coordinated outfit.

Examples of proper, WPS business attire for men, consist of dress shirt, tie, slacks, suit, or sport coat.

Unacceptable business attire includes, but is not limited to, blue jeans, painter pants, bib-type pants or jump suits, see-through blouses, T-shirts, and tops with low necklines. Outfits with bare shoulders are unacceptable unless accompanied by coordinated jacket, blouse, or sweater. Also, extreme hemlines - those which are too short or too long - casual footwear, thongs or 'tennis' shoes of any kind, and lack of hosiery (nylons or socks) are unacceptable.

If you have a question as to what is 'proper' business attire, check with your supervisor. Supervisors have the responsibility to assure that their employees' personal appearance is within the accepted standards. Safety and other job factors may be taken into consideration. Employees will be asked to leave their job assignment (on their own time) to correct their personal appearance.

Personnel Department
June 10, 1981
(See Complainant's Exhibit 1)

8. On September 18, 1981, the Complainant received counseling or a verbal warning from the Respondent for having worn a "floor-length" skirt to work. Said skirt hung three (3) to four (4) inches above the floor and was made of cotton with basically a dark blue background and red and green small print, wrap around and loosely fitting.
9. On November 13, 1981, the Complainant received a verbal warning for wearing blue jeans to work. The blue jeans were in good repair with no ragged edges.
10. On December 4, 1981, the Complainant received a written warning from the Respondent for wearing "tennis shoes" to work. She had actually worn light brown "running shoes". She was sent home by the Respondent and was able to change shoes over her lunch hour without losing any work time.
11. On March 26, 1982, the Complainant received a written warning from the Respondent for having worn the same "floor-length" skirt for which she had been counseled or warned on September 18, 1981. (See Finding of Fact 8.) She was sent home and missed 3-3/4 hours of work as the Respondent suspended her for part of the day.
12. On April 1, 1982, the Complainant was suspended indefinitely by the Respondent after having worn to work a "floor-length" denim jean skirt, different from the one for which she had previously been warned, which hung approximately five (5) inches above the floor. The reasons given by the Respondent for the suspension were "for insubordination and willful disobedience of a work rule governing appropriate dress." By insubordination, the Respondent referred to an alleged willful violation of the Complainant's scheduled and posted break periods (see Complainant's Exhibit 5). By "willful disobedience of a work rule governing appropriate dress", the Respondent referred to the five (5) incidences recited in Findings of Fact 8 through 12.
13. On April 6, 1982, the Complainant received a certified letter dated April 5, 1982 instructing her to return to work on April 8, 1982. Because she had been initially told her suspension was indefinite, she had terminated her arrangement with her regular babysitter. She was unable to arrange child care by April 8, 1982 and consequently failed to report to work. The Respondent subsequently discharged her.
14. Prior to the institution of the Respondent's dress code on August 1, 1981, other of Respondent's employees had worn, without mishap, skirts that were longer (closer to the floor) than the skirts which the Complainant had worn on September 18, 1981, March 26, 1982 and April 1, 1982.
15. The Complainant's work performance at all times was adequate or above the standards required by the Respondent.
16. The Complainant wore a sweatshirt to work on December 28, 1982. While other employees had worn sweatshirts up to this time subsequent to the effective date of the dress code, no one had been disciplined or warned by the Respondent about wearing them. However, on the afternoon of the day that the Complainant had worn her sweatshirt, the Respondent announced a policy that sweatshirts could no longer be worn to work by any employees.
17. Since the time of her discharge by the Respondent and up to the time of the hearing, the Complainant had looked through newspaper want ads for primarily day shift (first shift) work, had periodically checked the State employment bulletins at the Madison Unemployment Compensation office, and had sought employment at Kohl's, Copps, Prange-Way and Lake City Bank.

