

STATE OF WISCONSIN
BEFORE THE
DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS

Judith Thalhofer,
Complainant-Appellant

vs.

ORDER OF THE DEPARTMENT OF
INDUSTRY, LABOR AND HUMAN RELATIONS
Case #79-PC-ER-22

State Personnel Commission,
Respondent

This is an appeal to the Secretary of the Department of Industry, Labor and Human Relations, pursuant to Section 111.33(2), Stats. (1977), of a decision of the State Personnel Commission. That decision adopted a Hearing Examiner's proposed decision and order which held that there was no probable cause to believe that the University of Wisconsin - Oshkosh had engaged in unlawful discrimination against Complainant, Judith Thalhofer, by failing to hire her as an instructor in the Geography Department because of her sex, her age, or because she had filed an earlier charge of discrimination against the University.

In January 1979, a one semester instructor position in the Geography Department of the University of Wisconsin - Oshkosh became available due to the illness of the faculty member who would normally have held that position. Ms. Thalhofer, responding to an advertisement in the local newspaper, contacted

the University to indicate that she was interested in the position. Another candidate was selected for the position before Complainant submitted any of her credentials to the department. Upon Ms. Thalhofer's complaint to the University's Affirmative Action officer, the selection process was reopened in order that Ms. Thalhofer's credentials could be fully considered. After considering the relative qualifications of the candidates for the position, the university reaffirmed its original decision to hire a candidate other than Complainant. On February 14, 1979, Ms. Thalhofer filed a complaint with the State Personnel Commission alleging that this decision by the Geography Department was made in retaliation for her having filed an earlier charge of discrimination against the University, and because of her age and sex, all in violation of the Wisconsin Fair Employment Act.

On October 5, 1979, a Personnel Commission Equal Rights officer made an Initial Determination that there was no probable cause to believe that the University had discriminated against Complainant as alleged. Complainant appealed this no probable cause finding to the Personnel Commission, pursuant to Section 88.035, Wis. Adm. Code. After several pre-hearing conference calls, a hearing to review the Initial Determination of no probable cause was held before a Personnel Commission Hearing Examiner on February 21 and 22, 1981. On August 14, 1981, the Hearing Examiner issued a proposed decision and order finding that there was no probable cause to believe that Complainant had been unlawfully discriminated against. The Hearing Examiner's proposed decision and order were adopted by the Commission on September 23, 1981. On October 16, 1981, Complainant filed a request for re-hearing in this matter. This request was denied by the Commission on October 29, 1981, on the ground that Complainant's request was not filed in a timely fashion.

Complainant filed an appeal of the Personnel Commission's decision to the Department of Industry, Labor and Human Relations on October 22, 1981. On February 9, 1982, Respondent filed a motion to dismiss Complainant's appeal on the ground that the Department had no jurisdiction to hear this matter. Respondent's motion was denied in an order dated February 9, 1982. The parties were thereupon given the opportunity to present briefs in this matter. Ms. Thalhofer's brief was received by the Department on March 30, 1983. Ms. Thalhofer indicated that she also wanted the brief she filed before the Personnel Commission to be considered as a brief in this action. Respondent did not file a brief before the Department.

Sec. 111.33(2), Stats. (1977), provides that the review of a decision of the Personnel Commission by the Department shall be confined to the record and that the scope of review shall be the same as judicial review under Sec. 227.20, Stats. Sec. 227.20, Stats. provides that a court shall set aside an agency decision only where (1) it finds that the agency has erroneously interpreted a provision of law, or (2) it finds that the agency's action depends on any finding of fact which is not supported by substantial evidence in the record.

"Substantial evidence", as defined by the Wisconsin Supreme Court, is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Bucyrus-Erie Company vs. ILHR Department, 90 Wis. 2d 408, 418, 280 N.W. 2d 142 (1979), quoting Bell vs. Personnel Board, 259 Wis. 602, 609, 49 N.W. 2d 889 (1951). Substantial evidence does not mean preponderance of the evidence. In Robertson Transportation Company vs. PSC, 39 Wis. 2d 653, 658, 159 N.W. 2d 636 (1968), the Court stated:

"Substantial evidence is not equated with preponderance of the evidence. There may be cases where two conflicting views may each be sustained by substantial evidence. In such a case, it is for the agency to determine which view of the evidence it wishes to accept."

