STATE OF WISCONSIN
NO., 83-1105

IN COURT OF APPEALS
DISTRICT IV

ST. VINCENT De PAUL SOCIETY,
Plaintiff-Appellant,

v.

MADISON EQUAL OPPORTUNITIES COMMISSION,
Defendant-Respondent.

APPEAL from a judgment of the circuit court for Dane county: WILLIAM EICH, Judge. Reversed.

Before Gartzke, P.J., Bablitch, J. and Dykman, J.

DYKMAN, J. St. Vincent De Paul Society appeals a judgment of the circuit court affirming an order of the Madison Equal Opportunities Commission sustaining an age discrimination complaint. Because we conclude that the city improperly included religious organizations in its anti-discrimination ordinance, we reverse.

Ellen Fields filed an age discrimination complaint against appellant September 1979 under sec. 3.23 of the Madison General Ordinances. That ordinance prohibits age discrimination but does not define "employer."

The MEOC hearing examiner found appellant had violated the Madison Equal Opportunities Ordinance.

Section 111.32(3), Stats. 1979-80[1] provided: "The term 'employer' shall include each agency of the state and any employer as defined in s. 41.02(4), but shall not include a social club, fraternal or religious association not organized for private profit." The St. Vincent De Paul Society is a non-profit religious association.

In Village of Sister Bay v. Hockers, 106 Wis.2d 474, 483, 317 N.W.2d 505, 509 (Ct. App. 1982), we said: "Construction of an ordinance, like construction of a statute, is a question of law." In Johnson v. K-Mart Enterprises, Inc., 98 Wis.2d 533, 539, 297 N.W.2d 74, 77 (Ct. App. 1980), we said: "When the trial court rules on a question of law, our review is independent and we are not bound by the trial court's decision."

If the city of Madison has power to investigate allegations of discrimination, its source must be traced through the home rule provisions of the Wisconsin Constitution and sec. 62.11 (5) , Stats. Municipalities in Wisconsin have no inherent powers. Van Gilder v. City of Madison, 222 Wis. 58, 85, 268 N.W. 108, 109 (1936) . Art. XI, sec. 3 of the Wisconsin Constitution provides: "Cities and villages organized pursuant to state law are hereby empowered, to determine their local affairs and government, subject only to this constitution and to such enactments of the legislature of state-wide concern as shall with uniformity affect every city or every village . ..."

The city's power to investigate allegations of discrimination does not derive from its constitutional grant of local power. That power extends only to areas of local concern where no legislative enactment of statewide concern and uniform application exists. Plymouth v. Elsner, 28 Wis.2d 102, 106, 135 N.W.2d 799, 801 (1965). Section 111.375, Stats., gives the Department of Industry, Labor and Human Relations and to the agents or agencies it designates, the power to investigate and study discrimination, since sec. 111.31 (1) states: "The legislature finds that the practice of unfair discrimination in employment ... substantially and adversely affects the general welfare of the state. ..." In State ex rel. Michalek v. LeGrand, 77 Wis.2d 520, 529, 253 N.W.2d 505, 508 (1977), the court said: "In an area solely or paramountly of statewide concern, the legislature may either delegate to local units of government '... a limited authority or responsibility to further proper public interests,' or may preempt the field by expressly banning local legislative action as to such matter of statewide concern." (Footnote omitted.)

Section 62.11(5), Stats., provides that the police powers granted by the Legislature to cities is limited by express language only, not by mere implication:

Except as elsewhere in the statutes specifically provided, the council shall have the management and control of the city property, finances, highways, navigable waters, and the public service, and shall have power to act for the government and good order of the city, for its commercial benefit, and for the health, safety, and welfare of the public, and may

carry out its powers by license, regulation, suppression, borrowing of money, tax levy, appropriation, fine, imprisonment, confiscation, and other necessary or convenient means. The powers hereby conferred shall be in addition to all other grants, and shall be limited only by express language.

In Fox v. Racine, 225 Wis. 542, 546, 275 N.W. 513 (1937), quoting 43 C.J. Municipal Corporations sec. 220(b) (1927), the court said: "The fact that an ordinance enlarges upon the provisions of a statute by requiring more than the statute requires creates no conflict therewith, unless the statute limits the requirement for all cases to its own prescriptions." The boundaries of such enlargement of statutory provisions were laid out, however, in Volunteers of America v. Village of Brown Deer, 97 Wis.2d 619, 625, 294 N.W.2d 44, 47–48 (Ct.App. 1980). In that case we said:

If the state has expressed through legislation public policy concerning a subject, a municipality cannot ordain an effect contrary to or in qualification of the public policy so established, unless there is a specific, positive, lawful grant of power by the state to the municipality to so ordain. A municipality's ordinances may not infringe on the spirit of a state law or general policy of the state. A municipality cannot lawfully forbid what the legislature has expressly licensed, authorized or required or authorize what legislation has forbidden.

