STATE OF WISCONSIN PERSONNEL COMMISSION

TOM L. McFARLAND,
MARTINUS J. JOUBERT,

Complainants,

v.

President, UNIVERSITY OF WISCONSIN SYSTEM (Whitewater),

Respondent.

Case Nos. 85-0167-PC-ER
86-0026-PC-ER

FINAL ORDER

This matter is before the Commission to consider the proposed decision of the hearing examiner. The Commission has considered the parties' arguments and objections and has consulted with the hearing examiner. The Commission concludes that the proposed decision and order should be adopted as the final resolution of this matter, with the exception of the discussion of disparate impact. For the reasons expressed in the substitute language, the Commission deletes all of the discussion in the proposed decision starting with the second full paragraph ("In a typical disparate impact case....") on page 14 and substitutes the following:

However, one unifying theme present in these and all other cases of which we are aware where the courts have applied a disparate impact analysis is the presence of an employment policy, practice, procedure, criterion or test that serves a personnel, as opposed to a program function. In a typical disparate impact case, the court looks to the question of whether the employment practice in question in fact bears the

requisite relation to its purported purpose -- i.e., whether it meets the test of business relationship or business necessity. Most of the disparate impact cases have involved facially neutral employment tests or training and experience requirements which have a disparate impact on protected groups, and the ultimate question is whether the test or requirement measures what it purports to measure.

The instant cases vary significantly from these cases. The university based its decision to prohibit the faculty exchange in question essentially on political grounds, and not on the more traditional kinds of employment concerns discussed above. The decision certainly had nothing to do with a judgment about complainant Joubert's fitness to teach mathematics at UW-Whitewater, for example. Rather, it basically was motivated by the belief that for political and moral reasons it was unwise for the university to engage in intercourse with a South African institution. Therefore, while the decision impacted on both complainants, it was not based on employment-oriented criteria.

The university's position in this matter can be analogized to the decision of an employer in the private sector to cease operations in South Africa or some other area for moral, political or economic reasons. While such a decision might have a disparate impact on a protected group, it seems questionable whether under any circumstances it could give rise to a finding of a Fair Employment Act violation under the disparate impact model.

For example, if the Manpower, Inc., board of directors voted to withdraw its operations from Alabama either because that state had not ratified the Equal Rights Amendment, or because of market conditions there, this might impact more heavily on Manpower's black employes in

terms of layoffs and other facets of employment. However, if a black Manpower employe were laid off or denied a transfer into what had been considered a desirable position in Alabama as a result of this business decision, could this give rise to a disparate impact claim under the Fair Employment Act? The answer to this question appears rather clearly to be no.

The parameters and elements of the disparate impact model of employment discrimination must be taken from the reported cases, because neither Title VII nor the Wisconsin FEA defines discrimination, much less the disparate impact model of discrimination. We are unaware of any cases under either Title VII or the state FEA which have extended the reach of the disparate impact model to an employer's non-personnel-oriented business decision covering such things as where to do business and how to deploy capital, which will have obvious effects, and perhaps even disparate impacts, on its employes. The reason why the disparate impact model of employment discrimination cannot be applied to such decisions is that they are not the kind of employment or personnel decisions which Title VII and the FEA are intended or equipped to address, albeit such decisions frequently have significant employment ramifications.

The respondent university, although a non-profit educational institution, can be seen, like Manpower, as having a program or business sphere and a personnel or employment sphere. In order to determine whether a decision having a personnel impact belongs to one sphere or the other, it may be necessary to scrutinize the reason for the decision.

To return to the prior hypothetical, if Manpower decided to deny a requested transfer to Alabama because of a business decision to

discontinue operations in Alabama in the near future, this would not give rise to liability under the FEA even if its decision had a disparate impact on a protected group. If, however, the transfer were denied because of a requirement that employes in Alabama have degrees from the University of Alabama because the employer believed employes with such a background could relate better to Manpower's customers, then it could give rise to liability under a disparate impact theory.