An agency determination being reviewed under Chapter 227 will not be overturned because it is against the great weight and clear preponderance of the evidence. City of Superior vs. ILHR Department, 84 Wis. 2d 663, 666, 267 N.W. 2d 637 (1978). Rather, the agency's decision may be set aside on review only where, "upon an examination of the entire record, the evidence, including the inferences therefrom, is found to be such that a reasonable person, acting reasonably, could not have reached the decision from the evidence and its inferences." Bucyrus-Erie, supra, at 418; cited with approval in Hamilton vs. ILHR Department, 94 Wis. 2d 611, 618-19, 288 N.W. 2d 857 (1980).

The issues before the Department on this appeal are:

1. Did the Personnel Commission erroneously interpret any provision of law in concluding that there is no probable cause to believe that Complainant has been unlawfully discriminated against?
2. Is there substantial evidence in the record to support the Commission's finding that there is no probable cause to believe that Complainant has been unlawfully discriminated against?

"Probable Cause" is defined in Sec. IND. 88.03(2), Wis. Adm. Code, which states:

"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."

In order to establish that there is probable cause to believe that a Respondent has engaged in unlawful discrimination, a Complainant must demonstrate a reasonable ground for belief that:

- (1) She is a member of a protected class,
- (2) There was an adverse employment action (e.g., a refusal to hire Complainant), and
- (3) There is a causal connection between Complainant's protected status and the adverse employment action.

In this case it is undisputed that Complainant is a member of at least two classes of individuals who are granted protection under the Wisconsin Fair Employment Act. Firstly, Ms. Thalhofer is a female, while the successful candidate for the instructor position in the Geography Department at the University of Wisconsin was a male. Secondly, while there was no direct testimony at the hearing as to Complainant's age, it appears from one of the exhibits that her birth date was December 6, 1938. Complainant was therefore over 40 years old at the time the decision was made not to hire her for the instructor position. As for the third alleged basis of discrimination (retaliation for having filed an earlier charge of discrimination), no testimony was adduced at

the hearing that Ms. Thalhofer had ever filed another complaint of discrimination against the University.

It is undisputed that Complainant was not hired by the University to fill an available one semester instructor vacancy in the Department of Geography in 1979. In order to determine whether the third element of proof has been met, i.e., whether there is probable cause to believe that there is a causal connection between Complainant's sex and/or age and the University's decision not to hire her, we must examine the evidence presented in the record.

Ms. Thalhofer alleges that the initial selection process utilized by the University of Wisconsin - Oshkosh in selecting a replacement for one of its faculty members was discriminatory. Our examination of the testimony received at the hearing shows that it did not become apparent to the University until early January 1979 that an instructor position in the Geography Department would have to be filled for the coming semester due to the illness of the regular faculty member, Dr. Netzer. Because the University was between semesters at the time, the Chairman of the Geography Department, Dr. Donald Bruyere, was not available to take charge of the selection process himself. Dr. Bruyere gave Dr. Paul Johnson, a faculty member in the department, the responsibility for seeking a replacement for Dr. Netzer for the spring semester. Dr. Johnson placed a "Help Wanted" ad in the local newspaper. The advertisement stated:

"The Department of Geography at the University of Wisconsin - Oshkosh is accepting applications for a teaching position, spring semester 1979 only, starting date: January 29, 1979. Teach one or more of the following courses:

Physical Geography I (one lecture and two labs), Anglo-America, and Environmental Conservation. Masters' degree required. Closing date: January 16, 1979. Contact Mr. Paul Johnson, Department of Geography, University of Wisconsin - Oshkosh, Oshkosh, Wisconsin 54901. Telephone: (414) 424-4242. An Equal Opportunity Employer."

