


Busch v. Wis. Correctional Camp System
Case No. 78-PC-ER-8
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Findings of Fact Nos. 15, 16 and 17 in the Amended Proposed Decision are renumbered as Findings 17, 18 and 19 respectively in order to accommodate the addition of the new Findings 15 and 16.

Dated May 15, 1981

STATE PERSONNEL COMMISSION


Charlotte M. Higbee
Chairperson


Gordon H. Brehm
Commissioner

AR:mek

Parties:

Mr. Patrick Busch
609-A Oak Street
Cottage Grove, WI 53527

Mr. Donald Percy
DHSS, Rm. 663
1 West Wilson Street
Madison, WI 53702

DISSENTING OPINION

In my opinion, the panel articulated legitimate non-discriminatory reasons for its action. Mr. Haines, one of the panelists, testified that he thought the complainant was more interested in using the position as a "stepping stone to rebuild his career."¹ Mr. Resop, another panelist, stated that he perceived the complainant as wanting "someplace to get rid of idle time," whereas the recommended candidates wanted the job as a career position. Mr. Briggs, the third panelist, testified that he was concerned with the "compatibility factor" between himself and the job candidate. He believed that the complainant would be less likely to meet his (Mr. Briggs') expectations and requirements as supervisor of the position.

The plurality acknowledges the requirements for proving that the proffered justifications are merely pretexts as expressed in Furnco Construction Co. v. Waters, 438 U.S. 567 (1978) and McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), but fails to apply them. McDonnell Douglas requires that the articulated reasons must be eliminated as possible reasons for the employer's actions to prove pretext. There is a complete absence of evidence that sex or handicap had anything to do with the non-selection of the complainant by the panel.

The plurality found that one of the considerations in the final hiring decision was that complainant might bring drugs to the camp premises,

¹ The complainant's work history consisted mainly of working in the field of personnel management at a much higher level than a Typist 3.

which is translated into a discriminatory motive. The uncontroverted testimony on this point was that brief discussion about medication was precipitated by complainant's statement that he was on tranquilizers; however, the panelists were satisfied with his answers and department, and it was not a reason for his non-selection. The hearing examiner in his initial recommended decision made the following pertinent findings:

"11. Although panelist Haines did question how Complainant would handle himself if he were derided about being in a "typically female position," the testimony adduced at the hearing does not support the Complainant's inference that the panel was opposed to hiring a male typist; rather, the evidence indicates that in an institution which accommodated 500 male residents, complainant might well have been the subject of derision. On the other hand, it would have been advantageous to have a male secretary at such a facility.

12. The panel inquired about the Complainant's disability but from the evidence presented, there is no indication that the inquiry was not proper, given the fact that the position was at a correctional institution where emotional stability of staff would be a legitimate concern. In any event, the final decision was not based on concern over Complainant's health."

The plurality also concludes that the reasons given by the panel for selecting the particular candidate, because her local residency would benefit respondent's work release and study release programs; and that she would be less likely to quit after a short tenure, were pretextual because respondent's community programs were not included in the responsibilities of the job and there was no reason to believe the selected candidate would remain on the job any longer than the complainant. The inference is that it is impermissible to hire someone who may bring to a job attributes which are beneficial to an employer's program unless

such attributes are within the specifications of the position. The plurality fails to cite any law which is in support of this position. There is none. The plurality's conclusion that the reason given by the panel regarding tenure is pretextual is based solely on a difference of opinion. There is no evidence, as required in McDonnell Douglas (supra), which eliminates the panel's reasons for making the particular employe selection.

The plurality also infers in its discussion that the panel, contrary to law, was partially motivated by impermissible considerations in making their selection. They cite Appleton Electric v. DILHR (Dane County Circuit Court Case No. 155-255, 1977) in support. Appleton clearly shows that the plurality is in error. In that case a female employe was fired after unexcused and excessive absenteeism. She appealed alleging sex discrimination. There was explicit testimony that the supervisor who recommended her discharge did not want any women working in his department and vowed to get rid of them. The administrative hearing body found in the employe's favor. On appeal to the circuit court the decision was affirmed. However, the court also concluded that the administrative hearing body could have reasonably found the employe's discharge not to have been motivated by the supervisor's bias against women working in his department.

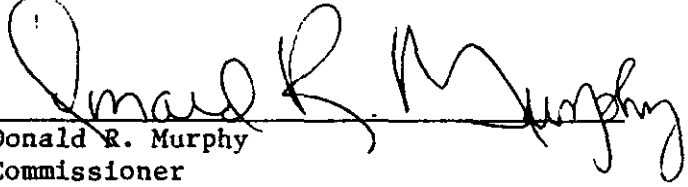
First it is doubtful that the plurality correctly cited the holding of Appleton. Second, assuming that the plurality correctly cited the holding of Appleton they failed to apply the other principles of that

case. Appleton required explicit testimony of discriminatory bias against the employe. In the instant case there was an absence of testimony that the panel was biased against the complainant for reasons of sex or handicap. Accordingly, the panel improperly inferred sexual and handicap discrimination by the panel.