The university's decision to deny the faculty exchange in this case, like the former decision in the foregoing hypothetical, was not based on personnel reasons, but rather on a program decision as to whether the respondent university should engage in intercourse with a South African institution. That this decision affected the complainant's conditions of employment does not make it susceptible to analysis under the disparate impact model of discrimination.

Neither of the cases cited by the commission in its preliminary decision is at odds with this conclusion. Espinoza v. Farah Manufacturing Co., Inc., 414 U.S. 86, 94 S.Ct. 334, 38 L.Ed.2d 287 (1973), dealt with an employment policy restricting employment to American citizens. The restriction in Molerio v. Federal Bureau of Investigation, 749 F. 2d 815, 36 FEP Cases 586 (D.C.Cir. 1984), was an employment criterion tied to the employer's belief that employes with relatives in certain countries would be more likely to be security risks.

Finally, it should be noted that an employer's ostensible non-personnel business decision may not always be outside the reach of the FEA. If such a decision were motivated by an intent to discriminate in employment, it might be actionable under the FEA in a disparate treatment context. For example, if a company closed down a branch office in a

neighborhood with an increasing minority population rather than to have to face hiring minorities, this could be unlawful. However, it is unnecessary to address this legal issue, since there is no evidence that the university's decision was motivated by a discriminatory animus against employing persons of South African origin.

Notwithstanding the foregoing, the Commission notes for the purpose of attempting to avoid a remand in the event the foregoing analysis were disturbed on judicial review, that if a disparate impact analysis were appropriate here, it would concur in the analysis set forth in the proposed decision.

ORDER

The proposed decision and order, a copy of which is attached hereto, is incorporated by reference and adopted as the Commission's final disposition of this matter with the exception that the discussion commencing with the second full paragraph on page 14 is deleted and the foregoing discussion on the question of whether a disparate impact analysis is appropriate is substituted in its place. Having concluded that there is no probable cause to believe respondent discriminated against complainant on the basis of national origin as alleged, these complaints are dismissed.

Dated: September 8, 1988 STATE PERSONNEL COMMISSION

GERALD F. HODDINOTT, Commissioner

DONALD R. MURPHY, Commissioner

LAURIE R. McCALLUM, Commissioner

AJT:rcr
RCR03/2

Attachment

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STATE OF WISCONSIN PERSONNEL COMMISSION

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* * * * * * * * * * * * * * * * *

PROPOSED
DECISION
AND
ORDER

NATURE OF THE CASE

These are complaints of discrimination on the basis of national origin. These cases were heard as appeals of Initial Determinations of No Probable Cause to believe such discrimination had occurred. Hearing was held before Dennis P. McGilligan, Chairperson, on October 30, 1987. The final brief was filed on January 4, 1988. On May 5, 1988, Laurie R. McCallum, Commissioner, was redesignated as the hearing examiner in these cases.

FINDINGS OF FACT

1. Complainant McFarland teaches in the Department of Mathematics and Computer Science at the University of Wisconsin at Whitewater (UW-Whitewater). Like other faculty members, he is allowed to request permission to arrange "exchanges" with faculty members from other institutions, whereby the two individuals exchange places for a determined period of time. The preliminary arrangements for such exchanges are made by the individuals themselves, but they are subject to approval by the

UW-Whitewater. Faculty involved in such exchanges remain on the payrolls of their institutions of origin. While at UW-Whitewater, exchange faculty are expected to teach regular courses, hold office hours, grade exams and conduct seminars; are provided an office and clerical support; are afforded the use of UW-Whitewater facilities; are given a staff identification card; and are required to abide by UW-Whitewater's regulations and policies to the extent they are applicable.

2. In the Spring of 1985, complainant McFarland agreed to many of the details of a proposed exchange with complainant Joubert, a faculty member in the Department of Applied Mathematics at the University of Zululand in the Republic of South Africa. The exchange was planned for a period of several months beginning in January 1987.

