

STATE OF WISCONSIN

PERSONNEL COMMISSION

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 ERROL A. WELCH,  
                                   Complainant,  
 v.  
 President, UNIVERSITY OF  
 WISCONSIN SYSTEM (Oshkosh)  
                                   Respondent.  
 Case No. 82-PC-ER-44  
 \* \* \* \* \*

ORDER

This matter is before the Commission following the promulgation of a proposed decision and order pursuant to §227.09(2), Stats. The Commission has considered the complainant's objections and arguments with respect to the proposed decision, which were filed September 24, 1984, and has consulted with the hearing examiner. The Commission adopts as its final disposition of this matter the proposed decision and order, a copy of which is attached hereto and incorporated by reference as if fully set forth, with the following amendments and comments.

1. Finding of Fact #3 is amended to conform to the record by changing "In February, 1982," to "On January 28, 1982."
2. The Commission does not agree with the statement of the fourth element of a prima facie case under McDonnell-Douglas v. Green, 411 U.S. 792, 93 5. Ct. 1817, 36 L. Ed. 2d 668 (1973). At page eight of the proposed decision, this element is expressed as "... the employer continued to seek applicants no better qualified than the complainant." In McDonnell-Douglas, this step was enunciated as follows:

(iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. 411 U.S. at 802, 935, Ct. at 1824.

In the opinion of the Commission, the term "of complainant's qualifications" means having training or experience in the same occupational area rather than "no better qualified than the complainant." That this is so is indicated by the Court's determination that the complainant had established a prima facie case: "Petitioner [the employer] sought mechanics, respondent's trade, and continued to do so after respondent's rejection." id. See also, Aikens v. U.S. Postal Srv. Board, 665 F.2d 1057, 1059, 26 FEP 1151, 1153 (D.C. Cir. 1981).

However, no error was caused by this approach in the proposed decision, since the question of relative qualifications were properly considered under the heading of whether the respondent's articulated reasons for its decision not to hire the complainant, which included the question of qualifications, were pretextual.

The Commission notes that, running throughout the complainant's arguments with respect to the proposed decision, was an apparent misconception about the rules applicable to the civil service transaction involved here.

The vacancy in question was announced as a service-wide transfer announcement, as either a Personnel Manager 1 or 2. The final decision on the level was not made until after the appointment was made. The complainant argued that certain of the applicants who were considered for appointment were ineligible for transfer at the PM 2 level. This ignores the fact that the position could have been, and in fact was filled at the PM 1 level.

The complainant also argued that he was per se better qualified than other applicants because they were in lower pay ranges. This does not follow. There is nothing in the civil service code that suggests that relative qualifications for a particular position to be filled by transfer must or should be determined solely by reference to the salary range of the applicant's current position.

Complainant made the further argument that because the announcement stated that persons could apply based on transfer, reinstatement, or voluntary demotion rights acquired by virtue of state employment in the classified service, "[t]his meant that only state employment would be evaluated," and not experience gained outside of state service.

The language of the announcement was:

Persons may apply based on transfer, reinstatement or voluntary demotion rights acquired by virtue of current or former state employment in the classified service....

All that this means is that the current or former state employment would form the basis of eligibility for application -- obviously a person would not be eligible for transfer, reinstatement, or voluntary demotion unless he or she had a certain kind of qualifying prior state employment. This can not be interpreted to mean that the evaluation of those eligible would be limited to their state service. In fact, the announcement went on to state: "Submit a completed state application ... Include all pertinent qualifying education, training, and experience."

ORDER

This complaint is dismissed.

Dated: October 3, 1984 STATE PERSONNEL COMMISSION

  
DONALD R. MURPHY, Chairperson

AJTjmf

  
LAURIE R. McCALLUM, Commissioner

  
DENNIS P. MCGILLIGAN, Commissioner

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STATE OF WISCONSIN

PERSONNEL COMMISSION

\* \* \* \* \*

ERROL A. WELCH

Appellant,

v.

UNIVERSITY WISCONSIN -  
OSHKOSH

Respondent.

