STATE OF WISCONSIN PERSONNEL COMMISSION

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PAMELA ANDERSON,

Appellant/Complainant,

v. ORDER

Secretary, DEPARTMENT OF INDUSTRY, LABOR, AND HUMAN RELATIONS,

Respondent.

Case Nos. 79-320-PC, 79-PC-ER-173

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The respondent in these cases objected to the Proposed Decision and Order of the hearing examiner. The Commission held oral arguments at the request of respondent. The Commission has also examined the record and the briefs and written arguments ofthe parties and has consulted with the hearing examiner concerning determinations particularly within her province, including the demeanor and credibility of the witnesses in the case.

Based upon all of the above, the Commission adopts the Proposed Findings of Fact as the Finding of Fact of the Commission and adopts in part, modifies in part and rejects in part the Proposed Conclusions of Law and Opinion as follows:

CONCLUSIONS OF LAW

The Commission adopts as its own Conclusions of Law the Proposed Conclusions of Law 1, 2, 3, 7. The Commission modifies Proposed Conclusion of Law 4, 5 and 6 as follows, and as so modified, adopts them as its own:

4. The respondent has discriminated against the complainant on the basis of her sex in violation of §111.32(5)(g)1, Wis. Stats., when it failed to extend the temporary interchange agreement and failed to appoint her to the permanent position of Madison Job Service Director.

5. Appellant has the burden to prove that the action of the respondent in failing to appoint her to the permanent position of Madison Job Service Director was an illegal action or an abuse of discretion under §230.44(1)(d), Wis. Stats.

6. The appellant has met her burden of proof and has proven that the action of respondent in failing to appoint her to the permanent position constituted an illegal action.

The Commission rejects Proposed Conclusion of Law 8 and substitutes in its place the following:

8. The Commission lacks jurisdiction under §230.44(1)(d), Wis. Stats., to decide whether the failure to extend the temporary interchange agreement was an illegal act or an abuse of discretion.

The modification of Conclusion 4 is in order to more accurately reflect the nature of one of the transactions at issue and to make the language consistent with the rest of the Findings, Conclusions and the Opinion. The modification of Conclusions 5 and 6 reflects changes necessitated by Commission's Conclusion 8. The Commission's Conclusion 8 is based on its determination that it lacks jurisdiction under §230.44(1)(d), Wis. Stats. to deal with a decision which was not related to the hiring process in the classified civil service.

OPINION

The Commission adopts the Proposed Opinion as written with the addition of the following language after page fourteen immediately after the sentence in the text which is referenced by footnote 2. The

purpose of the addition to the Proposed Opinion is to fully articulate the reasoning used to arrive at a determination that complainant has proved her prima facie case. Proposed footnotes 3 thru 9 are renumbered 4 thru 10 to reflect the footnote added herein.

OPINION

In this case, although the disputed position was not filled at the time of the hearing, the nature of the civil service selection process is such that the position can be said to have remained open and that Polston continued to look for applicants of complainant's qualifications. Although Polston's expressed intention was to upgrade the salary range of the position, the duties did not change. Since the duties remained the same, the position can be said to have remained open for purposes of the Fair Employment Act, since the appointing authority continued to look for someone other than complainant to do the same job which she claimed she was qualified to do but to which she was not appointed. Polston also continued to look for applicants of complainant's qualifications. Complainant was as a matter of fact qualified for the position. Polston did not recognize her qualifications but did continue to look for other applicants who were to be qualified similar to complainant--certified by valid civil service testing and interview panel.

The prima facie case can be made up of elements other than the specific elements cited by the Court in McDonnell Douglas. The court has consistently recognized the need for flexibility within the basic framework which allocates the burden of proof in many discrimination

cases.[3] In this case the civil service requirements do add a new element to the prima facie case, but there is no disruption to the basic analytic framework.

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[3] Texas Department of Community Affairs v. Burdine, 25 FEP Cases 113, 115, N.6. (U.S.S.Ct. 1981); Bundy v. Jackson, 24 FEP Cases 1155 (C.A.-DC 1981); Wade v. New York Telephone Co., 24 EPD $31,256 (U.S. D.C.-S.D.N.Y, 1980).

Dated: July 2, 1981. STATE PERSONNEL COMMISSION

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STATE OF WISCONSIN PERSONNEL COMMISSION

PAMELA ANDERSON,

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Secretary, DEPARTMENT OF INDUSTRY, LABOR, AND HUMAN RELATIONS,

Respondent.

Case Nos. 79-PC-ER-173
79-320-PC

DISSENT

In my view the respondent expressed legitimate reasons why complainant was not hired as District Director, Job Service of the Madison office.

The complainant contended she was not hired because she was a woman. To make her case she must prove by a preponderance of the evidence that the respondent intentionally discriminated against her. I believe the complainant failed to establish and sustain such a case.