3. However, in early August 1985, complainant McFarland received a letter from Richard Schauer, his Department Chairman, in which Schauer stated, in part:

> "I write this letter to inform you that I can no longer maintain a position of neutrality on the matter of your proposed exchange visit to the Union of South Africa. ...It could be argued that faculty exchanges are beneficial and are largely private arrangements between the participating individuals. My present view is that the important unresolved social issues raise moral and political questions that transcend exchanges with South African Universities. The symbolic content of your proposed visit has risen so that it is no longer unconnected to the moral and political standing of this department.... In the department meeting this Fall when your proposed exchange is considered, I will oppose department approval. Last year a Faculty Senate resolution of mine was adopted that asked that the State Investment Board sever its connections with companies doing business in South Africa. It is my intent this year to ask that all faculty exchanges between UW-Whitewater and South Africa be discontinued...."

The letter indicated that copies were being sent to the Chancellor, the Vice Chancellor, and the Dean.

4. On September 5, 1985, H. Gaylon Greenhill, Vice Chancellor and Dean of Faculties of the UW-Whitewater, wrote to complainant Joubert in South Africa, stating:

> Professor Tom McFarland of our Department of Mathematics and Computer Science had informed me of your discussions about a faculty exchange to begin in January of 1987. While his discussions have been in good faith, the current situation in South Africa makes the possibility of an exchange unwise. In fact, UW-Whitewater has adopted a policy of not approving any future exchanges with the Republic of South Africa.
>
> I regret any inconvenience that this termination of discussions about a possible exchange might cause you, but hope you understand why this action is taken.

The Vice Chancellor's letter indicated that copies were being sent to the Chancellor, to Acting Dean Faulton, and to complainant McFarland.

5. The faculty meeting Professor Schauer mentioned was held on September 17, 1985. Minutes of the meeting state that Professor Schauer himself did not attend because he was ill. At the meeting, a motion was made which approved complainant McFarland's particular exchange but registered disapproval of the South African government's policies of racial segregation. The motion passed 9 in favor, 2 against, with 3 abstentions. The precise wording of the motion was:

> THE MATHEMATICS DEPARTMENT hereby approves the exchange of faculty, in which Thomas McFarland will teach at the University of Zululand in Natal, South Africa, and Dr. M. J. Joubert will come to the University of Wisconsin-Whitewater, each faculty member performing approximately the teaching duties of the other during the spring semester of 1987. As is the tradition with visiting faculty, it is understood that Dr. M. J. Joubert will teach approximately 9 credits per semester while he is here at Whitewater. The Mathematics Department hereby grants to the Chairman, Richard Schauer, the authority to pursue the best interests of the department in arranging specific details of this faculty exchange.
>
> It is further understood that the University of Wisconsin-Whitewater shall have no obligations, written or implied, direct or indirect, to the government of the Republic of South Africa, whose policies of racial segregation are abhorrent to the Mathematics Department, and it is sincerely hoped that the

> longstanding tradition of FREEDOM OF ASSOCIATION and SPIRIT OF UNCENSURED INQUIRY which has heretofore characterized this university's exchange program will aid in the dismantling of South Africa's racial barriers.

6. The next day, complainant McFarland wrote to Vice Chancellor Greenhill, asking for a response to his request for approval of the proposed exchange. In a letter dated September 20, the Vice Chancellor responded:

> Please be advised that I do not approve of any faculty exchanges with institutions in South Africa for the reasons I indicated when I initially indicated University policy not to approve any exchanges with South African universities given conditions there. My decision can be appealed to Chancellor Connor.

7. The policy referred to by Vice Chancellor Greenhill was an informal policy established by the Vice Chancellor, not a formal policy adopted through the shared governance procedures of the University of Wisconsin.