18. While the Complainant's job duties varied over the period of time that she was employed by the Respondent, she initially performed primarily paperwork duties including the reviewing and processing of claim forms. Later, she also entered data on a CRT, a computer terminal, with a typewriter-like keyboard. At all times during her employment with the Respondent, she performed her job duties on the second floor of the Respondent's Sherman Avenue building and she was primarily seated at a desk in a room with 70 to 80 co-workers who were seated at similar desks. While seated, it was impossible for other individuals to see what kind of clothing she was wearing from the waist down, including tennis shoes or blue jeans. However, the Respondent did have visits from at least one client per month - generally United States government military personnel - and a visitor could observe all of the Complainant's attire when the Complainant was on break or if she went to lunch. Visitors needed to obtain a security pass to visit or conduct business in the building and were generally on a tour. Security passes were obtained from the receptionist on the first floor of the Sherman Avenue building.
19. On October 5, 1981, the Complainant received a verbal reprimand from the Respondent for excessive talking after having talked to co-employee, Jean Mckenzie, for two to three minutes that morning and for having talked to a news reporter during her (the Complainant's) lunch hour. The subject of both conversations was the situation that day where a boiler had malfunctioned and the Respondent's employees were being required to work in building temperatures of approximately 90 degrees. McKenzie was not reprimanded. The Complainant grieved the matter through her union, and said grievance was denied in approximately late November, 1981.
20. The Initial Determination issued by the EOC in Case No. 2877 (this case) was sent to the parties on or about December 11, 1981.
21. On December 24, 1981 at about 3:00 p.m., the Complainant was called to a meeting with Dennis Milanowsky, an assistant manager for the Respondent who had supervisory authority over the Complainant. Milanowsky denied the Complainant's request to have a union steward present and proceeded to tell the Complainant that he had been noticing a definite attitude change in her and that she was talking to different people too much. He later instructed her to get her work and to be at her work station to do what was required of her.
22. On February 18, 1982, the Complainant was instructed to put away a personal letter - "Dear Mon and Dad" - that she had started on company time. At 3:30 p.m., the Complainant was called into the office by Connie Sanford, her immediate supervisor, to discuss an attendance problem. The Complainant requested a union steward, and went to the meeting. Milanowsky was also present at the meeting. Sanford discussed the Complainant's attendance and Milanowsky discussed the Complainant's writing a letter on company time and using company supplies to do so. The Complainant was reprimanded for her attendance, but later grieved the reprimand successfully and said reprimand was removed from her file.
23. On February 19, 1982, the Complainant was again called into a meeting by Sanford and was informed that she was being given a verbal warning regarding the use of office supplies and for writing a personal letter on company time in violation of a work rule.
24. On March 1, 1982 at approximately 3:00 p.m., Milanowsky instructed the Complainant to put away some wallet-sized pictures of her children which she was viewing. At approximately 3:50 p.m., Milanowsky told her that she was cleaning her desk too soon and that she was to work until 3:55 p.m. Other employees were cleaning their desks at 3:50 p.m. as well.
25. During the morning of March 5, 1982, the Complainant attended a prehearing in MEOC Case No. 2877 (this case). She returned to work after the lunch hour. At 3:00 p.m. on March 5, 1982, Milanowsky instructed the Complainant to turn around in her seat and get back to work. Another co-employee who had left her seat to get a drink at a water fountain and who had stopped to talk to the Complainant was not reprimanded.
26. On March 9, 1982, the Complainant met with Bill Meyer, Respondent's Director of the Champus Program. Meyer told the Complainant that he had not been aware of some of the treatment that the Complainant had been receiving and that he had instructed all reprimands to cease now that he had become aware. He also said that he had observed other persons exchanging photographs during the workday and since nothing had been said to them, nothing should have been said to the Complainant either.
27. On approximately March 16 or 17, 1982, the Complainant was informed by Meyer that she should only go on breaks at her assigned times, and that alternatives to the break system would be worked out. She had taken breaks at different times than she had been assigned previous to this discussion with Meyer.

RECOMMENDED CONCLUSIONS OF LAW

1. The Complainant is a member of the protected class of "physical appearance" within the meaning of Section 3.23, Madison General Ordinances.
2. The Respondent is an employer within the meaning of Section 3.23, Madison General Ordinances.
3. The Respondent discriminated against the Complainant on the basis of the Complainant's physical appearance in regard to terms and/or conditions of employment and in regard to discharge from employment, in violation of Section 3.23, Madison General Ordinances.
4. The Complainant has used reasonable or due diligence, within the meaning of Section 3.23, Madison General Ordinances, in seeking other employment and otherwise mitigating her losses since the time of her discharge.