McDonnell Douglas Corp. v. Green, 411 US. 792 (1973) is the proper frame work for analysis of this case. Under McDonnell the complainant must first establish a prima facie case by meeting four requirements, the last being that after her rejection the job remains open and the employer continues to seek applicants from persons with complainant's qualifications. This element is absent in the present case.

Contrary to the majority's conclusions the complainant never established the fourth requirement of a prima facie case as expressed in McDonnell. The record is replete with uncontroverted testimony and

documentary evidence showing that the respondent discontinued the hiring process, attempted to redefine the position and requested the Department of Employment Relations to upgrade the job to a higher level. The requirements of a prima facie case set forth in McDonnell were never met.

If the complainant establishes a prima facie case the burden shifts to the respondent to rebut the presumption of discrimination. The respondent must offer legitimate non-discriminatory reasons for rejecting the complainant, but need not persuade the trier of face. It is sufficient that respondent "raise a genuine issue of fact as whether it discriminated against the [complainant]." Texas Dept. of Community Affairs v. Burdine, 25 FEP 113(1981). The respondent in the present case accomplished this by presenting legitimate reasons for not hiring the complainant.

In satisfying Burdine the respondent introduced evidence, including documents that showed that the Administrator, Division of Job Service, rejected the certification list - 4 males, 2 females - which included the complainant because in his estimation none of the remaining certified candidates - one male withdrew - demonstrated strong managerial qualities determined to be needed for the Madison position.

I disagree with the majority's conclusion that complainant proved by a preponderance of the evidence that respondent's proffered reasons for not hiring the complainant were pretextual.

The respondent presented unrefuted testimony that the plan to upgrade the Madison position, originating in 1973, occurred before complainant's final interview. Subsequently the Department of Employment

Relations did give respondent approval to upgrade the position.

The respondent also presented considerable detailed evidence including documentation showing that complainant was not a strong manager and that the Madison office under her management suffered performance problems in several areas. Again, contrary to the majority's inferences, no witness testified that complainant demonstrated the managerial qualities needed for the Madison position.

It is patently clear from the record that the Job Service Division Administrator had sufficient justification for rejecting the certification list, including the complainant. The majority's "but for" test though accurately stated is misapplied. Furnco Construction Corp. v. Waters. 438 US -, 17 FEP Cases 1062 (1978). The court in Furnco gives a complete explanantion of the reasoning behind this test.

Of considerable importance is the fact that respondent, after deciding not to hire anyone for Madison, offered the complainant an equivalent position - same classification and pay - in Janesville. The complainant also was certified for this position but refused it because she preferred Madison. As the court stated in Furnco:

> "The central forms of the inquiry ... is always whether the employer is treating some people less favorably than others because of [prohibited forms of discrimination]."

In light of the forgoing, complainant's claim of discrimination is inconsistent and faulty.

The majority's inference that the respondent's reasons for not hiring the complainant for the Madison position was pretextual because in Milwaukee a black male with minimal managerial experience was

selected as District Director over an experienced white female lacks an evidentiary base and is speculative. In that transaction both people were in the "protected" class. Clearly the appointment of either person would be considered to be in concert with state affirmative action policies. The evidentiary record regarding the reasons behind the particular appointment is incomplete. Absent a complete record on the reasons for the Milwaukee appointment, any inference that such an appointment was discriminatory is speculation.

A comment is warranted regarding the majority's conclusion that respondent's non-extension of the temporary interchange argument was based upon the fact that complainant is a woman. The conclusion is erroneous. This agreement, known as an Intergovernmental Personnel Act (IPA) contract is governed by §230.047, Wis. Stats. and Chapter Pers. 31 Wis. Adm. Code. Pers. 31.04 provides that such agreements shall not exceed one year except that the director - Administrator, Division of Personnel - may authorize an extension when justified. The Job Service Personnel Director testified it was not customary to extend such agreements. Complainant's supervisor said there was "no reason" to extend the agreement. This view was confirmed by two other Job Service administrators. The majority's conclusion is factually and legally incorrect and should be rejected.

I believe, based upon the record that the complainant was not discriminated against by the respondent because she is female, she received no disparate treatment and the respondent had legitimate reasons for not

appointing any of the candidates, including complainant, to the Madison position. McDonnell Douglas does not demand that an employer give preferential treatment to the protected class. The state Fair Employment Act was not intended to diminish traditional management perogatives.

Dated: July 2, 1981. STATE PERSONNEL COMMISSION

Donald R. Murphy
Commissioner

DRM:jmg

STATE OF WISCONSIN PERSONNEL COMMISSION

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Appellant/Complainant,

v.

