DISTRICT IV

Office of the Clerk

COURT OF APPEALS

OF WISCONSIN

Marilyn L. Graves
Clerk

September 20, 1995

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You are hereby notified that the Court entered the following opinion and order:

95-0190 Union Cab Cooperative v. Equal Opportunities Commission of the City of Madison (MEOC), and Joseph Scott Maxwell (L.C. #92-CV-3260)

Before Eich, C.J., Gartzke, P.J., and Dykman, J.

Joseph Scott Maxwell appeals from a circuit court order dismissing his complaint before the Madison Equal Opportunities Commission (MEOC). Based on our review of the briefs and the record, we conclude at conference that this case is suitable for summary disposition. RULE 809.21, STATS.

We specifically note that Union Cab Cooperative's alleged discrimination against Maxwell never had any practical effect.

Although Maxwell was assessed six demerit points for violating an agreement not to appear at work in makeup, those points never led to a demotion, firing or any other adverse action. Maxwell continued in Union Cab's employ through the time relevant to this appeal.

Because we agree with the circuit court order, we incorporate that order here, and summarily affirm on that basis. *See* 133 Wis.2d 1, 19-20 (court of appeals internal operating procedures allow it to adopt the circuit court order where appropriate).

IT IS ORDERED the circuit court order is affirmed summarily. RULE 809.21, STATS.

Marilyn L. Graves
Clerk of Court of Appeals

STATE OF WISCONSIN	CIRCUIT COURT BRANCH 3	DANE COUNTY
UNION CAB COOPERATIVE, Petitioner, vs. EQUAL OPPORTUNITIES COMMISSION OF THE CITY OF MADISON, Respondent.	FILED DEC 2 1994 CIRCUIT COURT DANE COUNTY, WI	MEMORANDUM DECISION and ORDER Case No. 92-CV-3260

Although the record in this case is voluminous, the issue before the court on certiorari review is very limited. Concisely stated, it is: did the Equal Opportunities Commission of the City of Madison, ("MEOC"), keep within its jurisdiction and act according to law when it found: (1) that Union Cab Cooperative ("Union Cab"), discriminated against its employee, Joseph Scott Maxwell, ("Maxwell"), because of his physical appearance when it disciplined him for wearing cosmetics and earrings on Union Cab's premises; and (2) that Union Cab was motivated to discipline Maxwell "in part" in retaliation for Maxwell's earlier complaint against Union Cab? After reviewing the record and considering the briefs of the parties, I conclude that MEOC failed to keep within its jurisdiction and failed to act according to law. Therefore, I reverse.

FACTS

The facts are undisputed and are fully set forth in the Hearing Examiner's Posture of

Case, Findings of Fact and attached Opinion, which were explicitly adopted by the MEOC.[1] The relevant facts for purposes of this decision are set out at ¶ A of the Examiner's Posture of Case, and ¶¶ 4, 6, 9, 14, 16 and 19 of the Examiner's Findings of Fact. They provide:

POSTURE OF CASE

> A. This case was initiated when the Complainant, Joseph Scott Maxwell (Mr. Maxwell), filed a complaint with the Madison Equal Opportunities Commission (MEOC) on September 1, 1988 alleging a violation of sec. 3.23, Mad. Gen. Ord. as follows: "I believe I was discriminated against because of my sex (male), retaliation (MEOC #20834), sexual orientation (perceived homosexuality), and physical appearance (makeup, earrings, and nail polish) when I was falsely accused on June 16, 1988 of violating the terms of the Conciliation Agreement of MEOC case #20834, and assessed six points for violating the Respondent's shop rules regarding disobeying supervisory directions."
>
> ...

FINDINGS OF FACT

> 4. Mr. Maxwell filed a complaint (MEOC #20834) against Union Cab on August 12, 1987, alleging employment discrimination on the basis of sex, sexual orientation and physical appearance.
>
> 6. On May 11, 1988, Mr. Maxwell and Union Cab signed a Compromise and Settlement Agreement (exhibit #13), as a result of which MEOC case #20834 was dismissed. The most relevant portion of that agreement is as follows:
>
> > ...
> >
> > 3. Claimant agrees to never again wear cosmetics, earrings or nail polish while on the job at Respondent's business.
>
> 9. On June 12, 1988, sometime between 9:10 P.M. and 9:20 P.M., Max Winkels, an employee of Union Cab as well as President of its Board of Directors, observed Mr. Maxwell on the premises of Union Cab wearing cosmetics and earrings. Mr. Maxwell "punched out" at approximately 9:15 P.M. that evening,

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[1] MEOC in its two page Decision and Order affirmed the Hearing Examiner's Findings of Fact *in toto* while reversing the Examiner's Conclusion of Law #6. MEOC also remanded the matter back to the Hearing Examiner on the question of attorney fees.