RECOMMENDED ORDER

1. That the Respondent cease and desist from discriminating against the Complainant on the basis of her physical appearance.
2. That the Complainant be reinstated in the next available position at the same or at a comparable job to the one which she was performing at the time of her unlawfully discriminatory discharge.
3. That the Complainant be paid all compensation to which she would have been and would be entitled had she not been unlawfully discharged, from April 8, 1982 until the time she is reinstated pursuant to paragraph no. 2 of this Order. This provision is intended to included both backpay and "frontpay". It is further ordered that the Complainant be paid all amounts to which she would have been entitled had she not been unlawfully suspended on March 26, 1982 and during the week of April 1 to April 8, 1982.
4. That the Complainant receive any and all rights, benefits, seniority, and perquisites of employment to which she would have been and would be entitled had she not been unlawfully suspended and/or discharged by the Respondent.
5. That the Respondent shall remove any and all written warnings pertaining to the wearing of "floor-length" skirts from the Complainant's personnel file or any other file kept by the Respondent regarding Complainant, specifically including, but not limited to, the removal of any warnings pertaining to the incidents of September 18, 1981, March 26, 1982, and April 1, 1982.
6. That the Respondent shall write to the Complainant a letter of apology for all of its discriminatory actions.
7. That the Respondent shall post in at least one conspicous location on each floor of its Madison facility for a period of one year, copies of Section 3.23, Madison General Ordinances and copies of the Final Order in this matter.
8. That the Respondent pay to the Complainant 7% annual interest on all amounts she is entitled to receive pursuant to this Order.
9. That the Respondent shall submit to the Hearing Examiner no later than thirty (30) days after this Order becomes final evidence of compliance with paragraphs 1 through 8 above.

MEMORANDUM OF OPINION

"Physical appearance" is defined in Section 3.23(2)(k), Madison General Ordinances as follows:

> "Physical appearance" means the outward appearance of any person, irrespective of sex, with regard to hair style, beards, manner of dress. . .or other aspects of appearance. It shall not relate, however, to the requirement of uniforms, or prescribed attire if and when such requirement is uniformly applied. . .to employees in a business establishment for a reasonable business purpose.

Section 3.23(7)(a) describes discrimination on the basis of physical appearance in regard to hire, discharge, compensation, terms, conditions, or privileges of employment.

There is no dispute that the Complainant was disciplined[1] for her "manner of dress", including the wearing of tennis shoes, the wearing of blue jeans, and the wearing of "floor-length" skirts that hung approximately four and five inches above the floor.

I. Burden of Proof in the Physical Appearance/Discharge Case

Consistent with the ruling in Boynton Cab Company vs. DILHR,[2] I find the following burden or proof applies:

(1) The Complainant must prove by a preponderance of the evidence that she is a member of a protected class; ie. that she falls within the physical appearance protections of the Ordinance;

(2) The Complainant must prove by a preponderance of the evidence that a causal connection existed between her physical appearance (in this case, her manner of dress) and the employer's actions toward her (specifically, the warnings, suspension and discharge).

In this case, I find the Complainant falls within the protection of the Ordinance and that a causal connection existed between her physical appearance and the employer's discipline and discharge of her. While the employer does not dispute that her discipline (warnings and suspension) was related at least in part[3] to her physical appearance, the employer contends that her discharge was not. The employer argues that her discharge was based on her failure to report to work after she had been notified by certified letter that her "indefinite suspension" would be five days and that she had to report to work by April 8, 1982. The Respondent contends further that her failure to report by the specified date was a violation of the collective bargaining agreement,[4] and that her discharge was pursuant to the violation of the bargaining agreement.