Secretary, DEPARTMENT OF INDUSTRY, LABOR, AND HUMAN RELATIONS,

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PROPOSED DECISION AND ORDER

## NATURE OF THE CASE

Two cases were consolidated for hearing on the merits. One case is an appeal pursuant to Chapter 230, Wisconsin Statutes, of the failure of respondent to hire appellant for a permanent status classified position with the State of Wisconsin and an appeal of respondent's termination of a temporary interchange agreement under which appellant had been employed by the State of Wisconsin. The failure to hire is alleged to be an illegal act or an abuse of discretion. The termination of the interchange agreement is alleged to be an abuse of discretion. The second case is a complaint under the Fair Employment Act, §§111.31-111.37, Wis. Stats., alleging discrimination on the basis of sex with respect to the termination of the interchange agreement and with respect to the failure to hire complainant for the permanent status classified position. Respondent waived investigation and conciliation of the charge of discrimination and the parties agreed to consolidate the two cases for hearing on the merits. A hearing was held before a hearing examiner

appointed by the Commission.

## FINDINGS OF FACT

1. Appellant, Pamela Anderson, served as Director, Madison District Job Service (Madison), in the Department of Industry, Labor and Human Relations (DILHR), from November 5, 1978 through November 2, 1979, under the terms and authority of a temporary interchange agreement entered into by herself and her "sending agency" the City of Madison, and by the Secretary of DILHR ("receiving agency") and the Administrator of the Division of Personnel in the Department of Employment Relations. (App. Ex. 1).

2. The selection and appointment under the temporary interchange agreement was the result of competition open to federal, state and local government employes. (App. Ex. 2).

3. The agreement was subject to an option to extend it for an additional year.

4. The announcement of the temporary position contained a description of the qualifications required, which included "two years of responsible professional work experience which would provide reasonable assurance that the knowledges and skills required have been acquired." (App. Ex. 2).

5. As of November 5, 1978, appellant had three years of experience as Executive Director of the Madison C.E.T.A Consortium, reporting to the Mayor of Madison, managing a multi-million dollar employment training and placement program with subordinate staff, and three prior years

experience in state-wide program administration and management in Iowa. These prior positions included both management and planning functions.

6. As of the end of October, 1979, appellant had acquired an additional year of management experience as Director of Madison Job Service.

7. The Madison Job Service District is one office out of twenty (20) district offices administered by the Job Service Division of DILHR. The first line supervisor of most of the Job Service District directors is George Kaisler, Assistant Administrator in charge of Field Operations in the Job Service Division; he was appellant's first line supervisor during the period of her employment with DILHR. Mr. Kaisler has been employed with Job Service since 1952, and has held his position with Field Operations since October, 1976.

8. The termination of the temporary interchange agreement, or the extention of the agreement was within the authority of Mr. Robert Polston, who was the Administrator of the Job Service Division from late July, 1979 through the end of January, 1980. By its terms the temporary interchange agreement expired if it was not specifically renewed or extended; the consensus among the individuals involved in the process of interviewing candidates for the permanent Madison position was to allow the agreement to expire.

9. The intent of the appointing authority had been to fill the Madison Director position on a permanent basis and the process for permanent appointment had begun prior to the time Mr. Polston became Administrator.

10. The usual practice within Job Service is to fill positions from among candidates within the state service, but Mr. Kaisler wanted to recruit for the Madison position from external sources as well in order to give appellant an opportunity to compete for the position.

11. Appellant applied for the permanent Madison position and was certified as number one among all applicants. She simultaneously applied for another position as Director of the Janesville District. (App. Ex. 3). Her certification as number one applied to the Janesville position as well. Both positions were assigned to Pay Range 1-16.

12. An applicant who applies for a classified position within civil service and is certified as an eligible candidate is qualified for the position.

13. Appellant was certified as the number three ranked candidate for a position as Director of the Milwaukee Metropolitan Job Service District, which position is assigned to Pay Range 1-18.

14. Polston interviewed appellant for the Milwaukee position in September, 1979, and interviewed her for the Madison position on October 19, 1979. Appellant was not appointed to either position.

15. Polston considered appellant's prior professional experience to be in the area of planning and did not consider it relevant to the Madison position (Tr 104, 111), and questioned her management experience in both the Milaukee and Madison interviews.

16. On October 23, 1979, Polston and Kehl separately spoke to the appellant at a meeting of Job Service District Directors, and told her that Polston was considering not filling the Madison position and would try to upgrade it and advised her to consider the Janesville position.

17. After October 23, 1979, appellant called Kehl to inquire about a final decision on the Madison position. Kehl responded that he was waiting for her decision about the Janesville position. Appellant asked if this was an offer of the Janesville position; for the first time Kehl officially extended an offer of the Janesville position to appellant. Appellant turned down the offer and stated that her last day as Madison District Director would be November, 1979.

18. The interviews for the Milwaukee, Madison and Janesville positions were all conducted in two stages. For the Milwaukee position, the first interviews were conducted by Kaisler and Ed Kehl, Deputy Administrator of the Job Service Division, and the second interviews were conducted by Polston and Joseph Noll, Secretary of DILHR. The questions were the same for all candidates, but Polston raised questions concerning the adequacy of appellant's management experience. In the interviews for the Madison and Janesville positions, Kaisler and Richard Anderson, Management Specialist in Field Service Operations who was assigned to work with District Directors, conducted the first interviews. Standard questions were asked. Among the questions was one about an applicant's preferred job location. (Appellant's Exhibit 5) At the same time, appellant informed the interviewers that she was only interested in the Madison position. The second interview was with Polston and Kehl.