> and at the time that Max Winkels observed Mr. Maxwell, Mr. Maxwell was off-duty. Max Winkels thought the condition of the makeup indicated it had been applied earlier, while Mr. Maxwell was on-duty. Max Winkels reported this to Perry Benson, who, as General Manager, was primarily responsible for disciplinary matters.
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> 14. On June 16, 1988, after consultation with Union Cab's legal counsel, Perry Benson assessed six category 1 points against Mr. Maxwell's record, for willful or deliberate failure to follow or obey proper supervisory direction, and informed Mr. Maxwell of this in a letter (exhibit #25).
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> 16. Mr. Maxwell requested a review of this disciplinary action by the Workers' Council, a Union Cab internal review committee.
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> 19. On June 29, the Workers' Council met to review the disciplinary decision. The Council listened to Perry Benson, Max Winkels, Karl Armstrong and Mr. Maxwell, and reviewed a letter from Marsha Rummel (exhibit #6). ... The Workers' Council upheld the disciplinary decision, ...

Other relevant facts will be noted in the body of the decision.

STANDARD OF REVIEW

There is no dispute concerning the standard of review that the court applies on certiorari review. Both counsel correctly cite the test from case law as early as 1967 in *State ex rel. Kaczkowski v. Board of Police Commissioners of the City of Milwaukee*, 33 Wis.2d 488 (1967), and as recent as 1993 in *Marris v. City of Cedarburg*, 176 Wis.2d 14 (1993). As stated in *Marris* at 24:

> ... The scope of our review by certiorari is limited to determining the following: (1) whether the Board "kept within its jurisdiction"; (2) whether the Board "acted according to law"; (3) whether the Board's action "was arbitrary, oppressive, or unreasonable and represented its will and not its judgment"; and (4) whether the evidence was such that the Board "might reasonably make the order or determination in question. ... (Footnote omitted).

Because I determine that MEOC lacked jurisdiction over the dispute between the employee and the employer under the applicable law, I reverse under the first two standards.

Deference is accorded administrative agency decisions on statutory interpretation and legal conclusions on three levels. *Jicha v. DILHR*, 169 Wis.2d 284 (1992). The levels are concisely set out in *Murphy v. LIRC*, 183 Wis.2d 205, 212 (Ct. App. 1994):

> This court has generally applied three levels of deference to conclusions of law and statutory interpretation in agency decisions. First, if the administrative agency's experience, technical competence, and specialized knowledge aid the agency in its interpretation and application of the statute, the agency determination is entitled to "great weight." The second level of review provides that if the agency decision is "very nearly" one of first impression it is entitled to "due weight" or "great bearing." The lowest level of review, the *de novo* standard, is applied where it is clear from the lack of agency precedent that the case is one of first impression for the agency and the agency lacks special expertise or experience in determining the question presented. (Emphasis in original; citations omitted.)

Counsel for MEOC argues that the court must apply the "great weight" level of deference to the conclusions reached by MEOC because of its specialized knowledge and experience in applying the Madison ordinance. I disagree.

The issue presented in this case appears to be one of first impression, namely, when a Compromise Settlement Agreement has been negotiated between an employee and an employer concerning and resolving an otherwise "protected status" of an employee, does a violation or perceived violation of the Agreement necessarily involve the employee's "protected status" or may it involve the employee's "conduct"? The agency's conclusion on this issue, as one of first impression, is accorded "no weight at all." *Local No. 695 v. LIRC*, 154 Wis.2d 75, 84 (1990).

Even if the issue is not of first impression for MEOC, the heart of the issue is MEOC's

authority to oversee, interpret or enforce an agreement between an employee and employer resolving an earlier claim of discrimination. In other words, the issue concerns the power of MEOC, and as such, the agency's conclusion is reviewed without deference. This principle was noted in *Amsoil, Inc. v. LIRC*, 173 Wis.2d 154, 165 (Ct. App. 1992):

> Moreover, an agency's decision dealing with the scope of its own power is not binding on this court. Because this is a novel issue that involves an agency defining its own power, we owe no deference to LIRC's interpretation of its power ... (citation omitted).