I find, however, that had the Complainant not been unlawfully disciplined on the basis of her physical appearance in the first instance, she would not have been suspended and the circumstances which arose leading to her discharge would not have otherwise arisen. In this case, there is such a direct connection between the Respondent's unlawful actions and the Complainant's discharge that I am compelled to find the discharge is also unlawfully discriminatory, notwithstanding that it may not have otherwise been in violation of the collective bargaining agreement. Whether or not an action is within the terms of a collective bargaining agreement may be probative but certainly is not conclusive of whether or not discrimination occurred.[5]

In addition, the Complainant established and it is not disputed that her work performance was not an issue in her discharge. Early on, she exceeded the Respondent's work performance minimum standards, and she was at all times at or above the Respondent's standards.[6]

The Complainant has thus established the first two elements required by Boynton and has also met the prima facie standards of Burdine.[7] Under a Boynton analysis, the burden of proof now shifts to the Respondent to show that the Respondent's conduct falls within the Ordinance exceptions.[8] The Respondent must establish the following elements:

(1) That the "physical appearance" complained of related to a requirement of cleanliness, uniforms, or prescribed attire

and

(2) Such requirement was uniformly applied to employees in a business establishment for a reasonable business purpose. (Emphasis supplied)

II. Tennis Shoes and Blue Jeans: "Prescribed vs. Proscribed Attire"

The Ordinance exception clearly recognizes that an employer may require the wearing of uniforms so long as the requirement is uniformly applied to employees for a reasonable business purpose. Similarly, the Ordinance exception recognizes that an employer may require "prescribed" attire (presumably, other than or in addition to uniforms) so long as the requirement is uniformly applied to employees for a reasonable business purpose.

Further, I hold that the Ordinance, by inference, permits an employer to proscribe attire so long as the proscription is uniformly applied to employees for a reasonable business purpose. Essentially, for purposes of the physical appearance ordinance section, "prescription" and "proscription" are one in the same.

When an employer requires "uniforms" or "prescribed attire" an employer defines the range of dress an employee may wear and, for the sake of convenience, lists what the employee may wear as it is a much shorter list than what the employee may not wear. However, when the employer permits a broad range of items to be worn by employees, it is more convenient for the employer to "proscribe" or list what the employee may not wear as it is a much shorter list than the range of items permitted. However, even when "proscribing", the

employee is nevertheless defining the range of dress an employee may wear (by virtue of informing the employee what is not permitted).

Further, the prescription or proscription requires a degree of specificity such that an employee of "common intelligence" knows what is prescribed or proscribed.[9] I find that this employee knew or should have known what the employer meant by its proscription of tennis shoes[10] and blue jeans;[11] i.e., said proscriptions were sufficiently specific in the Respondent's dress policy of which the Complainant was aware. The evidence also supports the finding that these proscriptions were uniformly applied to all employees (and the Complainant presented no evidence to the contrary). The only real issue remaining is that of "reasonable business purpose" in regard to the tennis shoes and the blue jeans.

The articulated business purpose by the Respondent was one of business image or public image. I hold that as a matter of law, it is not improper for an employer for purposes of business image to proscribe, in a uniform manner, the wearing of tennis shoes and/or blue jeans in an office setting where there is even minimal public contact,[12] regardless of whether or not the wearing of those items of clothing physically interferes with a person's ability to do their job.

III. The "Floor-Length" Skirts: Lack of Specificity, Vague and Overbroad Rule, Arbitrary and Unrelated To Stated Business Purpose

The need for specificity in the design of an employer's rule regarding "manner of dress" or physical appearance has been described above. The Respondent did not meet the proper standards of specificity in its rule prescribing the wearing of "extreme hemlines - those which are too short or too long . . ." (See Footnote 9) Furthermore, there is not one scintilla of evidence to support Respondent's articulated business purpose: safety.

On one occasion, the Complainant wore a cotton[13] "floor-length" skirt that was three (3) to four (4) inches above the floor. On a later occasion, the Complainant wore the same skirt. On a third occasion, she wore a blue denim[14] "floor-length" skirt of a different material that was five (5) inches above the floor.

A. Vagueness. There is no way this employee, an employee of at least common intelligence, could reasonably have known what the Respondent had proscribed by the words "extreme hemlines - those which are . . . too long . . ." An employee should not be expected to have to figure out a dress code by trial and error at the risk of adverse discipline.[15] At the same time, an employer should not have to describe in vivid detail each particular item of clothing prescribed.

