

STATE OF WISCONSIN

PERSONNEL COMMISSION

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 *
 WALTER RASCHICK, *
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 Complainant, *
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 v. *
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 President, UNIVERSITY OF *
 WISCONSIN SYSTEM (Eau Claire), *
 *
 Respondent. *
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 Case No. 81-PC-ER-101 *
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DECISION
AND
ORDER

This matter is before the Commission after a timely appeal from an initial determination of "no probable cause" to believe that discrimination on the basis of age occurred. The parties agreed to the following issue for hearing:

Whether there is probable cause to believe that the respondent discriminated against the complainant by failing to hire him as a Public Information Officer 2 in January, 1981.

FINDINGS OF FACT

1. Complainant was born in 1928. He received a bachelor of arts degree in journalism from the University of Minnesota in 1950.

2. Beginning in mid-1951 and until 1955, the complainant was employed by various publications in the television magazine trade. During this period, the complainant was solely responsible for the production (including writing, editing, typing, lay-out, and scaling) of the weekly TV magazine serving the Minneapolis and St. Paul area.

3. From 1956 through 1979, the complainant worked first as general manager and then as president of Queen Bee Advertising, Inc., an

advertising agency in Cincinnati, Ohio. Queen Bee employed an average of approximately 65 employees during a given quarter and operated offices in seven states. In 1979, complainant sold his interest in Queen Bee to a third party.

4. In August of 1980, a notice appeared in the Current Opportunities Bulletin for a position of Public Information Officer 2 (PIO 2) at the University of Wisconsin-Eau Claire's University News and Publications Office (UNPO). The notice provided in relevant part, as follows:

University of Wisconsin-Eau Claire, University News and Publications. Start at \$1215 per month. Produce news releases, features, and public service announcements for radio, television, and the printed media. Duties will include developing ideas, researching, interviewing, writing, and editing. A knowledge of writing, editing and publication of news and features for radio, television and the printed media is essential.

5. The person vacating the PIO 2 position was Ms. Jackie Olson. The position was supervised by Mr. Stephen Morgan, Director of the UNPO.

6. Ms. Ann Hoffman, born in 1956, had worked in the University News and Publications Office for four months in 1978 while a student at UW-Eau Claire. During that period, her duties included the writing of news releases and feature articles, conducting interviews, developing story ideas and being in daily contact with university faculty, staff and students. For the period from February 1979 until she was selected for the PIO 2 position, Ms. Hoffman was employed by Telemark, a resort and convention center in Cable, Wisconsin. Her duties included writing news releases, radio and print media advertisements, brochure copy, informational material for resort guests and articles for various publications put out by Telemark including a newspaper about the American Birkebeiner ski race.

7. Either Mr. Morgan or Ms. Olson, both of whom had worked with Ms. Hoffman when she was a student employe, advised her of the PIO 2 opening. Mr. Morgan urged Ms. Hoffman, as well as several other individuals, to apply for the position.

8. Numerous applications were filed for the position and over forty examinations were completed and then rated by the Associate Director of UNPO (Mr. Ray Massoth) and by an administrative assistant in that office (Ms. Laurie Woletz). Ms. Woletz who, in 1980 was approximately 58 years old, knew Ms. Hoffman, while Mr. Massoth was only somewhat familiar with Ms. Hoffman. The exam questions, which asked the applicants to describe applicable work experiences and also to prepare a media package regarding a hypothetical event, were graded blindly, i.e. the applicant's name and resume were not attached to the responses to be graded.

9. The examination results caused six persons to be certified as eligibles for selection. Those persons, their score and their year of birth are shown below.

Debra France	91.250	1954
Ann Hoffman	96.875	1956
Eleanor Jones	95.625	1921
- Helen Killingstad	90.625	1930
Walter Raschick	92.500	1928
Lee Stromberg	91.875	1950

Ms. Jones' score included 5 veterans points while Mr. Raschick's score included 10 veterans points.

10. Due to errors within UW-Eau Claire's personnel department, the complainant was initially credited with 5 veterans preference points rather than 10. By the time the error was remedied, interviews had been conducted with the other five eligibles.

11. Stephen Morgan conducted the PIO 2 interviews and had the final authority to make the hiring decision. At that time, Mr. Morgan was 39 years of age.

12. Complainant appeared for his employment interview casually dressed, i.e., in clothing more casual than most of the employment interviewees in and around the UNPO office. Complainant brought with him several work examples. All of the examples were between 25 and 30 years old, some were on brittle newsprint paper and the examples were musty smelling.

13. Mr. Morgan interviewed the complainant in a main work area, not in Mr. Morgan's own office. During the course of the interview, Mr. Morgan stated that he was looking for someone who would "fit-in" to the office. The other persons in the UNPO office who were visible to the complainant appeared to be under 25 years of age.

14. The interview lasted less than half an hour with Mr. Morgan asking just a few questions. The rest of the interview consisted of discourse by the complainant or silence. At no point during the interview did the complainant state that he was involved in a lawsuit against his former business partners.

