

STATE OF WISCONSIN

PERSONNEL COMMISSION

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JOHN MEYETT,  
 JULIUS RABIDEAUX,  
                   Complainants,  
 v.  
 Secretary, DEPARTMENT OF  
 INDUSTRY, LABOR AND HUMAN  
 RELATIONS,  
                   Respondent.

Case Nos. 80-PC-ER-140  
           81-PC-ER-2

\* \* \* \* \*

DECISION  
 AND  
 ORDER

NATURE OF THE CASE

These are appeals pursuant to PC 4.03(3) Wis. Adm. Code and §§230.45(1)(b), Stats. of initial determinations of no probable cause to believe that discrimination occurred with respect to complaints of discrimination on the basis of sex (Meyett) and on the basis of sex, race, or age (Rabideaux). The issue for hearing set forth in the prehearing conference report was: whether there is probable cause to believe that respondent discriminated against the complainants on the basis of sex (as to both Mr. Rabideaux and Mr. Meyett), and race and age (as to Mr. Rabideaux) with respect to the hire of the WIN Supervisor 4. The following findings, conclusions, opinion and order are the result of a hearing and briefs on the issues.

FINDINGS OF FACT

1. In September of 1980, respondent department's job opportunities bulletin announced the vacancy of Job Services Supervisor 4-WIN. The vacancy existed in the Superior, Wisconsin offices.

2. Ms. Carol Laudenbach and complainants Meyett and Rabideaux applied and were certified for the position. Mr. Meyett and Mr. Rabideaux were at the time of certification supervisors in Respondent's Job Service Program (Supervisor III) and Ms. Laudenbach was a Job Service Specialist I.

3. In November of 1980, Laudenbach, Meyett and Rabideaux participated in individual interviews as a part of the selection process.

4. Present at and conducting the interviews with each of the candidates were Jacquelyn Coleman, Superior District Director, and Peter Grandstrom, a supervisor in the Superior office.

5. Ms. Coleman had the sole authority to decide whom to appoint to the Supervisor 4 vacancy.

6. With the exception of a single question asked of Meyett which acknowledged an award given to the WIN unit he supervised in Ashland, Wisconsin, the questions asked in each of the three interviews were identical.

7. Based on documents submitted by the three candidates for the supervisory position prior to their interviews, Ms. Coleman and Mr. Grandstrom had concluded that the work histories and experiences of the three candidates were relatively equal. The preponderance of evidence in the record of these complaints supports that conclusion.

8. Ms. Coleman and Mr. Grandstrom felt that with regard to content, the answers given by the candidates during their interviews were acceptable and relatively equal.

9. Having relative equality of the candidates' work history, work experience and content of their answers at the oral interview, Ms. Coleman's and Mr. Grandstrom's final ranking of the candidates was based primarily on their manner of presentation at the oral interview.

10. The traits Ms. Coleman and Mr. Grandstrom reacted to relative to the candidates' presentation at the oral interview included tact, conviction of the positions taken, take charge attitude, and ability to deal with personnel problems.

11. Subsequent to the completion of the three oral interviews, Ms. Coleman and Mr. Grandstrom independently and without discussion ranked the candidates. They each ranked the candidates in the following order: (1) Ms. Laudenbach, (2) Mr. Meyett and (3) Mr. Rabideaux.

12. Ms. Laudenbach was appointed to the supervisory position (Job Service Supervisor 4-WIN, Superior, Wisconsin) effective November 16, 1980. On November 12, 1980, during a meeting at the Sawyer County Courthouse involving various employes, Ms. Coleman and Mr. Meyett had a private conversation during which Ms. Coleman informed Mr. Meyett that Ms. Laudenbach had been selected for the supervisory position. Mr. Meyett's impression and current recollection of that conversation is that Ms. Coleman indicated that Ms. Laudenbach's selection was an affirmative action hire. Ms. Coleman's impression and current recollection of the conversation is that she did not use the words affirmative action during the conversation, that she did not state during the conversation that Ms. Laudenbach had been hired in order to fulfill an affirmative action plan, and that she doesn't recall and doesn't think she said anything to Mr. Meyett concerning a protected class member.

