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BARBARA RUBIN,  
 Appellant,

v.  
 President, UNIVERSITY OF  
 WISCONSIN SYSTEM,  
 Respondent.

Case No. 78-PC-ER-32

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DECISION AND ORDER

NATURE OF THE CASE

This is a complaint of discrimination heard pursuant to s.230.45(1)(b), stats., on an appeal of an initial determination that there was no probable cause to believe that the respondent discriminated against the complainant with respect to her application for employment with the Department of Geography at the University of Wisconsin-Madison.

Findings of Fact

1. The University of Wisconsin System, which includes the University of Wisconsin-Madison, is an employer within the meaning of Subchapter II, Chapter III, stats.

2. In 1975, Professor Andrew Clark of the department died. Professor Clark had been a leading geographer specializing in rural historical geography.

3. Following Professor Clark's death, the department hired a temporary replacement, and the department subsequently interviewed this replacement, and other applicants, for a permanent position, essentially to replace Professor Clark.

4. Because of its relatively low assessment of all the applicants, the department made no appointment.

5. The department in 1975 also advertised for two faculty positions as follows, see Complainant's Exhibit 8: "1. Physical Geography, specialization in climatology preferred", and "2. Human geography, specialization flexible."

6. A woman, Carol Jenner, was hired to fill the first position after she had been recruited by personal contact.

7. With respect to the second position, the department hoped to use this, in essence, to replace Professor Clark. Also there was some possibility envisioned that another professor, a specialist in population geography, would not obtain tenure and would have to be replaced. The department also wished to attract as broad a pool of applicants as possible for affirmative action purposes and in order to enhance the number of female applicants. For all these reasons, the department announced the second position as broadly as possible.

8. With respect to this second position, there were no qualified applicants with an historical specialization. The department hired a female applicant with a specialization in quantitative social population geography. She had been asked to apply by the department after she had been recommended by a member of the Northwestern University faculty. The department felt that although she would not be a "replacement" for Professor Clark, she was well qualified and that she possessed needed expertise. She was hired without a Ph.D. but it was anticipated that she would, and she in fact did, receive a Ph.D. at a later date. It was not unusual for the department to hire junior faculty before they had received the Ph.D., with the understanding that the degree would be received at a later date. She commenced employment in the department in January, 1977.

9. In December, 1977, the department received authorization to announce for a permanent (tenure track) position.

10. The departmental chairperson, Professor Morrison, informed the faculty of this authorization and they proceeded to inform faculty at other institutions of the vacancy and to solicit recommendations. Professor Sack notified the faculties at, among other institutions, the University of Minnesota. It was suggested that he contact Professor Ostergren, a recent Minnesota graduate teaching at the University of South Dakota. Professor Sack did so and Ostergren subsequently applied.

11. Professor Morrison caused the following ad to be printed in the February and March 1978 issues of the publication "Jobs in Geography":

"Teaching Position. Fall 1978. Rank and salary dependent on experience and qualifications, junior appointment preferred. Ph.D. required. Permanent position with research interests in historical geography and instructional responsibilities in human geography. Equal opportunity affirmative action employer."  
Complainant's Exhibit 8.

12. The department's intentions with regard to this position again included the "replacement" of Professor Clark. Thus the department hoped ideally to find someone with a rural historical emphasis with a social science perspective, who also could teach courses other than in historical geography in the general field of human geography, which includes historical geography. There also was a subsidiary interest in someone with third world potential, due to the resignation of an African specialist.

13. While the department's primary preference was as set forth above, a candidate who was not a rural historical geographer but who had substantially superior qualifications than other candidates would have been given serious consideration.

14. The department had designated a new staff committee which had responsibility for screening applications. The committee consisted of five faculty members of which one was female.

15. The committee received 43 applications, including the complainant's and Mr. Ostergren's, the eventual appointee. There was a total of 38 male and 5 female applicants.

16. The committee selected 10 applicants for a "short list" for further consideration. The complainant was not among those selected for the short list. There were nine men and one woman on the list.

17. The short list was intended to identify those applicants who best met the needs of the department and might be considered further. It was not intended to identify those with the best qualifications in general.

18. The reasons for inclusion of each candidate on the short list are summarized as follows (the numbers in parentheses were assigned to each candidate for reference purposes in the course of the hearing in order to protect the anonymity of non-selected applicants):

a.(16) This applicant had extensive qualifications in third world geography, including fluency in five third world languages, and an historical focus.

b.(17) This applicant's emphasis was on rural historical geography. He was a member of a number of historical associations, and had research, writing, and teaching involvement in historical areas.

c.(18) This applicant had an extensive and continuing African background.

d.(19) This applicant had research interests in rural historical geography.

