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 DAPHNE TAYLOR, \*  
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 Complainant, \*  
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 v. \*  
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 PUBLIC DEFENDER, \*  
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 Respondent. \*  
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 Case No. 79-PC-ER-136 \*  
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DECISION  
 AND  
 ORDER

The complainant filed a complaint with the State Personnel Commission alleging that she was denied a certain position with the respondent because of her race, sex and for reasons of retaliation. The Commission's Equal Rights Officer who investigated the complaint determined there was probable cause to believe complainant had been discriminated against on the basis of sex, but not for reasons of race or retaliation. The following findings, conclusions, opinion and order are the result of a hearing and briefs on the issues.

FINDINGS OF FACT

1. Prior to July 1, 1979 the State Public Defender (SPD) contracted with the Milwaukee Legal Aid Society (MLAS) to provide legal services for indigents in Milwaukee County. When that contract expired, the State Public Defender, effective July 2, 1979, took direct responsibility for such functions. The Milwaukee County branch of SPD was composed of appellate and trial offices. The trial office consisted of four units: felony, misdemeanor, juvenile and civil commitment. The two adult criminal law units - felony and misdemeanor - were located in downtown Milwaukee, Wisconsin, while the juvenile and civil commitment units were in Wauwatosa, Wisconsin.

2. The trial office had a total of thirty-seven attorney positions of which thirty-four were newly created by the legislature. The other three were existing positions transferred from the appellate division. Twelve positions

were allocated to the felony unit, eight to misdemeanor, thirteen to juvenile, and one to civil commitment.

3. In early 1979 the State Public Defender began recruitment for these positions which were in the state classified civil service and were classified at the Attorney 15 level. The complainant, Daphne Taylor, was among seventy-seven candidates interviewed by the respondent. Ms. Taylor graduated from Marquette University Law School in May, 1978 and, soon thereafter, was offered a position with the Milwaukee Legal Aid Society but did not begin with them until mid-May, 1979. At that point she was assigned to the adult criminal units. During the interim, she handled several cases representing juveniles in juvenile court. While a law student, complainant participated for one academic year in an intern program with MLAS in their misdemeanor unit.

4. The complainant was interviewed by the respondent for a position with the Milwaukee SPD. In the interview, complainant advised respondent that she wanted employment in the misdemeanor unit, not the juvenile unit. By letter dated June 15, 1979, respondent offered complainant a position in the juvenile unit. The complainant telephoned the respondent, protested her job offer and indicated she thought it to be discriminatory. On July 2, 1979, respondent again offered the same position to complainant but she refused, electing to wait for an offer in the adult criminal division.

5. At the time complainant was again offered a position, the misdemeanor unit, one of two units in the adult criminal division, was composed of one chicano male, one black female, two white females and four white males. Later, an inter-unit transfer occurred adding a black male to the misdemeanor unit. By September, 1979, the felony unit consisted of one white female and nine white males. Some recently graduated attorneys were hired in misdemeanor, while more experienced attorneys were hired in the felony unit.

During this same period the juvenile division consisted of one black female, one black male, five white males and six white females. The civil commitment unit consisted of one white male staff attorney.

6. Between July and August, 1979, the Milwaukee SPD trial division directorship was held by three different people. In August, 1979, the third Milwaukee SPD director hired three white male attorneys and assigned them to the misdemeanor unit. The complainant called the director to determine why she was not offered a misdemeanor position. The respondent wrote complainant that she would be considered solely for a position in the juvenile unit. The complainant never replied to the letter. On September 18, 1979, the Governor imposed a hiring freeze on all positions in the SPD. The freeze remained in effect until June 30, 1980.

7. On September 26, 1979, the complainant filed a complaint with the Commission and alleged the SPD had discriminated against her for reasons of race, sex and retaliation by not employing her in a position in the misdemeanor unit of its criminal division.

8. The staff attorney positions in the juvenile and misdemeanor units of SPD have the same civil service classification: Attorney 15. These positions also have identical fringe benefits, vacation and insurance coverage, and are covered by the same collective bargaining agreement.

9. There are 9,500 attorneys in the state bar of Wisconsin, 822 of whom are women. Using this statistical evaluation there is a high ratio of women in the adult criminal and juvenile divisions of the Milwaukee State Public Defender. Other statistical tests are inapplicable because the samples are too small and the magnitude of the numerical factor representing each female causes distortion. Females constitute nineteen percent of the attorneys in the criminal division and fifty-four percent in the juvenile division. No statistical evidence was provided regarding black attorneys.

