

STATE OF WISCONSIN

PERSONNEL COMMISSION

* * * * *
DAVID BRUMMOND,
Complainant,
v.
President, UNIVERSITY OF
WISCONSIN SYSTEM (LaCrosse),
Respondent.
Case No. 84-0178-PC-ER
* * * * *

DECISION
AND
ORDER

NATURE OF THE CASE

On August 18, 1983, complainant filed a complaint of discrimination with the Personnel Commission alleging respondent failed to hire him for a Building Maintenance Helper 2 position because of his arrest record and handicap, in violation of the Fair Employment Act, Subch. II, ch. 111, Wis. Stats.

On December 19, 1984, one of the Commission's Equal Rights Officers issued an Initial Determination finding No Probable Cause to believe that complainant was discriminated against on the basis of his handicap or his arrest record in regard to the subject hiring decisions. Complainant filed an appeal of this initial determination. A hearing was held on April 30, 1985, and June 3, 1985, before Commissioner Laurie R. McCallum.

FINDINGS OF FACT

1. Complainant was arrested and charged with sexual assault during 1982. He was incarcerated for 44 days on the charge and subsequently acquitted on or around January 11, 1983.

2. In 1975, complainant sustained a severe head injury which resulted in an organic mental disorder. Complainant is handicapped within the meaning of the Wisconsin Fair Employment Act.

3. At the time of his arrest, complainant was employed as a Building Maintenance Helper 2 (BMH 2) at the University of Wisconsin - Parkside for five days. Subsequent to his arrest and during his incarceration, complainant was terminated from this BMH 2 position.

4. In a memo to Debbie Veglahn of the University of Wisconsin - La Crosse, dated February 14, 1983, Jim LaMack of the University of Wisconsin - Parkside forwarded a copy of complainant's application for state employment, a copy of complainant's request for reinstatement, an explanation for complainant's termination by the University of Wisconsin - Parkside, and a statement that complainant was perceived during his period of employment with the University of Wisconsin - Parkside as a potentially excellent employee and that any consideration given complainant would be appreciated. Attached was a copy of a January 12, 1983, article which appeared in the Kenosha News and which referenced and described complainant's acquittal.

5. On or around February 18, 1983, complainant completed an application for state employment and a request for reinstatement. The complainant did not state on either form that he was handicapped. The application summarized complainant's employment as a BMH 2 by the University of Wisconsin - Parkside, his employment as a seasonal LTE laborer for the Department of Natural Resources during the summers of 1981 and 1982, and his employment as an assembler by General Motors from August, 1976, to June, 1978. In the space labeled "reasons for leaving or considering leaving" in the section describing his employment at the University of Wisconsin - Parkside, complainant indicated he had a "wish to discuss." On

the request for reinstatement in response to question 12. Why did you leave state service employment?, complainant indicated "incarcerated for something I was not guilty of, later cleared of any charges."

6. In March of 1983, the University of Wisconsin - La Crosse had four BMH 2 vacancies. Complainant was one of the 28 certified candidates considered for the positions and he was interviewed by Roger Johnson and Allen Rugg, Custodial Supervisors at the University of Wisconsin - La Crosse, on March 25, 1983. At the time of the interview, Mr. Johnson and Mr. Rugg had available to them a copy of complainant's application and request for reinstatement. The record is not clear as to whether Mr. Johnson or Mr. Rugg saw the LaMack memo prior to scoring complainant's interview. In their testimony, both Mr. Johnson and Mr. Rugg indicated they had not seen the LaMack letter prior to scoring complainant's interview but, in response to a question from the Commission's investigator, both Mr. Johnson and Mr. Rugg indicated that they first became aware of complainant's arrest record as the result of seeing the LaMack letter and accompanying materials.

7. The criteria and the weight assigned to each criterion used in evaluating each candidate's interview performance are as follows:

<u>Criterion</u>	<u>Weight</u>
Physically capable to perform assigned duties	10
Demonstrates initiative	9
Ability to assume responsibility	9
Ability to work with others	8
Personal disposition (appearance, personality, response to questions)	7
Stable work record	6
Ability to project a good self image	5
Custodial experience	4

8. Mr. Johnson gave complainant a total score of 365 and Mr. Rugg gave complainant a total score of 389. Complainant was ranked 26th

overall. The positions were offered to those candidates with the highest interview scores.

9. Mr. Johnson felt that complainant, in his interview, was not responsive to the questions, i.e, answered yes or no without offering further explanation; was very defensive; did not exhibit a good knowledge of cleaning procedures and priorities; and was evasive concerning his arrest even though he had indicated on his application that he wished to discuss it. Mr. Rugg felt that complainant, in his interview, gave the impression that he would need to be closely supervised and could become easily upset if things didn't go right; was hesitant in answering the questions; and did not have a very stable work record.