- e. (20) This applicant had a specialization in rural historical geography.
- f. (21) This candidate specialized in historical geography.
- g. (22) This candidate's emphasis was in historical geography.
- h. (23) This candidate specialized in historical geography with a rural emphasis.
- i. (24) This candidate was a tenured senior faculty member at another university with an historical orientation.
- j. (Robert Ostergren) This candidate specialized in rural historical geography, specifically Scandinavian emigration and settlement in the midwest, an area of study of great current interest among students in the department. His work was social science oriented with emphasis on the use of primary source material. His degrees were from a school, the University of Minnesota, with a well-respected geography department, his bachelor's degree was magna cum laude, he had received National Science Foundation fellowship and Fulbright scholarships, and had two publications to his credit including articles entitled "The Decision to Emigrate: A Study in Diffusion" (co-authored) and "Cultural Homogeneity and Population Stability among Swedish Immigrants in Chisago County", the latter published in Minnesota History.

19. In the resume that the complainant submitted to the department, she listed under the heading of "education" the following "areas of specialization" under her Ph.D.:

"Urban Geography, Cultural Geography, Geography of Anglo-America; Dissertation: "Monuments, Magnets and Pilgrimage Sites: A Genetic Study in Southern California"."

Under "Professional Interests" she listed the following:

Teaching:

Urban Geography (urban structure, urban systems)  
Introductory and Advanced Cultural Geography  
Field Methods and Techniques in the Built Environment  
, Architectural History for Geographers  
Geography of Anglo-America  
Geography of West Africa  
Popular Culture Methods  
Biogeography (plants/economic)  
Economic Geography and Public Policy

Teaching Experience:

University of California, Santa Barbara (1/1/76-6/30/76)  
Courses: Economic Geography, Cultural Biogeography (plants)  
and California Geography (economic, cultural)

Research--Ongoing:

Urban architectural history  
Urban environmental design  
Mass-culture ("popular culture") impact on landscape design  
Medical hydrology and balneology  
Tourism, travel and cultural perceptions  
Ethno- and Economic Botany

Under "Publications" she listed the following:

"A Chronology of Architecture in Los Angeles, ANNALS, Association of American Geographers, Vol. 67 (1977), pp. 521-537

"Laminaria digitata: A Checkered Career," ECONOMIC BOTANY, Vol. 31 (1977), pp. 66-71

"The Forest Lawn Aesthetic: A Reappraisal," JOURNAL, Los Angeles Institute of Contemporary Art, No. 9 (1976), pp. 10-15

Commentary, ANNALS, Association of American Geographers, Vol. 65 (1975), pp. 113-115

"Calabash Decoration in North East State, Nigeria," AFRICAN ARTS, Vol. IV, No. 1 (1970), pp. 20-25

"The Architecture of Commerce: Sources and Objectives," ANNALS, Association of American Geographers (in revision)

"Thermae of the West: From Matilija to Manhattan," (in progress)

Under "field research" she listed the following:

- 1977 Survey of thermae in the western states: Colorado, Wyoming, Idaho, Oregon, California, for work-in-progress
- , 1973-1975 Survey of settlement patterns, urban architecture in Southern California including environmental/experiential fantasy landscapes: Disneyland, Knott's Berry Farm, Magic Mountain, Movieland Wax Museum, Desert Christ Park, San Diego Zoo, Marineland, Palm Springs and others
- 1969-1971 Survey of settlement patterns, traditional architecture and material culture in West Africa: Senegal, Ivory Coast, Ghana, Nogeria, Cameroon
- 1964-1965 Survey of culture groups in Benue River Valley, Northern Nigeria; mapping of diverse ethnic/linguistic peoples, and collection of oral histories for historical reconstruction of non-literate peoples' land tenure and migration patterns

See Respondent's Exhibit 6. In the cover letter accompanying the resume, she stated in part that: "I am responding to your job posting ... for a cultural/historical geographer. Both my research and instructional interests lie in these areas." Respondent's Exhibit 5.

20. The department ultimately was authorized to proceed with hiring and to interview one candidate. The committee selected Ostergren from the short list for an interview. He came to Madison and presented a talk to the department. The members of the faculty were impressed by the talk and authorized his appointment.

21. The complainant had had a "commentary" published in the ANNALS of the Association of American Geographers in 1975, concerning a prior article on prostitution in Nevada. The commentary attacked at some length the article as having reinforced and consolidated a "sexist mentality too long prevalent in academic geography." Complainant's Exhibit 12.