13. On August 4, 1980, Ms. Laudenbach was named acting supervisor of the WIN unit in Superior. In this capacity, her responsibilities were to coordinate work and work flow but did not include the full range of supervisory responsibilities such as recommending discipline, approval of

leave requests, etc. At the time she was named acting supervisor, there was no indication that Ms. Laudенbach, Mr. Rabideaux, nor Mr. Meyett could be considered for the Job Services Supervisor 4 vacancy at the Superior office (the filling of which is the subject of these instant appeals) because there was an existing register from which the selection was to be made and none of the three was on the existing register.

14. At the time Ms. Laudенbach was designated as acting supervisor, she was working at the Superior office. Mr. Meyett and Mr. Rabideaux were not working at the Superior office at that time.

15. Ms. Laudенbach's selection as acting supervisor was not based upon her age, race or sex.

16. Mr. Meyett's sex was not a factor in his not being appointed to the permanent Job Service Supervisor 4 position at the Superior office.

17. Mr. Rabideaux's sex, race and age were not factors in his not being appointed to the permanent Job Service Supervisor 4 position at the Superior office.

#### CONCLUSIONS OF LAW

1. These matters are properly before the Commission pursuant to §230.45(1)(b), Wis. Stats.

2. The respondent is an employer within the meaning of §111.32(3), Wis. Stats.

3. The burden of persuasion is on the complainants to show the existence of probable cause as probable cause is defined in §PC 4.03(2), Wis. Adm. Code.

4. Complainants have failed to carry their burden of persuasion.

5. With respect to the filling of the vacant Job Service Supervisor 4-WIN in the Superior Job Service office, there is no probable cause to believe that Mr. Meyett was discriminated against on the basis of his sex and there is no probable cause to believe that Mr. Rabideaux was discriminated against on the basis of his sex, race or age.

OPINION

In order to make a finding of probable cause, there must be "reasonable ground for beliefs 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." PC 4.03(2), Wis. Adm. Code. The framework for analyzing charges of discrimination as alleged by the complainants in the instant cases before the Commission was set forth by the United States Supreme Court in McDonnell/Douglas Corporation v. Greene, 411 U.S. 792, 802, 5 FEP, Cases 965, 969 (1973). The framework indicates:

1. The establishment of a prima facie case by the complainants and the complainants have done so. They are members of a protected class, they applied for a vacancy and were qualified and the respondent appointed someone other than the complainants to the position.

2. At this point, the respondent must produce evidence that the complainants were "rejected or someone else was preferred for a legitimate, nondiscriminatory reason ... It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." Taxes Department of Community Affairs v. Burdine, 450 U.S. 248, 254, 101 S. ct. 1089, 67L. Ed 2nd 207, 216, 25 FEP Cases 113, 116 (1981).

3. Having given evidence for its action which the respondent feels is legitimate, the focus shifts to whether the proffered reasons were a pretext for discrimination.

While there may be a shifting of the burden of proof in such an analysis "the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." (Burdine). In a probable cause proceeding, given the definition of probable cause in PC 4.03(2), the evidentiary standard is different from that required in a hearing on the merits. Nonetheless, the three part framework is helpful for analyzing probable cause cases.

In articulating the reasons for the selection it made, the respondent indicated that with regard to the three candidates, there was general equivalency of work experience and background as well as an approximate equality of the content of their respective answers during the oral interview. The final decision then relied upon the candidates' presentations at the oral interview and various "personality characteristics" indicated in those presentations as indicated in Finding of Fact #10. Complainants assert, however, that the respondent erred in its judgment of equal qualifications for the supervisory position which was vacant. A review of the record in this case does not support complainants' assertion that their supervisory qualifications were superior to Ms. Laudenschick. Mr. Meyett's initial experience as a supervisor began in January of 1980 and Mr. Rabideaux's supervisory experience commenced in March of 1980. (these were supervisory positions with the State of Wisconsin). To varying degrees, each of the three had experience with WIN programs and some of that experience was supervisory in nature. Mr. Meyett and Mr. Rabideaux had longer work experience with the State of Wisconsin

than did Ms. Laudenschach but Ms. Laudenschach's prior experience includes Manpower program experience (CETA-CEP) as well as supervisory and managerial experience. All three candidates were college graduates and have exhibited an ability to supervise.

