

STATE OF WISCONSIN

PERSONNEL COMMISSION

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BARBARA WOLFE, *

Complainant, *

v. *

President, UNIVERSITY OF *

WISCONSIN SYSTEM *

(Stevens Point), *

Respondent. *

Case No. 84-0021-PC-ER *

* * * * *

FINAL
DECISION
AND
ORDER

This matter is before the Commission following the issuance of a proposed decision and order by the hearing examiner. The Commission has considered the parties' objections and arguments and has consulted with the examiner. The Commission adopts as its final disposition of this matter the proposed decision and order, a copy of which is attached hereto, with the following amendments which are made for purposes of clarity and to better reflect the record.

On page 10, third paragraph, the Commission deletes the first line: "In view of the above, the Commission finds that complainant was better qualified for the disputed position than Charles Cose, if not Brian Repinski." In its place, the Commission substitutes the following: "On this record, complainant has established that her qualifications for the position in question were better than Cose and at least as good as Repinski, and that the employer's contention that these two men were better qualified was pretextual."


On page 11, second paragraph, the Commission deletes the last line: "Based on the foregoing, the Commission finds that complainant should have

performed better on the oral interview than at least Cose, and there is no rational basis offered by respondent for its decision otherwise." In its place the Commission substitutes the following: "On this record, the complainant has established that her performance in the interview was better than Cose, and respondent's contention to the contrary was pretextual."

The Commission believes that Szymkowiak's remark about women was properly admitted, for the reasons set forth in the proposed decision, and adds that, even without this particular piece of testimony, there is sufficient other evidence to support the findings and conclusions contained in the proposed decision.

Dated: October 22, 1986 STATE PERSONNEL COMMISSION


DENNIS P. MCGILLIGAN, Chairperson


DONALD R. MURPHY, Commissioner


LAURIE R. MCCALLUM, Commissioner

AJT:baj

Parties:

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BARBARA WOLFE,
 Complainant,

v.

President, UNIVERSITY OF
 WISCONSIN SYSTEM
 (Stevens Point)
 Respondent.

Case No. 84-0021-PC-ER

* * * * *

PROPOSED
 DECISION
 AND
 ORDER

NATURE OF THE CASE

On March 2, 1984, complainant filed a charge of discrimination with the Personnel Commission alleging respondent failed to hire her for a Building Maintenance Helper 2 position because of her sex and a perceived handicap in violation of the Fair Employment Act, Subch. II, Ch. 111, Stats. On August 22, 1985, the Commission issued an Initial Determination finding of Probable Cause to believe that respondent failed to hire her on the basis of sex and of No Probable Cause to believe that respondent failed to hire her on the basis of handicap. Complainant did not request a hearing on the "No Probable Cause" determination as to the handicap issue. A prehearing conference was held on October 21, 1985, before Donald R. Murphy, Commissioner, at which time the parties agreed to the following issue:

Whether respondent discriminated against complainant because of her sex in violation of the Fair Employment Act when respondent failed to select complainant for a Building Maintenance Helper 2 position in January, 1984.

Hearing in the matter was completed on January 21, 1986, before Dennis P. McGilligan, Chairperson. The parties made oral argument at hearing and waived their right to file written briefs in the case by letter dated June 12, 1986, from the Hearing Examiner.

FINDINGS OF FACT

1. Complainant, a female, applied for one of two available Building Maintenance Helper (BMH) 2 positions. Through expanded certification for females complainant was interviewed by respondent on December 7, 1983. She had previously taken the state examination administered for this classification.

2. On January 3, 1984, complainant received a letter notifying her she had not been selected.

3. Respondent interviewed over a two week period approximately 20 candidates, including complainant, for the two positions noted above. The interviews were structured with each applicant being asked identical questions in a half hour time period. The interviewers were Fritz Szymkowiak and Willard Poeschel, both Custodial Supervisor 1s. Len Zoromski, Szymkowiak's supervisor, was also present at the interview for respondent.

4. The top five candidates were ranked after the interviews. The top four candidates were males and they were ranked as follows:

1. Brian Repinski
2. Henry Christensen
3. Stanley Omernik
4. Charles Cose

Number 5 was a female by the name of Glory Bussian. Complainant was not ranked in the top five.