ANALYSIS

In my opinion, everyone associated with this case except Union Cab has missed the real issue: Maxwell, the employee, saw the issue as discrimination because he claimed he was "falsely accused" of violating the Compromise Settlement Agreement. The Hearing Examiner saw the issue as the discipline imposed by Union Cab and opined that the manner in which the discipline was imposed, although warranted in its severity, was the result, in modest part, of a retaliatory animus. The MEOC affirmed the Hearing Examiner but went further and concluded that Maxwell was discriminated against because he "was treated differently from other employees based on his physical appearance." Counsel for MEOC argues that the severity of the discipline imposed on Maxwell (six demerit points rather than two points or a warning) was the product of discriminatory animus and retaliation.[2] Only Union Cab saw the issue as Maxwell's conduct in wearing cosmetics, earrings and nail polish on the premises. It concluded

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[2] This argument was rejected by the Hearing Examiner in his Opinion when he found that the severity of discipline was warranted. And, under the MEOC reasoning, presumably any discipline, whether two points or a warning, would have been discriminatory and based on a retaliatory animus given its reliance on comments made subsequent to the purported violation of the Compromise Settlement Agreement.

that this conduct was a "willful and deliberate" violation of the Agreement, and it imposed discipline for the conduct.

I agree with Union Cab. Therefore, the issue is very narrow: did MEOC have jurisdiction under applicable law to examine the purported violation of the terms of the Compromise Settlement Agreement. I conclude that it did not.[3]

The Wisconsin Supreme Court in *Federated Rural Elec. Ins. Co. v. Kessler*, 131 Wis.2d 189 (1986) recognized a distinction in employment discrimination cases between work rules that discriminate on the basis of "status" and work rules that control the "conduct" of employees.[4]

Federated dealt with a work rule that prohibited married employees from associating with opposite sex employees outside of the work place.[5] Kessler was discharged in part because he violated this work rule. He challenged the discharge before the MEOC as discriminatory based on marital status.[6] MEOC concluded that his discharge was based in part on the work rule and that the work rule discriminated on the basis of marital status. Therefore, it found a violation of the Madison ordinance. The Dane County Circuit Court reversed. The Court of Appeals

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[3] Counsel for Union Cab came close to making this legal argument in his brief and reply brief when he quizzically queried: of what discriminatory act was Union Cab guilty? He also noted in the reply brief that "[t]he enforcement decision may have been unwise, but it was a good-faith attempt to enforce the stipulation and order in the prior Maxwell case; the attempt did not, could not, constitute discrimination, or retaliation, or no order could be enforced by a party."

[4] I point out that I do not necessarily subscribe to the reasoning of the court in *Federated*. I am, however, bound by its rationale.

[5] The rule also prohibited unmarried employees from associating with opposite sex married employees.

[6] Kessler also alleged discrimination based on his physical appearance. This claim was upheld by the examiner but reversed by the commission and not appealed.

affirmed the MEOC and the Supreme Court reversed the Court of Appeals and, in effect, affirmed the Circuit Court's reversal of MEOC.

The Supreme Court summarized the hearing examiner's rationale which became the MEOC's decision as follows at 200:

> The examiner concluded from the above finding [of a violation of the work rule] that Federated discriminated on the basis of marital status. The examiner explained this conclusion in his memorandum opinion. He stated without discussion that the work rule discriminated on its face on the basis of marital status. Furthermore, violation of the rule was a "residual" factor in the discharge decision because it affected the employer's trust in Kessler. The examiner considered dismissal based on distrust which is caused by violation of a discriminatory policy to be "in actuality no different and no less discriminatory than relying on the policy itself."

The opposite conclusion was reached by the Supreme Court and stated at 193:

> We conclude that Federated's rule does not discriminate on the basis of marital status, and, therefore, Kessler's termination did not violate the Madison equal opportunities ordinance even if the employer was motivated in part by Kessler's violation of the work rule.

The rationale adopted by the Supreme Court was that the work rule applied to the conduct of the employees, not the marital status of the employees. At page 208 it adopted the Circuit Court reasoning:

> We agree with the analysis of the circuit court. In this case, Federated's rule proscribed certain conduct among employees which all employees were required to honor. The sanction of the rule is not triggered by the offending employee's marital status. The rule does not require the offending person to be married for its application because a person can be a party to an extra-marital association regardless of their own marital status. ... Thus, Federated's rule prohibited a course of conduct rather than a status. The rule simply does not condition employment on having a specific marital status.

