

STATE OF WISCONSIN

PERSONNEL COMMISSION

 *
 MILDRED MITCHELL, *
 *
 Complainant, *
 *
 v. *
 *
 Chancellor, UNIVERSITY OF *
 WISCONSIN-MILWAUKEE, *
 *
 Respondent. *
 *
 Case No. 84-0170-PC-ER *
 *

DECISION
AND
ORDER

The Commission adopts the proposed decision and order in its entirety and goes on to find that even if the complainant had been able to establish a prima facie case with respect to her claims, she has not shown that the reasons advanced by the respondent were pretextual.

Dated: April 4, 1986

STATE PERSONNEL COMMISSION

Dennis P. McGilligan
DENNIS P. MCGILLIGAN, Chairperson

Donald R. Murphy
DONALD R. MURPHY, Commissioner

Laurie R. McCallum
LAURIE R. MCCALLUM, Commissioner

DPM:vic
VIC02/1

Parties

Mildred Mitchell
4109 North Street
Milwaukee, WI 53216

Frank E. Horton
Chancellor
University of Wisconsin-Milwaukee
Chapman Hall
Milwaukee, WI 53201

* * * * *
 *
 MILDRED MITCHELL, *
 *
 Complainant, *
 *
 v. *
 *
 Chancellor, UNIVERSITY OF *
 WISCONSIN-MILWAUKEE, *
 *
 Respondent. *
 *
 Case No. 84-0170-PC-ER *
 *
 * * * * *

PROPOSED
 DECISION
 AND
 ORDER

NATURE OF THE CASE

On October 19, 1984, and March 12, 1985, complainant filed a charge of discrimination with the Personnel Commission alleging respondent failed to recall her following a layoff for a position because of her race and in retaliation for filing a 1979 complaint of discrimination in violation of the Fair Employment Act, Subch. II, Ch. 111, Wis. Stats. On July 2, 1985, the Commission issued an Initial Determination finding of No Probable Cause to believe that respondent failed to recall her on the basis of race or retaliation. Complainant filed a timely appeal from said Initial Determination. A prehearing conference was held on September 12, 1985, before Dennis P. McGilligan, Chairperson, at which time the parties agreed to the following issues:

1. Is there probable cause to believe complainant was discriminated against on the basis of race in regard to recall following layoff?
2. Is there probable cause to believe complainant was discriminated against on the basis of retaliation in regard to recall following layoff?

Hearing in the matter was completed on November 5, 1985. The parties finished their briefing schedule on December 18, 1985.

FINDINGS OF FACT

1. The complainant, a black female, was employed as a Data Entry Operator 1 (DEO 1) in pay range 5, with respondent in the Department of Administrative Computing Services (ACS) from January, 1975 to January 31, 1984.

2. On August 12, 1983, complainant received the following letter from Gilbert L. Lee Jr., Assistant Chancellor for the respondent informing her of the abolishment of her position as a DEO 1 effective January 31, 1984:

As a result of the budget and workforce adjustments that we must make, it is with regret that I must inform you that your Data Entry Operator 1 position in the Department of Administrative Computing Services is being abolished effective January 31, 1984.

I am bringing this to your attention at this time so that every effort can be made to secure you employment elsewhere within the University prior to the actual abolishment of your position.

In this regard, I urge you to contact Bobbie Barnes (x5414) or David Putchinski (x5411) of Personnel Services at the earliest possible time to obtain assistance in finding alternative suitable employment. They will also be prepared to respond to any questions you may have related to your employment rights.

3. Two other employees, Gayle Kortright (a white female), DEO 2 and Audrey McIntosh (a black female), DEO 2 of ACS received the same letter at the same time as complainant. Both Kortright and McIntosh, as DEO 2's, were in pay range 6.

4. The aforesaid layoffs were caused by respondent's computer operations being transformed from a "batch system" to an "on-line" system of processing information. The transformation eliminated the need for employees who performed batch key punch duties, including complainant and her co-workers, Kortright and McIntosh. As a result of the computer operation's change and in order to maximize the affected persons' future job possibilities, Brian Wilmot, Manager of the Production Center for ACS and complainant's

supervisor, arranged for training to be received by the affected employees on the newly installed Wang word processing system. Complainant registered for and received the Wang training in the fall of 1983 as did the other employees noted above.

