

STATE OF WISCONSIN

PERSONNEL COMMISSION

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 *
 JOYCE LARSON, *
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 Complainant/Appellant, *
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 v. *
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 Secretary, DEPARTMENT OF *
 INDUSTRY, LABOR AND HUMAN *
 RELATIONS, *
 *
 Respondent. *
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 Case Nos. 86-0019-PC-ER *
 86-0013-PC *
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 * * * * *

DECISION
AND
ORDER

NATURE OF THE CASE

This is an appeal and a charge of discrimination on the basis of age, sex, and marital status relating to the same hiring decision. On October 26, 1987, one of the Personnel Commission's equal rights investigators issued an initial determination finding no probable cause to believe that complainant had been discriminated against as alleged. Complainant appealed such no probable cause determination. A consolidated hearing of the appeal and the probable cause issue relating to the discrimination complaint was conducted by Laurie R. McCallum, Commissioner, on August 12, 1988. The briefing schedule was completed on October 21, 1988.

FINDINGS OF FACT

1. Appellant/Complainant (hereafter app/comp) was originally employed by respondent as a Job Service Specialist 1, Employment Service in respondent's Chippewa Falls office effective October 20, 1980. This position did not involve the determination of Unemployment Compensation benefits. After app/comp successfully completed probation in this

position, the position was eliminated and app/comp was laid off effective August 8, 1981.

2. In July of 1982, respondent appointed app/comp to an LTE Clerical Assistant position in Unemployment Compensation processing in its Sheboygan office.

3. Effective October 16, 1982, respondent appointed app/comp to a seasonal Job Service Specialist 1 position in its Beloit office. The duties and responsibilities of this position are accurately described in a position description signed by app/comp on October 18, 1982, as follows in pertinent part:

- A. Determination of eligibility in disputed claims.
 - A1. Question claimants to obtain information regarding events leading up to separation.
 - A2. Contact employers to obtain facts and information of claimant's statement regarding separation.
 - A3. Utilize labor market specialist and other sources for additional information relevant to determining claimant's eligibility.
 - A4. Evaluate information received from all sources, review proper section of UI Law, and following department procedures and policy, determine the claimant's eligibility.
 - A5. Record all findings on proper forms, dictate local office determination setting forth such decision to allow or deny benefits.
 - A6. Review initial disputed claims to take Administrative notice of appropriate issues.
 - A7. Assure that first payment deadlines are met as well as issue all determinations in a timely manner.
- B. Determination of claimant's eligibility for benefits based on issues arising during course of claim.
 - B1. Question claimants regarding availability and ability to work depending on wage expectations, hours and type of work desired, distance willing to travel and location of job, physical limitations, etc.
 - B2. Investigate questions of fraud involving failure to report work and wages, failure to report all relevant facts such as job offers, self-employment, etc.
 - B3. Investigate questions of eligibility such as not an employee, CETA employment, independent contractor, etc.
 - B4. Investigate issues of job refusals and failure to apply when referred by the Job Service to determine if good cause exists.

- B5. Interview claimants regarding failure to register or file claims in a timely manner to determine if good cause exists and if benefits should be allowed or denied.
 - B6. Check with labor market specialist to determine how claimant's expectations affect chances of obtaining work.
 - B7. Evaluate all information and facts, review UI Law and Administrative code, follow policy and procedures to determine eligibility.
 - B8. Record all information on proper forms, following departmental policy practices and procedures and tally all nonmonetary determinations.
 - B9. Dictate findings and issue determinations setting forth eligibility or denial of benefits to claimants.
 - B10. Assure that all of the above are done in a timely manner.
- C. Explanation of UI Law and services.
 - D. Registration of claimants under all regular UI programs in group session.
 - E. Registration of claimants for Extended Benefits.
 - F. Registration of WERP claimants for Employment Services, as well as completion of all items to be covered in the WERP interview UC-355.
 - G. Development, scheduling and conducting Job Search Workshops.

This position became permanent on March 6, 1983. During her tenure in this position, app/comp attended training sessions on Basic Adjudication (April 11-15, 1983) and Managing Anger and Conflict (June 8, 1983).