The Supreme Court has noted that the analysis of *Federated* is "consistent with Wisconsin decisions distinguishing between 'status' and 'conduct' in the context of employment discrimination." *Dane County v. Norman*, 174 Wis.2d 683, 691 (1993), citing *City of Onalaska v. LIRC*, 120 Wis.2d 363 (Ct. App. 1984) and *Squires v. LIRC*, 97 Wis.2d 648 (Ct. App. 1980).

Applying the *Federated* holding to the facts of this case directs the conclusion that MEOC exceeded its jurisdiction in concluding that discrimination and retaliation occurred.

On August 12, 1987, Maxwell filed a discrimination claim against Union Cab (MEOC #20834). The complaint concerned a dispute between his right to dress as he chose on the job as a cab driver and Union Cab's directive that he not wear cosmetics, earrings, or nail polish before 6:00 P.M. because it claimed his appearance was losing the cooperative "business accounts." Maxwell's complaint raised the issue of whether Union Cab's directive discriminated against Maxwell because of his physical appearance or whether Union Cab had a "reasonable business purpose exception" permitting control of the employee's physical appearance.[7]

Maxwell's complaint was settled between the parties on May 11, 1988, with the parties entering into a Compromise and Settlement Agreement. By the terms of the Compromise and Settlement Agreement, Union Cab agreed not to discharge Maxwell and agreed to pay Maxwell's attorney fees and costs. Maxwell agreed to "never again wear cosmetics, earrings or nail polish while on the job at Respondent's business." The agreement dismissed the MEOC complaint #20834.

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[7] Maxwell also complained that Union Cab's directive discriminated against him on the basis of sex and sexual orientation.

In my opinion, the Compromise and Settlement Agreement became an employment contract between Maxwell and Union Cab. By its terms, and for consideration, Maxwell agreed to alter his physical appearance by contracting not to wear "cosmetics, earrings or nail polish while on the job at Respondent's business." Maxwell's physical appearance "protected status", the primary subject of his complaint with MEOC, was compromised with his assent.[8]

Having agreed to the terms of the agreement, Maxwell agreed to modify his physical appearance "on the job at Respondent's business" to comport with the terms of the agreement even though this meant that his physical appearance "status" would be arguably controlled by his employer perhaps contrary to Madison ordinance, §3.23(7). In doing so, Maxwell gave up his right to litigate whether his physical appearance was protected under the ordinance.

Maxwell was seen on Union Cab's premises on June 12, 1988, wearing cosmetics and earrings. After consulting with the cooperative's counsel, Union Cab disciplined Maxwell for what Union Cab believed was a "willful and deliberate" violation of the Agreement. It imposed 6 demerit points against his record.[9] Maxwell exercised his right to have this disciplinary action

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[8] Maxwell did not raise in this case nor did the MEOC consider or find that the Compromise and Settlement Agreement discriminated against Maxwell based on his physical appearance. For purposes of this case, therefore, the Agreement must be considered a valid agreement enforceable by the parties.

[9] Union Cab had a demerit point system set out by the Hearing Examiner at Finding of Fact 13:

> 13. ... Union Cab's disciplinary policy at the time consisted of a point system with two categories (category 1 for disciplinary incidents and category 2 for driving incidents) whereby accumulation of 12 points in any one category in a year, or 16 points in any one category in two years, or 16 points in both categories in one year, or 20 points in both categories in two years was grounds for termination.

reviewed by the cooperative's internal review procedure. The Workers' Council upheld the disciplinary decision and added a recommendation that Maxwell "seek counseling".[10]

On September 1, 1988, Maxwell filed this complaint alleging that he had been "falsely accused" of violating the "Conciliation Agreement" because he was not "on duty" when he was observed wearing "cosmetics and earrings" on Union Cab's premises. MEOC did not address this issue because the apparent ambiguity in the language of the Compromise and Settlement Agreement clearly was not before the MEOC. The Hearing Examiner noted at p. 11 of his Proposed Decision:

> 4. This is not a forum for deciding a question which is of academic interest only at this point, whether or not Mr. Maxwell was wearing makeup while on-duty on June 12, 1988.