5. Fritz Szymkowiak and Willard Poeschel made the hiring decision using information contained in the candidates' applications and gathered

from the personal interview. After the interviews, Szymkowiak and Poeschel went over their notes, compared ratings and made their hiring decisions. They selected two males, Brian Repinski and Charles Cose. Len Zorowski did not take part in the interviews and/or hiring decisions.

6. The reasons for selecting the aforesaid candidates were as follows:

a. Fritz Szymkowiak. Szymkowiak mainly considered two factors in deciding who to hire for the BMH 2 position: work experience and performance in the oral interview. Szymkowiak accorded more weight to how the applicant "came off" in the interview. Szymkowiak felt Repinski's work record suited him well for the position; particularly, his work at the furniture company and the Plover Post Office. Szymkowiak relied on Cose's experience as a dental technician and as a groundskeeper at Sentry Insurance golf course. Szymkowiak was looking for a candidate who would have a high standard for keeping things clean.

b. Willard Poeschel. Poeschel also mainly considered two factors in deciding on the best candidates to fill the disputed positions: work experience and oral interview. Poeschel heavily favored the applicant's performance in the oral interview. Poeschel felt Repinski created a favorable impression and had a terrific interview. Poeschel relied on Repinski's previous work experience as a custodian at the Plover Post Office to help him decide that Repinski was more qualified than Wolfe for the position in question. With respect to Cose, Poeschel really liked his experience as a dental technician in the Navy -- you had to be "neat and clean" in the Navy and this would translate into the same kind of performance as a BMH 2

-- and as a groundskeeper at Sentry World (for the operation of power machinery such as riding mowers).

7. Repinski's application indicated that he worked part-time (64 hours per month) as a custodian at the Plover Post Office from September, 1977 to December, 1981. His responsibilities at Plover included cleaning the inside and outside of a one story post office. Repinski also worked about two years at a furniture company (1981-83) where, according to his application, he placed furniture on a finishing line.

8. Cose's application indicated that he worked at Sentry World golf course as a groundskeeper on a full-time seasonal basis from August, 1982 to June, 1983. As a groundskeeper Cose was responsible for operating riding mowers, lawn vacuums, tractors and power sand rakes; planting flowers and general lawn maintenance. The application also indicated that Cose had training in the Navy as a dental technician from April, 1968 to August, 1968. Cose's application indicated no janitorial experience.

9. Wolfe's application indicated that after graduating from high school in 1974 she attended Cosmetology School for ten months and worked in cosmetology for a short while thereafter. Responsibilities included cleanup and various sanitary measures. From August to October of 1977 Wolfe worked at Triwiler Construction where she was responsible for such duties as landscaping, clean-up and running concrete vibrators. For three months in 1978 she worked for Boltd Construction in Appleton where she again cleaned up and ran heavy equipment. From July of 1978 to February, 1979 Wolfe worked for Findorf Construction in Madison doing the following work: general cleanup, assisting carpenters and masons, bringing in supplies, opening and locking up buildings, washing windows and floors. During 1982-83 Wolfe worked on a part-time basis for Togo's Sub Shop in

Stevens Point where she made sandwiches and did custodial work. In 1983 she had temporary work on the line sorting vegetables for Celestial and Isherwood Farms. As noted above, Wolfe has had experience over the years performing custodial and related work including general cleanup, mopping, washing windows, changing light fixtures, shovelling snow, erecting scaffolding, working on ladders, lifting heavy objects and operating heavy equipment. She communicated this experience to the interviewers during the interview.

10. For purposes of Affirmative Action (AA) reporting, BMH 2s were included in the Service/Maintenance Category. Respondent's AA plan for Biennium 83-85 indicated 160 employees in the Service/Maintenance Category, with 29 being female or 18.2%. The AA plan stated there was an underutilization of females in this category based on a state population that is 51% female. The respondent's overall employee statistics cited 606 total employees, with 351 being female, and no underutilization of females in the total employee population.