In Anchor S & L v. Madison E.O.C., No. 82–1508, slip op. at 10 (Wis. Oct. 2, 1984) the court concluded that where the state legislature had placed all savings and loan associations under the supervision and control of the Savings and Loan Commissioner, sec. 215.03(1), Stats., a municipal equal opportunity commission was pre–empted from regulating the lending practices of a savings and loan association because such control was in conflict with the state comprehensive plan.

By excluding religious associations from the definition of "employer", sec..111.32(3), Stats. (1979–80) precluded government anti–discrimination agencies from accepting or investigating complaints alleging discrimination on the part of such associations. Under the rule described in Volunteers of America, a city may not authorize what state legislation has forbidden.

At the time this action was brought, state statute forbade inclusion of non-profit religious associations as employers subject to bias suits. We conclude that the city of Madison could not lawfully include within its ordinance those categories of employers specifically and expressly excluded by the state statute.

By the Court. -- Judgment reversed.

Dated October 24, 1984

Inclusion in the official reports is not recommended.

APPENDIX

[1] This section was amended to remove the religious association exclusion and was renumbered sec. 111.32(6)(a), Stats., by sec. 4, ch. 334, Laws of 1981, effective August 4, 1982.

STATE OF WISCONSIN : IN CIRCUIT COURT : DANE COUNTY

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY ST. VINCENT DE PAUL SOCIETY, Plaintiff, vs. MADISON EQUAL OPPORTUNITIES COMMISSION, Defendant.	MEMORANDUM DECISION Case No. 81CV4231

Petitioner St. Vincent De Paul Society has instituted this common law certiorari proceeding to review a decision of the Madison Equal Opportunities Commission (MEOC). In its decision MEOC found that St. Vincent had been guilty of age discrimination when it discharged a 66 year old employee, Ms. Ellen Fields. Ms. Fields had worked in St. Vincent's used clothing store in Madison primarily as a clothes sorter, sorting acceptable and unacceptable pieces from the used clothing donated to the Society. She had, however, operated the cash registers during the Christmas seasons of 1977 and 1972. In all, she had worked at the store for at least fifteen years. After concluding that Fields' termination was discriminatory, MEOC ordered, inter alia, that St. Vincent offer her the next. "clerk and/or sorting position." R. 113.

I. SCOPE OF REVIEW

In reviewing such determinations, courts must limit the scope of their inquiry to:

"(1) Whether the board kept within its jurisdiction; (2) whether it proceeded an correct theory of the law; (3) whether its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that it might reasonably make the order or determination in question." State ex rel. DeLuca v. Common Council, 72 Wis. 2d 672, 676, 242 N.W.2d 689 (1976), quoting State ex rel. Ball v. McPhee, 6 Wis. 2d 190, 199, 94 N.W.2d 711 (1959).

St. Vincent suggests, however, that the fact that the Commission denied a motion for rehearing enlarges the inquiry on review. While agency proceedings such as these are intended to provide ample opportunity for the presentation of evidence, there is no statutory right to a rehearing, nor is one constitutionally mandated. Judicial review by writ of certiorari is the proper vehicle for redress of any wrongs alleged to have been committed by the Commission, and the scope of review enunciated in State ex rel. DeLuca, supra, governs these proceedings.

II. JURISDICTION OF THE MEOC

St. Vincent argues that MEOC lacked jurisdiction to act in the matter because the ordinance under which it receives its powers is unconstitutional.

Overcoming the presumption of constitutionality at any level is a difficult task, for ". . .[E]very possible presumption is in facor of [a law's] validity . . . ." Nebbia v. New York, 291U.S. 502, 538 (1934).

"It is not enough that respondent establish doubt as to the act's constitutionality nor is it sufficient that respondent establish the unconstitutionality of the act as a probability. Unconstitutionality of the act must be demonstrated beyond a reasonable doubt. Every presumption must be indulged to sustain the law if at all possible and, wherever doubt exists as to a legislative enactment's constitutionality, it must be resolved in favor of constitutionality.

The court is not concerned with the wisdom, merits or practicability of the legislature's enactment, but only with its validity in light of specific constitutional principles." Hopper v. City of Madison, 79 Wis. 2d 120, 129, 256 N.W.2d 139 (1977).

St. Vincent argues first that the ordinance constitutes an unlawful delegation of judicial power. It provides as follows:

"3.23 EQUAL OPPORTUNITIES ORDINANCE
(1) Declaration of Policy. The practice of providing equal opportunities in housing, employment, public accommodations and City facilities and credit to persons without regard to sex, race, religion, color, national origin or ancestry, age, handicap, marital status, source of income, arrest record or conviction record, less than honorable discharge, physical appearance, sexual orientation, political beliefs, or the fact that such person is a student as defined herein is a desirable goal of the City of Madison and a matter of legitimate concern to its government. ...