Likewise, the issue of whether Maxwell's physical appearance "status" was protected was not before the MEOC. Again, as noted by the Hearing Examiner on p. 10, the MEOC complaint brought by Maxwell in September, 1988, was not a forum to address:

> ... whether his use of makeup, earrings, and nail polish would be protected under the MEOC ordinance. ... the issue was altered and effectively foreclosed in this forum by the Compromise and Settlement Agreement.

However, despite these conclusions expressed in the Hearing Examiner's Opinion, the MEOC nevertheless found that Maxwell "was treated differently from other employees based on upon

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The Hearing Examiner found that the 6 demerit points were warranted based on the "apparent" violation of the Compromise and Settlement Agreement and upon prior incidents involving Maxwell.

[10] The Examiner found that the Workers' Council "acts as a check on management."

(sic) his physical appearance." Having adopted the Examiner's Findings of Fact, this conclusion is a *non sequitur*. It is also contrary to law. *Federated* at 192.

CONCLUSION

Maxwell's purported violation of the Compromise Settlement Agreement involved Maxwell's "conduct", not his physical appearance "protected status." His physical appearance "status" had already been compromised by the terms of the Agreement in which he agreed to comport his "conduct" in the manner of his physical appearance. His purported violation of the agreement was the sole issue involved in Union Cab's decision to discipline Maxwell. This issue was not decided by the MEOC for reasons set out by the Hearing Examiner. In my opinion, this issue could not have been before the MEOC because it involved Maxwell's "conduct" on June 12, 1988, not his physical appearance "protected status".

The difficulty with this case has been the attempt of the MEOC to fit a round peg into a square hole. Whether Maxwell was wronged by Union Cab's decision to discipline him for a purported violation of the Compromise Settlement Agreement was the subject of the cooperative's internal review procedure. Whether it should have been reviewed further is an unanswered question. However, it should not and, in my opinion, could not be reviewed by the MEOC. The agreement respected Maxwell's "conduct" not his physical appearance "status". As the court held in *Federated* and its progeny, work rules (or agreements) that prohibit a course of conduct do not condition employment on a specific protected status. "The sanction of the rule [or agreement] is not triggered by the offending employee's ... [physical appearance] status. ... Reliance on the rule [or agreement] ... was a permissible action in the employment ... relationship, which did not violate Madison's antidiscrimination ordinance or any

'fundamental and well-defined public policy as evidenced by existing law.'" *Id.* at 208, 214-15.

Therefore, It Is Ordered that the decision of the MEOC is REVERSED and the complaint filed is DISMISSED.

Dated: December 1, 1994

BY THE COURT:

P. Charles Jones, Circuit Judge

STATE OF WISCONSIN	CIRCUIT COURT BRANCH 3	DANE COUNTY
UNION CAB COOPERATIVE, Petitioner, vs. EQUAL OPPORTUNITIES COMMISSION OF THE CITY OF MADISON, Respondent.		MEMORANDUM DECISION and ORDER Case No. 92-CV-3260

Although the record in this case is voluminous, the issue before the court on certiorari review is very limited. Concisely stated, it is: did the Equal Opportunities Commission of the City of Madison, ("MEOC"), keep within its jurisdiction and act according to law when it found: (1) that Union Cab Cooperative ("Union Cab"), discriminated against its employee, Joseph Scott Maxwell, ("Maxwell"), because of his physical appearance when it disciplined him for wearing cosmetics and earrings on Union Cab's premises; and (2) that Union Cab was motivated to discipline Maxwell "in part" in retaliation for Maxwell's earlier complaint against Union Cab? After reviewing the record and considering the briefs of the parties, I conclude that MEOC failed to keep within its jurisdiction and failed to act according to law. Therefore, I reverse.

FACTS

The facts are undisputed and are fully set forth in the Hearing Examiner's Posture of

Case, Findings of Fact and attached Opinion, which were explicitly adopted by the MEOC.[1]

The relevant facts for purposes of this decision are set out at ¶ A of the Examiner's Posture of Case, and ¶¶ 4, 6, 9, 14, 16 and 19 of the Examiner's Findings of Fact. They provide:

POSTURE OF CASE

> A. This case was initiated when the Complainant, Joseph Scott Maxwell (Mr. Maxwell), filed a complaint with the Madison Equal Opportunities Commission (MEOC) on September 1, 1988 alleging a violation of sec. 3.23, Mad. Gen. Ord. as follows: "I believe I was discriminated against because of my sex (male), retaliation (MEOC #20834), sexual orientation (perceived homosexuality), and physical appearance (makeup, earrings, and nail polish) when I was falsely accused on June 16, 1988 of violating the terms of the Conciliation Agreement of MEOC case #20834, and assessed six points for violating the Respondent's shop rules regarding disobeying supervisory directions."
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FINDINGS OF FACT