8. Complainant McFarland did appeal the decision, claiming among other things that the refusal to approve the exchange constituted discrimination in employment. The Chancellor on October 15, 1985, replied that he was advised by the "System legal counsel" that the denial of the exchange did not constitute discrimination in employment, and stated:

> Since the legal basis for your appeal of Vice Chancellor Greenhill's decision does not exist and since this is a matter for institutional judgment, I am reaffirming and concurring in the Vice Chancellor's decision to deny this exchange.

The Chancellor's letter encouraged complainant McFarland to pursue the possibility of an alternative exchange.

9. At the time that he made his recommendation not to approve the proposed exchange, Professor Schauer was aware or had assumed that complainant Joubert was a citizen of South Africa.

10. At the time that he withheld approval of the proposed exchange, Vice Chancellor Greenhill was not aware of complainant Joubert's national origin. Vice Chancellor Greenhill based his decision to withhold approval of the proposed faculty exchange on the following three factors:

a. The failure of the proposed faculty exchange to win the approval of the Chairman of the Department which would be affected by the exchange, i.e., Professor Schauer;

b. The political ramifications for the UW-Whitewater in view of the fact that public, media, and legislative attention was focused on the South African apartheid/divestment issue at the time; and

c. A concern for complainant McFarland's safety in view of the volatile and unstable political situation in South Africa at the time.

11. On February 10, 1978, the Board of Regents of the University of Wisconsin system adopted Resolution No. 1590 which stated as follows:

> That in accordance with §36.29(1), Wis. Stats., all investments "made in any company, corporation, subsidiary or affiliate which practices or condones through its actions discrimination on the basis of race, religion, color, creed or sex..." be divested in as prudent but rapid manner as possible.

An accompanying document characterized as an interpretation of Resolution No. 1590 stated, as follows:

1. It shall be applied to corporations doing business in South Africa, without regard to the number of individuals employed.

2. The words "which practices or condones through its actions" shall be interpreted to mean "employing persons in nations which by their laws discriminate on the basis of race, religion, color, creed or sex."

12. Respondent had approved a faculty exchange between complainant McFarland and a faculty member at the University of Natal in South Africa

in 1982, and had hired a faculty member at the University of Natal as a visiting professor at UW-Whitewater in 1982.

13. Respondent granted complainant McFarland a leave of absence without pay for the spring 1987 semester with knowledge that he intended to use such leave to teach at the University of Zululand in South Africa.

14. An Initial Determination finding No Probable Cause to believe discrimination had occurred as alleged in Case No. 85-0167-PC-ER and Case No. 86-0026-PC-ER was mailed by the Commission to complainant McFarland and to complainant Joubert on March 23, 1987. The accompanying letter from the Commission stated:

> If you feel that this "no probable cause" determination is in error and if you wish to have a hearing on the issue of probable cause then you must, within 30 days of the date of this letter, file a letter of appeal with the Commission. The appeal must be in writing, must specifically state the grounds on which it is based, and must include your name, the case number, and a statement that you request a hearing on the "no probable cause" determination. The appeal must be actually received by the Commission within the 30 day period rather than merely having been mailed within that period. (§PC 4.03(3), Wis. Adm. Code)

In a letter received by the Commission on April 9, 1987, complainant McFarland filed an appeal of the no probable cause Initial Determinations in Case No. 85-0167-PC-ER and Case No. 86-0026-PC-ER. Complainant McFarland had indicated to the Commission and to respondent on occasions prior to this that he had been given permission by complainant Joubert to act on his behalf in matters relating to Case No. 86-0026-PC-ER. In a letter dated April 9, 1987, postmarked on April 10, 1987, and received by the Commission on April 27, 1987, complainant Joubert appealed the no probable cause Initial Determinations in Case No. 85-0167-PC-ER and Case No. 86-0026-PC-ER and stated in regard to the Initial Determination in Case No. 86-0026-PC-ER that: "I also wish to add that your letter arrived in

Zululand while I was away on university business and that left me with very little time to study and react to your letter and still meet the deadline."