10. While there appears to be a disproportionately high percentage of females in the respondent's juvenile unit, the majority of the females so designated requested the assignment.

11. There is no pattern of work force imbalance in the respondent's agency due to alleged unlawful discrimination.

12. The respondent's decision to assign the complainant to its juvenile unit, instead of its misdemeanor unit, was for non-discriminatory reasons.

#### CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to ss.230.45(1)(b) and 111.33(2), stats.

2. The respondent is an employer within the meaning of s.111.32(3), stats.

3. The complainant has failed to establish facts sufficient to warrant a prudent person to believe, to a reasonable certainty, that respondent discriminated against her for reasons of retaliation or on the basis of race, as alleged.

4. The complainant has failed to sustain her burden of proving by a preponderance of credible evidence that respondent discriminated against her on the basis of sex, as alleged.

#### OPINION

Complainant acknowledges that she was offered a job as an attorney by the respondent, State Public Defender, in its juvenile division. However, her allegations of discrimination are based upon respondent's failure to hire her in its adult division. The specific questions before the Commission are: whether the complainant was discriminated against on the basis of sex, and whether there is probable cause to believe complainant was retaliated against and discriminated against for reason of race. In each instance the burden of persuasion is with the complainant.

Chapter PC 4, Wis. Adm. Code defines probable cause as follows:

SPC 4.03(2)...

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

Race

Complainant's allegations of race discrimination center upon the testimony of two of respondent's employes and a former MLAS/employe, all of the same ethnic background as the complainant. One witness testified that she was introduced to the director of SPD who proceeded to state: "What else have you got going for you besides the fact that you're tall, black and beautiful." The witness also testified that the director said he didn't think there were any good black lawyers in Milwaukee and that she had to prove to him that she was worthy of being hired. The witness also stated that she was introduced as a person whom SPD wanted to hire and the ensuing conversation was on that subject. The witness was subsequently hired in the misdemeanor unit.

A former MLAS employe testified that SPD offered him an equivalent position, at five thousand dollars less than he had previously been paid. He declined the position. SPD also did not allow him to take his entire caseload with him into private practice as previously permitted by MLAS. He also testified that he was urged to remain with SPD by the director and by two other people who later each held the directorship. During the conversation, he was informed that the offered position, in classified civil service, with a set pay range, probably would become unclassified within a few months, at which time he along with others could be paid a satisfactory salary. The witness also testified that based upon his

personal observation, he believed the complainant to be a good attorney, but was aware of others who shared a different view.

The third witness testified that in 1977 he began employment with SPD in its appellate division and continued appellate functions until July 2, 1979. At that time he was transferred, against his wishes, to the juvenile division. Further, he testified that after the transfer orders, he remained in the same office, continued to handle appellate cases and never went to the juvenile office. Later in August, 1979, he was given his preference and transferred to the misdemeanor unit.

Taken in its entirety, the evidence adduced fails to meet the probable cause standard for racial discrimination. The complainant presented insufficient evidence to show that respondent discriminated against persons of complainant's ethnicity by refusing to assign such persons, for reasons of race, to the misdemeanor unit. No evidence was introduced showing a pattern of racial discrimination, the relevant labor market, or general policies and practices of racial discrimination. The complainant principally relied upon a statement allegedly made by a State Public Defender director, interpreted as a racial slur, regarding the competency of black attorneys in Milwaukee. The SPD director denied making the statement. The contraverted statement could be construed as exhibiting racial bias. However, standing virtually alone, its probative value is insufficient to support a probable cause finding of racial discrimination.

#### Retaliation

Unlawful retaliation under the Wisconsin Fair Employment Law occurs when any employer, licensing agency or employment agency, discriminates against any person because that person has opposed any discriminatory practices under state law or because that person has made a complaint, testified or assisted in any proceeding under such law.

The Commission believes there is little evidence to support a probable cause finding of unlawful retaliation by the respondent. The complainant's argument rests upon the assertion that the respondent refused to consider her for a position in the misdemeanor section after she filed a discrimination complaint.

The testimony was that respondent has consistently, since the initial job offer in June, 1979, refused to offer complainant a position in the misdemeanor unit. The complainant failed to introduce evidence which reasonably links her protected conduct of September 1979 with an adverse reaction by respondent. Indeed, in August, 1979, the complainant had ceased to request employment with the respondent.