19. Appellant's second interview for the Madison job deviated from

the standard format used with previous interviews. Polston stated that he wanted to ask appellant questions specific to her performance in the Madison job over the previous year and not cover ground already covered by the questions asked during the Milwaukee interviews. Complainant did not have a choice of the manner in which the interview would be conducted. Polston proceeded to question appellant about the performance statistics of the Madison office with respect to the time within which first payments of unemployment compensation were made, statistics for individual job placements, rumors of low office morale, public complaints received about the office, and appellant's motivation for applying for a management position with a planning background, and other questions all tending to show a negative attitude toward appellant's experience, ability and performance. Ed Kehl did not participate in the interview until the end, when he focused attention to positive aspects of appellant's performance in the Madison office.

20. The incidents of complaints concerning the Madison office were typical in number and were to be expected and were not a negative aspect of appellant's performance. (Tr. 329).

21. There was no problem of low office morale connected with appellant's managerial skill and performance.

22. Performance statistics for job placement goals and for first unemployment compensation payments were below set goals. Performance statistics for other goals exceeded set goals. (Tr. 280)

23. Appellant discussed with Polston at the final Madison interview some business reasons for the below goal performances, which reasons were substantiated by Kehl; she also discussed measures she had taken to remedy the situation, which measures were considered to be sound and proper by Kaisler. Polston did not give weight to this information in arriving at his determination that appellant was not qualified for the Madison position.

24. All persons concerned in the hiring process, including Polston, Kehl, Kaisler, and Pamela Anderson, agreed that the Madison office had been historically difficult to manage and that certain problems existed prior to the appellant's tenure.

25. For fiscal year 1979-80, the year after appellant's departure from Job Service, statistical goals for job placements were lowered from the 1978-79 levels. (Resp. Ex. 8; Tr. 283). Fiscal year 1977-78 goals for time of first unemployment compensation payments were lower than goals for 1978-79. (Resp. Ex. 4; Tr. 277).

26. Evaluation of appellant's performance was accomplished by a method called "management by objectives" (MBO), which considers quantitive factors such as whether certain statistical performance goals have been met, but also includes evaluation of whether an employe is taking appropriate steps to solve existing problems as well as other non-statistical factors such as program planning, program management, use of community resources, public relations, and administrative and management functions. (App. Ex. 7, 8; Tr. 147-150).

27. Polston had discussed with Kehl, prior to the Madison interviews

his concern with the level at which the Madison job was classified and the possibility of upgrading the position. The idea of upgrading Madison had been discussed for several years at DILHR, in the context of a review of the level of several offices at once, to determine whether there should be a group of Job Service offices at Pay Range 1-17. As of the date of the interviews for the Madison office, there were no Job Service Director positions at that range. The existing pay ranges were Pay Range 1-15, 1-16 and 1-18. The 1-18 was assigned only to the Milwaukee Metropolitan District office.

28. Duane Sallstrom, Personnel Director of DILHR, opposed an attempt to upgrade the Madison office alone, and favored an examination of several Range 1-16 and 1-15 offices to determine what criteria should be used and the manner of their application to determine classification.

29. The administrator of the State Division of Personnel turned down the request to upgrade Madison alone. A group of District offices, which included Madison, were eventually upgraded to Range 1-17.

30. Polston discussed upgrading the Madison office with Kaisler in September, 1979, well before Kaisler had completed his portion of the interview process for Madison, and before Polston conducted his final interviews for Madison.

31. Polston was interested in upgrading the Madison office only, without upgrading any other district offices, for the purpose of encouraging experienced Job Service managers statewide to apply for the position, after discussions with some of the white male Job Service

Directors with long experience with the Service. (Tr. 127-128). Polston felt prior Job Service experience was a definite advantage for the position, which he considered a showcase position because of its proximity to the seat of state government. (Tr. 216).

32. When Polston interviewed and hired for the Milwaukee Job Service position in September, 1979, Pamela Anderson, Joan Smith, Linda Thielke, and Nancy Newbury, all experienced Job Service managers, applied for the job (Tr. 115); a black male with no prior Job Service experience was hired for the Pay Range 1-18 position.

33. Kaisler thought appellant had done a good job in the Madison office and was taking appropriate steps to correct existing problems, Anderson was very positive about appellant's performance, and Kehl also thought appellant had done well in the Madison office.

34. Female managers at the administrative level of the Madison office were underutilized by DILHR as a whole, according to statistics produced by its affirmative action officer. Female professionals at a level just below the Madison level were also underutilized. The underutilization is approximately 5.68% agency-wide, compared to the parity figures which call for 30% of positions at the level of the Madison office at Range 1-16 or higher. The percent of female managers at that level at the Job Service Division was actually lower than the 5.68% agency-wide figure, since there were no women at Range 1-16 or higher after appellant left and she was the only one at that level during her tenure. (App. Ex. 7; Tr. 173-175; 182-187).

