

STATE OF WISCONSIN

PERSONNEL COMMISSION

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 RICHARD J. BISBEE,  
                     Complainant,  
 v.  
 Secretary, DEPARTMENT OF  
 HEALTH and SOCIAL SERVICES,  
                     Respondent.  
 Case No. 82-PC-ER-54  
 \* \* \* \* \*

DECISION  
 AND  
 ORDER

NATURE OF THE CASE

This is a complaint of discrimination on the basis of handicap and sexual orientation and of retaliation with respect to certain hiring decisions. Following an initial determination by an equal rights officer of the Personnel Commission that there was no probable cause to believe that such discrimination or retaliation had occurred, a hearing was held pursuant to §PC 4.03(3), Wis. Adm. Code, on an appeal of that initial determination.

FINDINGS OF FACT

1. From March 1976, until his resignation in July, 1979, complainant was employed by respondent as a hearing examiner in the Office of Administrative Hearings (hereinafter "Office)). At his request, he was employed on a half-time basis from July, 1977, until July, 1979.

2. In September of 1981, Kristiane Randal became the supervisor of the Office. Prior to this, Ms. Randal had been employed by respondent in the Office of Legal Counsel. In September of 1981, there were two vacant hearing examiner positions in the Office: one was a position in Madison

which primarily handled a probation and parole hearing caseload and the other was a position in Milwaukee which primarily handled a categorical aids hearing caseload.

3. Due to ordered budgetary reductions, a decision was made to fill only the Madison position at that time. Complainant applied for and was certified for this position but chose not to participate in the interview phase of the selection process and, therefore, was not considered for the position. The interview panel consisted of Ms. Randal; William Ridgely, a Social Services Supervisor in respondent's Bureau of Community Corrections; and Charles Holton, Deputy Administrator of respondent's Division of Economic Assistance. The panel selected William Lundstrom as their first choice, offered Mr. Lundstrom the position and he accepted. The panel ranked Kenneth Streit as their second choice.

4. In November, 1981, a vacancy in a hearing examiner position in the Office was created by the resignation of Patrick Currie. After a review of the Office's caseload and other factors, a decision was made to fill the vacant Milwaukee position which had not been filled in September, 1981, and not to fill the position vacated by Mr. Currie at that time. Ms. Randal requested and received a list of certified candidates. This list contained many of the same names which had been on the earlier list. Those candidates who had not been interviewed for the position filled by Mr. Lundstrom were contacted and given an opportunity to interview for this position. The interview panel again consisted of Ms. Randal, Mr. Ridgely, and Mr. Holton and the questions asked of each interviewee were essentially the same as those questions which had been asked of each interviewee in the earlier interviews. Each member of the panel ranked candidate Lloyd Bonneville as their first choice. Mr. Bonneville was offered the position

and he accepted it. Mr. Ridgely and Mr. Holton ranked complainant as their second choice and Ms. Randal ranked complainant and two other candidates as her second choices.

5. In March or April, 1982, a decision was made that, in view of Office workload demands, the remaining vacant hearing examiner position would be filled. When this decision was first made, it was announced that this position would primarily handle a categorical aids caseload, at least initially. This decision was made as a result of caseload increases in the categorical aids area resulting from changes in federal requirements. However, before the interviews for this position were conducted, caseload shifts resulted in a decision that the position would primarily handle a probation and parole hearing caseload, at least initially.

6. Ms. Randal did not request another list of certified candidates but decided that the selection would be made from the list of certified candidates from which Mr. Bonneville had been selected. Ms. Randal reviewed the interview notes of each of the panel members from both the first and second set of interviews.

7. On the basis of a comparison of the responses of complainant and Mr. Streit to the interview questions and of the written comments of the interview panel members regarding each interviewee, Ms. Randal decided that Mr. Streit was the better candidate for the position. Specifically, (1) in response to a question relating to how the candidate would handle a situation where his personal opinion was in conflict with Department policy, complainant indicated that he would not be inclined to follow the Department policy. The members of the panel felt that this response indicated a tendency on complainant's part to resist supervision. Mr. Streit's answer to this question was regarded as superior to complainant's and more consistent

with the goals of the Office; (2) in reviewing complainant's and Mr. Streit's responses to a question relating to making the transition from a role as advocate to a role as impartial decision-maker, the members of the panel concluded that, although both complainant and Mr. Streit had served in advocacy positions, complainant had been in an advocacy role for too long and would not make the transition as well as Mr. Streit; and (3) in response to a question relating to parties to a proceeding who are not represented by counsel, the members of the panel felt that complainant's answer, by focusing on the fairness of the proceeding to the parties, failed to emphasize the primary goal of assuring that an adequate record is made. The panel members felt that Mr. Streit emphasized this primary goal in his response and his response was, therefore, superior to complainant's.