15. Respondent's decision not to approve the proposed faculty exchange was based on political and moral considerations, not on complainant Joubert's national origin.

16. Respondent's policy not to approve faculty exchanges between professors at UW-Whitewater and professors at South African universities had a disparate impact upon South Africans but did not violate the Wisconsin Fair Employment Act in view of the legitimate, non-discriminatory program reasons for the policy.

CONCLUSIONS OF LAW

1. These cases are properly before the Commission pursuant to §230.45(1)(b), Stats.

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

3. The complainants have the burden to prove that there is probable cause to believe respondent discriminated against them on the basis of national origin as alleged.

4. The complainants have not sustained their burdens of proof.

DECISION

At the hearing, respondent renewed its objections to jurisdiction. These objections were outlined and discussed in the Commission's Interim Decision and Order dated September 4, 1986, in these cases.

One of the points addressed by the Commission in such Interim Decision and Order was whether complainant Joubert's relationship to the respondent would be considered that of "employment." The Commission decided that at that stage of the proceeding, "... it cannot be said as a matter of law

complainant Joubert would not be considered respondent's employe for FEA purposes...." In the Initial Determination, it was stated, in regard to this issue that, "Where the complainants' burden of proof is less than at the merit stage, there are enough incidents of the employment relationship, as discussed in the Interim Decision, for a conclusion that complainant Joubert would have been in an employment relationship under the FEA."

As an exchange professor, complainant Joubert would have been expected to teach at least 9 hours per week at UW-Whitewater, hold office hours, grade exams, and conduct seminars; would have been provided an office and clerical support; would have been afforded the use of UW-Whitewater facilities; would have been given a staff identification card; and would have been required to follow applicable UW-Whitewater policies and regulations. Technically, the professors involved in a faculty exchange remain on the faculties of their respective universities. However, to permit this technicality to deprive them of a forum in which to air their allegations of discrimination is to elevate form over substance in a case (Case No. 86-0026-PC-ER) such as the one before us in which so many incidents of the employment relationship are present and to ignore the FEA's liberal construction policy.

Respondent also continues to condend that the Commission lacks jurisdiction over these cases because a faculty exchange is not a "term, condition or privilege of employment" within the meaning of the FEA and continues to contend that complainant McFarland does not have standing to bring Case No. 85-0167-PC-ER. The Commission concludes that there is nothing in the record of these cases to justify a different conclusion in regard to these contentions than that reached in the Interim Decision and Order.

A decision on a procedural matter was also reserved for decision at this time. Respondent contends that complainant Joubert did not file a timely appeal of the No Probable Cause Initial Determination in Case No. 86-0026-PC-ER and the case should be dismissed on that basis.

Section PC 4.03(3), Wis. Adm. Code (1980), states:

> When there is an Initial Determination of no probable cause to believe that discrimination has been or is being committed, notice thereof shall be served upon the parties, together with copies of the complaint and the Initial Determination. Within 30 calendar days after the date of such service, the complainant may petition the Commission for a hearing on the issue of probable cause wherein the Commission may affirm or reverse the Initial Determination. If reversed, the matter shall then be set for conciliation or hearing in conformance with PC 4.04 or PC 4.07, Wis. Adm. Code.

This 30-day filing requirement has been held not to be jurisdictional. (Vesperman v. UW-Madison, Case No. 81-PC-ER-66) (6/4/82)), i.e., failure to comply with the requirement does not automatically deprive the Commission of authority to hear the case.