> 4. Mr. Maxwell filed a complaint (MEOC #20834) against Union Cab on August 12, 1987, alleging employment discrimination on the basis of sex, sexual orientation and physical appearance.
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> 6. On May 11, 1988, Mr. Maxwell and Union Cab signed a Compromise and Settlement Agreement (exhibit #13), as a result of which MEOC case #20834 was dismissed. The most relevant portion of that agreement is as follows:
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> > 3. Claimant agrees to never again wear cosmetics, earrings or nail polish while on the job at Respondent's business.
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> 9. On June 12, 1988, sometime between 9:10 P.M. and 9:20 P.M., Max Winkels, an employee of Union Cab as well as President of its Board of Directors, observed Mr. Maxwell on the premises of Union Cab wearing cosmetics and earrings. Mr. Maxwell "punched out" at approximately 9:15 P.M. that evening,

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and at the time that Max Winkels observed Mr. Maxwell, Mr. Maxwell was off-duty. Max Winkels thought the condition of the makeup indicated it had been applied earlier, while Mr. Maxwell was on-duty. Max Winkels reported this to Perry Benson, who, as General Manager, was primarily responsible for disciplinary matters.

14. On June 16, 1988, after consultation with Union Cab's legal counsel, Perry Benson assessed six category 1 points against Mr. Maxwell's record, for willful or deliberate failure to follow or obey proper supervisory direction, and informed Mr. Maxwell of this in a letter (exhibit #25).

16. Mr. Maxwell requested a review of this disciplinary action by the Workers' Council, a Union Cab internal review committee.

19. On June 29, the Workers' Council met to review the disciplinary decision. The Council listened to Perry Benson, Max Winkels, Karl Armstrong and Mr. Maxwell, and reviewed a letter from Marsha Rummel (exhibit #6). ... The Workers' Council upheld the disciplinary decision, ...

Other relevant facts will be noted in the body of the decision.

STANDARD OF REVIEW

There is no dispute concerning the standard of review that the court applies on certiorari review. Both counsel correctly cite the test from case law as early as 1967 in *State ex rel. Kaczkowski v. Board of Police Commissioners of the City of Milwaukee*, 33 Wis.2d 488 (1967), and as recent as 1993 in *Marris v. City of Cedarburg*, 176 Wis.2d 14 (1993). As stated in *Marris* at 24:

> ... The scope of our review by certiorari is limited to determining the following: (1) whether the Board "kept within its jurisdiction"; (2) whether the Board "acted according to law"; (3) whether the Board's action "was arbitrary, oppressive, or unreasonable and represented its will and not its judgment"; and (4) whether the evidence was such that the Board "might reasonably make the order or determination in question. ... (Footnote omitted).

Because I determine that MEOC lacked jurisdiction over the dispute between the employee and the employer under the applicable law, I reverse under the first two standards.

Deference is accorded administrative agency decisions on statutory interpretation and legal conclusions on three levels. ***Jicha v. DILHR***, 169 Wis.2d 284 (1992). The levels are concisely set out in ***Murphy v. LIRC***, 183 Wis.2d 205, 212 (Ct. App. 1994):

> This court has generally applied three levels of deference to conclusions of law and statutory interpretation in agency decisions. First, if the administrative agency's experience, technical competence, and specialized knowledge aid the agency in its interpretation and application of the statute, the agency determination is entitled to "great weight." The second level of review provides that if the agency decision is "very nearly" one of first impression it is entitled to "due weight" or "great bearing." The lowest level of review, the ***de novo*** standard, is applied where it is clear from the lack of agency precedent that the case is one of first impression for the agency and the agency lacks special expertise or experience in determining the question presented. (Emphasis in original; citations omitted.)

Counsel for MEOC argues that the court must apply the "great weight" level of deference to the conclusions reached by MEOC because of its specialized knowledge and experience in applying the Madison ordinance. I disagree.

The issue presented in this case appears to be one of first impression, namely, when a Compromise Settlement Agreement has been negotiated between an employee and an employer concerning and resolving an otherwise "protected status" of an employee, does a violation or perceived violation of the Agreement necessarily involve the employee's "protected status" or may it involve the employee's "conduct"? The agency's conclusion on this issue, as one of first impression, is accorded "no weight at all." ***Local No. 695 v. LIRC***, 154 Wis.2d 75, 84 (1990).