10. After complainant's interview was completed and he had left the interview room, Mr. Johnson left for lunch. Complainant then returned to the interview room and told Mr. Rugg that he was handicapped as a result of a serious head injury. Mr. Rugg so advised Mr. Johnson after they returned from lunch and each added a statement to this effect on the sheets they used to score complainant's interview. Both Mr. Johnson and Mr. Rugg had completed their scoring of complainant's interview prior to being advised of his handicap and they did not change their scoring after receiving this information.

11. The following candidates were hired as BMH 2's by the University of Wisconsin - La Crosse on the basis of the above-described selection process:

- a. Mark Kraklow -- total interview score of 952; served in the Marines from 1974 to 1980; worked as a maintenance supervisor for McDonald's from September, 1979, to March, 1980; worked as a spot welder for Preway, Inc. from August, 1980 until he was laid off in September, 1980; and worked as the assistant manager of Lyons Rental from March, 1981 until he was laid off in August, 1982.

- b. Clarence Maack -- total interview score of 964; worked as an upholsterer from June, 1964, to March, 1974; worked as the manager of Sletten Furniture Co. from March, 1974 to April, 1981 -- this included supervision of maintenance staff; and worked as a driver for Coulee Refuse from May, 1981, to the date of the interview.
- c. Helen Ewoldt -- total interview score of 986; worked as a physical education teacher from August, 1971, to May, 1979; worked as a foreman for Empire Screen Printing, Inc. from July, 1979, to June, 1980; worked as a supervisor/instructor for a community action program from September, 1980 to January, 1981; worked as a silk screener from January, 1981 to the date of the interview.
- d. Barbara Gromacki -- total interview score of 1044.
- e. Steven Paul McCabe -- total interview score of 1116 -- worked as a cook (included maintenance and cleaning of all equipment) from August, 1976, to October, 1981; and worked as an LTE custodian for the University of Wisconsin - La Crosse from October, 1981, to December, 1981 and from August, 1982 to March, 1983.

12. On March 29, 1983, Mr. Johnson received a telephone message to call Mr. Jim Allen at the University of Wisconsin - Parkside. Mr. Johnson returned the call, but Mr. Allen was not available and the call was referred to Mr. LaMack. Mr. LaMack explained to Mr. Johnson the February 14, 1983, memo he had sent to the University of Wisconsin - La Crosse.

13. There is no evidence in the record to support a finding that the interviewers' comparisons of complainant's qualifications and responses to interview questions with those of the other candidates interviewed did not accurately reflect the information available to the interviewers at the time, that the selection criteria were unreasonable in relation to the duties of the subject positions, or that such criteria were not uniformly applied to the candidates.

CONCLUSIONS OF LAW

1. The Commission has authority to hear this matter pursuant to §230.45(1)(b), Wis. Stats.

2. The burden of persuasion is on the complainant to show the existence of probable cause, as probable cause is defined in §PC 4.03(2), Wis. Admin. Code.

3. The complainant has failed to carry his burden of persuasion.

4. There is no probable cause to believe that complainant was discriminated against on the basis of his handicap or on the basis of his arrest record with respect to the subject hiring decisions.

OPINION

In McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 5 FEP Cases 965 (1973), the Supreme Court established the basic allocation of burdens and order of presentation of proof in cases alleging discriminatory treatment. The complainant must carry the initial burden of establishing a prima facie case by a preponderance of the evidence. This may be accomplished by showing 1) that he belongs to a protected group; 2) that he applied for and was qualified for a job for which the employer was seeking applicants; 3) that despite his qualifications, he was rejected under circumstances which give rise to an inference of unlawful discrimination. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 25 FEP Cases 113 (1981). If the complainant succeeds in establishing a prima facie case, the burden of production then shifts to the respondent employer to articulate "some legitimate, non-discriminatory reason" for the employee's rejection. Once this is accomplished the complainant must be given a fair opportunity to show by a preponderance of the evidence that the employer's stated reasons for the rejection were in fact a pretext for a discriminatory decision. The ultimate burden of persuading the trier of fact that the respondent intentionally discriminated against the complainant remains at all times with the complainant, Burdine, supra, at 1094.

Although the evidentiary standard in a probable cause proceeding such as the one before us is not as rigorous as that applied in reaching a decision on the merits, it is nonetheless useful to use the McDonnell-Douglas format in analyzing the record before the Commission in this complaint.