22. None of the members of the committee both read the commentary and associated the complainant with it in the course of the selection process for the position in question.

23. Two of the three faculty hires that occurred in the geography department between 1975 and the appointment in question in 1978 were women.

24. Since July 1975 and through 1980, 276 men and 35 women applied for permanent, tenure track positions with the department. Of these, four men and two women received appointments. No women were appointed since 1976.

25. In 1978, 3 of 18, or 16%, of the department were women.

26. From 1970-1978, approximately 9.6% of the Ph.D.'s granted in geography were received by women. The figure for 1978 was 19.6%.

27. Of the 56 institutions in the United States that have graduate programs in geography, there are only three that have three or four women faculty members, and this includes the UW-Madison.

#### CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to s.230.45(1)(b), stats., and s.PC 4.03(3), Wis. Adm. Code.

2. "Probable cause" is defined by s.4.03(2), Wis. Adm., Code, as follows:

"Probable cause exists when there is reasonable ground for belief supported by facts and circumstances strong enough in themselves to warrant a prudent person in the belief that discrimination probably has been or is being committed."

3. On this record, probable cause to believe that discrimination has been committed has not been established.

#### OPINION

In a case involving a claim of sex discrimination, a complainant establishes a prima facie case in a hearing on the merits by making the following showing:

- (1) That she is a member of a protected class;
  - (2) That she applied and was qualified for a job for which the employer was seeking applicants;
  - (3) That despite her qualifications, she was rejected;
  - (4) That, after her rejection, the position remained open and the employer continued to consider applicants from persons of her qualifications.
- See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

While the ultimate burden of persuasion always remains with the complainant, the establishment of the foregoing prima facie case shifts the burden of proceeding or going forward to the respondent, who then must "articulate some legitimate, nondiscriminatory reason" for its action. See Board of Trustees v. Sweeney, 439 U.S. 24 (1978), Texas Dept. of Community Affairs v. Burdine, 25 FEP Cases 113 (1981).

If the respondent satisfies this burden, the appellant then has an opportunity to show that the articulated nondiscriminatory reason for the action is actually a pretext for a discriminatory reason. McDonnell Douglas, supra.

In a hearing such as this of an appeal of a no probable cause determination, a similar form of analysis is followed, although the ultimate burden on the complainant is less. The complainant need not establish that discrimination occurred, but rather that there is probable cause to believe that discrimination occurred.

In this case, the complainant effectively was eliminated from further consideration for appointment when the committee failed to place her on the short list. Assuming for the moment that the complainant satisfied her

burden with respect to probable cause as to the question of whether she was "qualified" for the position, and that the respondent had articulated a legitimate, nondiscriminatory reason for its action, then the focus is on whether the articulated reason is pretextual.

The complainant argues that a number of the short-listed applicants did not possess Ph.D.'s, one of the job criteria, while she did. However, it was clear that this was not a requirement on application, but only following appointment, and that it had not been unusual for the department to have appointed applicants prior to their actual receipt of a Ph.D. but conditioned on its ultimate attainment. It was not unusual that many applicants for what was likely to be a junior level appointment would still be completing their Ph.D.'s.

She also argues that, unlike some of those on the short list, she qualified as an historical geographer.

While the complainant stated in her cover letter forwarding her application that she was a "cultural/historical" geographer, see Respondent's Exhibit 5, given the nature of the announcement this is only to be expected.

The committee could have been expected to and did look at her resume in determining whether she met the classification of an historical geographer. In the opinion of the Commission, her resume does not support a claim of a concentration in historical geography. Under "professional interests" under "teaching" she lists eight areas, only one of which is historical. With respect to her Ph.D., she lists areas of specialization as "Urban Geogrphahy, Cultual Geography, Geography of Anglo-America", with a dissertation topic of "Monuments, Magnets, and Pilgrimage Sites: A Genetic Study in Southern California."

Each member of the committee testified at some length as to why he or she did not believe that she met the requisite criteria. Professor Sack identified her as urban, Doeppers as concentrating in popular culture, Stapleton as urban cultural geography and popular culture, Morrison as urban cultural specializing in architecture of buildings, and Vale as urban geography structures and systems.

Reasonable people versed in the area could argue about how best to categorize the complainant's academic background. However, in the opinion of the Commission, the evidence supporting the opinions of the five committee members is substantial, and fully supports their opinions. Ms. Rubin points out that in the Directory of the Association of American Geographers she has a listing as an historical geographer (her entry in the publication also lists other specialties of urban geography and cultural geography), there was no evidence that the Committee members consulted this publication or that their failure to do so should be considered suspect. There was testimony to the effect that designations of specialization were up to the individual geographer to provide and were not considered to be necessarily accurate. Again, the best available source to the committee was the complainant's resume.