8. Once Ms. Randal had decided that Mr. Streit was the better candidate and would be offered the position, she contacted Mr. Streit's employment references to verify his identity and the fact of his employment. Upon receiving satisfactory verifications of these matters, Ms. Randal offered the position to Mr. Streit and he accepted it. Ms. Randal did not at any time contact complainant's employment references nor did she ever discuss complainant with any of his former supervisors at the Department of Health and Social Services or review complainant's personnel file at the department.

9. Although Mr. Bonneville and Mr. Streit were appointed to their respective hearing examiner positions by Eric Stanchfield, who was then serving as Executive Assistant to the Secretary of the Department of Health and Social Services, the hiring decisions were made by Ms. Randal.

10. At the time that the decisions were made to hire Mr. Bonneville and Mr. Streit, complainant was handicapped as a result of mental illness. Ms. Randal was aware that complainant was so handicapped due to the fact that complainant's name appeared on the list of certified candidates under a subheading entitled "Handicapped Expanded Certification." Ms. Randal did not show this list of certified candidates to Mr. Ridgely or Mr. Holton and there is no evidence in the record to support a finding that either Mr. Ridgely or Mr. Holton knew or should have known of complainant's handicap at the time the interviews were conducted or hiring decisions made.

11. In July, 1980, complainant filed a complaint in Dane County Circuit Court captioned Bisbee v. Gunderson, Case No. 80CV4097. A copy of the complaint was placed in complainant's personnel file at the Department of Health and Social Services and a copy was circulated among the staff of the Office. Ms. Randal did not see a copy of the complaint until after the subject hiring decisions were made and did not discuss the complaint or the complainant with any of the Office staff before the hiring decisions were made. Ms. Randal did see a newspaper article relating to the complaint but does not recall if this was before or after the subject interviews were conducted and hiring decisions made. The complaint in the circuit court action did not state expressly or clearly imply the nature of complainant's sexual orientation and did not refer to actions on complainant's part to oppose any discriminatory practices or to make a complaint, testify, or assist in any proceeding under the Wisconsin Fair Employment Act.

12. The record establishes that some of complainant's co-workers in the Office were aware that he was bisexual. However, at no time relevant to the matters in issue here did Ms. Randal discuss complainant in general or complainant's sexual orientation in particular with these co-workers and

there is no evidence in the record to support a finding that any of the members of the interview panel knew or should have known the nature of complainant's sexual orientation at the time the interviews were conducted or hiring decisions made.

13. There is no evidence in the record to support a finding that complainant was better qualified than Mr. Bonneville or Mr. Streit on the basis of experience or that the panel's comparisons of complainant's qualifications and responses to interview questions with those of the other candidates did not accurately reflect the information available to the panel members at the time, that the selection criteria the panel applied to the candidates were unreasonable in relation to the duties of the subject positions or the policies or responsibilities of the Office, or that such criteria were not uniformly applied to the candidates.

14. There is no probable cause to believe that the members of the interview panel were influenced in their decisions by complainant's mental illness handicap or sexual orientation or that they retaliated against him in relation to the subject hiring decisions.

#### CONCLUSIONS OF LAW

1. This matter is appropriately before the Commission pursuant to §§230.45(1)(b) and 111.375(2), Wis. Stats., and §PC 4.03(3), Wis. Adm. Code.

2. The respondent is an employers within the meaning of §111.32(6), Wis. Stats.

3. The complainant has the burden of proving that, with respect to the subject hiring decisions, there is probable cause to believe the respondent discriminated against him on the basis of handicap or sexual

orientation or that respondent retaliated against him within the meaning of §111.322(3), Wis. Stats.

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

OPINION

Common sense dictates that, in order to prevail, a complainant in an employment discrimination action must establish by a preponderance of the evidence that the employer knew or should have known that complainant was a member of a protected class at the time the subject action was taken. In the instant action, the complainant would have to establish that there is probable cause, i.e., reasonable ground for belief supported by facts or circumstances strong enough in themselves to warrant a prudent person in the belief that the respondent knew or should have known that complainant was a member of a protected class on the basis of his mental illness handicap or his sexual orientation at the time the subject interviews were conducted or hiring decisions made.