11. The AA plan described in Finding of Fact Number 10 above provides certain guidelines with respect to interviewing. The plan stated, for example, that the interviewer should keep objective notes as to why or why not an employee is hired." The plan adds: "To say 'not impressed' or 'bad attitude' is not enough. Keep records three years, whether or not applicant is hired." The aforesaid AA plan also requires that if an applicant is not hired "the reasons should be clearly documented." Notes were taken during the interviews but were not preserved.

12. Respondent's Affirmative Action Officer, Bill Bailey, monitored the hires in question. Prior to making an offer, Vicki Kubisiak, a personnel manager with respondent, took the candidates' rankings to Bailey and

discussed with him the interviewers' choices. Bailey had no objections to the hire.

13. The duties, working conditions and "physical demands" placed on a BMH 2 at UW-Stevens Point are described in Respondent's Exhibit Number 2, a copy of which is attached hereto and incorporated by reference as if fully set forth as a part of this finding.

14. Charles Cose did not report for work on the agreed upon starting date of January 9, 1984. To fill the again vacant position, respondent requested a new list of candidates from the Department of Employment Relations because the one used in December of 1983 had expired. Gloria Bussian's name was on this new list. She was the female ranked No. 5 during the December interviews, and was selected for the newly vacant position effective March 12, 1984 following new interviews by Szymkowiak, Poeschel and Ray Kerkel.

15. Bussian's application indicated that she worked as a "cleaning person" for Maintenance Engineering of Appleton from May, 1979 to February, 1981. She also worked as a draftsman of blue prints and machine parts for HMF, Inc. of Appleton and Waupaca Elevator of Waupaca from February of 1981 to the date of her hire as a BMH 2 by respondent.

16. The record supports a finding that Fritz Szymkowiak was biased against hiring a female into a BMH 2 position during the hire in question.

17. Barbara Wolfe was not hired in the disputed BMH 2 position because of her sex.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction of this case pursuant to §111.322(1), Stats. and §230.45(1)(b), Stats.

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

3. The complainant has the burden of proving that respondent discriminated against her on the basis of sex in violation of the Fair Employment Act when respondent failed to select complainant for a Building Maintenance Helper 2 position in January of 1984.

4. The complainant has satisfied her burden.

5. Respondent has discriminated against complainant on the basis of sex in failing to hire her as a Building Maintenance Helper 2 in January of 1984.

OPINION

Under the Wisconsin Fair Employment Act (FEA), the initial burden of proof is on the complainant to show a prima facie case of discrimination. If complainant meets this burden, the employer then has the burden of articulating a non-discriminatory reason for the actions taken which the complainant may, in turn, attempt to show was a pretext for discrimination. See McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 5 FEP Cases 965 (1973), and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 25 FEP Cases 113 (1981).

In the context of a hiring decision, the elements of a prima facie case are that the complainant 1) is a member of a class protected by the Fair Employment Act, 2) applied for and was qualified for an available position, and 3) was rejected under circumstances which give rise to an inference of unlawful discrimination.

Complainant has established a prima facie case. She is a member of a protected group (female). She applied for and was qualified for an available position. This is demonstrated by the facts that she took the state

examination, was certified to respondent as a candidate, and was interviewed. Both interviewers (Szymkowiak and Poeschel) testified that complainant was capable of performing the work. Complainant was not selected and two males were, thus giving rise to an inference of unlawful discrimination.

It is true that a woman (Glory Bussian) was ultimately hired. At first glance, this appears to dispel an inference of sex discrimination. The record indicates that Charles Cose decided not to accept the position and Bussian was hired instead, thus giving the impression that a woman was hired, albeit not as a first choice. The Commission feels this is misleading. The hard facts are that the top four candidates were males, that two males were selected for the vacant positions, and that no females were even in consideration until after one of these males did not report for work. Only then, when a position became vacant again, and after a new hiring process including interviews, was Bussian hired. This was after the fact and technically a different hiring transaction.

Having established a prima facie case of discrimination, the next step is to have the respondent articulate legitimate, non-discriminatory reasons for not selecting complainant.