(2) Definitions.
(a) 'person' shall mean. . .associations, corporations. ..."
(7) Employment Practices. It shall be an unfair discrimination practice and unlawful and hereby prohibited:
(a) For any person or employer individually or in concert with others to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation terms, conditions, or privileges of employment, because of such individual's ... age. ...
(9)(b) The Equal Opportunities Commission shall have the following powers and duties:
(4) To receive and initiate complaints alleging violation of this ordinance and to attempt to eliminate or remedy any violation by means of conciliation, persuasion, education, litigation, or any other means, to make the complainant whole again.
(c) ...The Equal Opportunities Commission shall use the following procedures in acting on complaints of discrimination:
(2)(a) If the Commission finds probable cause to believe that any discrimination has been or is being committed, it shall

immediately endeavor to eliminate the practice by conference, conciliation or persuasion. In case of failure so to eliminate the discrimination, the Commission shall issue and serve a written notice of hearing. . .requiring the respondent to answer. . .and to appear. . . .
(b) If, after hearing, the Commission finds that the respondent has engaged in discrimination, it shall make written findings and order such action by the respondent as will redress the injury done to complainant in violation of this ordinance, bring respondent into compliance with its provisions and generally effectuate the purpose of this ordinance. In regard to discrimination in employment, remedies may include, but not be limited to, back pay.
Back pay liability shall not accrue from a date more than two (2) years prior to the filing of a complaint with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person discriminated against, shall operate to reduce back pay otherwise allowable. Amounts received by the person as unemployment benefits or welfare payments shall not reduce the back pay allowable, but shall be withheld from the person discriminated against and immediately paid to the unemployment reserve fund or, in the case of a welfare payment, to the welfare agency making such payment.
***
(4) All orders of the Equal Opportunities Commission shall be final administrative determinations and shall be subject to review in court as by law may be provided.

(12) Penalty.
(a) Any person violating any of the provisions of this section shall upon conviction be subject to a forfeiture of not less than one hundred ($100) nor more than five hundred dollars ($500).
(b). . .[e]very day or fraction thereof on which [a]. . .person shall fail or neglect to comply with [a Commission]. . .order, shall be deemed a separate offense."

St. Vincent argues that the ordinance delegates judicial authority to MEOC in violation of Wis. Const. art. XI, Sec. 2, which vests judicial power exclusively in the courts. While some adjudicative authority may be delegated to administrative bodies, that delegation is only proper insofar as the agency's powers are limited to what is incidental and reasonable to the discharge of its responsibilities. International Union, U.A.W. Local No. 386 v. Wisconsin Employment Relations Board, 258 Wis. 481, 46 N.W.2d 185 (1951). The Society argues that the powers delegated to MEOC are neither incidental nor reasonable, citing Klein v. Barry, 182 Wis. 255, 196 N.W. 457 (1923), for the proposition that an administrative agency allowed to fashion its own remedies in the absence of definitive and ascertainable standards is one that has been wrongly granted judicial prerogatives. The Society's argument, as I understand it, is that MEOC is free, under the terms of the ordinance, to impose any remedy it seems appropriate including disparate remedies for different defendants none of which would be judicially reviewable in light of the limited scope of certiorari proceedings.

The Madison Common Council has declared that one of the City's goals is to eradicate age, sex, race, and other types of discrimination in all areas of human activity. The judicial powers delegated by the ordinance clearly may be viewed as incidental and reasonable to the purposes and responsibilities of the Commission. The power to determine whether discrimination has occurred, and, if it has, to formulate remedies, is an inherently rational means of implementing an anti discrimination policy. The ordinance contains specific standards for accrual and computation of back pay and the treatment to be accorded welfare, unemployment and similar benefits. In addition, the ordinance requires that the Commission's remedy "redress the injury. . .bring respondent into compliance with [these]. . .provisions, and generally effectuate the purpose of this ordinance." See MGO, Sec. 3.23(9)(c)(2)(b). The standards governing the remedies available to the Commission have not been shown, by the degree of proof required (which, under DeLuca, supra, is "beyond a reasonable doubt"), to be unascertainable.

Moreover, I disagree with St. Vincent's assertion that the remedy imposed by MEOC in this case is beyond the scope of judicial review. Certiorari requires the court to determine whether the agency's action "was arbitrary, oppressive, or unreasonable and represented its will and not its judgment . ..." DeLuca, supra, 72 Wis. 2d at 676. If the order imposes an arbitrary, oppressive or unreasonable remedy, it is subject to reversal.

The Society argues next that the ordinance, as applied in this case, violates the "freedom of religion" provisions of the federal and state constitutions. The two provisions, while differing somewhat in language, ". . .are intended and operate to serve the same dual purpose of prohibiting the 'establishment of religion' and protecting the 'free exercise' of religion . ..." State ex rel. Holt v. Thompson, 66 Wis. 2d 659, 676, 225 N.W.2d 678 (1975), quoting State ex rel. Warren v. Nusbaum, 55 Wis. 2d 316, 332, 198 N.W.2d 650 (1972).

Different tests, with shifting emphases, have been proposed as methods of assessing the validity of laws or ordinances that have, or could have, some impact on religious activities:

(1) Does the act (the law challenged) reflect a secular legislative purpose?
(2) Is the primary effect of the act to advance or inhibit religion?

(3) Does the administration of the act foster an excessive governmental entanglement with religion?
(4) Does the implementation of the act inhibit the free exercise of religion?

See State ex rel. Warren v. Nusbaum, supra, 55 Wis. 2d at 323.