There are several factors militating against the adoption of respondent's position in this regard. First of all, complainant Joubert's designated representative clearly indicated in the letter received by the Commission on April 9, 1987, that such letter constituted an appeal of the no probable cause Initial Determination in Case No. 85-0167-PC-ER and Case No. 86-0026-PC-ER. Not only is it a well-established practice for the Commission to accept representations made by a person designated by a party as his or her representative, but it would also be difficult for respondent to argue on these facts that they failed to receive notice of complainant Joubert's appeal until he filed his letter with the Commission. In addition, not only was complainant away on business when the Initial Determination in Case No. 86-0026-PC-ER arrived at his address but, as the postmark

on his letter of appeal indicates, it took 17 days for his letter to reach the Commission. In view of the fact that respondent has failed to show lack of diligence on complainant Joubert's part or actual or potential prejudice to respondent's case, the Commission in the exercise of its discretion denies the motion to dismiss Case No. 86-0026-PC-ER.

In McDonnell Douglas v. Green, 411 U.S. 792, (1973) and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), the United States Supreme Court developed a framework for analyzing complaints of employment discrimination. In an appeal of a no probable cause determination such as those before us, a similar analysis is appropriate, although the ultimate burden on the complainant is less. The complainant need not establish that discrimination occurred, but rather, that there is reasonable grounds for beliefs 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. §PC 4.03(3) (1980), Wis. Adm. Code.

Under the McDonnell Douglas framework, the complainant has the initial burden to establish a prima facie case of discrimination. The respondent then has the burden of proceeding to articulate a legitimate, non-discriminatory rationale for the action taken, after which the burden of proceedings shifts to the complainant to attempt to show the articulated rationale was in reality a pretext for unlawful discrimination. This method of analysis can be applied to either of the two models of discrimination under the FEA, disparate treatment or disparate impact. These theories of discrimination were discussed by the Supreme Court in Teamsters v. United States, 431 U.S. 324, 335, 52 L.Ed. 2d 396, 415, 97 S.Ct. 1843, 14 FEP Cases 1514, 1519, n.15 (1977), as follows:

> "'Disparate treatment'... is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some instances be inferred from the mere fact of differences in treatment....
>
> Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity.... Proof of discriminatory motive, we have held, is not required under a disparate impact theory...."

The most general statement of the elements of a prima facie case as to the disparate treatment model is that 1) The complainant must be a member of a group protected by the FEA, 2) he or she must suffer an adverse employment action, and 3) this must occur under circumstances which "give rise to an inference of unlawful discrimination" Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253, 67 L.Ed. 2d, 207, 215, 101 S.Ct. 1089 (1981). These complaints contain at least the first two elements of a prima facie case at this probable cause stage of the proceedings. Complainant Joubert is of South African national origin and, as discussed above, the Commission finds that complainant McFarland has standing to raise a claim based on complainant Joubert's national origin. Both complainants suffered an adverse employment action in the denial of their faculty exchange. However, it is doubtful whether the circumstances surrounding the denial are inferential of national origin discrimination. The respondent's objection to the proposed faculty exchange may be seen as running not to complainant Joubert's national origin, but rather to his association with a South African institution, and in the fact that complainant McFarland would be teaching at a South African institution. Presumably the respondent would have the same objection to the proposed

faculty exchange if complainant Joubert were of British origin and teaching in South Africa on a temporary basis. Presumably respondent would have no objection to the exchange if complainant Joubert was on the faculty of a British university. The Commission concludes, therefore, that complainants have failed to establish, within the context of a probable cause analysis, a prima facie case of discrimination on the basis of national origin under the disparate treatment model.

If complainants had so established a prima facie case, respondent would then have the burden of proceeding to articulate a legitimate, non-discriminatory rationale for the action taken. The Commission finds that the rationale articulated by respondent for its action in this regard as outlined in Finding of Fact 10, above, is both legitimate and non-discriminatory.