According to Complainant's testimony, she saw the ad in the newspaper on January 11, 1979 and subsequently telephoned Dr. Johnson about the position. She testified that when she asked Dr. Johnson if it was necessary to submit her credentials, he replied that it was not necessary "at this time." Ms. Thalhofer concluded that it was not necessary to submit a resume or supporting credentials since she had been an instructor at the Geography Department at the University of Wisconsin - Oshkosh several years earlier and she assumed that her credentials were still on file. On January 16, 1979, those members of the Geography Department Staffing Committee who were available during the period between semesters met to consider the applicants for the instructor position. Dr. Johnson testified that there had been only three responses to the advertisement. One applicant, a graduate student, had telephoned Dr. Johnson and expressed an interest initially but then had decided not to pursue his application. Dr. Johnson informed the Committee that he had received a telephone call from Complainant, but that he had not received any supporting credentials from her. Dr. Johnson testified that since Complainant had not submitted her credentials, he assumed that she did not wish to pursue her application. The third candidate for the position was Robert Ader, who was selected by the Committee as the successful candidate.

When Complainant learned that she had not been selected for the position, she contacted the University's Affirmative Action officer to complain that she had been unfairly eliminated from consideration. The Affirmative Action officer, Ms. Phyllis Liddell, testified that upon receiving Ms. Thalhofer's complaint, she immediately contacted Dr. Bruyere and informed him that Ms. Thalhofer was interested in the position and that the selection process should be reopened in order to consider Ms. Thalhofer's candidacy. Although Mr. Ader had already been offered the position, no contract had yet been signed. Dr. Bruyere testified that he contacted Complainant immediately upon speaking to Ms. Liddell, and requested that she submit her credentials for consideration. Complainant testified that she felt she was not allowed sufficient time to gather her credentials. However, she did submit to Dr. Bruyere a resume of her educational background and an undergraduate transcript, along with a letter of recommendation. She further indicated to Dr. Bruyere that he could telephone two other references, since there wasn't sufficient time for her to request these references by mail. Complainant did not provide Dr. Bruyere with telephone numbers of these two additional references; however, Dr. Bruyere did attempt to find the numbers and contact these references on his own. He testified that he was not able to learn the telephone number of one of the references residing in Pennsylvania. In attempting to contact the second reference at a university in New York, Dr. Bruyere found that the person Ms. Thalhofer referred him to was off campus at the time. Dr. Bruyere then talked to someone else at the university who indicated some familiarity with Complainant and her work. Dr. Bruyere testified that the Committee did not have time to wait for written letters of recommendation since the second semester of the school year was about to begin and a candidate for the instructor position had to be selected as soon as possible. The Staffing Committee of the

Geography Department met again on January 31, 1979 to consider both Mr. Ader and Ms. Thalhofer for the instructor position. The Committee necessarily based its consideration on the credentials made available to it by the two candidates. After discussing the relative qualifications of the two candidates, the Committee again recommended that Mr. Ader be selected for the position. The testimony adduced at the hearing established that the selection process itself was not unfair.

Ms. Thalhofer's contention is that the Personnel Commission erred in concluding that the University's decision to hire Mr. Ader was based upon his qualifications rather than upon its desire not to hire Complainant because of her sex and/or age. Ms. Thalhofer contends that her qualifications were superior to those of Mr. Ader. A review of the documents submitted by Complainant to the Staffing Committee in support of her candidacy for the instructor position (Complainant's Exhibits 4, 5 and 6) indicates that Complainant has a Bachelor's degree with majors in biology and geography from the University of Wisconsin-Oshkosh. She also has a Masters' degree in geography from Northwestern University. The resume further indicates that Complainant has taken

several summer session courses in the general field of geography and biology, although no dates are given for these summer sessions. The only teaching experience indicated on the resume is a teaching assistantship at Northwestern University. The one letter of recommendation complainant submitted is from her instructor in a course entitled "Women and Law" at the University of Wisconsin-Oshkosh in 1975. This course was unrelated to the position she was applying for.