For the reasons expressed this Commission should find for the respondent.

Dated May 14, 1981

STATE PERSONNEL COMMISSION


Donald R. Murphy
Commissioner

DRM:mek

* * * * *

PATRICK W. BUSCH,

Appellant,

v.

WISCONSIN CORRECTIONAL CAMP
SYSTEM,

Respondent.

Case No. 78-PC-ER-8

* * * * *

AMENDED
PROPOSED
DECISION
AND
ORDER

NATURE OF THE CASE

On February 16, 1978, Patrick W. Busch filed with the Department of Industry, Labor and Human Relations a complaint alleging that the McNaughton State Camp, a correctional institution operated by the respondent, discriminated against him because of his sex when it failed to hire him for a Typist 3 vacancy. Following a February 14, 1979, Initial Determination by the State Personnel Commission that there was probable cause to believe that the complainant had been discriminated against because of his sex and handicap.¹ The Commission held a prehearing conference on March 28, 1979, and the matter was noticed for hearing on the merits with the following statement as to the issue in the case: "Whether or not the complainant was discriminated against on the basis of sex and/or handicap in the respondent's refusal to hire him." The evidentiary hearing before then Chairperson of the Commission, Joseph W. Wiley, was held on June 19, 1979.

¹The Commission's investigator found probable cause to believe Complainant had been discriminated on the basis of handicap notwithstanding the fact that the complaint was not amended to allege handicap discrimination.

FINDINGS OF FACT

1. The complainant, a male, applied and took a written test for employment with the State of Wisconsin as a Typist 3 sometime in 1977.

2. Prior to applying for employment as a typist, complainant had an employment history dating back to 1958 and his experience included inter alia private sector employment as radio announcer, and as an auditor and branch manager of a finance company; and public sector employment as a public school teacher and in progressively more responsible professional positions in U.S. Civil Service.

3. Between May 27, 1977, and December 16 or 17, 1977, the complainant worked as a data entry operator for the State of Minnesota; his job duties also included processing State Patrol expense reports issuing warrants for blood alcohol tests, maintaining manuals, and switchboard relief. Prior to that he had been a \$19,386 per annum Employee Development Specialist (GS-12) with the U.S. Army Corps. of Engineers in St. Paul, Minnesota; he had retired from that employment on disability in the spring of 1976 following a period of hospitalization to treat severe depression.

4. On November 29, 1977, complainant interviewed for a Typist 3 vacancy at McNaughton State Camp, a correctional institution operated by the respondent, but was not selected for the position.

5. The person who was selected for the position was Sandra Gee, a female.

6. The Complainant had scored 94 on the written test and was ranked number one on the Civil Service Register for the position in question, while Ms. Gee had scored 87 and was ranked number three on the register.

7. At the November 29, 1977 interview, the three panelists, Mark Briggs, Terry Haines and James Resop each made notations on State Bureau of Personnel Applicant Evaluation Sheets (AD-PERS-104) which listed 22 evaluation factors under the general headings: Work Experience and Training, Qualities Relating to the Position, and Personal Characteristics.²

8. On their AD-PERS-104 Forms, each panelist gave complainant an overall rating and score of "Exceptionally Well Qualified, 94-100," while each gave Ms. Gee an overall rating and score of "Well Qualified, 86-93."

9. Notwithstanding the ratings and scores they had entered on the AD-PERS-104 forms, the panelists, after considering the candidates' qualifications overnight and discussing their relative merits for two hours, concluded that Ms. Gee was the more suitable candidate and un-animously recommended that she be appointed to the Typist 3 position.

10. The panel stated that both the complainant and Ms. Gee could perform the job, but that they favored Ms. Gee because: (a) she was a local resident whose acquaintanceships in the community would be of benefit to the respondent as it sought to develop and maintain work- and study-release programs in the community; (b) she was perceived as wanting the

²Use of AD-PERS-104 or the factors thereon is not mandatory.

position on a permanent basis and as a local resident she would be less likely to quit after a short tenure.

11. The job duties and responsibilities of the Typist 3 position did not include program development. This was the responsibility of other McNaughton staff members. The Typist 3 devotes 75-80 percent of the time to typing invoices, forms, resident histories, and Parole Board summaries as well as handling medical records, money transmittals and other business matters for the camp.

12. At the time she was interviewed, Ms. Gee was enrolled full time, at Nicolet College, Rhinelander, in associate degree accounting program; if selected for the Typist 3 position she planned to continue in the program on her own time in the evening. For the past five years she had handled all clerical and accounting duties for her husband's small construction business.

13. Panelist Haines questioned the complainant as to how he would handle himself if he were derided about being in a "typically female position." The institution accommodated 55 male residents and the complainant might well have been the subject of derision; on the other hand, it would have been advantageous to have a male secretary at such a facility.

14. The panel inquired about the complainant's disability but from the evidence presented, there is no indication that the inquiry was not proper, given the fact that the position was at a correctional institution where emotional stability of staff would be a legitimate

concern.

15. The complainant, at the time of his consideration by the panel, was handicapped within the meaning of §111.32, stats., but was able to perform, without accommodation, the duties and responsibilities of the position in question.