Respondent argued the two males were selected because they were better candidates. Specifically, both ranked in the top five candidates, whereas complainant did not; Brian Repinski had previous custodial experience, a good work background and an excellent interview; and Charles Cose had a good (suitable) work record in manual and grounds work including a stint in the Navy.

Returning to the McDonnell-Douglas framework, these non-discriminatory reasons for the hiring decision must be examined for pretext. Pretext may

be shown either directly by showing that a discriminatory reason more likely motivated the employer or indirectly by showing the employer's proffered explanation is unworthy of credence. The reasonableness or lack thereof of the employer's explanation is probative in this regard. See EEOC v. Trans World Airlines, 32 FEP Cases 857 (SD NY, 1982).

Respondent argues that Brian Repinski and Charles Cose were the best candidates for the BMH 2 position based on their work experience and performance in the oral interview. The record, however, does not support a finding regarding same. It is true that Repinski had previous custodial experience for a little over four years at the Plover Post Office. However, Repinski worked only on a part-time basis in a one story building. In contrast, complainant had custodial duties with a number of different employers (at least 4) over a longer period of time (about 7 years) demanding the performance of custodial work in a wide variety of situations. Interviewer Szymkowiak felt Repinski's work on the line at a furniture company also qualified him for the position in question. However, complainant also had experience on the line with two employers immediately prior to the disputed hire process. In addition, complainant had more experience than Repinski in operating a wide variety of machinery and equipment and lifting heavy objects.

With respect to Charles Cose, the record indicates that he was even less qualified for the position in question especially when compared with complainant. First, Cose had no janitorial experience. Secondly, both interviewers relied heavily on Cose's experience as a dental technician in the Navy as an indicator that he would do a good job of cleaning in the BMH 2 position. Assuming arguendo that 4 months of training as a dental technician in the Navy almost 16 years ago is relevant work experience for

a BMH 2 position, complainant had more experience in a comparable field. In this regard the record indicates that complainant received training as a cosmetologist ten years ago for 10 months and worked in cosmetology for a short time thereafter. (Interviewer Poeschel stated that dental technicians must be neat and clean and Cose would do similar quality work as a BMH 2. If so, complainant would also meet high standards of cleanliness as a BMH 2 since the record indicates that cosmetologists too must meet cleanliness and sanitary standards as part of their job.)

Interviewer Szymkowiak cites Cose's experience as a groundskeeper as another reason for hiring Cose despite the fact that the BMH 2 position calls for no outside work such as cutting grass, planting shrubs and flowers, etc. Nevertheless, if groundskeeper work experience is relevant for the BMH 2 position, complainant had a wide variety of work experiences in this area including landscaping, shoveling snow, assisting carpenters and masons, cleanup and operation of equipment and machinery.

In view of the above, the Commission finds that complainant was better qualified for the disputed position than Charles Cose, if not Brian Repinski. This conclusion is also supported by a comparison of complainant's qualifications with the duties and physical demands placed on a BMH 2 which are described in Finding of Fact Number 13. In summary, the BMH 2 position involves a lot of cleaning -- floors, bathrooms, carpet, walls and snow removal -- waste paper pickup and replacement of light bulbs. To accomplish these tasks a BMH 2 must be physically capable of lifting weights of 50 lbs or more; agile enough to climb ladders and work with hands above shoulder level, etc.; and able to operate various machinery and equipment in the performance of custodial duties. Unlike Cose, complainant

has extensive custodial experience in these areas, and it is undisputed that she is physically capable of performing the job.