There is no evidence in the record from which it is possible to conclude that any member of the interview panel knew or should have known at the time of the subject interviews or hiring decisions that complainant was bisexual. Although some of the individuals complainant worked with while he was employed in the Office were aware of his sexual orientation, these individuals never discussed complainant with any of the members of the interview panel prior to the time the hiring decisions were made. Although Ms. Randal was employed as an attorney by respondent during the time that complainant was employed by respondent, she was located in another office and was not personally acquainted with complainant. Ms. Randal did not assume her position with the Office of Administrative Hearings until September, 1981. Complainant had resigned from his position

with the Office in July, 1979. Although Ms. Randal was aware of the civil action complainant had filed against Steve Gunderson through a newspaper account, the record does not establish that this newspaper account discussed complainant's sexual orientation. The language of the complaint itself does not state expressly or clearly imply the nature of complainant's sexual orientation. Since the members of the interview panel were not aware of complainant's sexual orientation at the time the interviews were conducted or hiring decisions made, and there is no evidence in the record from which to conclude that they should have been aware of complainant's sexual orientation at these times, their comparisons of the qualifications of the candidates for the positions, their rankings of the candidates, and, ultimately, the decisions as to which candidates to hire could not have been influenced by complainant's sexual orientation.

Respondent has stipulated that complainant was handicapped on the basis of mental illness at all times relevant to the matters in issue here. The record, however, does not establish that either Mr. Ridgely or Mr. Holton knew or should have known that complainant was handicapped at the time the interviews were conducted or hiring decisions made. Ms. Randal was aware of complainant's handicap as a result of the fact that the list of certified candidates for the positions included complainant's name under a subheading entitled "Handicapped Expanded Certification." Arguably, in view of the fact that Ms. Randal based her hiring decision in large part on the rankings and comparisons of the candidates by Mr. Ridgely and Mr. Holton and that these rankings and comparisons clearly supported the hiring decisions which she ultimately made, it could be concluded that complainant had failed to establish a prima facie case of handicap discrimination. Even if the Commission were to conclude that complainant had established a



prima facie case, it is clear from the record that, not only has respondent advance legitimate nondiscriminatory reasons for hiring Mr. Bonneville and Mr. Streit instead of complainant, but also that these reasons were not pretextual. It is undisputed that Mr. Bonneville was ranked first by each member of the interview panel. In comparing the qualifications of complainant and Mr. Streit, the answers to three questions relating to: (1) a conflict between personal opinion and Department policy, (2) making the transition from advocate to impartial decision-maker, and (3) the conduct of hearings when one or more parties were unrepresented, were contrasted. It is clear from the record that these question were reasonable in view of the duties of the subject positions and the policies and responsibilities in the Office. It is also clear from the record that complainant's answers to these questions were inconsistent, at least in part, with the policies and responsibilities of the Office and that the panel members felt that Mr. Streit's answers were more consistent with these policies and responsibilities. There is no evidence in the record from which to conclude that complainant was better qualified than Mr. Bonneville or Mr. Streit on the basis of experience or that the panel did not uniformly apply reasonable selection criteria to the information relating to the candidates which was available to the panel at the time.

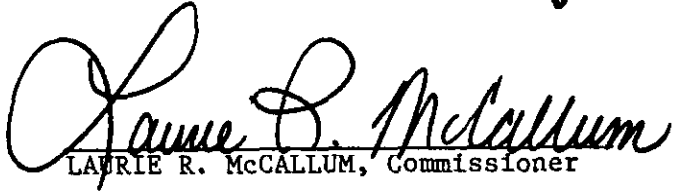
Finally, in regard to the complaint of retaliation, it should be noted that §111.322(3), Wis. Stats., is intended to protect employees who oppose any discriminatory practices or who make a complaint, testify, or assist in any proceeding under the Wisconsin Fair Employment Act. The civil action upon which complainant bases his complaint of retaliation does not relate to protected activities under the Fair Employment Act, either expressly or by implication.

ORDER

This complaint is dismissed.

Dated: June 23, 1983 STATE PERSONNEL COMMISSION

  
DONALD R. MURPHY, Chairperson

  
LAURIE R. McCALLUM, Commissioner

LRM:lmr

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