Case Nos. 82-PC-ER-44

\* \* \* \* \*

PROPOSED  
DECISION

NATURE OF THE CASE

On May 6, 1982, complainant filed a charge of discrimination with the Commission alleging that, in the course of making a particular hiring decision, respondent had discriminated against complainant on the basis of his race, color and/or national origin. In an initial determination dated March 23, 1983, one of the Commission's Equal Rights Officers concluded that there was no probable cause to believe that respondent had so discriminated against complainant. In a decision and order issued by the Commission on April 6, 1984, after a hearing on the issue of probable cause, the Commission decided that there was probable cause to believe that respondent had so discriminated against complainant and ordered that the case be set for hearing on the merits. A hearing was conducted on June 4, 1984, and the parties were given an opportunity to file post-hearing briefs.

FINDINGS OF FACT

1. Complainant is a black male whose national origin is the British West Indies.

2. In January, 1982, the respondent University of Wisconsin - Oshkosh (UW-0) posted a service wide transfer announcement for a Personnel Manager 1 or 2 (PM 1 or PM 2) position in its personnel office. The announcement stated in pertinent part:

PAY: Pay will be based on rules that apply to compensation upon transfer, reinstatement or voluntary demotion. Beginning pay will not be less than the minimum of the classification.

JOB DUTIES: As Assistant Director of Personnel, coordinate the staffing and classification functions for all classified positions; recommend appropriate classification for positions; write position descriptions and vacancy announcements; interview applicants; ensure all affirmative action rules have been met; provide employment benefits counseling and orientation of new employes, interpret collective bargaining agreements.

TO APPLY: Submit a completed state application to Mary Koepp (414-424-0283); UW Oshkosh Personnel Office, Dempsey Hall, Room 328, 800 Algoma Boulevard, Oshkosh, WI 54901. Include all pertinent qualifying education, training and experience.

3. In February, 1982, complainant applied for the subject position by submitting a resume and a recent performance evaluation to respondent. Complainant's application indicated that he was applying for a PM 2 position. At that time, complainant was employed as a Regulation Compliance Investigator 4 at the Department of Industry, Labor and Human Relations (DILHR) and was eligible to transfer into the subject position.

4. The complainant's application indicated that he held a bachelors degree in international studies/politics, a masters degree in history, a two-year certificate in education, a two-year certificate in agriculture/business management, and had received training in fraud investigative techniques and administrative law. His work experience included serving as a DILHR Regulation and Compliance Investigator 4 and as acting branch

office manager for DILHR's Berlin Job Service branch office from 1975 to 1979. As acting branch office manager, he:

Supervised, co-coordinated and planned daily activities of office personnel for the District Branch Job Service Office and Itinerant offices located at Ripon and Montello.

Prepared position descriptions and vacancy announcements. Recruited, interviewed, selected and hired personnel.

Trained and orientated new employes. Assessed training needs of staff and conducted training.

Dealt with transfer, layoff, return from layoff, compensation and fringe benefits.

Prepared new position descriptions, recommend reclassification requests.

Prepared annual plan of action, budget and affirmative action plans designed to comply with executive order No. 26 of the State of Wisconsin Statutes in conjunction with the objectives of DILHR.

Prepared reports to enable the Affirmative Action Council to monitor and evaluate affirmative action programs and employment opportunities.

Served as rural specialist migrant coordinator.

Coordinated employer relation program. Received job orders from employers. Prepared job orders,, interviewed, selected and referred applicants to job vacancies.

Served as Labor Market Information Specialist and Equal Rights Specialist.

Complainant's application also indicated that he had attended the University of West Indies/Caribbean from 1962 to 1964 and had worked for the World Bank Corporation in Trinidad and Tobago from 1964 to 1969. The performance evaluation submitted as part of the application indicated that complainant's performance was outstanding.

5. Respondent received approximately 90 applications for the subject position. Ed Edmonds, who was then Director of Personnel at UW-0 but who was to retire on February 19, 1982, contacted approximately 30 to 40 of these applicants, including complainant, by phone and asked each these same questions:

1. Are you still interested in the Personnel Manager position?
2. Why are you interested in this position?
3. What in particular through your past training, experience, or education qualifies you for this position?
4. May I contact your present supervisor or other previous supervisors?
5. When would you be available to start?