4. Respondent appointed app/comp to a Job Service Specialist 1, Workshop Leader position in its Wisconsin Rapids office effective August 8, 1983. After app/comp successfully completed probation in this position, the position was reclassified to the Job Service Specialist 2 (JSS 2) level.

5. App/comp's JSS 2 position in respondent's Wisconsin Rapids office was eliminated effective June 30, 1985. In lieu of layoff, app/comp accepted transfer to a JSS 2 position in respondent's Marshfield office which is 42 miles from app/comp's home. At this time, there was a JSS 1 project position in the Wisconsin Rapids office.

6. In a letter dated November 22, 1985, Darrel Pufahl, Local Office Manager of respondent's Wisconsin Rapids office, wrote to app/comp and at least 5 others, as follows:

Currently there is a full-time job opening for an Unemployment Benefit Specialist 1, 2 or 3 at Wisconsin Rapids in the Adjudication Unit of the Department of Industry, Labor and Human Relations.

If you are interested in interviewing for this position please contact Kathleen Raygo at (715)421-2000 within 5 days of this letter's post mark date. If you fail to respond to this inquiry within the 5 day limit, I will assume that you are not interested in this position.

Please note this position, after the individual is trained, would require travel to different offices throughout the state and working in these offices for periods of time to replace other staff as vacancies occur and as the need arises. The person in this position would have to have their own transportation. The State would pay meals, lodging and mileage. The duration of the work at these offices would be anywhere from one or two weeks up to several months.

7. The duties and responsibilities of this UBS position are accurately described in a position description signed by Mr. Pufahl on October 10, 1985, as follows:

- A. Investigation of Unemployment Compensation benefit eligibility issues raised by the employer, the department or the actions of the claimant.
 - A1. Review documents and identify eligibility question(s) which must be resolved.
 - A2. Identify and obtain background/supporting facts prior to conducting confrontation interview.
 - A3. Interview claimant, in person or via telephone, and elicit claimant's position/rebuttal in response to allegations that would suspend/disqualify the claimant from receipt of Unemployment Compensation.
 - A4. Prepare a clear and concise claimant statement which responds to the pertinent allegations of ineligibility.
 - A5. Identify and obtain additional facts/statements from other parties or the principals which are needed to resolve eligibility issues.
 - A6. Summarize additional information in a clear and concise manner, allegations of ineligibility with supporting facts.
- B. Resolution of eligibility issues which were raised by an employer, the agency or the actions of the claimant which were investigated by the employe or other staff member.

- B1. Review investigation (goal A). Make "findings of fact" which are necessary to resolve issues pursuant to requirements of the US Secretary of Labor.
 - B2. Apply appropriate eligibility rationale to the "findings of fact".
 - B3. Prepare and issue an initial determination which resolves issues in a clear and concise manner, and also provides the principal parties with the critical facts so that either party can base a decision to appeal.
 - B4. Ensure that prior to mailing, the determination is factually correct, findings are adequately documented, the decision reflects a resolution consistent with departmental policy and is written in a professional manner.
- C. Assessment of claimants continuing eligibility for benefits (Eligibility Review Procedure)
- C1. Review claimant's attachment to labor market including prior waiver of work registration and work search requirements.
 - C2. Identify questions of "availability for" or "ability to work." Investigate and resolve questions that, without further investigation, would disqualify or suspend the claimant's eligibility for benefits (Goals A & B).
 - C3. Review and determine the acceptability of the claimant's work search. As appropriate, assist claimant to develop an acceptable work search plan. Monitor subsequent performance of previously established work search plans.
- D. Explanation of the effects of computations, initial determinations and appellate level decisions which resolve benefit eligibility questions. Provide general information about Wisconsin's UC law and similar federal/state unemployment compensation laws.
- D1. Testify at public hearings as a representative of the department.
 - D2. Respond to outside agency request for information about Wisconsin's UC program.
 - D3. Answer complex employer or claimant benefit related inquiries.
- E. Performance of other duties when necessary on a fill in basis, including but not limited to, claimant assistance functions.