It also has been stated that:

"The determination of whether a law infringing religious liberty is justified requires the weighing of the burden on the free exercise of one's religion and the importance of the state's interest asserted in justification of the substantial infringement." State v. Yoder, 49 Wis. 2d at 430, 434, 182 N.W.2d 539 (1971), aff'd. sub nom, Wisconsin v. Yoder, 406 U.S. 205 (1972).

The Seventh Circuit Court of Appeals considered the question in an analogous situation in Mitchell v. Pilgrim Holiness Church Corp., 210 F.2d 879 (7th Cir., 1954). There, the Secretary of Labor filed an action against the defendant church alleging violations of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. secs. 201, et seq. The Secretary claimed that the church had paid its employees less than the minimum wage, failed to pay them for overtime, and failed to keep accurate wage and hour records. The court ruled as follows on the "religious freedom" defense:

> "It seems clear, in the instant case, that the Fair Labor Standards Act is such a reasonable, nondiscriminatory regulation by an Act of Congress, a regulation in the interest of society for the welfare of all workers, and that, therefore, the application of the provisions of the Act to the Pilgrim Holiness Church Corporation and to its employees who work in the production, printing, handling, addressing and distributing of the books, magazines, pamphlets, leaflets and other printed matter issued by the defendant and to all other employees of the defendant whose work is necessary to the production of such goods does not violate the Constitutional provisions guaranteeing the free exercise of religion." Id., at 885.

St. Vincent has failed to establish that the Madison ordinance is anything other than a "reasonable, nondiscriminatory regulation... in the interests of society for the welfare of all workers. ..." There has been no showing that the ordinance reflects a non secular purpose, that its primary effect will be to inhibit religion, that it fosters excessive governmental entanglement with religion, or that it in any way inhibits the free exercise of religion. In sum, St. Vincent has failed to dislodge the presumption of constitutionality which attaches to the ordinance.

St. Vincent next argues that the City has overstepped its home rule powers and enacted an ordinance that conflicts with the state Fair Employment Act. An ordinance is void if it is "logically inconsistent" with state law. Wis. Environmental Decade, Inc. v. DNR, 85 Wis. 2d 518, 534, 271 N.W.2d 69 (1978). The Society maintains that such an inconsistency exists here in that the state law exempts religious institutions from its prohibitions against employment discrimination, whereas the ordinance includes them within the reach of similar prohibitions.

I note first that the legislature has amended the Act to repeal the exclusion for religious organizations. Sec. 4, Ch. 334, Laws of 1981, effective August 4, 1982. Thus, even if the ordinance might have been viewed as inconsistent with the former version of the law, the inconsistency has now been eliminated. Even so, the Madison ordinance does no more than enlarge upon the provisions of the Act, extending its coverage to more employers; it does not permit or authorize any discriminatory practice prohibited by the Act.

". . .(T)he ordinance goes farther in its prohibition--

> but not counter to the prohibition under the statute. The city does not attempt to authorize by this ordinance what the legislature has forbidden; nor does it forbid what the legislature has expressly licensed, authorized, or required. Under those circumstances there is nothing contradictory between the provisions of the statute and of the ordinance because of which they cannot coexist and be effective. Unless legislative provisions are contradictory in the sense that they cannot coexist, they are not to be deemed inconsistent because of mere lack of uniformity in detail." Fox v. Racine, 225 Wis. 542, 546 547, 275 N.W. 513 (1937).

The Madison ordinance and the state Fair Employment Act are not logically inconsistent; compliance with one does not render impossible compliance with the other. They can be said to "coexist," and the Society's argument on this point is unpersuasive.

The next argument advanced is that the ordinance deprives the Society of its right to a jury trial. The right to trial by jury does not arise under either the federal or state constitutions unless the common law required the cause of action to be heard by a jury at the time the jury constitutional provisions came into being. See General Drivers & Helpers Union, Local 662 v. Wisconsin Employment Relations Board, 21 Wis. 2d 242, 251 252, 124 N.W.2d 123 (1963); National L.R.

Board v. Jones & Laughlin Steel Corp., 310 U.S. 1, 48 (1937). The cause of action for employment discrimination did not exist when the relevant constitutional provisions were adopted, and the Society's argument is without merit.

In an unpublished, per curiam decision, State ex rel. Badger Produce Co., Inc. v. EOC, Case No. 80 1906 (Wis. March 26, 1982), the Wisconsin Supreme Court stated, "The validity of the [Madison Equal opportunity] ordinance was upheld by the court of appeals and this court is equally divided as to whether the decision should be affirmed or reversed." Id., at 1. Thus, the court said, the court of appeals decision was upheld. Id., at 1 2. The court of appeals decision, which also was unpublished, adopted the trial court's opinion as its own. State ex rel. Badger Produce Co., Inc. v. EOC, Case No. 80 1906 (Wis. Ct. App. July 16, 1981). The trial court (the Hon. Geroge R. Currie) addressed the issue of whether the Madison ordinance and the MEOC rules violated due process requirements. He ruled that they did not, principally because the ordinance created no "special circumstances that would result in an intolerable risk of unfairness" [Withrow v. Larkin, 421 U.S. 35, 685 686 (1975)], and because the probable cause procedure provided for did not improperly omit the opportunity to present and confront witnesses. [State ex Eel. DeLuca v. Common Council, supra, 72 Wis. 2d at 242]. See State ex Eel. Badger Produce Co., Inc. v. EOC, Case No. 79 CV 4405 (Sept. 2, 1980).