35. Polston did not want to change the duties of the Madison Director but only wanted to upgrade the pay range of the position (Tr. 243).

36. Sallstrom supported the decision not to fill the position because Polston told him that he wanted to add duties to the position (Tr. 81-82).

37. Sallstrom was not informed of the final decision to upgrade the Madison office nor of the decision not to fill the position until after the interviews were completed, although he had previously discussed the idea of an upgrade with Polston. (Tr. 66).

38. Polston did not consider the appellant qualified to be the Madison District Director in either Pay Range 1-16 or 1-17. (Tr. 136)

39. It is very unusual for an appointing authority to decline to fill a position after certification and interview of candidates. If such a decision is made, it is normally for reasons such as budget problems within the employing agency, change in the duties of a position so that the examination and register created from it are no longer job-related, or because of filling a position on a transfer basis.

40. None of the reasons cited in Finding 39 were given as a reason for not filling the Madison position. Polston reported to the Equal Employment Officer of Job Service that the reason for not filling Madison with a protected candidate (i.e., a female) was that an upgrade request had been put in for that office and that if the upgrade were approved, a new testing procedure would have to be started. (Resp. Ex. 4).

He did not state his opinion that appellant was not qualified for the job.

41. The duties of the Madison District Director position have not changed since appellant's term in the position. (App. Ex. 10,11; Resp. Ex. 11; Tr. 79).

42. The visibility, or showcase nature of a position is not a criterion in determining the appropriate classification of that position. (Tr. 314-315).

43. Since there was no change in duties contemplated as a justification for upgrading the Madison office, a new testing procedure was not mandatory. If the skills and abilities of the position were the same, the same test could be used for filling the job at a higher level as that which had been used to determine the register of candidates in the fall of 1979. (Tr. 320-321).

44. There was no personnel reason not to fill the Madison position other than a change in duties of the position. (Tr. 94).

45. Appellant could have been appointed to the position when it was at Pay Range 1-16 and could have stayed in the position when it was upgraded at Pay Range 1-17. (Tr. 80-82).

46. Polston acknowledged that program innovations had occurred in the Madison office under appellant's management which were of the type of "showcase" items be envisioned for the position. Polston had no particular programs which he personally wanted to see implemented.

47. Appellant was the most qualified candidate for the Madison position and was also recommended as the first choice for hire by

Kaisler and Anderson (App. Ex. 15). Kehl would have supported Polston in a decision to appoint appellant as well in his decision not to appoint her.

48. The person appointed to replace appellant as acting Madison District Director was a District Manager whose job was at Pay Range 1-15 and who competed for but was not certified and qualified for the Madison position.

49. Appellant would have been appointed to the Madison position on a permanent basis but for Polston's opposition to the appointment.

50. Ms. Anderson was not hired for the permanent Madison position because of her sex.

51. Ms. Anderson was not continued in the Madison position under the temporary interchange agreement because of her sex.

## CONCLUSIONS OF LAW

1. The Commission has jurisdiction of this case pursuant to §111.33 (2), 230.45(1)(b), 230.44(1)(d) and 230.45(1)(a), Wis. Stats.

2. The burden in on the complainant/appellant to prove that respondent discriminated against her on the basis of her sex when he failed to continue her in an acting capacity as Madison Job Service Director under a temporary interchange agreement and when he failed to appoint her to the permanent position of Madison Job Service Director.

3. The complainant/appellant has met her burden of proof.

4. Respondent has discriminated against complainant/appellant on

the basis of sex in failing to appoint her in an acting and in a permanent capacity as Madison Job Service Director.

5. Appellant has the burden to prove that the actions of the respondent were illegal or an abuse of discretion under §230.44(1)(d), Wis. Stats.

6. Appellant has met her burden of proof.

7. Respondent violated §230.18, Wis. Stats. and discriminated against complainant on the basis of her sex when it failed to hire her as Madison Job Service Director.

8. Respondent's failure to appoint appellant in an acting and in a permanent capacity as Madison Job Service Director constituted an abuse of discretion.

## OPINION

This case involves allegations that the employer's conduct was impermissible with respect to two separate employment decisions concerning the complainant and that each decision was improper under the standards of two separate and distinct statutes. The employer's actions are examined first pursuant to the State Fair Employment Act, §111.31-111.37, Wis. Stats. (1977) (F.E.A.) and then pursuant to Chapter 230, Wis. Stats. (1977), Subchapter II, Civil Service.

### I Fair Employment Act Liability of Employer

The statute is administered by reference to the analytical model set forth for administration of Title VII of the Civil Rights Act of 1964, in McDonnell Douglas Corp. v. Green, 93 S. Ct. 1817 (1973).