Both interviewers cite the two successful candidates' performance in the oral interview in large part as the basis for their decision to hire them. However, at hearing the interviewers, aside from general comments about Repinski and Cose like "terrific interview" or "very good personal reaction" could only cite their work experiences noted above as the basis for their selection. They gave no testimony at all about complainant's interview or why she did not rate as high as Repinski and Cose. They took notes of the interviews which were used as a basis for their decision, but contrary to respondent's practice and the AA plan's recommendation, destroyed them after the hire decision. Complainant testified, unrebutted by respondent, that she talked about her work experiences during the interview as described in Finding of Fact Number 9. Poeschel admitted at hearing that this work experience was good background for a BMH 2 position but could not remember comparing it to Cose's experience. Szymkowiak liked Cose's experience as a dental technician and at Sentry World. However, he also admitted that Cose's experience as a groundskeeper at Sentry World did not relate directly to any duties performed by a BMH 2. As noted above, Cose's experience as a dental technician, for what it was worth as a credential for a BMH 2 position, was outweighed by complainant's experience as a cosmetologist. Szymkowiak also couldn't remember comparing Cose's experience with complainant's nor could he offer any persuasive rationale as to why Cose's experience was better than complainant's for the BMH 2 position. Based on the foregoing, the Commission finds that complainant should have performed better on the oral interview than at least Cose, and there is no rational basis offered by respondent for its decision otherwise.

In view of all of the above, the Commission finds that respondent lacked a creditable reason for not selecting complainant for one of the vacant BMH 2 positions. Work experience ultimately was the main criterion for filling these positions (either reflected on the candidate's application or through the oral interview) and complainant has demonstrated that she was better qualified for a position than at least Cose while respondent failed to offer a rational basis for its contrary decision. As noted above, pretext may be shown indirectly by showing employer's proffered explanation is unworthy of credence. Complainant has met this burden in the instant case.

In addition, the Commission finds that complainant has shown pretext directly by establishing that a discriminatory reason likely motivated respondent's hire decision. In this regard, the record supports a finding that Fritz Szymkowiak was biased against hiring a female into a BMH 2 position during the hire in question. In particular, the record indicates that Szymkowiak did not want any more women working in the BMH 2 position because he felt that they couldn't handle the job. Szymkowiak also felt that complainant couldn't do the job apparently because of her construction background. Szymkowiak made these statements to Willard Poeschel prior to the disputed hire. Fred Hopfensperger, a custodian for respondent at the time of the hire, testified that he heard someone say that Szymkowiak had made these statements, but could not remember who repeated them except that they were made during the course of a conversation in the workplace between himself, Mary Ann Repinski (a co-worker) and his supervisor, Poeschel.¹ Respondent objected to this testimony at hearing as hearsay. The objection

¹ Subsequent testimony by Evelyn O'Brien discussed above, confirmed that the remark had been made by Poeschel.

was overruled. Section 908.01(4)(b) 4. provides that an admission by party opponent is not hearsay where the statement is offered against the party and is made "by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship." In the instant case the disputed statements were made by a supervisor of respondent responsible for the hire decision. They were conveyed to Hopfensperger by the other supervisor who participated in the hire during the conversation noted above. The Commission finds in each instance the statements in question were not hearsay pursuant to §908.01(4)(b) 4. described above since they were made during the scope of the employees' employment or agency with respondent.²

Evelyn O'Brien, an Investigator for the Commission, testified at hearing that during the investigation Hopfensperger identified Poeschel as making the statements regarding Szymkowiak's comments regarding not hiring a woman for the BMH 2 position. Again, respondent objected on the basis of hearsay and the objection was overruled. O'Brien's testimony was offered, in part, to impeach Hopfensperger's testimony regarding his failure to recall who attributed the aforesaid discriminatory remarks to Szymkowiak. Section 908.01(4)(a) 1. provides that such a statement is not hearsay if:

(a) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is:

1. Inconsistent with his testimony or

² See, for example, Jenzeke v. City of Brookfield, 108 Wis. 2d 537, 545, 322 N.W. 2d 516 (1982) where a statement by two city employes that sewer backup was due to city negligence was admission against interest, not inadmissible hearsay, where there was proof of employes' identification and the employes were sent to plaintiff's home to investigate the cause of the backup. Plaintiff and plaintiff's neighbor testified that two city employes told them that the sewer backup was due to the city's negligence.

Hopfensperger's testimony at hearing is inconsistent with his previous statement and O'Brien's testimony is permitted for impeachment purposes.

As noted in the Findings, Szymkowiak played a substantial role in the hire decision for respondent. As discussed above, his reasons for selecting Repinski and Cose, instead of complainant, for the disputed position are not worthy of credence; a better explanation is that a discriminatory reason more likely motivated his decision.