The ordinance must be presumed constitutional, and none of the Society's arguments have rebutted the presumption. The Commission did not lack jurisdiction over the parties or the subject matter of the controversy on any of the other theories or arguments advanced by St. Vincent.

III. ST. VINCENT'S ARGUMENTS 0N THE MERITS

The Society next argues that the Commission proceded on an incorrect theory of law in affirming the decision of its hearing examiner. The examiner approached the case in the following manner: He indicated that the complaining employee has the burden of establishing a prima facie case, which, when established, shifts the burden to the employer to articulate a legitimate business reason for firing the complainant. R. 80. The examiner's Memorandum opinion indicates that he also considered, implicitly at least, whether the stated business reasons were pretextual.

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), is the leading case on the subject and has consistently been followed in cases arising under Wisconsin EOC laws and ordinances. McDonnell Douglas was an action for racial discrimination in employment brought under Title VII of the Civil Rights Act of 1964, 78 Stat 253. The Court ruled as follows on the question of matters of procedure and proof:

> "The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (if) that, after his rejection, the position remained open and the employer continued to seek applications from persons of complainant's qualifications . . . .
>
> The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection .
>
> . . .[R]espondent must. . .be afforded a fair opportunity to show petitioner's stated reason for respondent's rejection was in fact _pretext." Id., at 802 804.

The record indicates that the hearing examiner utilized these criteria in making his determination, and, thus, he proceeded on the correct theory of law.

The Society argues, however, that to demonstrate pretext, the employee must show that he or she was replaced by a younger person. The Commission contends there is no such requirement, citing McCuen v. Home Insurance Co., 25 FEP Cases 1772, 1773 (5th Cir., 1981); Hayden v. Rand Corp.,25 FEP Cases 12 (9th Cir., 1979); and Bonham v. Dresser Industries, Inc., 569 F.2d 187, 195 (3rd Cir., 1977), cert. den., 439 U.S. 821 (1978).

Other courts, however, have required such a showing. See Sahadi v. Reynolds Chemical Division of Hoover Ball & Bearing Co., 23 F.E.P. cases, 1338, 1340 (1981); and Mulcahy v. Vulcan Corp., 18 F.E.P. Cases 787 (D.C. Mo. 1978).

I consider that Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981), compels the conclusion that the employee need not prove replacement by a younger person. In that case, the court stated that, once the employer presents a legitimate business reason for firing an individual, that individual:

> ". . .retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now mercies with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She

> may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's profered explanation is unworthy of credence." Id., at 255, citing McDonnell Douglas, supra, 411. U.S. at 804 805 (Emphasis Added).

The Court's use of the language ". . .either directly. . .or indirectly. . ." indicates that an employee is not held to such a rigid requirement of proof, but, rather, may prove discrimination in any reasonable fashion. Here, too, St. Vincent's argument fails.

The Society also objects to the fact that in Madison the protected class of individuals is anyone over the age of 18. MGO, Sec. 3.23 (2) (m) (u). It argues that this classification places a particularly difficult burden on the Society, which, as a charitable organization, specializes in hiring the hard-to-employ--the handicapped and others who tend to be members of classes protected by anti discrimination legislation. As a result, the Society argues, anyone it fires might well claim membership in a protected class and thus subject it to suit more frequently than other employers. While I am sympathetic to the Society's concerns, it has not shown any legal basis for shielding or otherwise exempting it from the application of the ordinance.

The Society's next argument is that the MEOC decision is arbitrary and unreasonable.

The hearing examiner did not explain in detail his reasoning with respect to whether or not the parties met their respective burdens of proof under McDonnell Douglas, supra. However, he implicitly indicated: that the employee established her prima facie case; that St. Vincent offered a legitimate business reason for firing her ["Respondent did perhaps have economic justifications to lay off employees . . ." R. 113]; and that such justification was ultimately pretextual. He stated:

> "Because there are no indications that Fields was ever warned of substandard job performance, because Fields was originally told she was laid off for economic reasons and only later told she was terminated for ineffective job performance based on documents prepared after the fact, because the President of the Society differed from the Manager as to her actual job status, and because of the store's 'youth movement' just prior to Fields' termination, it would appear that Respondent neither had valid reason for terminating her nor even laying her off. The clear inference is that age was the factor in her layoff and/or discharge." R. 114.