Mr. Edmonds contacted complainant on February 10, 1982. Among other things, complainant told Mr. Edmonds in their telephone conversation that he would not be interested in the position if it were classified at the PM 1 level because he would have to take a cut in pay and that his current salary was above PSICM in his salary range. It is not clear from the record how Mr. Edmonds determined which applicants he would contact. Mr. Edmonds gave his notes regarding these telephone contacts to Ms. Koepp, who was then the Assistant Personnel Director at the UW-0 and made recommendations to her regarding which applicants he felt she should consider further. Ms. Koepp was selected as the Personnel Director at UW-0 after Mr. Edmond's retirement and she made the subject hiring decision.

6. At the time, complainant's position was in the same salary group as a PM 2 position. Complainant was under the impression that, if he transferred into a PM 2 position, his salary would be the same or more than his current salary of \$20,146.88 per year. The salary for the subject position could not exceed the salary budgeted for the position which was \$19,000.00.

7. Ms. Koepp then reviewed the 90 applications and separated them into three groups: (a) most qualified, (b) qualified, (c) least qualified. Those in the least qualified group included applicants not eligible for transfer, those without a college degree, those with no relevant training or experience, and those who she felt were over qualified. Included in this group of over qualified applicants were those with advanced degrees or



extensive management/supervisory experience. The only applicant with extensive management/supervisory experience who was included in the most qualified group was Bradly Paul Czebotar who had experience as a Personnel Manager. The least qualified group consisted of 32 applicants, 25 of whom were considered over qualified. Of these 25, one was black (complainant) and 24 were white. The most qualified group consisted of 13 applicants.

8. Ms. Koepp then reviewed the applications of these 13 most qualified applicants to determine how many were women, minorities, or handicapped. Her review indicated that three were women, one was a minority, and two were handicapped. After consulting with Phyllis Liddell, the Director of Affirmative Action at UW-O, Ms. Koepp decided to interview all minority applicants and two additional women applicants. On the basis of state applications completed by applicants, Ms. Koepp determined that the only other minority applicant was a Mr. Bennett, but she was never able to contact him to schedule an interview. Since not all of the candidates had submitted state application forms, Ms. Koepp asked Mr. Edmonds if he knew of any additional minority applicants. Mr. Edmonds told Ms. Koepp that, based on the complainant's accent and the fact that his resume indicated that he had worked and gone to school in the Caribbean, he thought complainant might be a minority applicant. Ms. Koepp also added to the group to be interviewed Elizabeth Winter who had extensive personnel experience and Patricia Below who, even though she had a masters degree, also had some personnel experience and had been involved with several professional personnel associations. It is clear from the record that Ms. Winter had originally been included in the least qualified applicant group because she did not have a college degree and Ms. Bellow had been included in the over qualified group because she had a masters degree.

9. Ms. Koepp then interviewed these 16 applicants and selected 10, including complainant, for further consideration. Ms. Koepp asked each interviewee the same questions Mr. Edmonds had asked in his phone contacts with applicants. Complainant was interviewed on March 1, 1982. During the interview, Ms. Koepp, in describing the position to complainant, indicated that the unit in which the position functioned had a "close-knit atmosphere." Complainant felt that, in making the statement, Ms. Koepp was implying that complainant would not be able to get along with others in the unit. Ms. Koepp also asked complainant where he had lived. Complainant felt that this question was motivated by Ms. Koepp's concern with his national origin. Ms. Koepp checked the references provided by these 10 applicants by either reviewing the written references provided by the applicants or by contacting the listed references. Ms. Koepp considered the performance evaluations (which had been completed by two of complainant's listed references) provided by complainant as written references and did not contact his listed references.

10. During the course of contacting references for certain of the applicants, Ms. Koepp contacted Walter Marty, the Director of the Oshkosh Job Service Office. Mr. Marty asked Ms. Koepp which of the applicants still under consideration were present or former employees of the Job Service. When Ms. Koepp mentioned that complainant was still under consideration, Mr. Marty volunteered that complainant had done a good job on a project he was familiar with and that, since he had not supervised complainant, he did not know if complainant had experience writing position descriptions or performing other personnel work but he didn't think he did. Mr. Marty also made a reference to complainant's use of the "King's

English." Mr. Marty's unsolicited reference was not given significant weight by Ms. Koepp in making the subject hiring decision.