Based on all of the above, the Commission finds that the answer to the issue as stipulated to by the parties is YES, respondent discriminated against complainant because of her sex in violation of the Fair Employment Act when respondent failed to select complainant for a Building Maintenance Helper 2 position in January, 1984.

ORDER

Respondent is ordered to offer appellant the next available equivalent BMH 2 position and to give her all rights, benefits and privileges to which she would have been entitled from January 9, 1984, the first date on which she could have begun employment with respondent, until the time she is offered an equivalent position by respondent or until she indicates she is no longer interested in a position, or until the time she becomes unavailable to accept a position, whichever occurs first.

Interim earnings or amounts earnable with reasonable diligence shall reduce the back pay otherwise allowable. Any amounts received by complainant in unemployment benefits or welfare payments shall not reduce the back pay otherwise allowable, but shall be withheld from the person discriminated against and immediately paid to the unemployment reserve fund as set out in §111.39(4)(c), Stats. or in the case of a welfare payment, to the welfare agency making the payment.

The Commission has the authority to award reasonable attorney's fees to a prevailing complainant under the Fair Employment Act. Watkins v. LIRC, 117 Wis 2d 753, 765, 345 N.W. 2d 482 (1984) Ray v. UW-LaCrosse, 84-0073-PC-ER and Gray v. UW-LaCrosse, 84-0086-PC-ER (5/9/85). Any such request by complainant should be made by motion and include an itemized application along with all appropriate documentation and should be submitted to the Commission and to the opposing party no later than 30 days from the date of this order. The losing party then has 20 working days from the date of receipt to respond in writing to the motion.

Dated: _____, 1986 STATE PERSONNEL COMMISSION

DENNIS P. MCGILLIGAN, Chairperson

DPM:jmf
ID11/2

DONALD R. MURPHY, Commissioner

Attachment

LAURIE R. McCALLUM, Commissioner

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UNIVERSITY OF WISCONSIN - STEVENS POINT

Summary of Duties and Working Conditions
for Building Maintenance Helper 2

Worked Performed	Physical Demands
1. Wet mop floors and halls.	1. Mop buckets are normally 32 quart size. When filled 2/3 full of water they will weigh approximately 50 lbs. Mopping requires considerable movement of arms, twisting and bending of back.
2. Manually or by machine, strips floor finish and applies new floor finish.	2. Application of floor finish is similar to mopping. Operation of electric buffers involves considerable twisting of back. Must be capable of carrying 5 gallon cans of floor finish weighing approximately 47 lbs.
3. Scrubs bathrooms sinks, toilet fixtures, floors and walls.	3. Duties requiring frequent bending, stooping and kneeling; use of arms above shoulder level. Frequent exposure to cleaning solutions, disinfectants and other chemicals.
4. Operates industrial vacuum cleaners and rug shampooers.	4. Considerable movement of arms. "Back-Pack" vacuums, weighing approximately 15 lbs. Are used on stairways.
5. Washes walls, inside windows and ceilings.	5. Must work with hands and arms above shoulder level. May work from a step ladder.
6. Moves furniture, file cabinets, tables and other equipment.	6. Carts or dollies available for some desks and equipment. Others must be moved by hand.
7. Pick up waste paper from offices and empty in outdoor rubbish containers.	7. Paper pick-up cart weight approximately 50-60 lbs. When filled with paper. Cart must be lifted and emptied into a large rubbish container which is about 48" above ground level.
8. Climbs ladders and replaces light bulbs.	8. Must be agile enough to climb step ladder and work with hands above head. Six, eight and ten foot step ladders are most common sizes in use.
9. Snow removal from steps and sidewalks.	9. Hand shoveling of snow from steps and entranceways. May operate a snowblower.

Miscellaneous Information:

1. The majority of the employes in this classification are employed on a night shift, either 10:30 p.m. to 6:30 a.m., 11:00 p.m. to 7:00 a.m. or 4:30 p.m. to 12:30 a.m. Requires individual that can adjust to the changes in eating and sleeping schedules.
2. Most work is performed indoors. Some assignments require going from building to building and they may be exposed to inclement weather.