In this case, however, the words "too long" cannot be reasonably expected to be interpreted to mean three or four inches above the floor or five inches above the floor for the record is clear that prior to the institution of the dress code, other employees had worn dresses of this length or longer, and the Respondent's dress code states no specific length that is proscribed.

B. Safety. There is further no evidence to support the Respondent's contention that safety concerns applied to the Complainant's clothing. In fact, the evidence supports the opposite conclusion, that the Complainant's clothing in fact was quite safe. The Complainant had no mishaps with her clothing while traversing those stairs which the Respondent alleged were dangerous or potentially dangerous for someone who was wearing a dress that was "too long", as well as to others. Prior to the institution of the dress code, other employees had worn dresses of greater length (closer to the floor) with no known mishap.[16]

The employer does not contend that the skirts were objectionable in any other manner except for safety.[17] In analyzing the Complainant's three warnings and two suspensions after wearing "floor-length" skirts to work, I conclude as follows:

> (1) The September 18, 1981 incident where the Complainant wore the cotton skirt that was three or four inches above the floor and received a verbal warning was discriminatory both because the Respondent's dress policy was too vague and because the Respondent had no reasonable business purpose for proscribing that particular item of clothing; ie., I reject the Respondent's articulated reason of safety and find it not to be a credible reason.

(2) The March 26, 1982 written warning where the Complainant was warned and suspended for wearing the same dress she had worn on September 18, 1981 was discriminatory because the Respondent had no reasonable business purpose for proscribing that particular item of clothing. While vagueness was no longer a problem, as the Complainant was warned for having worn that item of clothing on a previous occasion, the Respondent nevertheless violated the Ordinance because the safety reason articulated by it was not a credible reason.

(3) The April 1, 1982 incident where the Complainant wore a "floor-length" skirt five inches above the floor and received a written warning and suspension was discriminatory both because the employer's dress policy was vague and also because the Respondent had no credible reasonable business purpose for proscribing that particular item of clothing.

As stated earlier, in addition to the warnings being discriminatory and the suspension being discriminatory, the direct relationship between the unlawful warnings, the suspension and the discharge makes the discharge discriminatory as well.

IV. Retaliation for Opposition to Discriminatory Practices

The Complainant also alleges that she was singled out subsequent to the time she had filed her original amended complaint with the Madison Equal Opportunities Commission. I discuss these allegations in the footnote below.[18]

V. Conclusions

Based on the preceding analysis, I have entered an appropriate order to remedy the Respondent's unlawful acts.

Signed and dated this 27th day of September, 1982.

EQUAL OPPORTUNITIES COMMISSION

Allen T. Lawent
Hearing Examiner

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[1]The discipline included verbal warnings, written warnings, and suspensions.

[2]Boynton Cab Co. v. DILHR, 96 Wis. 2d 396, 291 N.W. 2d 850 (1980).

[3]As recited in Finding of Fact 12, the Respondent's position is that the suspension was also based in part on some problems that the Complainant experienced regarding break schedules. Even presuming this to be true (and the evidence supports such a finding), it is sufficient for the Complainant to prove by a preponderance of the evidence that her physical appearance was a determining factor in the Respondent's adverse actions toward her. See Wisconsin Dept. of Agriculture v. Wisconsin Labor and Industry Review Commission, 17 EPD par. 8607 (1978) for the proposition that - as paraphrased from Muskego - Norway C.S.J.S.C. v. WERB, 35 Wis 2d at p. 562 - an employer's conduct is not insulated from a finding of illegality when one of the motivating factors - e.g., physical appearance - is legally protected no matter how many other valid reasons might exist for the action complained of.

In this case, it is clear that the Complainant's physical appearance was clearly the determining factor in the warnings and suspension she received described in Findings of Fact 8 through 11. As for the "indefinite suspension" described in Finding of Fact 12, it is also clear that the Complainant's physical appearance was at least a determining factor, and I find that Complainant's physical appearance was in fact the primary determining factor leading to said suspension (in light of the progressive discipline which she had received for physical appearance infractions prior to the suspension.)