The person in this position will be required to travel to various UC offices throughout the State of Wisconsin performing the above duties as required by the Department.

8. App/comp and 5 other candidates were interviewed for this position. Each of the candidates was asked to provide a written answer to the following:

This job requires skills at written communications -- briefly give any background which you have had in written communications that you feel would help in this position. We will be looking at

spelling, penmanship, grammar, clarity of sentence structure and how well you organize your thoughts.

Each candidate was also asked to give an oral answer to the following:

An ideal adjudicator is one who is compassionate but not sanguine; does not get emotionally involved; is able to distinguish fact from fiction; never gets flustered; is slow to anger; never preaches; does not have a "bone of prejudice"; is able to write like Hemingway; can make a decision which is based on fact and logic; and whose determination is NEVER reversed.

Unfortunately, such a person does not exist. However, adjudicators must develop the art of interviewing, fact-finding and decision writing to the best of their ability. Sloppy work should never be the norm.

We must learn to communicate with people in the manner in which we expect others to treat us.

We must learn to weigh the facts objectively, follow the guidelines and decide the issues, regardless of personalities.

We must use a writing style that is understandable to the involved parties. Do not write "below" or "above" the reader's capabilities. Do not use slang.

Unemployment Compensation is not a welfare dole; it is an earned right to which the claimant is entitled unless disqualified by a specific provision of the Law. As investigators, this should always be foremost.

The Department's principal administrative responsibility is to see that benefits are paid to eligible individuals and denied to individuals not eligible under the law.

We are now going to ask you three questions related to this job. As you answer each one, please try to relate your responses to your work experience, education, training and other life experiences.

1. The fact finding must develop certain skills and use appropriate interviewing skills. What methods and techniques would you use to initiate and control the interview in order to obtain all of the necessary facts?

- [2]. You will come into contact with some irate claimants. What methods and techniques would you utilize to keep the situation under control?

- [3]. This position will require extensive travel statewide to fill in as needed. What problems do you feel you would have that would hinder your ability to be away from home overnight for periods from one week to several months?

9. The interviewing panel consisted of Mr. Pufahl and Mary Moore, Northeast Area Manager for the Unemployment Compensation Division. Mr. Pufahl and Ms. Moore considered the candidates' resumes as well as the content and presentation of their written and oral responses in making their selection decision. Their primary selection criterion was the oral and written communication skills and experience of the candidates. Since the position was a trainee position, the candidates' previous work experience was considered a secondary selection criterion. Both Mr. Pufahl and Ms. Moore ranked Julia Herman as their first choice, Jill Edwards as their second, and app/comp as their third.

10. Ms. Edwards' written response detailed her experience answering labor market questions relating to random audit memos and was very clear and concise and contained no spelling, grammatical, or syntax errors. Ms. Edwards' resume indicated that she had been employed by respondent from November, 1975, to the date of the interview as a JSS 2 whose duties included: interviewing, assessment, job development, attending UC hearings, employer relations, JTPA and TJTC certification, and service as itinerant Employment Specialist leadworker. In her interview, Ms. Edwards related her response to 2 out of 3 of the oral questions to her experience, education, etc.

11. Ms. Herman's written response detailed the writing courses she had taken and the writing experience she had gained taking non-writing courses at the college level and was clear and concise and contained no spelling, grammatical, or syntax errors. Ms. Herman's resume indicated that, between June of 1979 and October of 1984, she had been employed by respondent as an Employment Specialist and Tax Credit Specialist in the Wisconsin Rapids Job Service office whose duties included: counseling and

interviewing job applicants and assessing qualifications in order to place in appropriate employment; promotion of agency services within the business community; and dealing on a continuing basis with concerns and problems of the public related to employment. In her interview, Ms. Herman was the only one of the candidates to relate her response to all 3 of the oral questions to her experience, education, etc.