16. The panel's articulated reasons for hiring Ms. Gee for the position in question were pretextual.

17. The respondent refused to hire complainant for the position in question because of his sex and handicap.

DISCUSSION

In a non-class action complaint alleging discriminatory treatment in employment, the complainant has the initial burden of establishing a prima facie case of discrimination. This can be satisfied by a showing that: (a) he is a member of a protected group, (b) he applied and was qualified for a position the employer was trying to fill, (c) although qualified, he was rejected, (d) the employer continued to seek applicants with complainant's qualifications. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

The court in Furnco Construction Corp. v. Waters, 438 U.S. 567, explained that a prima facie showing of discrimination is not the equivalent of a factual finding of discrimination. Rather, the court stated: "[I]t is simply proof of actions taken by the employer from which we infer discriminatory animus because experience has proved that in the absence of any other explanation it is more likely than not those actions

were bottomed on impermissible considerations." Reilly v. Bd. of Ed. of New Berlin, Wis., 458 F. Supp. 992, 996-7, 18 FEP Cases 973, 975-6 (E.D. Wis., 1978).

The complainant successfully carried his burden of establishing a prima facie case of discrimination based on sex and handicap.

Once the plaintiff has established a prima facie case, the burden shifts to the employer to articulate some legitimate, nondiscriminatory reason for the employe's rejection. McDonnell Douglas Corp., v. Green, supra at 802. The burden which shifts to the employer is merely that of proving that he based his employment decision on a legitimate consideration not an illegitimate one such as sex or race. Furnico Construction v. Waters, supra; McDonnell Douglas Corp. v. Green, supra.

If the employer meets this burden, the plaintiff must then be given an opportunity to introduce evidence that the proffered justification is merely a pretext for discrimination. Reilly v. Bd. of Ed., supra.

When the articulated reasons have been eliminated as possible reasons for the employer's actions it is more likely than not that this employer based his decision on an impermissible consideration. Furnico Douglas Corp. v. Green.

The two reasons articulated by the respondent for selecting Ms. Gee rather than the complainant were that her local residency would benefit the respondent in developing and maintaining work- and study-release programs and that she would be less likely to quit after a short

tenure.

The Commission concludes that both of these reasons are pretextual in that (1), the duties and responsibilities of the Typist 3 did not include development and maintainance of such programs and (2), Ms. Gee's clear intention to continue her accounting studies, which would not be utilized in the Typist 3 position, raise as least as great if not a greater question as to the likelihood of her becoming a long-term employe.

It is not necessary that the complainant establish that the sole motivating factor for his rejection was his sex or his handicap; if the employer was partially motivated by impermissible considerations, the failure to hire the complainant constituted discrimination based on sex and handicap. See Appleton Electric v. DILHR, (Dane County Circuit Court Case No. 155-255, 1977).

At the beginning of the proceeding the respondent objected to the Commission hearing evidence on handicap discrimination on the grounds that there was no valid complaint or amendment alleging discrimination on that basis. Testimony and evidence was received without limitation with the understanding that the Commission would issue a ruling on this objection with its decision. The Commission rules that absent timely objection to the statement of issue, it was proper to hear evidence on handicap discrimination.

At the end of the presentation of evidence, the complainant moved to amend the original charge to allege handicap discrimination to conform to the proof as presented at the hearing. A reply by the respondent, if

any, was to be submitted by July 9, 1979. No reply by the respondent was received.

The Commission rules that the complainant's motion should be granted as the matters asserted in the amendment arose out of the transaction set forth in the original complaint and should be considered to relate back in time to the date of the original pleading. Compare, §802.09, Stats. Furthermore, the charge of handicap was included in the investigation and initial determination, and was included in the notice of hearing.

With respect to the question of remedy, official notice is taken of the fact that the position standards for the clerical classifications, including the typist series, have been rewritten following the clerical survey since the transaction in question. Therefore, it would not be appropriate to order the respondent to appoint the appellant to this position or a similar position. However, the respondent should be required to cease and desist from further discrimination against the complainant and to pay him back pay and benefits he would have received from the date of the appointment of Ms. Gee to the position in question to the date of this Order, less mitigation required by statute.

CONCLUSIONS OF LAW

1. The State Personnel Commission has jurisdiction to hear this case pursuant to §230.45, Stats.
2. The basis for the complainant's nonselection for a Typist 3 position at McNaughton State Camp constituted unlawful considerations based on sex or handicap in violation of §111.31 to 111.37, Stats.

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ORDER

The Commission having found that the respondent has engaged in discrimination on the basis of sex and handicap, it is ordered that the complainant be awarded back pay and benefits in the amount that he would have received had he received the appointment in question, less mitigation, from the date of the appointment that was made in this case to the date of this Order, and that the respondent cease and desist from any further discrimination against the complainant with respect to his sex and handicap.

Dated: _____, 1980.

STATE PERSONNEL COMMISSION

Charlotte M. Higbee
Chairperson

Gordon H. Brehm
Commissioner

Dissent: _____
Donald R. Murphy
Commissioner

CMH:jmg

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