The burden of proof is on the complainant to show by a preponderance of evidence that the employer's decision was based on discriminatory motivation.[1] The burden of coming forward with evidence is initially on complainant. She must show that she is a member of a group which is protected under the FEA, that she applied for and was qualified for the position at issue, that she was rejected despite her qualifications, and that the position thereafter remained open and the employer continued to seek applicants of complainant's qualifications.[2] Once complainant makes out a prima facie case she has raised the inference, "if such actions remain unexplained, that it is more likely than not that such actions were [discriminatory]."[3] The employer must then come forward with some evidence on this issue in order to rebut the inference of discrimination raised by complainant's prima facie case.[4] The strength of the inference raised by the prima facie case will obviously affect the nature and quantity of the evidence

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[1] International Brotherhood of Teamsters v. U.S., 97 S. Ct. 1843, 1854, (1977); McDonnell Douglas v. Green, 93 S. Ct. at 1825.

[2] McDonnell Douglas Corp. v. Green, 93 S. Ct. at 1824.

[3] Furnco Construction Corp. v. Waters, 98 S. Ct. 2943, 2949 (1978).

[4] Board of Trustees of Keene State v. Sweeney, 99 S. Ct. 295, (1978); Furnco Construction Corp. v. Waters, 98 S. Ct. at 2949-51; McDonnell Douglas Corp. v. Green, 93 S. Ct. at 1824.

the employer must introduce in order to successfully rebut it.[5] Once the employer has introduced evidence in rebuttal, the employe has the opportunity to introduce evidence that the employer's articulated legitimate, non-discriminatory reason is merely a pretext for an impermissible, discriminatory reason. The ultimate issue in a case alleging discriminatory treatment is therefore a determination of the motivation for the employer's decision. The complainant's argument is that under all the facts and circumstances of this case she would have been hired to fill the position of Madison Job Service Director

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[5] Milton v. Brown, 471 F. Supp. 150 (1979). In Loeb v. Textron, Inc. 600F.2d 1003(1979), the Court of Appeals, in a detailed and articulate footnote, explained the relation of the employer's burden of production to the employe's prima facie case:

> 5. Although the employer has a burden of production rather than of persuasion, "The employer's defense must ... be designed to meet the prima facie case ...." International Brootherhood of Teamsters v. United States. 431 U.S. 324, 360 n.46. 14 FEP Cases 1514,1529 (1977), and must be sufficient, on its face, to "rebut" or "dispel" the inference of discrimination that arises from proof of the prima facie case. See McDonnell Douglas, 411 U.S. at 807, 5 FEP Cases at 971; Teamsters, 431 U.S. at 342 n. 23. 14 FEP Cases at 1521-1522. A passing reference by just one of many witnesses to some deficiency in the plaintiff's job rating, for example, would be insufficient. Nor would it be enough to offer vague, general averments of good faith - a plaintiff cannot be expected to disprove a defendant's reasons unless they have been articulated with some specificity .... 600 F.2d at 1011-1012.

but for the fact that she is a woman. This "but for" test is the definition of pretext.[6] A finding of pretext and of discriminatory motive is almost invariably based on circumstantial evidence, which is sufficient under the facts and circumstances in the record of the case to lead to a conclusion that discrimination occurred.[7]

Pursuant to this analytical approach to the Findings of Fact, the preponderance of evidence leads to the conclusion that the respondent discriminated against complainant on the basis of her sex when he failed to extend the temporary interchange agreement and when he failed to appoint her to the permanent position. Robert Polston, Administrator of the Job Service Division of DILHR (the appointing authority) testified that he did not consider the complainant to be qualified for the position either as the position was described and classified as of October, 1979, or as he wanted it to be classified in the future. He also testified that he wanted to upgrade the position to a higher pay range to attract more experienced Job Service Managers to apply for the job, and that he did not think it would have been "fair" to complainant to appoint her to the position at Pay Range 1-16 and then have her compete for it again when it was placed in a higher

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[6] Sherkow v. State of Wisconsin, Dep't. of Public Instruction, No. 79-2247, slip op. at 6-7 (C.A.7, August 20, 1980); Sweeney v. Board of Trustees of Keene State College, 604 F. 2d 106 (1979).

[7] Sweeney v. Board of Trustees of Keene State College; 604 F. 2d 106 (1979); Kennedy v. Goodwin, 19 F.E.P. Cases 1531 (1977); Weiner v. County of Oakland, 14 FEP Cases (1976).

pay range. Since Polston did not want to hire appellant in the first instance because he considered her unqualified, it was logically inconsistent for him to be concerned about whether it was fair to her to appoint her because she might have to compete again for the position if it was upgraded. Such a rationale is logically acceptable only if he merely intended to delay her appointment, but not if he intended to prevent it. The evidence is clear that he wanted to unequivocally prevent her appointment. Complainant was, however, qualified for the position on the basis of ranking number one in competition with other applicants. Polston did not criticize the job-relatedness or validity of the examination process by which complainant was ranked as the number one candidate. He did not propose to change the duties of the position. Ms. Anderson was the objectively most qualified candidate by virtue of her ranking on the certification list. She was the subjectively most qualified according to the recommendations of Kaisler and Anderson. Kehl would have gone along with the decision to hire complainant as well as the decision not to hire her. Polston continued to look for candidates with complainant's qualifications, i.e., certified eligible candidates.