Finally, it is clear that had the Complainant not been unlawfully disciplined (warned and suspended), the circumstances leading to her discharge would not have arisen. Therefore, her physical appearance was also a determining factor (in fact, the primary determining factor) leading to her discharge.

[4]The Respondent contends that the Complainant's discharge was based on Section 7.5 of the collective bargaining agreement in effect between the Respondent and Local 1401, Office Employees Division of United Food and Commercial Worker's Union (AFL-CIO) stating as follows:

> Section 7.5, Loss of Seniority. An employee shall lose all seniority rights and his employment relationship shall be terminated if:
>
> . . . (F) The employee fails to report for work on the next regularly scheduled work day upon termination of a disciplinary layoff. (See Respondent's Exhibit 1.)

[5]See Alexander v. Gardner-Denver, 415 U.S. 36, 7 FEP Cases 81 (1974). Even where a case has gone through arbitration, the courts are reluctant (except where very stringent conditions are met) to adopt the arbitration or grievance process as dispositive of discrimination issues. Further, an employee's decision to bypass the grievance process and litigate the discrimination issue in a public forum is at the employee's discretion. Guarantees of protection from discrimination by ordinance law is a right that supercedes the law of the shop.

[6]In the early period of the Complainant's employment, her work productivity exceeded the Respondent's "reasonable expectancy" or required standards such that her supervisor, Connie Sanford, testified that she was, from a production standpoint, an "excellent employee" during that period.

In the latter part (last five or six months) of her employment, the Complainant's production was average (85%), but certainly not unsatisfactory to the Respondent. Regarding a brief period when the Complainant dipped below the average, Sanford testified:

". . .I'm not even sure what the chronological order is as far as Mary had indicated she swooped down when she went to the CRT as far as production goes, which is a normal learning problem, but she never came out above 85 after that, at an average production." (See Transcript, p. 95)

[7]In Texas Department of Community Affairs v. Burdine, 101 S.CT. 1084, 25 EPD 31,544 (1981), the U.S. Supreme Court discussed at length the burden of proof to be applied in Title VII disparate treatment cases. While the case at hand is not a Title VII case (it is an alleged ordinance violation) nor is filed under protected classes that would fall under Title VII, the Burdine precedent is nevertheless frequently applied to cases involving alleged violations of Section 3.23, Madison General Ordinances.

The Burdine court requires that the Complainant must prove by a preponderance of the evidence a prima facie case of disparate treatment. In this case, the Complainant has shown a prima facie case of discrimination for both discipline and discharge:

> (1) She is a member of the protected class (physical appearance).
> (2) She was performing her job duties satisfactorily at all times.
> (3) She was disciplined on the basis of her physical appearance.
> (4) She was discharged as a result of circumstances which arose primarily from her discipline for her physical appearance.
> (5) (By inference) Her duties are now being performed by a person or persons whose physical appearance is not objectionable to the Respondent.

See Flowers v. Crouch-Walker, 552 F.2d 1277, 14 EPD 7510.

[8]The issue is to what degree the Respondent must "prove" that the Respondent's conduct falls within the Ordinance exception. I hold the Respondent must prove at least by a preponderance of the evidence (if not by clear and convincing evidence), that the Respondent's conduct falls within the Ordinance exception.

It is important not to confuse the proper burdens of proof in these cases. Applying Burdine, "the ultimate burden of persuading the trier of facts (in this case, the Hearing Examiner) that the Respondent intentionally discriminated against the Complainant remains at all time with the Complainant." (See Footnote 7 for Burdine cite; see also Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24,18 EPD par. 8672).

In Burdine once the Complainant has established a prima facie case of discrimination (by a preponderance of the evidence), a very light burden (one of little more than articulation of legitimate, non-discriminatory reasons) is shifted to the Respondent to rebut the presumption of discrimination raised by the Complainant's prima facie case, and the burden again shifts to the Complainant to "now show that a discriminatory reason more likely motivated the employer than the employer's articulated non-discriminatory reason or the Complainant must show that the employer's pro-offered reason is unworthy of credence."