11. Ms. Koepp then selected a final pool of three applicants which did not include complainant. Ms. Koepp did not select complainant because his selection would not have been a career advancement for him; he had extensive supervisory/management experience; he had functioned very independently in the jobs he had held over the past several years; he had an advanced degree; he would have had to take a cut in pay; and the primary reason he offered for seeking the position was a desire to work in Oshkosh. The final three applicants included; (a) Mary Jo Norton (white female) - had a bachelors degree; did not have management experience; had worked in skills assessment/job placement; demonstrated a great deal of enthusiasm for the position; selection would mean career advancement; (b) Richard Kleifgen (white male) - had a bachelors degree; did not have supervisory/management experience; had performed personnel work within the University system; demonstrated a great deal of enthusiasm for the position; selection would mean career advancement; and (c) John L. Willihnganz (white male) - had a bachelors degree; did not have supervisory/management experience; had performed personnel work for the State Department of Administration; demonstrated a great deal of enthusiasm for the position; selection would mean career advancement. Mr. Willihnganz was subsequently offered the position at the PM 1 level and he accepted it. The complainant was notified that he was not selected for the position in a letter from respondent dated April 2, 1982. The decision to classify the position at the PM 1 level was made after the decision to offer the position to Mr. Willihnganz.

13. The decision not to hire complainant was not based on his race, color, and/or his national origin.

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to sections 230.45(1)(b) and 111.33(2), Wis. Stats.

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

3. The complainant has the burden of proving that, with respect to the subject hiring decision, the respondent discriminated against him on the basis of race, color, and/or national origin.

4. The complainant has not satisfied his burden of proof.

OPINION

In McDonnell-Douglas v. Green, 411 U.S. 792 (1973), the United States Supreme Court developed a framework for analyzing complaints of employment discrimination. Under the terms of the McDonnell-Douglas test, it must first be determined that a prima facie case of discrimination has been established. As applied to the instant case, there must be evidence that complainant is a member of a class protected by the Fair Employment Act; that he applied for and was qualified for the job; that he was not hired despite his qualifications; and the employer continued to seek applicants no better qualified than the complainant. Second, the employer must articulate legitimate, non-discriminatory reasons for not hiring complainant. Third, in order to rebut the employer's stated reasons, there must be evidence the reasons were merely a pretext for the employer's decision.

Complainant has demonstrated that, as a black and a native of the British West Indies, he is a member of a class protected by the Fair Employment Act as a result of his race, color and national origin.

Complainant has also demonstrated that he applied for, was qualified for, and was not hired for the subject position. Complainant has not demonstrated, however, that respondent continued to seek applicants no better qualified than complainant. In establishing the criteria she would utilize in rating the relevant qualifications of the applicants for the position, Ms. Koepp decided that she would consider applicants who did not have extensive management/supervisory experience or an advanced degree as better qualified for the position than those who possessed such training or experience. In view of the fact that the position was to function as an assistant to a higher level position, it was not unreasonable for Ms. Koepp to regard as less appropriately qualified for the position those applicants who were accustomed to supervising or managing, rather than being supervised or managed; who may not maintain their interest in a position which did not represent a career advancement for them; and whose level and training exceeded that of their supervisor. The only applicant who was included in the "most qualified" group of 13 who had extensive management/supervisory experience was Mr. Czebotar. He was included in this group because he had experience in personnel management. Since the subject position was a personnel manager position and since complainant did not have personnel management experience other than the personnel work he had performed incidental to his work as a supervisor, it cannot be concluded that Mr. Czebotar was "no better qualified" than the complainant. Of the three applicants in the final group, none had an advanced degree or extensive management/supervisory experience. In addition, each of these three demonstrated during the course of their oral interviews a great deal of enthusiasm for personnel work in general and the subject position in particular. Complainant, on the other hand, stated

that his desire to work in Oshkosh was his primary reason for applying for the position. It was also not unreasonable for Ms. Koepp to consider level of enthusiasm for the position as a hiring criterion. Complainant has thus failed to establish a prima facie case of discrimination.

If, however, complainant had established a prima facie case, respondent could have rebutted this prima facie case by articulating legitimate, non-discriminatory reasons for its decision not to hire complainant for the subject position. The primary reasons offered by respondent were cited above: complainant's extensive management/supervisory experience, an advanced degree, and his failure to demonstrate enthusiasm for the position itself as opposed to its location in Oshkosh. As also discussed above, these reasons were reasonable in view of the nature of the position to be filled, were neutral as to race, color, and national origin, and were applied uniformly to the applicant pool. Another reason offered by respondent is the fact that complainant would have had to take a cut in pay if he had been hired for the position. In view of the complainant's statement to Mr. Edmonds that he would not be interested in the subject position if it were classified at the PM 1 level because he would have to take a cut in pay, it was not unreasonable for respondent to conclude that pay was an important consideration for complainant. Although the record supports the fact that complainant would have had to take a pay cut if he were hired, it also supports the conclusion that this was not one of the primary reasons for respondent's decision not to hire complainant.