Complainant is handicapped as the result of a severe head injury and has an arrest record and is thus a member of two classes protected by the Wisconsin Fair Employment Act. Complainant did apply for the vacant BMH 2 positions at the UW- La Crosse. In view of the fact that complainant had performed custodial work for the Department of Natural Resources and for the University of Wisconsin - Parkside and that Mr. LaMack acknowledged in his February 14, 1983, memo that complainant was perceived as a "potentially excellent employee" while employed at the University of Wisconsin - Parkside, and that complainant was certified for the vacant BMH 2 positions, the Commission concludes that complainant was qualified for the subject positions. Complainant was not hired for the positions. Finally, due to the fact that an inference could be drawn from the record that none of the successful applicants was handicapped or had an arrest record, an inference of unlawful discrimination could also be drawn. Complainant has thus established a prima facie case.

The respondent did articulate legitimate, non-discriminatory reasons for its hiring decisions. It is clear from the record that each successful applicant had a higher interview score than complainant and a more stable work record. Although some may not have had as much custodial experience as complainant, experience was not a heavily weighted selection criterion (see Finding of Fact No. 7). Complainant has not made any showing that the selection criteria applied by respondent were not reasonably job-related,

that they were not uniformly applied to the candidates, or that the interviewer's comparisons of complainant's qualifications and responses to interview questions with those of the other candidates did not actually reflect the judgment of the interviewers or the information available to the interviewers at the time. Finally, in order to rebut respondent's stated reasons, complainant must show that such reasons were pretextual. To show pretext, complainant has argued that he had more custodial experience than some of the successful applicants, and, therefore, should have received a higher interview score than they. As stated above, however, experience was not a heavily weighted selection criterion. Moreover, respondent has offered evidence that those with arguably less actual custodial experience than complainant (Mark Kraklow, Clarence Maack, Helen Ewoldt) had very stable employment records in other lines of work and other experience such as experience working with students or experience as a supervisor which respondent felt could be useful for someone employed as a member of a team in a school setting. Complainant has failed to show pretext in this regard.

Complainant further argues that the failure of the University of Wisconsin - La Crosse to provide a copy of the LaMack memo to Mr. Johnson and Mr. Rugg prior to the interviews demonstrates pretext. The record shows, however, that if in fact the LaMack letter was not forwarded to the interviewers prior to complainant's interview, this procedure is consistent with a standard operating procedure of the University of Wisconsin - La Crosse designed to equalize the selection process, i.e., to insure that the same type of information regarding each candidate is available to the interviewers. Complainant has failed to show pretext in this regard.

One of the factual issues in this case involves whether the interviewers knew of complainant's handicap at the time they scored complainant's interview. As Finding of Fact No. 10 indicates, the Commission resolved this factual issue in respondent's favor. It is important to note in this regard that complainant, in his testimony, admits that it was possible that he told Mr. Rugg and Mr. Johnson of his handicap after the interview was completed. In Bisbee v. DER, Case No. 82-PC-ER-54 (1983), the Commission concluded that, "common sense dictates that, in order to prevail, 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." (See also Rasmussen v. DHSS, Case No. 81-PC-ER-1391 (1982)). However, even if the interviewers had been aware of complainant's handicap, complainant has failed to show that the hiring decision was based on anything other than his qualifications for the positions as measured by his interview performance and the scoring of his performance.

Complainant points to the inconsistency in the record regarding whether or not the interviewers saw the LaMack letter prior to scoring complainant's interview (see Finding of Fact No. 6) as evidence of pretext. This argument would be more persuasive if there was a dispute as to the interviewers' awareness of complainant's arrest record. Such is not the case. Both Mr. Johnson and Mr. Rugg acknowledge that they were aware of complainant's arrest record at the time of his interview and discussed it with him at that time. (see Finding of Fact No. 9). This inconsistency appears then to relate more to the reliability of Mr. Johnson's and Mr. Rugg's long-term memory than to Mr. Johnson's or Mr. Rugg's credibility.

The Commission concludes the complainant has failed to demonstrate pretext in this regard.

ORDER

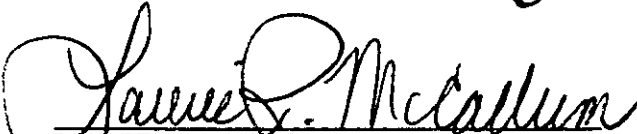
This complaint is dismissed.

Dated: October 10, 1985 STATE PERSONNEL COMMISSION


DENNIS P. MCGILLIGAN, Chairperson

LRM:jmf
JEN/2


DONALD R. MURPHY, Commissioner


LAURIE R. MCCALLUM, Commissioner

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