Burdine, however, is the burden of proof applied to show the necessary causal connection between the Respondent's actions and the Complainant's protected status which make the Respondent's actions discriminatory. This burden of proof is necessarily heavy on the Complainant who is the accuser. However, once the Complainant has carried her burden to show the necessary causal connection between her protected status and the Respondent's actions (thus, establishing that discrimination occurred), the burden of proof that shifts to the Respondent is necessarily heavy to show that its conduct either falls within an ordinance exception, is a bona fide occupational qualification, or deserves some other special consideration. This is because the Complainant has already persuasively established that the discrimination occurred, and exceptions to what has been shown to be discriminatory will be granted only under special and compelling circumstances.

In this case, there is no dispute that the Respondent's actions in disciplining the Complainant (by use of verbal and written warnings) was a result of her physical appearance. Further, although the Respondent argues that the Complainant was legitimately discharged in accordance with the terms of a collective bargaining agreement, the complainant persuaded the Examiner by a preponderance of the evidence that the circumstances leading to her discharge would not have arisen but for the determining part played by the discriminatory discipline she received on the basis of her physical appearance (see also Footnote 3). Consequently, the Complainant has ultimately persuaded the Examiner by a preponderance of the evidence that the Respondent was motivated by discriminatory reasons both in the discipline and discharge of the Complainant, and has carried her Burdine burden of proof.

The case is now beyond Burdine, and the Respondent must prove by a preponderance of the evidence (if not by clear and convincing evidence), that its conduct falls within the Ordinance exception (or is a bfoq, or deserves other special consideration).

[9]In Kessler v. Federated Rural Electric Insurance Company v. EOC, 26 EPD 32,077, the Wisconsin Court of Appeals, Dist. IV, in a decision affirmed by a split Wisconsin Supreme Court, discussed ordinance regulations and vagueness:

> A regulation is unconstitutionally vague if it is "so obscure that persons of common intelligence must necessarily guess at its meaning and differ as to its applicability." To survive constitutional scrutiny a regulation "need not meet impossible standards of specificity," but must only attain "a fair degree of definiteness."

To show that a government regulation is unconstitutionally vague is a heavy burden. Yet, even applying such a heavy standard to the Respondent's dress policy (i.e., giving the Respondent's policy the maximum benefit of the doubt), I find the Respondent's policy regarding "extreme hemlines - those which are . . . too long . . ." to be so obscure that persons of common intelligence must necessarily guess at its meaning and differ as to its applicability. (See Page 13 for further discussion.)

[10]Although the Respondent's dress policy refers to "tennis shoes", and the Complainant claims that she was wearing "running shoes", the distinction does not impress this Examiner. While such a distinction may no doubt be meaningful both to shoe salespeople and consumers, it is nevertheless not unreasonable for a Respondent to assume that the term "tennis shoes", when used in the context of a dress policy, will be sufficient to include those shoes known commonly as "running shoes".

[11]While the Respondent specifically proscribed blue jeans, there is no dispute on the record that denim skirts (i.e., skirts made of the same or similar material as blue jeans) were permissible. The Respondent contends that the number of employees who, prior to the institution of the dress policy, had worn jeans with ragged edges (and so on) was so great that it did not want to have to spend time distinguishing between blue jeans that met the dress policy versus blue jeans that did not. Consequently, only blue jeans were proscribed but not skirts made of the same or similar material.

I find the Respondent's distinction legitimate (between blue jeans and "blue jean" skirts) in the context of this case, although there is a question as to whether or not such a policy may perhaps amount to sex discrimination. However, this employee did not raise, nor has standing to raise that issue, as blue jeans were proscribed for males and females alike, and she was not prevented from wearing "blue jean" skirts, at least there was no objection to their appearance.

[12]While the occasional visitors to the Respondent's building could likely not see the Complainant's blue jeans or tennis shoes while she was seated at a CRT in the midst of 70 or 80 other employees in a large room, the employee's appearance was visible during breaks and lunch periods or on other occasions when an employee might stand to walk around.

[13]See Finding of Fact 8.

[14]See Footnote 11 for discussion regarding the proscription against blue jeans versus the acceptability of "blue jean" or denim skirts.