The examiner also found that between March 15, 1979 (when Ms. Fields' supervisor was hired) and September 4, 1979 (when Ms. Fields was laid off) 22 employees between the ages of 17 and 32 were hired by St. Vincent. He also found that a 20 year old cashier was hired the day Ms. Fields was laid off, that a 50-year-old woman had been hired as a sorter in July, 1979, and that a younger woman had also been hired as a clerk during that month. He further implies in his recommended order that Ms. Fields could have been a cashier at St. Vincent's, as he suggests that Ms. Fields be considered "on 'layoff' status. . . and be offered the next available clerk and/or sorting position." R. 113.

The reviewing court's responsibilities with respect to determining the reasonableness of an agency's findings of fact have been the subject of various pronouncements by the Wisconsin Supreme Court. See State ex rel. Beierle v. Civil Service Commission of the City of Cudahy, 41 Wis. 2d 213, 217, 163 N.W.2d 606 (1979); State ex rel. DeLuca v. Common Council, supra, 72 Wis. 2d at 695; Stacy v. Ashland County Department of Public Welfare, 39 Wis. 2d 595, 602, 159 N.W.2d 630 (1968). I consider that the appropriate standard of review of agency factual determinations on a common law writ of certiorari is the same as that under ch. 227, Stats. -- the substantial evidence test. Even under this test, however, and giving due deference to the agency's expertise and competency, the reviewing court is not relieved from the responsibility of determining whether the agency's ultimate decision is based on, and reasoned from, its findings of fact. Voight v. Washington Island Ferry Line, 70 Wis: 2d 333, 342, 255 N.W.2d 545 (1977). The court must still "evaluate the evidence. . . to see if its sufficiency reaches that degree of substantiality in terms of burden of proof to support a finding of or convincing power that reasonable men acting reasonable men acting reasonably might reach the decision the administrative agency did." State ex rel. Beierle v. Civil Service Commission, supra, 41 Wis. 2d at 218.

The record before the examiner contains evidence that Ms. Fields had worked at St. Vincents as a clothes sorter for fifteen years, and that she had never heard any complaints from her supervisors as to the quality of her work, or any "personality" or other problems. Co workers testified that she was a good, competent worker, who frequently was relied on to train new employees. After returning from a day off work to attend to a family medical emergency, Ms. Fields was informed by her supervisor, Mr. Strizek, that she was being laid off because of a lack of work. Ms. Fields testified that there was plenty of work to do at that time.

Strizek acknowledged that he told Fields she was being laid off for lack of work, but testified at the hearing that the real reason was that she was "unable to get along with people". Strizek told others that she was terminated because of a "personality conflict", and he later informed Fields that the reason for her firing was that she was not sorting clothes

properly. At the hearing Strizek stated that she was fired for "all" these reasons. Strizek never kept any records relating to employee complaints or other personnel matters, although he stated generally that there had been "complaints" about Fields. The nature of the "complaints" was not disclosed.

Another Society officer probably understated the case when he testified that the organization and management of the store was "pretty much chaos." Indeed, the testimony of Society employees and officials amounts to a "parade of horribles" in their recounting of serious management problems relating to records, funds, retirement programs, taxes--virtually every area of the store's operation.

As indicated earlier, there was evidence that nearly all of the 22 employees hired by the society in the months leading up to Fields termination were under the age of 33. While it was pointed out that there were five employees over the age of 60, and that the store payroll had decreased in recent years, it is for the agency, not the court, to resolve conflicts in testimony, and there is evidence in the record which, if believed by the examiner, substantially supports the conclusion: (1) that Fields, a member of a protected class, was terminated; (2) that St. Vincent's "previous reasons" for firing her were pretextual.

St. Vincent's plight is certainly understandable. It provides valuable services to the community and its employment of the otherwise unemployable is commendable in the highest degree. It is true, too, that these laudable activities can, and have, lead to many unique employment practices and problems. It may, well be true that had the Society's record keeping or its personnel or overall management practices been a little less chaotic, the situation which gave rise to this action may never have developed. The fact is, however, that it did; and the Society was not able to establish a defense before the agency.

The decision, being supported by substantial evidence in the record, must be affirmed.

Counsel for the Commission may prepare the appropriate order.

Dated at Madison, Wisconsin, this 30th day of March, 1983.

William Eich
Circuit Judge

EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
351 WEST WILSON STREET
MADISON, WISCONSIN

Ellen M. Fields 503 South Baldwin Madison, Wisconsin 53703 Complainant vs. St. Vincent dePaul Society 1309 Williamson Street Madison, Wisconsin 5370 Respondent	FINAL ORDER Case No. 2528

The examiner issued his Recommended Findings of Fact, Conclusions of Law and order on October 7, 1980. Timely exceptions were filed, written arguments were submitted, and oral arguments were heard by the Commission.

Based upon a review of the record in its entirety, the MADISON EQUAL OPPORTUNITIES COMMISSION issues the following:

ORDER

That the attached RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAST AND ORDER of the examiner is adopted in its entirety and shall stand as the final order herein.

Commissioners Bell, Gassman, Goldstein, Khuester, McShan, Perkins, Swamp and Ware all join in affirming the examiner's decision in its entirety. No Commissioners dissented or abstained, and Commissioners Basurto, Brown, Fineman, and Hall did not participate.

Signed and dated this 20th day of February, 1981.