Sex

The case on the merits involved the question of sexual discrimination. The complainant's allegation was that the respondent refused to assign her to the unit of her choice because of her sex. The particular formulation was that the complainant suffered disparate treatment by being offered a less desirable position.

It appears to have been conceded by the complainant that there was no monetary difference between the offered and desired positions. The complainant presented several witnesses who expressed the opinion that the practice of juvenile law has a lesser status than criminal law. Two of these witnesses, however, testified that they personally did not acknowledge or perceive such differences. The opinions of these witnesses were subjective, each adhering to his or her particular legal interests. While instances of unlawful discrimination may not be limited to pecuniary emoluments, testimony of these two non-expert witnesses has little probative value in determining the relative status between juvenile and criminal law. The Commission is not convinced that criminal law is generally considered to be a more worthy pursuit than any other field of law.

However, assuming for the moment that such is the case, after establishing a prima facie case, the complainant, in order to prevail, must prove respondent's reasons for its alleged unlawful action to be pretextual. McDonnell Douglas Corp. v. Green; 411 US 792 (1973). The respondent articulated several reasons for assigning the complainant to the juvenile unit. The respondent's first director testified that most of the applicants for SPD attorney positions had limited or little experience in handling defense work. Consequently, he attempted to disperse employees of such limited experience throughout the system with a heavier concentration of experienced attorneys in the misdemeanor unit. It was within that framework that the complainant was assigned to the juvenile unit. At that same time, three other employees who had requested misdemeanor assignments were assigned to the juvenile unit. Two were male and one was female. Appointments into the misdemeanor unit consisted of two males and one female.

Extensive evidence was introduced by the complainant in an attempt to prove that respondent's reasons for her rejection were pretextual. The evidence included a biographical sketch of the complaint, a detailed account of her educational background and accomplishments and testimonies of her character and legal abilities. The essence of the complainant's claim of pretext is that she was at least as qualified as the appointees to the misdemeanor unit. While this claim is not without merit, it misses the mark.

The issue is not whether the complainant was qualified for assignment to the misdemeanor unit or should have been assigned to that unit, but whether she was denied the assignment because she is female. The decision of the respondent to assign the complainant to the juvenile unit is entitled to stand even though it may appear to be unwise or ill-considered, unless it constitutes sexual discrimination. The evidence supports the position that the respondent based its decision



on program needs and its evaluation of the complainant.

Discriminatory motive is essential in disparate treatment cases, such as the present case. Patterns of employment or assignment of members of a protected group are often offered to show discriminatory animus. Employers are also allowed to introduce evidence demonstrating that its actions are void of discriminatory motivation. In the present case, the respondent introduced evidence which showed its workforce to have a high percentage of women in its misdemeanor unit, as well as other units. This statistical evidence gives rise to an inference of a complete absence of any unlawful discriminatory motive by the respondent.

In support of her arguments alleging that the respondent was engaging in sex stereotyping and disparate treatment by placing most of the women in the juvenile unit, the complainant cited Rodriguez v. Board of Education, 620 F.2d 362 (1982). In that case, Dr. Carmen Rodriguez was a junior high school art teacher with twenty years experience who was transferred to an elementary school. At the time, the junior high school employed two other art teachers, both male. Neither possessed Rodriguez's credentials or seniority. Rodriguez was also replaced by a male art teacher with half her seniority. There had never been a male art teacher in the elementary schools in 22 years. In sharp contrast, the complainant in the present case, similarly to other job applicants, received a general law degree, had minimal professional experience and was never employed by the respondent. In addition, there was no evidence, based upon the labor pool, of disproportionately low female representation as in Rodriguez. Finally, unlike Rodriguez, the complainant offered no evidence showing that the offered assignment would stigmatize her career or render her law training useless.

The Commission believes that the respondent's successfully rebutted complainant's allegations of unlawful discrimination.

ORDER


The claims of unlawful discrimination by the complainant, Daphne Taylor, against the respondent, Public Defender, are dismissed.

Dated: August 5, 1982 STATE PERSONNEL COMMISSION

  
DONALD R. MURPHY, Chairperson

DRM:jmf

  
LAURIE R. McCALLUM, Commissioner

  
JAMES W. PHILLIPS, Commissioner

Parties

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