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ANALYSIS

In my opinion, everyone associated with this case except Union Cab has missed the real issue: Maxwell, the employee, saw the issue as discrimination because he claimed he was "falsely accused" of violating the Compromise Settlement Agreement. The Hearing Examiner saw the issue as the discipline imposed by Union Cab and opined that the manner in which the discipline was imposed, although warranted in its severity, was the result, in modest part, of a retaliatory animus. The MEOC affirmed the Hearing Examiner but went further and concluded that Maxwell was discriminated against because he "was treated differently from other employees based on his physical appearance." Counsel for MEOC argues that the severity of the discipline imposed on Maxwell (six demerit points rather than two points or a warning) was the product of discriminatory animus and retaliation.[2] Only Union Cab saw the issue as Maxwell's conduct in wearing cosmetics, earrings and nail polish on the premises. It concluded

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[4] I point out that I do not necessarily subscribe to the reasoning of the court in *Federated*. I am, however, bound by its rationale.

[5] The rule also prohibited unmarried employees from associating with opposite sex married employees.

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affirmed the MEOC and the Supreme Court reversed the Court of Appeals and, in effect, affirmed the Circuit Court's reversal of MEOC.

The Supreme Court summarized the hearing examiner's rationale which became the MEOC's decision as follows at 200:

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The rationale adopted by the Supreme Court was that the work rule applied to the conduct of the employees, not the marital status of the employees. At page 208 it adopted the Circuit Court reasoning:

> We agree with the analysis of the circuit court. In this case, Federated's rule proscribed certain conduct among employees which all employees were required to honor. The sanction of the rule is not triggered by the offending employee's marital status. The rule does not require the offending person to be married for its application because a person can be a party to an extra-marital association regardless of their own marital status. ... Thus, Federated's rule prohibited a course of conduct rather than a status. The rule simply does not condition employment on having a specific marital status.

The Supreme Court has noted that the analysis of *Federated* is "consistent with Wisconsin decisions distinguishing between 'status' and 'conduct' in the context of employment discrimination." *Dane County v. Norman*, 174 Wis.2d 683, 691 (1993), citing *City of Onalaska v. LIRC*, 120 Wis.2d 363 (Ct. App. 1984) and *Squires v. LIRC*, 97 Wis.2d 648 (Ct. App. 1980).

Applying the *Federated* holding to the facts of this case directs the conclusion that MEOC exceeded its jurisdiction in concluding that discrimination and retaliation occurred.

On August 12, 1987, Maxwell filed a discrimination claim against Union Cab (MEOC #20834). The complaint concerned a dispute between his right to dress as he chose on the job as a cab driver and Union Cab's directive that he not wear cosmetics, earrings, or nail polish before 6:00 P.M. because it claimed his appearance was losing the cooperative "business accounts." Maxwell's complaint raised the issue of whether Union Cab's directive discriminated against Maxwell because of his physical appearance or whether Union Cab had a "reasonable business purpose exception" permitting control of the employee's physical appearance.[7]

Maxwell's complaint was settled between the parties on May 11, 1988, with the parties entering into a Compromise and Settlement Agreement. By the terms of the Compromise and Settlement Agreement, Union Cab agreed not to discharge Maxwell and agreed to pay Maxwell's attorney fees and costs. Maxwell agreed to "never again wear cosmetics, earrings or nail polish while on the job at Respondent's business." The agreement dismissed the MEOC complaint #20834.

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[7] Maxwell also complained that Union Cab's directive discriminated against him on the basis of sex and sexual orientation.

In my opinion, the Compromise and Settlement Agreement became an employment contract between Maxwell and Union Cab. By its terms, and for consideration, Maxwell agreed to alter his physical appearance by contracting not to wear "cosmetics, earrings or nail polish while on the job at Respondent's business." Maxwell's physical appearance "protected status", the primary subject of his complaint with MEOC, was compromised with his assent.[8]

Having agreed to the terms of the agreement, Maxwell agreed to modify his physical appearance "on the job at Respondent's business" to comport with the terms of the agreement even though this meant that his physical appearance "status" would be arguably controlled by his employer perhaps contrary to Madison ordinance, §3.23(7). In doing so, Maxwell gave up his right to litigate whether his physical appearance was protected under the ordinance.