The final step in the McDonnell-Douglas analysis calls for the complainant to offer evidence that the employer's stated reasons are a pretext for discrimination. Complainant argues that his inclusion in the final group of 16 as a result of the fact that he was a minority applicant and

despite the fact that Ms. Koepp had already determined that he was over qualified for the position demonstrates that respondent never seriously considered complainant for the position and was only paying lip service to affirmative action. However, it is always possible that complainant could have overcome what respondent viewed as a deficiency in his qualifications by an outstanding interview or that the other 15 applicants interviewed could, as a result of their interviews, be deemed to have deficiencies greater than complainant's in areas not discernible from their written applications or phone contacts. Thus, it is difficult to conclude that respondent's inclusion of complainant in the group to be interviewed was meaningless, particularly in view of the fact there was never any question that respondent felt the complainant was qualified to perform the duties of the position. Complainant also alleges in this regard that only over-qualified minorities were included in the final 16 and not those minorities in the "qualified" group and that respondent's consideration only of those minority applicants already eliminated from consideration as opposed to those still in the running demonstrates pretext. However, the record does not support complainant's representation of the facts in this regard. Ms. Koepp decided to include all minority applicants in the final group of 16. Complainant's argument that respondent did not make a good faith effort to contact minority applicant Bennett is simply not supported by the record.

Complainant alleges that Ms. Koepp's description of the subject position's working environment as close-knit implied to him that she did not feel the complainant would fit into such a work environment because of his race/accent. It was not unreasonable for Ms. Koepp to describe to complainant the nature of the work environment so he could decide whether the position sounded like a desirable one for him. There was no showing by

complainant that Ms. Koepp did not offer this same description to the other applicants interviewed. Furthermore, it is difficult to determine how complainant could logically draw the conclusion he did from the statement made by Ms. Koepp.

Complainant further alleges that Ms. Koepp's question relating to where he had lived had indicated her concern regarding his national origin. Again, it is difficult to determine the logical relationship between respondent's question and complainant's conclusion. In addition, Ms. Koepp would not have needed to ask such a question to determine complainant's race or the fact that his national origin was probably not this country since it would have been obvious to her, upon meeting complainant, that he was not white and that he had an accent probably not acquired in the United States. Complainant also alleges that Ms. Koepp first became aware of complainant's race and national origin at the time of the interview but the record does not support this.

Complainant is of the opinion that respondent's consideration of an unsolicited reference from Walter Marty was discriminatory in view of the fact that complainant's listed references were not contacted while those of other applicants were. It is clear from the record that Ms. Koepp did not ask Mr. Marty to serve as a reference for complainant, that she accorded little weight to Mr. Marty's reference, and that Mr. Marty's reference, although not clearly a positive one, is also not clearly a negative one. It is also clear that Ms. Koepp did not contact complainant's listed references because complainant had made available to her performance evaluations completed by these individuals, that Ms. Koepp viewed these evaluations as very favorable, and that there was no showing that Ms. Koepp



contacted the listed references of any of the final 16 who had provided written references as part of their applications.

Complainant has failed to demonstrate pretext in any of the actions or positions taken by respondent.

It is often useful, in reviewing a case such as this, to analyze whether the complainant was treated differently than white applicants similarly situated. It should be noted in this regard that the other 24 applicants in the "over-qualified" group were white and Mr. Czebotar, a white applicant, although included in the final 16 despite his management/supervisory experience, was excluded from the final three because he was deemed by Ms. Koepp to be over-qualified.

ORDER

This complaint is dismissed.

Dated: \_\_\_\_\_, 1984      STATE PERSONNEL COMMISSION

\_\_\_\_\_  
DONALD R. MURPHY, Chairperson

\_\_\_\_\_  
LAURIE R. McCALLUM, Commissioner

\_\_\_\_\_  
DENNIS P. MCGILLIGAN, Commissioner

LRM:jab  
ORDER

Parties

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