Roberta Gassman
President of the Madison Equal Opportunities Commission

EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
351 WEST WILSON STREET
MADISON, WISCONSIN

Ellen M. Fields 503 South Baldwin Madison, Wisconsin 53703 Complainant vs. St. Vincent dePaul Society 1309 Williamson Street Madison, Wisconsin 5370 Respondent	NOTICE OF RIGHT TO APPEAL Case No. 2528

Attached are the Recommended Findings of Fact, Conclusions of Law, and Order of the Equal Opportunities Commission's Hearing Examiner. The Rules of the EOC provide for appeal of this decision in the following terms:

10.1. "Either party may appeal the recommended findings of fact, conclusions of law and order of the Commission's designee within
ten (10) days after receiving them by filing written exceptions to such findings, conclusions, or order.

10.2. "If neither party appeals the recommended findings of fact, conclusions of law, or order within ten (10) days, they become final findings, conclusions and order of the Commission."

This Notice, Findings, Conclusions of Law and Order have been sent to both parties by certified mail, with a dated receipt. Any appeal from these Findings, Conclusions and Order must be postmarked or delivered at the offices of the EOC within ten (10) days of the dale of receipt.

Dated at Madison, Wisconsin this 7th day of October, 1980.

Allen T. Lawent
Hearing Examiner

EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
351 WEST WILSON STREET
MADISON, WISCONSIN

Ellen M. Fields 503 South Baldwin Madison, Wisconsin 53703	RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complainant vs. St. Vincent dePaul Society 1309 Williamson Street Madison, Wisconsin 5370 Respondent	Case No. 2528

The complaint in this matter was filed with the Madison Equal Opportunities Commission on September 11, 1979 alleging discrimination on the basis of age in regard to employment. The case was investigated by Renee Caldwell. An Initial Determination of Probable Cause was issued on December 21, 1979.

Conciliation was either waived or unsuccessful, and the case was certified to public hearing on January 31, 1980.

A hearing was held on August 21, 1980. Present at hearing was the Complainant in person, Ellen Fields, Attorney Paul Nesson of Voss, Nesson, Koberstein, Erbach and Voss, S.C. on behalf o£ the Complainant, and four representatives on behalf of the Respondent: Edward Grady, John Keyes, Dan Strizek and Gerald Pfister.

Based on the record of the hearing the following Recommended Findings of Fact, Conclusions of Law and Order are proposed.

RECOMMENDED FINDINGS OF FACT

1. Ellen Fields is an adult female.
2. St. Vincent de Paul Society is a charitable organization doing business i n the City of Madison.
3. St. Vincent de Paul is operated by a Board of Directors that changes in membership from time to time.
4. On August 31, 1979, Ms. Fields, then 66 years of age, was laid off from her job at St. Vincent de Paul, and by September 7, 1979 was led to believe she had been terminated by Respondent's store manager, Dan Strizek.
5. Ms. Fields was working 24 hours per week just prior to her termination, primarily as a "sorter" but she would also cashier from time to time, most recently during the Christmas season in 1977 and 1978. Her rate of pay was $2.90 per hour.
6. The duties of a "sorter" included separating "good" from "bad" donated clothing used for resale in the Society store and inspecting dishes and other goods for chips and defects.
7. Ms. Fields had worked for Respondent for a period of 15 years and had never received any written warnings or reprimands for her work prior to the time of her discharge.
8. Ms. Fields trained new employees from time to time in the sorting function.
9. At the time of her discharge, there were two full-time employees who sorted and performed other duties.
10. The two full time employees are still employed and perform the bulk of the sorting that is presently done.
11. Ms. Fields was laid off for economic reasons.
12. At the end of August 1979, there were 32 employees on the Society payroll.
13. Since the beginning of September 1979, the Society has employed 30 or fewer employees, and employed 23 employees at the time of the hearing.
14. Respondent had a retirement plan that was to have paid benefits to employees, but because it had not been approved by official Board of Directors action and because of other complications had been discontinued after paying a single benefit check to a single employee.
15. It is unclear when the retirement plan allegedly became effective, but for each year since that time Ms. Fields was required to forfeit 12 sick days per year.
16. At the time of discharge, Ms. Fields was told by Strizek that she was being laid off for economic reasons, although Respondent later told her she was being terminated because of complaints by her supervisor, Met Lutz, which were subsequently summarized in a letter.
17. Ms. Fields was never confronted with the contents or allegations of this letter which is printed, unsigned and undated.
18. The manager, Dan Strizek, "terminated" Ms. Fields on September 7, 1979, after she had been laid off on September 4, 1979.
19. Mr. Strizek did not have the authority to terminate Ms. Fields' employment
20. Since Dan Strizek became store manager on March 15, 1979, St. Vincent de Paul has hired 23 employees , including Strizek virtually all of whom were between 17 and 32 years of age except for Ann Schneider who is around 50 years old.