12. App/comp's written response detailed the report-writing experience she had gained in several positions she had held. Such response also contained syntax and spelling errors. App/comp's resume listed and described the various positions she had held with respondent, including her employment in the Beloit office which she characterized in her resume as adjudication experience. In Ms. Moore's opinion, app/comp's duties and responsibilities in the Beloit office primarily involved eligibility reviews (i.e., issues as to whether a UC claimant is able and available for work) and only involved adjudication of disputed claims to a limited extent. In her oral interview, app/comp related her response to 2 out of 3 of the oral questions to her experience; education; etc. App/comp testified that she did not discuss her UC adjudication experience during her interview.

13. Both Mr. Pufahl and Ms. Moore felt that Ms. Herman had presented herself better than app/comp in both the written and oral portions of the interview, had shown more enthusiasm for the position than app/comp, had created the impression that she would be a better interviewer, and had demonstrated better writing skills.

14. Ms. Herman was offered and accepted the subject UBS position. Her appointment was effective in January of 1986.

15. App/comp is older than both Ms. Edwards and Ms. Herman. App/comp's birth date is October 23, 1939. App/comp is divorced. Ms.

Edwards and Ms. Herman were both married at the time the subject interviews were conducted and hiring decision made.

16. App/comp filed a timely appeal of the subject selection decision and a timely charge of discrimination alleging that she had not been selected for the subject position on the basis of her age, sex, union membership and/or marital status.

CONCLUSIONS OF LAW

1. These matters are properly before the Personnel Commission pursuant to §§230.44(1)(d) and 230.45(1)(b), Stats.
2. Respondent is an employer within the meaning of §111.32(6), Stats.
3. Appellant has the burden to show that respondent's failure to appoint her to the subject position was illegal or an abuse of discretion.
4. Appellant has failed to sustain this burden.
5. Complainant has the burden to show that there is probable cause to believe that respondent discriminated against complainant on the basis of age, sex, and/or marital status by not appointing her to the subject position.
6. Complainant has failed to sustain this burden.
7. There is no probable cause to believe that complainant was discriminated against as alleged.

DECISION

The issues in this case are limited to the following:

1. Is there probable cause to believe that complainant was discriminated against on the basis of age, sex or marital status in regard to her not being hired as an Unemployment Benefits Specialist in January of 1986?
2. Was the decision of respondent in failing to hire appellant for the aforesaid position illegal or an abuse of discretion?

Discrimination Issue

In 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), the U. S. Supreme Court developed a framework for analyzing complaints of employment discrimination. Although the discrimination issue in the instant case requires a determination as to probable cause, not as to the merits, and involves, therefore, a less rigorous standard of proof, the McDonnell-Douglas framework is still a useful analytical tool. Under the terms of the McDonnell-Douglas framework, it must first be established by complainant that a prima facie case of discrimination exists. 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 (FEA), 2) applied for and was qualified for the subject position, and 3) was rejected under circumstances which give rise to an inference of unlawful discrimination.

It is is clear from the record that app/comp was, at the time of the subject hire, protected by the FEA as a result of her sex (female) age (46), and marital status (unmarried) and, in view of the fact that she was a certified candidate, that she applied for and was qualified for the subject position. The fact that a younger, married person was the successful candidate for the subject position gives rise to an inference of unlawful discrimination on the basis of age and marital status. However, the fact that the successful candidate is a female dispels any inference of unlawful discrimination on the basis of sex. It must be concluded,

therefore, that appellant has failed to establish a prima facie case of sex discrimination.

A respondent may rebut a prima facie case under the McDonnell-Douglas framework by articulating legitimate, nondiscriminatory reasons for its actions. Respondent has accomplished this in the instant case by specifying its primary selection criterion (i.e., oral and written communication skills and experience) and by explaining that, in respondent's opinion, Ms. Herman's relevant oral and written communication skills and experience were superior to app/comp's.

The final step in the McDonnell-Douglas analysis calls for the complainant to show that the respondent's stated reasons are a pretext for discrimination. App/comp attempts to do this by showing that she was obviously better qualified for the subject position because she had experience as a UC adjudicator and Ms. Edwards and Ms. Herman did not. However, the nature and extent of the candidates' experience as a UC adjudicator was not the primary selection criterion utilized by respondent and, in view of the fact that the subject position was to be filled as a trainee position, the primary selection criterion utilized by respondent (oral and written communication skills and experience) was not unreasonable or pretextual.