[15]While the Complainant was arguably "counselled" after her September 18, 1981 wearing of the cotton skirt, both this counseling and the April 1, 1982 wearing of the denim skirt were occasions where the Complainant suffered adverse consequences of varying degree for wearing skirts (one about four inches above the floor and one about five inches above the floor) without being able to reasonably ascertain what the Respondent was proscribing.

On March 26, 1982, the Complainant wore the same (length) skirt as she had worn on September 18, 1981, so the vagueness problem did not apply although the March 26 warning was discriminatory for safety reasons explained subsequently in this opinion.

[16]See testimony of LaVon Beale on Page 114 of the transcript:

> THE HEARING EXAMINER: Getting back to the people who wore dresses - which in relationship to the floor were actually closer to the floor, or in other words, longer than the dresses worn by the Complainant, did they ever have any safety problems at the facility that the Complainant worked at.
>
> MS. BEALE: I don't recall that we ever had an incident of anybody falling down the stairs or hurting themselves.
>
> THE HEARING EXAMINER: Were there any incidents of an employee - -
>
> MS. BEALE: Threatening perhaps, but nothing that actually occurred to hurt them physically.
>
> THE HEARING EXAMINER: Okay. Did any of those employees, if they were ever seated in a chair with rolling wheels on the bottom, ever roll over the dress, of those who wore the longer dresses.
>
> MS. BEALE: I don't know if this happened to any of the employees. It happened to me when I have been in a long dress, but I don't wear a long dress to the office, so not at the office.

[17]The testimony of three of the Respondent's witnesses, William Meyer, Connie Sanford and LaVon Beale, support this finding. Beale, who worked on the formulation of the dress code for the Respondent, testifies on Page 102 that ". . .On the long skirt, it (the proscription) was primarily for safety purposes. . ."

[18]This footnote relates to Recommended Findings of Fact 19 through 27. Even without these findings, Conclusion of Law 3 would stand, as it is based on Findings 1 through 18. The Complainant's allegations of retaliatory harassment generally must fail. (A) The October 5 reprimand for excessive talking appears to be related primarily to the Complainant's having discussed a sensitive problem with a news reporter and a co-employee, but no causal connection has been established between the reprimand and the Complainant's opposition to discriminatory practices. (B) The December 24, 1981 conference with Milanowsky, wherein Milanowsky discussed the Complainant's alleged attitude change came shortly after the EOC Initial Determination was issued and was perhaps probative that the Complainant was being singled out for her opposition to discriminatory practices. (C) The February 18, 1982 reprimand for attendance was rectified through the union grievance procedure. (D) The February 19, 1982 verbal warning for writing a personal letter on company time and with company supplies was not discriminatory as the Complainant did not show that other employees were treated differently in this regard. (E) The March 1, 1982 reprimand for looking at her children's pictures and March 5 talking reprimand was apologized for personally by the Champus Director, Meyer, eight days later and as soon as he first became aware of the problem. (G) The warnings of taking breaks do not appear to be discriminatory as the Complainant has failed to show differential treatment in this regard.

In summary:

- The October 5 reprimand is unrelated to the Complainant's opposition to discriminatory practices, but rather appears related solely to the events of that day.

- The December 24, 1981 verbal reprimand did not result in any adverse employment action and was not complained of by the Complainant to the Respondent's management above Milanowsky.

- The February 18, 1982 reprimand regarding attendance did constitute discriminatory retaliation but was later cured by the union grievance procedure in such a manner that the only remaining remedy is a "cease and desist order" which has already been entered regarding the other discriminatory actions found in this case.

- The February 19, 1982 verbal warning regarding the use of office supplies and writing a personal letter on company time was not discriminatory as the Complainant failed to present any evidence of disparate treatment.

- The March 1, 1982 incident where the Complainant was told by Milanowsky to cease looking at pictures of her children (and cleaning up too soon) was shortly (March 9) thereafter apologized for by Meyer, as was apparently the March 5, 1982 incident recited in Finding of Fact 25.

- The March 16 discussion with Meyer was not shown by the Complainant to constitute disparate treatment or retaliatory treatment.