Complainant contends that she was better qualified than Ader because she had previously taught at the University. Three of the members of the Staffing Committee who made the hiring selection testified at the hearing that they were aware that Complainant had taught in the Geography Department at the University of Wisconsin-Oshkosh approximately ten years prior to 1979. Dr. Johnson, Dr. Fonstad and Dr. Bruyere testified that at that time they had not been favorably impressed with Ms. Thalhofer's teaching ability or with her ability to get along with other staff members. None of these witnesses were able to cite specific instances of deficiencies on Complainant's part. How-

ever, each of these faculty members testified that their negative impression of her teaching ability in the past was not the sole reason Complainant was not selected for the instructor position in 1979. A more serious concern was that Complainant presented no evidence that she had either taught or been professionally active in the field of geography in the ten years preceeding her application for the instructor position in question. This was one basis upon which the Staffing Committee agreed that Mr. Ader, who had recently received his Masters' degree in geography, was better qualified than Ms. Thalhofer.

The credentials Mr. Ader submitted to the Staffing Committee (Respondent's Exhibit 3) indicate that Ader, who was 25 years old at the time, had received his Masters' degree in geography from the University of South Carolina in 1978. He submitted transcripts of both his undergraduate work at the University of Wisconsin - Oshkosh (where he majored in geography) and his graduate work at the University of South Carolina. The transcripts indicate that Ader received exceptionally high grades in his course work in geography at these two institutions. Ader further submitted three letters of recommendation in support of his candidacy. The letter from Professor Lovingood indicated that Ader was "one of the best graduate students I have worked with during my 16 years at the University at South Carolina." The Director of the Social and Behavioral Sciences Laboratory at the University of South Carolina indicated that Ader's thesis was "one of the very best ever done in our department." The letter from Associate Professor Robert Lloyd indicates that Ader's work was "of the highest quality." Although Ms. Thalhofer did meet the basic qualifications for the instructor position and had taught geography in the past, Mr. Ader was also well qualified for the position. In this respect, there was substantial

evidence in the record to support the Commission's finding that the selection of Mr. Ader over Ms. Thalhofer was based upon their relative qualifications rather than upon Ms. Thalhofer's age or sex.

Complainant's final contention is that the decision not to hire her was unfair because it was made by an all-male committee. Complainant contends that there has been an historical failure to promote women to tenured positions in the Geography Department at the University of Wisconsin - Oshkosh. The Commission found, based upon the testimony of the University's Affirmative Action officer, Ms. Phyllis Liddell, that in the approximately eight years preceeding 1979 about 5% of the persons receiving doctoral degrees in geography in the United States were women, and that about 9-1/2% of those receiving Masters' degrees were women. The Commission concluded that since nearly 90% of those qualified to teach geography in the United States are men, that the fact that there were no tenured women on the faculty of the Geography Department at the University of Wisconsin - Oshkosh in 1979 (and therefore no women on the Staffing Committee), did not establish that the University had a bias against hiring women for such positions. We believe that this conclusion is supported by substantial evidence in the record.

Based upon the foregoing, we conclude that there is substantial evidence in the record to support the Commission's conclusion that Complainant failed to establish that there was probabale cause to believe that the University of Wisconsin - Oshkosh's decision to hire Mr. Ader as the instructor in the Geography Department in the spring of 1979 was based upon sex and/or age, rather than upon Mr. Ader's better qualifications for the position. Further, we find no error in the manner in which the Commisson has interpreted and

applied the law regarding sex and race discrimination. Therefore, we conclude that the Commission's determination that there was no probable cause to believe that Complainant was discriminated against by Respondent as alleged must be, and is hereby, sustained.

Dated at Madison, Wisconsin

NOV 07 1983

Howard S. Bellman

Howard Bellman

Secretary of the Department of

Industry, Labor and Human Relations

cc: Ms. Judith Thalhofer
Atty. John B. Tallman
Wis Personnel Commission
Pamela Rasche

APPEAL RIGHTS

Pursuant to s. 111.33(2), Laws of 1977, this decision may be appealed to the Labor and Industry Review Commission by filing an appeal with the Commission's office in Madison within 20 days from the date that this decision is mailed. The Commission's address is: Labor and Industry Review Commission, P.O. Box 8126, Madison, WI 53708.

HB:PR:ns/0161H