15. At the conclusion of the interviews, Mr. Morgan ranked Ann Hoffman and Lee Stromberg as the top candidates and complainant as the least desirable candidate. Mr. Stromberg is a 1972 UW-EC graduate with experience as a newspaper reporter and as assistant publications editor for the Speed Queen Company where he had full responsibility for two company employe publications.

16. Mr. Morgan selected Ann Hoffman for the PIO 2 position because of her experience in a university setting, her ability to immediately perform the responsibilities of the position without any training and because of her exceptional writing skills.

CONCLUSIONS OF LAW

1. This case is properly before the Commission pursuant to §230.45 (1)(6), Stats., and § PC 4.03(3), Wis. Adm. Code.

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

3. The complainant has the burden to prove there is probable cause to believe that respondent discriminated against him on the basis of age in failing to hire him for the position of Public Information Officer 2 at the University of Wisconsin-Eau Claire.

4. The complainant has not satisfied his burden.

OPINION

The term "probable cause" is defined in §PC 4.03(2), Wis. Adm. Code as follows:

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 probable has been or is being committed.

The Commission utilizes the three part analytical structure identifying shifts in the burden of going forward as described in McDonnell Douglas v. Green, 411 U.S. 792 (1973) and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). The initial burden is on the complainant to establish a prima facie case, then the respondent must articulate some legitimate, nondiscriminatory reason for its action and , finally, the complainant must show that the respondent's articulated reason is merely pretextual. In the

present case, the analysis is applied within the context of a probable cause hearing rather than a hearing on the merits.

In the present case, the complainant established that his age places him within a protected class (§111.33(1), Stats.), that he applied and was qualified for the PIO 2 position, that he was not selected and that Ann Hoffman (aged 24) was selected instead. Therefore, the complainant established a prima facie case.

The respondent articulated a number of reasons why Mr. Morgan selected Ann Hoffman instead of the complainant:

- 1) Complainant's attire at the interview was inappropriate.
- 2) The work examples that complainant brought with him to the interview were smelly.
- 3) Complainant had stated during the interview that he had filed a lawsuit against a former business associate.
- 4) Complainant was a talker rather than a producer.
- 5) Complainant appeared to be devious, confused and/or unbalanced.
- 6) Complainant's experience was in advertising rather than public information.
- 7) Ms. Hoffman was a better qualified candidate because of her experience in a university setting, her ability to step into the PIO 2 position without any training and because of her exceptional writing skills.

Each of the seven points enumerated above is discussed separately below in terms of whether the complainant has shown those reasons to be inaccurate.¹

1. Attire

There was conflicting testimony regarding complainant's attire on the day of the interview. Both Mr. Morgan and Mr. Massoth considered complainant's apparel to be inappropriate although the specific descriptions of complainant's clothing are hardly identical. (See also, Mr. Parker's description.) When the testimony of Mr. Massoth and Mr. Morgan is considered together it outweighs complainant's statement that he wore a blue or grey suit.

2. Work Samples

The complainant conceded that, at least some of his work samples were "musty" smelling, in addition to being 25 to 30 years old and in some cases yellowed and brittle. Just how "musty" the samples were is disputed. Mr. Morgan stated he had to remove them from his office and place them in a storage room due to the smell. Regardless of the degree to which the documents actually smelled, they would create an unfavorable impression on

¹ In weighing the testimony in this case, the Commission has applied a restriction imposed by the hearing examiner in a letter to the parties dated March 21, 1984. There, the examiner granted the respondent's request to have Mr. Morgan's testimony taken by telephone rather than in person. At the time, Mr. Morgan was employed at the University of Kansas. In granting the request, the examiner placed two qualifications on Mr. Morgan's testimony:

First, in such matters as weighing relevant testimony or in assessing Mr. Morgan's demeanor, the fact that the testimony was received by telephone will have no adverse effect on the complainant's case. In addition, it is my recommendation that if this matter reaches the stage of scheduling a hearing on the merits, Mr. Morgan be required to testify in person at that time.

almost any interviewer. The condition of work samples is typically indicative of the person who is offering them. While the complainant suggested that Mr. Morgan should have asked for an explanation regarding the samples, it was up to the complainant to attempt to defuse the negative reaction that could be anticipated from such work samples.

3. Litigation

Mr. Morgan testified that during the interview, complainant spoke at some length about a lawsuit he had filed against a former business partner in Ohio. Mr. Morgan stated that he was concerned that if complainant sued his former partner, he might also sue a new employer such as UW-EC. However, Mr. Morgan's statements were never substantiated and complainant established via his own testimony that he had never sued a business associate. Therefore, the Commission finds the third reason articulated by the respondent is not based on fact.