Maxwell was seen on Union Cab's premises on June 12, 1988, wearing cosmetics and earrings. After consulting with the cooperative's counsel, Union Cab disciplined Maxwell for what Union Cab believed was a "willful and deliberate" violation of the Agreement. It imposed 6 demerit points against his record.[9] Maxwell exercised his right to have this disciplinary action

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[8] Maxwell did not raise in this case nor did the MEOC consider or find that the Compromise and Settlement Agreement discriminated against Maxwell based on his physical appearance. For purposes of this case, therefore, the Agreement must be considered a valid agreement enforceable by the parties.

[9] Union Cab had a demerit point system set out by the Hearing Examiner at Finding of Fact 13:

> 13. ... Union Cab's disciplinary policy at the time consisted of a point system with two categories (category 1 for disciplinary incidents and category 2 for driving incidents) whereby accumulation of 12 points in any one category in a year, or 16 points in any one category in two years, or 16 points in both categories in one year, or 20 points in both categories in two years was grounds for termination.

reviewed by the cooperative's internal review procedure. The Workers' Council upheld the disciplinary decision and added a recommendation that Maxwell "seek counseling".[10]

On September 1, 1988, Maxwell filed this complaint alleging that he had been "falsely accused" of violating the "Conciliation Agreement" because he was not "on duty" when he was observed wearing "cosmetics and earrings" on Union Cab's premises. MEOC did not address this issue because the apparent ambiguity in the language of the Compromise and Settlement Agreement clearly was not before the MEOC. The Hearing Examiner noted at p. 11 of his Proposed Decision:

> 4. This is not a forum for deciding a question which is of academic interest only at this point, whether or not Mr. Maxwell was wearing makeup while on-duty on June 12, 1988.

Likewise, the issue of whether Maxwell's physical appearance "status" was protected was not before the MEOC. Again, as noted by the Hearing Examiner on p. 10, the MEOC complaint brought by Maxwell in September, 1988, was not a forum to address:

> ... whether his use of makeup, earrings, and nail polish would be protected under the MEOC ordinance. ... the issue was altered and effectively foreclosed in this forum by the Compromise and Settlement Agreement.

However, despite these conclusions expressed in the Hearing Examiner's Opinion, the MEOC nevertheless found that Maxwell "was treated differently from other employees based on upon

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The Hearing Examiner found that the 6 demerit points were warranted based on the "apparent" violation of the Compromise and Settlement Agreement and upon prior incidents involving Maxwell.

[10] The Examiner found that the Workers' Council "acts as a check on management."

(sic) his physical appearance." Having adopted the Examiner's Findings of Fact, this conclusion is a *non sequitur*. It is also contrary to law. *Federated* at 192.

CONCLUSION

Maxwell's purported violation of the Compromise Settlement Agreement involved Maxwell's "conduct", not his physical appearance "protected status." His physical appearance "status" had already been compromised by the terms of the Agreement in which he agreed to comport his "conduct" in the manner of his physical appearance. His purported violation of the agreement was the sole issue involved in Union Cab's decision to discipline Maxwell. This issue was not decided by the MEOC for reasons set out by the Hearing Examiner. In my opinion, this issue could not have been before the MEOC because it involved Maxwell's "conduct" on June 12, 1988, not his physical appearance "protected status".

The difficulty with this case has been the attempt of the MEOC to fit a round peg into a square hole. Whether Maxwell was wronged by Union Cab's decision to discipline him for a purported violation of the Compromise Settlement Agreement was the subject of the cooperative's internal review procedure. Whether it should have been reviewed further is an unanswered question. However, it should not and, in my opinion, could not be reviewed by the MEOC. The agreement respected Maxwell's "conduct" not his physical appearance "status". As the court held in *Federated* and its progeny, work rules (or agreements) that prohibit a course of conduct do not condition employment on a specific protected status. "The sanction of the rule [or agreement] is not triggered by the offending employee's ... [physical appearance] status. ... Reliance on the rule [or agreement] ... was a permissible action in the employment ... relationship, which did not violate Madison's antidiscrimination ordinance or any

'fundamental and well-defined public policy as evidenced by existing law.'" *Id.* at 208, 214-15.

Therefore, It Is Ordered that the decision of the MEOC is REVERSED and the complaint filed is DISMISSED.

Dated: December 1, 1994

BY THE COURT:

P. Charles Jones, Circuit Judge