The burden of proceeding under the disparate treatment model then shifts to the complainants to show the articulated rationale is a pretext for unlawful discrimination on the basis of national origin. It is clear from the record that respondent's decision to withhold approval of the proposed exchange was based on political and moral considerations, not on complainant Joubert's national origin. The record even shows that Vice Chancellor Greenhill was not even aware of complainant Joubert's national origin at the time he decided to withhold approval of the proposed faculty exchange. It is clear from the record that respondent, in view of the public, media and legislative attention focused on the apartheid/divestment issue, at the time, decided to withhold approval of the proposed faculty exchange in order to avoid, by avoiding exchanges with faculty at South African universities, even the appearance that UW-Whitewater was "doing business" with or in South Africa. It is not possible to infer from this

any motive to discriminate against complainant Joubert because he is a South African. It is clear that the subject action was taken because complainant Joubert was a member of the faculty of a South African university, not because he is a South African.

Complainants allege in this regard that respondent's previous approval of a 1982 faculty exchange with a South African university faculty member, its 1982 hiring of a faculty member from a South African university as a visiting professor, and its approval of a leave of absence without pay for the spring 1987 semester for complainant McFarland with the knowledge that he intended to use such leave to teach at a South African university demonstrate pretext. However, the political climate in 1982 was different than that in 1985 and, as a result, it was not unreasonable for different policies regarding faculty exchanges or visiting professorships to be formulated in response to such different political climates. In addition, a leave of absence differs significantly from a faculty exchange, i.e., while on a leave of absence without pay, complainant McFarland was not paid a salary by UW-Whitewater, and there was no faculty member from another university performing his duties at UW-Whitewater. As a result, it is not possible to draw an inference of pretext from these prior or subsequent practices or incidents.

With respect to the disparate impact model, the seminal case was Griggs v. Duke Power Company, 401 U.S. 424, 429-430, 91 S.Ct. 849, 853, 3 FEP 175 (1981). The Court discussed the conceptual underpinnings of disparate impact as follows:

> The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employes over other employes. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent,

> cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.
>
> * * *
>
> ...The Act proscribed not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.

Griggs focused on facially neutral employment criteria which tend to perpetuate the effects of prior discriminatory practices. The Court noted that "because they are Negroes, petitioners have long received inferior education in segregated schools...." id. Other cases have dealt with employment practices or criteria which had a disparate impact not because of past discrimination, but because of certain characteristics of racial or gender groups. For example, a minimum height requirement may have a disparate impact on females because they tend to be shorter than males. See e.g., Dothard v. Rollinson, 431 U.S. 321, 53 L.Ed. 2d 786, 98 S.Ct. 2720 (1977).

In a typical disparate impact case, a court looks to the question of whether the employment practice under consideration in fact bears the requisite relation to its purported purpose, i.e., whether it meets the test of business relationship or business necessity.

In the instant cases, respondent's 1985 faculty exchange policy presumably had a disparate impact on South Africans since it must be presumed that the majority of faculty members at the University of Zululand were South Africans. The next question then must be whether the policy meets the test of business relationship or business necessity.

A legitimate "business" concern of an entity like the UW-Whitewater is its public image. To build and maintain a positive public image, an entity like the UW-Whitewater must be sensitive to and respond to issues of public

concern when establishing its policies. It is undisputed that, at the time the subject faculty exchange was proposed, a great deal of public concern and outrage was focused on South Africa's apartheid policy and a great deal of legislative attention was focused on proposals to divest U.S. holdings in South Africa. In response to this situation, respondent decided that it was advisable, as a means of maintaining its positive public image, to discontinue any practices which created an actual or perceived association with a South African university. This is the sort of program decision or "business" decision an employer is entitled to make regardless of the disparate impact it may have on a protected group. The subject policy is the sort of policy that is clearly designed to carry out a legitimate, non-discriminatory program goal of the employer, i.e., it clearly meets the test of business relationship or business necessity. As a result, it must be concluded that there is no probable cause to believe that respondent discriminated against complainants on the basis of national origin as alleged.

ORDER

There is no probable cause to believe respondent discriminated against complainants on the basis of national origin as alleged and these cases are dismissed.

Dated: _____,1988 STATE PERSONNEL COMMISSION

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DENNIS P. McGILLIGAN, Chairperson

LRM:jmf
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DONALD R. MURPHY, Commissioner

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