21. Since Ms. Fields' termination, Cammille Buszkowicz was hired as a store clerk and cashier on September 4, 1979, but she left the store's employment that same month.
22. Ms. Schneider was hired as a sorter on July 23, 1979, and a Ms. Barb Tienor was hired as a clerk on July 9, 1979, a little more than a month prior to Complainant's layoff and termination.
23. It was Respondent's policy to recall employees in a layoff status prior to hiring new employees.
24. Ms. Fields had the most seniority of the sorters.
25. The Complainant received $1,085 in unemployment compensation benefits from the time she was laid off through May 3, 1980.
26. Ms. Fields began part time employment on August 4, 1980 at the Sunshine Supermarket.
27. Pursuant to an emergency call, Ms. Fields left work one afternoon to attend her husband who had fallen down stairs. When she returned to work, she was informed of her layoff by Strizek.

RECOMMENDED CONCLUSIONS OF LAW

1. Complainant is a member of a protected class, age, under Section, 3.23 of the Madison General Ordinances.
2. Respondent is an employer as defined by Section 3.23 of the Madison General Ordinances.
3. Respondent discriminated against Complainant on the basis of age in regard to termination and/or layoff in employment in violation of Section 3.23 of the Madison General Ordinances.
4. Complainant used due diligence in seeking employment following her discharge and/or layoff from employment.

RECOMMENDED ORDER

1. That Respondent cease and desist discriminating against Complainant on the basis of age in regard to employment.
2. That Respondent pay to Complainant all sums she would have received between August 31, 1979 and the time she began her job at Sunshine Supermarket in 1980, less amounts received from Unemployment Compensation (UC) which Respondent shall directly reimburse to the UC fund. Complainant's backpay shall be calculated using a 24 hour week at minimum wage and shall also include 6% interest from August 31, 1980 until the date this Order becomes final. Proof of payment shall be submitted by Respondent to the Examiner within twenty (20) days.
3. Complainant shall be considered on "layoff" status by Respondent and shall be offered the next available clerk and/or sorting position.
4. The Madison Equal Opportunities Commission shall monitor Respondent's employment practices for the next three years.

MEMORANDUM OPINION

Ellen Fields, an employee of 15 years, was allegedly laid off on, September 4, 1979, and supposedly terminated on September 7, 1979. This is evidenced by the Employee Warning Record signed by Dan Strizek.

However, Edward Grady, President of the Society, stated at hearing that he had always considered Fields in a layoff status. Further, the document, which Strizek claims was filled out separately on the 4th and 7th of September 1979, was likely filled out after the 7th of September because of the way it is phrased:

> ...Ellie has been ineffective on her job and <u>was</u> <u>put</u> on a layoff starting September 4, !,1979. As of September 7, 1979 I am terminating employment of Ellen. (Emphasis added.)

Apparently, ineffectiveness was only sufficient for layoff on the 4th, yet was sufficient for termination three days later. Further, the notice states the employee was previously warned. This is allegedly supported by an undated, unsigned letter by Ms. Fields' supervisor, Mel Lutz. It is likely this letter was written well after Ms. Fields' layoff-termination, and it is likely Ms. Fields was never warned prior to her layoff termination.

Respondent's employment practices are generally sloppy and unorganized mainly due to the volunteer nature and bi annual turnover on the Board of Directors. Respondent did perhaps have economic justifications to lay off employees, as there were 32 employees as of the last August 1979 payroll, yet 30 or fewer employees since that time.

Any strength to the economic arguments are offset, however, by the lack of credibility of any of the other of Respondent's testimony. It is Respondent's statement, that employees who are laid off called back before new employees are hired. Yet, on the same day as Ms. Fields was laid off, a 20 year old clerk, Camille Buszkowicz, was hired. Between March 15, 1979, when Mr. Strizek was hired and September 4, 1979 when Fields was "laid off," 22 employees between the ages of 17 and 32 were hired by the Respondent. Only one other employee was hired in that period, and she was around 50.

In addition to Buszkowicz, Ann Schneider had been hired as a sorter in July of 1979 and Barb Tienor had been hired as a clerk in July 1979. Each had one plus months' seniority compared to 15 years for Fields at the time of Fields' layoff.

Also, the circumstances under which Ms. Fields was terminated were dubious. Pursuant to an emergency call, she had left work one afternoon to attend her husband who had fallen down the stairs. When she returned to work, she was informed of the layoff.

Respondent's employment practices are both arbitrary in terms of hire and fire practices as well as in consolidation of job duties. Fields had worked mainly as a sorter, but also as a clerk. Because there are no indications that Fields was ever warned of substandard job performance, because Fields was originally told she was laid off for economic reasons and only later told she was terminated for ineffective job performance based on documents prepared after the fact, because the President of the Society differed from the Manager as to her actual job status, and because of the store's "youth movement" just prior to Fields' termination, it would appear that Respondent neither had valid reason for terminating her nor even laying her off. The clear inference is that age was the factor in her layoff and/or discharge.

While it is acknowledged that Respondent performs many commendable, charitable duties for the community, Respondent's treatment of Ms. Fields in this matter was not at all commendable and was instead an Ordinance violation.

Signed and dated this 7th day of October, 1980, in Madison, Wisconsin.

Allen T. Lawent
Hearing Examiner