With respect to the potential for a third world specialist, the committee members testified that they did not rate the complainant highly because her African research was not current and she had not trained with third world geographers. Applicant #16, who was considered by the committee as a third world specialist, had more extensive credentials in this area than the complainant, including fluency in five third world languages, studies at the Institute of South East Asian Studies in Singapore, and third world interests from an historical perspective. Similarly, applicant #18 had worked with acknowledged

experts in African geography, had written his Ph.D. dissertation on an African subject, and had research interests in this area. The complainant's resume does list "Geography of West Africa" as one of 9 interests under teaching, but does not include any third world or African subject matter under "research-ongoing", or "publications." African subjects listed under "papers and symposia" and "field research" are for 1971 or prior, and she lists no references with specializations in African or third world geography.

Complainant also argues that she had published an article in a major journal, which was a qualification not possessed by the other applicants who were placed on the short list. However, selection for the short list was based primarily on fitting the areas of specialization sought by the department. While the publication certainly was to Ms. Rubin's credit, there was testimony from members of the committee that the article was not particularly impressive to them and/or was not reflective of the type of scholarly orientation they sought. Finally, it was not unusual that most of the other candidates would have limited publications considering that they for the most part were at early points in their professional careers.

The complainant argues that there are many "contradictions" in the evidence presented by the University. In the opinion of the Commission, it should not be considered unusual that a number of faculty members testifying as to their understanding as to the needs of the department, and their evaluations of the candidates for a faculty position, would not speak with one voice. The question is whether the professed reason or reasons for their actions were really pretexts for illegal discrimination, not whether the various faculty were in total agreement on every issue relative to the appointment in question.

Similarly, to the extent that the "contradictions" are the result of the inability of the committee to achieve their professed goal at each step in the process, this also should not be unexpected and is not necessarily probative of pretext.

For example, the complainant points out that despite the committee's expressed interest in finding a rural historical geographer, they did not come up with a short list consisting entirely of rural historical geographers. However, the committee also had collateral or secondary interests, such as the possibility of identifying a candidate with a strong third world background. The key facts were that the complainant's training and experience did not match the criteria sought by the committee, and that there was a rational explanation for the inclusion of each of the candidates placed on the short list.

With respect to statistics, there were 43 applicants of whom 5 were women. The one woman who was placed on the short list was approximately proportional to the number of women applicants.

Looking beyond this particular transaction, the respondent points to the fact that since 1975, when the state Fair Employment Act (Subchapter II of Chapter III) became effective as to state agencies, the department hired two women and four men. This constitutes 5.7% of the women applicants hired vs. 1.4% of the men. Also, in 1978, 16% of the geography faculty were women. During the period 1970-1978, the available applicant pool was 9.6%

The complainant points to the fact that since 1976, the department has hired no women while hiring 4 men. The argument is made that once the department had achieved "full utilization" for women, it stopped hiring them. However, as the respondent points out, the department could have

achieved the goal of full "utilization" by hiring two women, and would not have had to have hired the third woman to have achieved this end.

Finally, the percentage of women in the department compares favorably with other departments in the country.

The complainant's allegation that her non-hire was retaliatory has to do with the publication in 1975 in the ANNALS of the Association of American Geographers of a commentary on an article on prostitution in Nevada. This commentary attacked the article as having reinforced and consolidated a "sexist mentality too long prevalent in academic geography." However, no member of the committee testified that he or she had read the article and subsequently associated the complainant's name with it in the course of the selection process. Even if one could make the inference that this connection had been made, the law defining discrimination on the basis of sex applies, with respect to retaliation, only to persons who "has opposed any discriminatory practices under this section or because he has made a complaint, testified or assisted in any proceeding under this section" s.111.32.(5)(g)2., stats. The complainant's "commentary" does not fit within this definition.

ORDER

The Commission having determined that no probable cause exists to believe that the respondent discriminated against the complainant, this complaint of discrimination is dismissed.

Dated: Feb. 18, 1982

STATE PERSONNEL COMMISSION

Commissioner Murphy abstained from voting in this decision due to his employment with the University of Wisconsin at the time this appeal was filed.

Laurie R. McCallum /et/  
LAURIE R. McCALLUM, Commissioner

James W. Phillips  
JAMES W. PHILLIPS, Commissioner

Parties

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