Ms. Anderson had been performing the duties of Madison Job Service Director for one year prior to the decision of Polston not to hire her. Polston hired an individual with no Job Service experience to fill a Pay Range 1-18 position in Milwaukee. Polston subsequently complained about the failure to attract Job Service experienced candidates for the Madison position for which most if not all of the certified candidates had Job Service experience. He refused to recognize the management experience complainant had acquired prior to her tenure at Madison

Job Service, and characterized her prior professional experience as having no bearing on her application for the position. (Tr. 104). Yet he apparently overlooked the lack of Job Service experience of the successful Milwaukee candidate, and accepted his prior private sector experience, while refusing to acknowledge either the Job Service experience of the complainant or her prior seven years of combined management and planning experience.

Complainant's performance was considered more than satisfactory by those who directly supervised her and had regular contact with her during 1978-1979. The Findings of Fact show that only two of Polston's criticisms of her performance had any foundation in fact. The position was and is a highly complex one, involving many areas of performance and sophisticated methods of performance evaluation. See Findings 26. The single-minded manner in which Polston focused on isolated problem areas in an otherwise more than satisfactory performance strongly suggests a conclusion that he was looking for reasons not to hire complainant. The circumstances of this case, including Polston's disregard of complainant's qualifications for the position, his creation of a false issue of whether there was a change in duties of the position, whether a new examination would have to be given, and the appointment of an acting successor to complainant who had not himself qualified for the Madison position, all lead to the conclusion that Polston did not want to hire Ms. Anderson for the Madison position for impermissible reasons. Polston was concerned about the "showcase" aspects of the job. His most

specific statement about Ms. Anderson was that she was not a strong enough manager. The others of respondent's witnesses had more clear-cut reasons in support of her appointment than Polston had for his opposition. In summary, complainant was qualified for the Madison position and Polston refused to recognize her qualifications.

Although Polston did not want to hire Ms. Anderson for the Madison position, he acknowledged that she was the most qualified of all the certified candidates when he failed to hire anyone for Madison and offered Ms. Anderson the Janesville position. Part of respondent's defense is based on the offer of the Janesville position. The complainant alleges that respondent discriminated against Ms. Anderson on the basis of her sex with respect to the Madison position. The offer of Janesville does not constitute a defense to the failure to offer Madison. The failure to offer the Madison position was based on the sort of reasoning which is consistent with sexual stereotyping that women are not strong in certain roles, such as in managerial roles. Ms. Anderson was clearly qualified and had the recommendation of experienced Job Service managers. The refusal to hire her based on showcase elements of the job and on the basis of an inarticulate, undefined subjective measure of what is a strong manager, leads to the conclusion that she would have been hired but for the fact that she was a woman.

The failure to extend the term of the temporary interchange agreement and keep Ms. Anderson in an acting capacity was also the result of impermissible discrimination. The decision to attempt to upgrade the

Madison position was not on its face discriminatory. The upgrading of Madison along with certain other District offices had been a topic of interest to the Job Service Division prior to Polston's appointment as administrator. The decision not to fill the position was not a necessary element of the process of upgrading it. Under all the facts and circumstances of the case, the decision to place in an acting capacity an individual who had failed certification at Range 1-16, and to not continue Ms. Anderson in the position constitutes discrimination on the basis of sex. Ms. Anderson's temporary appointment was the result of a competitive selection process. The selection of her acting replacement was the result of a unilateral decision by the appointing authority to offer the assignment "in-house" to one of the permanent status District Directors. All of respondent's witnesses testified, both for respondent and adversely for Ms. Anderson, that the decision not to renew the temporary interchange agreement was not an active decision, but rather was a tacit understanding. No action was taken to renew and the agreement expired. Polston testified the non-renewal was Kaisler's decision (Tr. 238). Kaisler testified it was Polston's decision (Tr. 160). No one offered any substantive explanation for the decision. Complainant was qualified for the permanent position. Assuming for the sake of argument that Polston believes it was not fair to have her compete again for the position when it was upgraded, there is still no explanation offered why she could not have continued in the acting capacity until a decision was reached on

the upgrade.

The complainant has made strong prima facie showing which raises the inference of discriminatory motive. There has been no rebuttal which offers any credible legitimate non-discriminatory reason for the failure to extend the interchange agreement and the failure to appoint her to the permanent position. Respondent's witnesses Kaisler, Anderson, and Sallstrom did not support the testimony of Polston on any major issue. The testimony of Kehl did not carry the weight of any of the other three because he appeared to be amenable to support any decision by Polston rather than to offer his own convictions in the matter. The testimony of Kaisler, Anderson and Sallstrom negated the effect of Polston's testimony and resulted in a failure to successfully rebut the prima facie showing. In any event, the complainant also offered further testimony on the issue of pretext after respondent's case. In effect, regardless of whether the procedure of strict tripartite production of evidence was followed (as it was in this case), the complainant has established by the preponderance of evidence that respondent discriminated against her on the basis of her sex with respect to the failure to appoint her to a permanent position and with respect to the failure to extend the temporary interchange agreement beyond November 2, 1979.