5. Complainant responded to the August 12, 1983, letter and contacted respondent's Personnel Services Department (PSD) to arrange for a series of interviews for alternative employment within respondent. Complainant spoke to David Putchinski, Staffing and Recruitment Specialist in the PSD, who provided complainant with an explanation of transfer rights and a list of the type of positions within complainant's pay range for which complainant would be eligible to make application. Complainant had several subsequent contacts with the PDS making contact with Putchinski, as well as several other Personnel Specialists including Bobbie Barnes in arranging interviews with various departments and other employing units of respondent.

6. On January 13, 1984, Barbara J. Faucett, Director of Personnel Services, sent the complainant a letter outlining the layoff procedures and explaining her contractual layoff rights as follows:

The contract for the Clerical and Related Bargaining Unit, Article VIII, specifies the layoff procedures that will be applied to your position. When a layoff occurs, it shall be by employing unit within the bargaining unit, by classification, and by seniority in accordance with the provisions of Article VIII and Article V. Your layoff will be effective with your last day of work on Tuesday, January 31, 1984.

You have several options in considering alternate employment at UWM. You have a mandatory transfer right to Data Entry Operator 1 vacancies. There are no vacancies with that classification title. At the discretion of departments with other vacancies in your pay range or counterpart pay ranges, you may be considered for other transfer positions in which you are interested and qualified. You may file a request for transfer to any department in state service as well. Examples of positions that are in counterpart pay ranges include Clerical Assistant 2, Typist, and Technical Typist.

Your contractual layoff rights allow you three options: (a) to

bump; (b) to request a voluntary demotion; or (c) to be separated.

- (a) You can elect to bump the least senior employee with the classification Data Entry Operator 1 within employing unit 2. This is not a viable option for you since all the positions in your employing unit with your classification are being eliminated. In addition, you may elect to a classification in which you previously earned permanent status. Unfortunately, exercising these rights does not yield positive results because you have not served in a position in any other classification than Data Entry Operator 1.
- (b) You do not have a mandatory right to demote to a classification in a lower pay range although you may, at the discretion of departments with vacancies, be considered for positions in which you never attained permanent status for which you are qualified in a lower pay range than your present position.
- (c) If options (a) and (b) are not successful, you will be separated from state service on January 31, 1984.

If a permanent Data Entry Operator 1 vacancy occurs within employing unit 2, or a vacancy into which you could have bumped, you shall be recalled according to seniority, with the most senior laid off employee being recalled first. Your right to recall shall exist for five years from January 31, 1984 unless you are employed in a position in the same or counterpart pay range as the one from which you were laid off.

You can also file a request to reinstate to a permanent vacancy in any other employing unit within the University of Wisconsin System for a Data Entry Operator 1 vacancy. Reinstatement shall be by seniority, with the most senior employee reinstated first. In addition, you may file a request for reinstatement to any department in state service and be appointed to that vacancy at the discretion of the appointing authority if you meet the necessary qualifications.

If you have any questions about current vacancy opportunities, please call Bobbie Barnes (963-5414), or David Putschinski (963-5411). If you have any questions about your layoff rights or the contents of this letter, please call Clyde Jaworski (963-4903). I wish you success in your future endeavors.

7. On or about February 14, 1984, when complainant picked up her last paycheck, she received the following letter of recommendation from Wayne Adams, Operations Supervisor and complainant's former immediate supervisor:

Mildred Mitchell has been employed at the University of Wisconsin-Milwaukee from 19 January, 1978 through 31 January, 1984. Mildred was classified as a Keypunch Operator I during that period mentioned. The keypunch department of Computing Services/ Administrative Computing Services was eliminated as of 31 January, 1984 due to the upgrading of our Computer Systems. I recommend Mildred as a good Keypunch operator who was punctual and performed her duties well.

Adams gave similar letters of recommendation to the other laid off employees noted above.

8. Complainant was scheduled for interviews for Clerical Assistant 2 positions by respondent's Personnel Services Department on the following occasions:

<u>Date</u>	<u>Employing Unit</u>
9/28/83	Registrar
10/26/83	Printing Services
12/23/83	Graduate School (2)
1/19/84	Housing
4/6/84	Registrar
4/11/84	Registrar (2)
5/21/84	Financial Aid
11/12/84	Physical Plant
12/12/84	Division of Student Affairs
2/4/85	Registrar
3/20/85	Financial Aid

9. As a result of the Clerical Assistant 2 interviews, complainant was either not selected or did not respond to the interview notice.