4. Talker vs. Producer

Mr. Morgan also testified that based on the interview with the complainant he concluded that complainant was a talker and not a producer. Mr. Morgan acknowledged that he had no empirical basis for this conclusion and that the complainant's work in producing regional television magazines on a weekly basis in the 1950's would have required a lot of work. Based on the description of the interview by both the complainant and Mr. Morgan, as well as the complainant's style of testimony at the hearing, it is not inaccurate to describe complainant as a "talker." The record before the Commission does not completely discredit Mr. Morgan's subjective impression

regarding productivity although that conclusion is undermined somewhat by evidence relating to complainant's productivity some three decades earlier.²

5. Devious, Confused and/or Imbalanced

Mr. Morgan testified that he concluded complainant was devious, confused and/or imbalanced based on: 1) the way complainant talked; 2) the complainant's reluctance to look him in the eye, and; 3) a statement by someone else in the office that she had to lead complainant out of the office at the end of the interview. Complainant, on the other hand, testified that he assumed that he had made satisfactory eye contact during the interview and that if anything, he had been told he maintains too much eye contact. This testimony refuted Mr. Morgan's conclusion that complainant was devious. However, complainant did not respond to the statement about being assisted out of the office at the end of the interview. The statement must be considered accurate, thereby supporting Mr. Morgan's subjective conclusion that complainant appeared confused at the time of the interview.

6. Advertising vs. Public Information Experience

Mr. Morgan listed complainant's lack of public information experience as another reason for not hiring the complainant. There is no question that complainant had extensive advertising experience during the lengthy period he was associated with Queen Bee Advertising. The advertising experience would clearly be relevant in performing the functions of the PIO

² Whenever a selection decision is based even in part on such a subjective reaction to an applicant, it becomes very difficult for the applicant to show that the analysis was pretextual.

2 position. However, respondent established that the purpose of public information is to build public understanding and acceptance which is distinguishable from the sales purpose associated with advertising. Given this distinction, complainant's experience is less relevant than public information experience would have been.

7. Ann Hoffman's Superior Qualifications

Respondent's witness established that Ms. Hoffman, who was selected for the PIO 2 position, had experiences and skills particularly suited for the position in question. Ms. Hoffman graduated from UW-EC and was already familiar with both the University and the News and Publications Office. Given her experience, she could directly assume the responsibilities of the position without the training that someone like the complainant would have to undergo. Mr. Morgan testified that he wanted to avoid a lengthy training period. Finally, Mr. Morgan considered Ms. Hoffman's writing ability exceptional, and writing skills were considered to be a major part of the PIO 2 position.

Conclusion

The respondent articulated numerous reasons for selecting Ms. Hoffman rather than the complainant for the PIO 2 position. The majority of those reasons were supported by the evidence presented at hearing. Those exceptions may be attributed to the period of some 3½ years between the date of the hiring decision and the date of the hearing. For example, while the Commission found that complainant did not file suit against his former business partner, it is at least possible that he instead expressed some bitterness towards his partners during the interview. Over time, Mr. Morgan could have incorrectly concluded that any such bitterness had been embodied in a lawsuit.

The complainant identified only two reasons why he thought that the respondent had discriminated against him. The first was the general nature of the employment interview. The interview was short and complainant felt he was "getting the brush off." Mr. Morgan acknowledged that complainant "turned him off" during the interview. Mr. Morgan's resulting disinterest in the complainant as a candidate must have been obvious. However, this is not inconsistent with the fact that complainant's interview was held sometime after all the others and after Mr. Morgan had identified two prime prospects (Ms. Hoffman and Mr. Stromberg) from amongst the other candidates. Already having a standard for comparison and after being confronted, inter alia, with complainant's musty work samples and casual attire, it would have been easy for Mr. Morgan to conclude that complainant was not among the top candidates for the PIO 2 position.

Complainant also argued that Mr. Morgan's statement during the interview that he was looking for someone who would "fit-in" to the office was indicative of discriminatory intent when viewed in the context of the relative youth of the other persons in that office. Under certain circumstances the requirement of "fitting-in" can be a code phrase for practicing illegal discrimination. However, looking at the totality of the circumstances surrounding the interview in this case and the variety of reasons for not selecting the complaint, the Commission finds that Mr. Morgan used the phrase in terms of a need for cooperative working relations within the office rather than as a code word for age discrimination.

After considering 1) factors considered by the complainant to be indicative of age discrimination, 2) the reasons articulated by the respondent for its selection decision, 3) complainant's burden to show those

reasons to be pretextual, and 4) the definition of "probable cause," the Commission finds that the complainant has not sustained its burden of proof.

Although the grading of the PIO 2 examination was not specifically identified as an issue for hearing, limited testimony was elicited on the point. Complainant argued that because the two exam graders were both UW-EC employes, they would be biased in favor of Ms. Hoffman through contacts with her while she worked at UW-EC. The evidence showed that one of the two graders was only barely familiar with Ms. Hoffman (and her work) while she was employed at the University. Furthermore, the complainant was in fact certified as an eligible for the position and the two graders did not make the subsequent selection decision. There is simply no evidence that the graders practiced age discrimination in grading the examinations.

ORDER

The initial determination of "no probable cause" is affirmed and this case dismissed.

Dated: November 21, 1984 STATE PERSONNEL COMMISSION

KMS:ers

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