The Commission does not accept the argument that supervisory or programmatic experience in state service is in and of itself better than a non-state employment experience when assessing the qualifications of applicants for a supervisory vacancy in state service. The Commission does not disagree with the judgment made by the respondent regarding the respective qualifications of the applicants for the position which was vacant nor does it find facts or circumstances which would support a belief that this judgment was a pretext for discrimination. As stated in Burdine:

The fact that a court may think that the employer misjudged the qualifications of the applicants does not in itself expose him to Title 7 liability, although this may be probative of whether the employer's reasons are pretext for discrimination.

In this case, the Commission has not found that the respondent misjudged the qualifications of the candidates. Even if we had found the judgment incorrect, there is no indication that such misjudgment was pretextual.

All three candidates were certified for the vacant position. They were therefore considered eligible and qualified. The Commission's review of the record in this hearing, the exhibits and briefs, determines there is not a substantial difference in their qualifications and accepts the respondent's judgment that the qualifications of the individuals for the Job Service Supervisor 4 position were essentially the same.

Respondent further indicated that with regard to the oral interviews, the overall content of the answers of each of the three candidates was

essentially equivalent. Ms. Laudenbach and Mr. Rabideaux were asked thirteen questions, Mr. Meyett was asked fourteen (Finding of Fact #6). There was, however, according to the respondent, a difference in the presentation at the oral interview. Respondent indicates that Ms. Laudenbach's manner of presentation was more "dynamic" and indicative of the supervisory traits necessary for the Supervisor 4 position. This "tipped the scales" in favor of Ms. Laudenbach's selection for the supervisory vacancy.

Complainants argue that a selection decision which relied upon "manner of presentation" because it is "nebulous and subjective justifications after the fact as their rationalizations for selecting Ms. Laundenbach", or because it favors one management style over all others is improper and indicative of pretext.

The Commission does not disagree that there is a degree of subjectivity, and perhaps a large degree of subjectivity, with regard to the determination of the "personality characteristics" which an employer might prefer a job applicant to have as well as the determination as to whether a particular candidate has those characteristics. That, however, does not mean a reliance on these characteristics in selecting a candidate for a position is in and of itself improper. Within the certification process, a review of work histories and experiences, the identity of questions asked during the oral interviews, etc., there are elements which imparted to the process a degree of objectivity. There has been no showing that the characteristics relied upon are unreasonable or unrelated to the position which was vacant nor has there been a showing that these characteristic were the pretext for discrimination. Further, the Commission has accepted the premise that the candidates were relatively



equal up to the point in the selection process where the manner of presentation at the oral interview was considered. "The employer has discretion to choose among equally qualified candidates provided the decision is not based upon unlawful criteria." (Burdine).

As indicated by the court in Pierce v. Owen Corning Fiberglass Corp.,  
30 FEP Cases 53:

Although the plaintiff is correct in pointing out that subjective standards are suspect, Rowe v. General Motors Corp., 457 F.2d 348, 4 FEP Cases 445 (5th Cir. 1972), we believe that Williamson's subjective evaluation of the plaintiff, when combined with the other factors, provided a valid, nondiscriminatory reason for the hiring decision. An honest though partially subjective evaluation is not discriminatory per se. See Lieberman v. Gant, 630 F.2d 60, 67, 23 FEP Cases 505 (2d Cir. 1980). The plaintiff has not persuaded the court that Williamson's evaluation of him was racially motivated. Even if Williamson was mistaken in his assessment of the plaintiff's qualifications, such a mistaken belief is not racial discrimination unless the plaintiff has demonstrated that it was racially motivated.

In this case (Pierce) a supervisor had used his own informal rating system to rate candidates during an oral interview. The supervisor's ratings were based upon three criteria: (1) the applicant's employment history, (2) the manner in which the applicant responded to the questions asked and (3) the supervisor's assessment of the applicant's initiative. The plaintiff had more work experience for the position available than the person selected for the position, but, in the supervisor's rating, ranked lower in (2) and (3) than the person selected. As a result, the supervisor concluded the plaintiff was not the applicant best suited for the job. The court upheld the respondent.