10. Complainant was also scheduled for interviews for other positions by respondent's Personnel Services Department on the following occasions:

<u>Classification</u>	<u>Date</u>	<u>Employing Unit</u>
Building Maintenance Helper II	3/20/84	Physical Plant
Building Maintenance Helper II	3/20/84	Physical Plant
Building Maintenance Helper II	3/20/84	Physical Plant
Building Maintenance Helper II	3/22/84	Physical Plant

Building Maintenance Helper II	3/22/84	Physical Plant
Word Processing Operator 1	5/2/84	Business Administration
Word Processing Operator 1	5/25/84	Housing
Word Processing Operator 1	2/7/85	Urban Research Center
Typist	2/25/85	Placement & Career Dev.

11. As a result of the above interviews, complainant was either not selected or did not respond to the interview notice.

12. David Putchinski never received any requests for references for the complainant. Putchinski was not aware of complainant's previously filed complaint of discrimination against respondent in 1979 nor did he take any action against complainant as a result thereto.

13. Brian Wilmot received two requests for references for the complainant from Temporary Help Services and Wisconsin Bell. Wilmot gave positive references and characterized complainant's job performance as satisfactory. Wilmot was aware of complainant's 1979 complaint of discrimination. However, said complaint of discrimination did not affect Wilmot's working relationship with complainant or Wilmot's handling of complainant's layoff and recall rights. Wilmot gave complainant satisfactory job evaluations and helped her to find a new job by giving her additional training opportunities (Wang training) and time off for job interviews.

14. Wayne Adams never received any requests for references for complainant; but, as noted above, wrote positive letters of recommendation for all employees laid off who were under his supervision including complainant. Adams was aware of complainant's 1979 complaint of discrimination as well as at least one union grievance covering the same

subject matter but did not take any action against complainant in the workplace as a result thereto.

15. Gayle Kortright, a less senior white female employe, who was laid off under the same circumstances as complainant, was rehired (not recalled) to work in a different work unit for respondent. Neither complainant nor the other black female employe, Audrey McIntosh, were called back to work at respondent. However, the record does not support a finding that respondent treated its white employes and minority employes differently with respect to their layoff and recall rights.

CONCLUSIONS OF LAW

1. The Personnel Commission has jurisdiction over this discrimination complaint pursuant to §230.45(1)(b), 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 of proving that there is probable cause to believe that respondent discriminated against her on the basis of race and retaliation in regard to recall following layoff.

4. The complainant has not satisfied her burden.

OPINION

Complainant, Mildred Mitchell, filed her complaint in regard to two discriminatory actions alleged to have been taken by the respondent: 1) race in regard to recall following layoff; 2) retaliation for filing a 1979 discrimination complaint against the respondent in regard to recall following layoff. Each claim requires a different analysis and will be discussed separately.

Race in Regard to Recall

Section 4.03(2), Wis. Adm. Code defines probable cause as follows:

(2) Probable Cause Defined. 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 probably has been or is being committed.

In a probable cause proceeding such as the one before us, the evidentiary standard applied is not as rigorous as that which is required at a hearing on the merits. Nonetheless, it is useful to use the McDonnell-Douglas format in analyzing the record before the Commission in this complaint. In this regard the Commission notes that under the Wisconsin Fair Employment Act, the initial burden of proof is on the complainant to show a prima facie case of discrimination. The employer then has the burden of demonstrating a non-discriminatory reason for the actions taken which the complainant may, in turn, attempt to show was in fact a pretext for discrimination. See McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Dept. of Community Affairs v. Burdine, 540 U.S. 248 (1981).

In the context of a recall action following a layoff, 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) was performing satisfactorily prior to the layoff; 3) had recall rights to the position in question, and 4) the employer recalled someone not of the complainant's protected class with less seniority than the complainant.

In the instant case, there is no doubt that complainant is a member of a protected class. Complainant also meets the second element of the prima facie case. This is substantiated by facts that show complainant's work performance as satisfactory. Wayne Adams, formerly complainant's immediate supervisor, gave her a positive letter of recommendation, and Brian Wilmot, formerly the department manager of Mitchell's work unit, provided at least two positive job references characterizing complainant's work as satisfactory.

Complainant fails, however, to meet the third element of the prima facie case. Complainant claims that a less senior white employe, Gayle Kortright, was recalled to a position at respondent, and that complainant has yet to be recalled. However, the record indicates that none of the laid off employes was recalled. One employe, a white female, qualified through the interview process for a different position in a different employing unit.

According to the January 13, 1984 letter from Personnel to complainant, her recall rights were as follows:

If a permanent Data Entry Operator 1 vacancy occurs within employing unit 2, or a vacancy into which you could have bumped, you shall be recalled according to seniority, with the most senior laid off employee being recalled first. Your right to recall shall exist for five years from January 31, 1984 unless you are employed in a position in the same or counterpart pay range as the one from which you were laid off.