II. Respondent's liability under Chapter 230, Wis. Stats.

The particular violations alleged under this statute are under §230.44(1)(d), Wis. Stats. The failures to extend the interchange agreement and to appoint Ms. Anderson to the permanent position are alleged to be

illegal or an abuse of discretion. A finding of either illegality or an abuse of discretion is sufficient for a conclusion that there has been a violation of §230.44(1)(d).

Subchapter II of Chapter 230, Wis. Stats., contains a provision forbidding discrimination in the hiring process:

> ... No discriminations may be exercised in the recruitment, application, examination or hiring process against or in favor of any person because of the person's political or religious opinions or affiliations or because of age, sex, handicap, race, color, national origin or ancestry except as otherwise provided. §230.18, Wis. Stats.

In this case, while the respondent offered reasons other than appellant's sex to explain the failure to hire, it has been determined that those reasons were not the actual motivating factors and that the determinant factor in the decision was appellant's sex. It is not clear whether §230.18, Wis. Stats. requires the same level of proof to support a finding of discrimination as does the State Fair Employment Act. It is, however, reasonable to conclude that no higher level of proof is required. A finding based on the preponderance of credible evidence that appellant would have been hired "but for" her sex is certainly a basis for a finding of impermissible discrimination under §230.18 which overrides justifications otherwise provided.

The remaining question is whether the failure to appoint appellant was also an abuse of discretion. The appointing authority does have discretion to select the successful candidate for appointment from a list of certified eligible candidates. Subjective criteria may form

part of the basis for choice among qualified candidates, as long as the subjective criteria are not themselves suspect. The exercise of discretion in applying subjective criteria still involves a process of reasoning[8] which the appointing authority may be called upon to explain. The proper exercise of discretion cannot be arbitrary.[9]

Polston's explanation of his reasons for not hiring appellant show that he abused his discretion in failing to appoint Ms. Anderson. He arbitrarily refused to recognize her prior professional management experience as relevant to her qualifications for the disputed position. He did this after she had successfully competed for the acting position, which required at least two years of relevant professional experience, and after she was certified as the most qualified candidate after competing for the same position on a permanent basis. There was no evidence brought out and included in the record which could rationally justify Polston's refusal to recognize Ms. Anderson's professional experience. There was, on the other hand, more than sufficient evidence introduced to show that Polston concentrated inordinate and disproportunate attention to the weaker areas of her actual Job Service performance and disregarded or did not weigh in the balance the satisfactory and positive elements of her performance. At no time did Polston challenge the process by which Ms. Anderson was found qualified for

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[8] Reidinger v. Optometry Examining Board, 81 Wis. 2d 292, 297 (1977).

[9] State ex rel. Knudsen v. Board of Ed., 43 Wis. 2d 58, 67 (1969).

the position. He simply disregarded the effect of the examination and certification process, of which he was aware or most certainly should have been aware.

Polston also offered as a reason for non-appointment his reluctance to hire appellant at Range 1-16 and then have to make her compete again if the position were upgraded. Again, he knew or should have known that a second competition was not necessary. He also was aware that Ms. Anderson was qualified to hold a Range 1-18 position in the Milwaukee Metropolitan Job Service District. The reasons given for non-appointment are mutually inconsistent. The Findings of Fact, taken as a whole, lead to the unavoidable conclusion that the failure to appoint cannot be described as an exercise of discretion "which must be exercised on a rational and explainable basis."[10] It was in fact an arbitrary action which was unreasonable, without rational basis, and not the result of the "winnowing and sifting process."[11]

## ORDER

The action of the respondent in failing to continue complainant/appellant in an acting capacity and failure to appoint her to the permanent position is rejected and respondent is ordered to offer appellant the next available equivalent position and to give her all rights, benefits and privileges to which she would have been entitled from November 3, 1979, the first date on which she was no longer employed by DILHR, until the time she is offered an equivalent position

by DILHR or until she indicates she is no longer interested in a position, or until the time she becomes unavailable to accept a position, whichever occurrs first.

Interim earnings or amounts earnable with reasonable diligence shall reduce the back pay otherwise allowable. Any amounts received by complainant in unemployment benefits or welfare payments shall not reduce the back pay otherwise allowable, but shall be withheld from her as set out in §111.36(3)(b), Wis. Stats.

Dated: _____, 1981. STATE PERSONNEL COMMISSION

_____
Charlotte M. Higbee
Chairperson

_____
Donald R. Murphy
Commissioner

_____
Gordon H. Brehm
Commissioner

AR:jmg

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