With regard to the conversation between Mr. Meyett and Ms. Coleman at the Sawyer County Courthouse, it is difficult to reconstruct what actually was said. On direct examination, Mr. Meyett indicated that Ms. Coleman

said that Ms. Laudenbach had been selected for the position, that she was in a protected class and that it was an affirmative action hire. On cross-examination, when asked if he had been told that Ms. Laudenbach was hired because she was a member of a protected class, Mr. Meyett answered "no." When asked if he was told that Ms. Laundenbach had been hired because it was necessary to fulfill an affirmative action program, Mr. Meyett replied that, "he didn't believe so." On redirect, Mr. Meyett stated that his impression as a result of the conversation was that the hire was an affirmative action hire. Ms. Coleman's testimony (with regard to the conversation) was emphatic that she did not say Ms. Laudenbach was hired in order to fulfill an affirmative action plan, that to her knowledge she did not use the words "affirmative action" during the conversation, and does not recall saying anything with regard to a "protected class member", but is sure that she did not say that Ms. Laudenbach was hired because she was a member of a protected class. With both participants in the conversation giving their current recollection with apparent candor and sincerity, it is difficult to resolve the import of the discussion. Other factors brought forth in the hearing, however, have a bearing on this event. At no time during the selection procedure did Ms. Coleman and Mr. Grandstrom discuss the affirmative action program or the affirmative action aspects of the selection of the Supervisor 4 candidate. In the case of previous hires at the Superior District (Beaver and Willing), Ms. Coleman demonstrated that she was not reluctant to select a non-protected group member for a position and justify her selection in writing. An affidavit introduced into evidence as a complainants' exhibit indicates that Alan Birch had, as a part of his responsibilities, been delegated the responsibility of EEO/Affirmative Action specialist for the Superior district. In his affidavit, Mr. Birch

indicated that the issue of Ms. Laudenbach's employment as well as her promotions had never been discussed with him nor presented to him as being necessary for the purpose of the satisfaction of any affirmative action requirement. He further states that if her employment or promotion were to be in satisfaction of an affirmative action requirement, he would have been consulted regarding the same. Respondents through a preponderance of credible evidence, have shown that they selected the best of the three certified candidates for the vacant position. From the foregoing, the Commission concludes that the selection of Ms. Laudenbach and the decision to appoint her to the Supervisor 4 position was not based on an affirmative action plan or the requirements of such a plan.

With regard to the designation of Ms. Laudenbach as acting supervisor of the WIN unit at the Superior office, the Commission finds no indication that this designation was a pretext for discrimination. At the time she was made acting supervisor, Ms. Laudenbach was not on the register and therefore was not eligible for the Supervisor 4 vacancy. She was the only one of the three eventually certified candidates who was assigned to the Superior office at the time the acting vacancy became available. She was strongly recommended for the acting position by the supervisor who was vacating the position, and the "Birch" affidavit stated that her temporary assignment was not discussed or presented as being related to any affirmative action purposes. There is no indication that her selection to the temporary position was based on factors of race, age or sex; and, given the circumstances which existed at the time the selection was made, there is no indication that Ms. Laudenbach was being preselected or "wired" for the permanent Supervisor 4 appointment. The propriety of the acting assignment pursuant to Pers. 32.01 Wis Adm. Code is beyond the scope of the hearing on probable cause presently before the Commission.

Complainant Rabideaux asserts that his previous nonselection for the Supervisor 4 position (in January of 1980) is indicative of discrimination and that the statistics used in constructing the affirmative action plan for the Superior district, with regard to current population of the locality and clientele served, are inaccurate. The evidence and testimony presented do not support his assertions. The individual selected in January of 1980, was as is complainant Rabideaux, a Native American. The record indicates that the successful candidate, while having no previous WIN experience, was selected for his supervisory potential and the respondent was most satisfied with his performance on the job. While complainant Rabideaux exhibited a knowledgeable understanding of the Native American population in the Superior SMSA, he did not produce evidence which would make suspect statistical data relative to the labor force and labor force incidence of Native Americans used to construct the affirmative action plan for the Superior district offices. Further, a review of the personnel transactions report submitted for the Superior district does not reveal a pattern of discrimination based on age, sex or race.

ORDER

The complaints are dismissed.

Dated April 15, 1983 STATE PERSONNEL COMMISSION

  
DONALD R. MURPHY, Chairperson

JWP:jmf

  
LAURIE R. McCALLUM, Commissioner

  
JAMES W. PHILLIPS, Commissioner

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