However, no such vacancy occurred for which complainant was entitled to recall.

Complainant interviewed for a number of positions in the same or in counterpart pay ranges. The record indicates that complainant's lack of success in obtaining employment was not due to lack of referrals for interviews or bad references or any other actions (inaction) by respondent. Three prospective employers testified that they never requested references of her former supervisors. One non-University witness even testified that she did hire the complainant for a temporary position but terminated her early because of lack of speed, accuracy and basic skills.

Contrary to the above, complainant argues that the aforesaid layoffs were designed by respondent to get rid of some minorities. Complainant, however, offers no persuasive evidence in support of this contention. To the contrary, the record indicates that the decision to layoff complainant and other employes in her work unit was based solely on budget and management

considerations. In particular, the other black employe laid off at the same time as complainant testified, un rebutted by Mitchell, that in her opinion there was no discrimination on the basis of race by respondent in regard to the aforesaid recall following layoff.

Finally, complainant maintains that her failure to obtain another job on campus was based on race and/or retaliation. However, there is no persuasive evidence in the record to support such a claim. The record does indicate that complainant's own lack of interview skills contributed to her failure to obtain a new job.¹

Complainant has, therefore, failed to establish the third element of her prima facie case. Under these circumstances, the facts are not strong enough in themselves to warrant a prudent person in believing that respondent probably discriminated against complainant on the basis of her race.

Retaliation in Regard to Recall

Regarding the retaliation claim, the application of the three part McDonnell-Douglas Corp. v. Green, supra, legal analysis is again appropriate. However, to establish a prima facie case in the retaliation context, there must be evidence that 1) the complainant participated in a protected activity and the alleged retaliator was aware of that participation, 2) there was an adverse employment action, and 3) there is a causal connection between the first two elements. A "causal connection" is shown if there is evidence that a retaliatory motive played a part in the adverse employment action. See Jacobson v. DILHR, Case No. 79-28-PC, Personnel Comm. (4/10/81) at pp. 17-18, and Smith v. University of Wisconsin-Madison, Case No. 79-PC-ER-95, Personnel Comm. (6/25/82) at p. 5.

¹Unrebutted testimony of Edward Pickett and Theresa Franz.

Complainant meets the first element in that she filed a complaint of discrimination in 1979 and Brian Wilmot, the department manager was aware of the complaint. Complainant also alleges that both David Putchinski and Wayne Adams retaliated against her. However, Putchinski had no knowledge of Mitchell's previous complaint nor was he asked to provide any job references. Adams knew about the previously filed complaint of discrimination but provided a favorable letter of recommendation for complainant. The second element is met because the facts show that complainant was laid off and has not yet been recalled to a position with respondent. Complainant fails, however, to establish the causal connection required in the third element. Between the filing of Mitchell's 1979 complaint and August of 1983, the effective date of the layoff notice, complainant was subjected to no disciplinary action and received satisfactory performance evaluations. The evidence indicates that complainant had no employment problems during this period of time. To establish a causal connection of retaliation past the four year period would be too spurious. These facts are not sufficient to establish a causal connection between the first and second elements of the prima facie case. This is especially true where, as in the instant case, the record clearly indicates that the layoffs were based on budget considerations and management's decision to transform the computer operations from a "batch system" to an "on-line" system of processing information.

Even if the time between the 1979 complaint and the 1983 notice of layoff had been shorter, the facts reveal several incidents that disprove any allegation of retaliation. Complainant was offered and received training on respondent's new Wang work processing system that was the cause of her position being eliminated. The training was intended to improve the chances of all the affected employees gaining alternate employment within respondent.

Complainant was also given time off for job interviews as well as referred to a number of job interviews by respondent's Personnel Department. Brian Wilnot provided at least two positive job references to Temporary Help Services and Wisconsin Bell characterizing complainant's job performance as satisfactory. As noted above, Wayne Adams, complainant's immediate supervisor, wrote a positive letter of recommendation prior to the effective date of the layoff.

ORDER

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

Dated: _____, 1986

STATE PERSONNEL COMMISSION

DENNIS P. MCGILLIGAN, Chairperson

DONALD R. MURPHY, Commissioner

DPM:vic
VIC02/1

LAURIE R. McCALLUM, Commissioner

Parties

Mildred Mitchell
4109 North Street
Milwaukee, WI 53216

Frank E. Horton
Chancellor
University of Wisconsin-Milwaukee
Chapman Hall
Milwaukee, WI 53201