In filling a trainee position, it is not unreasonable to assess the candidates on the basis of general skills and experience rather than specific program knowledge and experience. In the instant case, the primary duties and responsibilities of the subject position involve interviewing, fact-finding, and decision-writing. Obviously, one's performance as an interviewer and decision-writer depends upon one's oral and written communications skills and experience. The importance

respondent attached to the oral and written communication skills and experience of the candidates in regard to the subject hiring decision is well illustrated by the fact that, of the 4 questions presented to each of the candidates, one was related to written communication skills and experience and two to oral communication skills and experience. It is also interesting to note that none related to specific program knowledge and experience, i.e., none related to experience as a UC adjudicator.

The record clearly shows that Ms. Herman was the only candidate to relate all 3 of her responses to the oral interview questions to her experience, education, etc. as the candidates had been instructed. The record also clearly shows that Ms. Herman's writing style in her response to the written interview question was superior to app/comp's which contained spelling and syntax errors.

Mr. Pufahl and Ms. Moore did consider the previous work experience of the candidates as a secondary selection criterion. The record in this regard shows that app/comp had limited UC adjudication experience as well as some other professional level experience in the employment area while Ms. Edwards and Ms. Herman had no UC adjudication experience but did have professional level experience in the employment area. Mr. Pufahl and Ms. Moore felt that app/comp's previous UC adjudication experience was a positive factor but, in view of the fact that the subject position was a trainee position, was not a critical factor, particularly in view of Ms. Edwards' and Ms. Herman's professional level experience in the employment area, and it was not sufficient to overcome Ms. Edwards' and Ms. Herman's superior written and oral communication skills and experience. As a result, it is not possible, on the basis of this record, to conclude that the selection criteria were unreasonable, were not uniformly applied, or

were not as respondent represented them to be; or that Mr. Pufahl's or Ms. Moore's assessments of the candidates were not reasonable in view of the presentations of the candidates at the interviews and in view of the selection criteria.

Complainant has failed to demonstrate pretext and has failed to show probable cause to believe that the subject selection decision was based in whole or in part on app/comp's age or marital status.

Illegality or Abuse of Discretion

This is an appeal pursuant to §230.44(1)(d), Stats. Therefore, the standard to be applied is whether the appointing authority's decision was "illegal or an abuse of discretion."

The term "abuse of discretion" has been defined as "... a discretion exercised to an end or purpose not justified by, and clearly against, reason and evidence." Ludeen v. DOA, 79-208-PC (6/3/81). The question before the Commission is not whether it agrees or disagrees with the appointing authority's decision, in the sense of whether the Commission would have made the same decision if it substituted its judgment for that of the appointing authority. Rather, it is a question of whether, on the basis of the facts and evidence presented, the decision of the appointing authority may be said to have been "clearly against reason and evidence." Harbort v. DILHR, No. 81-74-PC (1982).

App/comp alleges that she was better qualified than Ms. Herman or Ms. Edwards because she had experience as a UC adjudicator and the existence of this experience should have been more strongly emphasized in the selection process. However, as the Personnel Commission stated in Stichert v. UW-Oshkosh Case No. 86-0197-PC (6/11/87),

It is not the Commission's role to determine which of an unlimited number of possible criteria it would have been best for

respondent to utilize but rather to determine whether the criteria utilized by respondent were reasonably related to the duties and responsibilities of the position to be filled and were uniformly applied.

In making the subject hiring decision, respondent relied primarily upon a comparison of the candidates' oral and written communication skills and experience as presented in the oral and written parts of the interviews. As discussed above, it is not possible to conclude, on the basis of this record, that the selection criteria were unreasonable, were not uniformly applied, or were not the actual criteria utilized by respondent; or that respondent's assessments of the candidates were not reasonable in view of the presentations of the candidates at the interviews and in view of the selection criteria.

There has been no showing that respondent's selection decision was clearly against reason and evidence and no showing, therefore, that respondent abused its discretion in this regard.

App/comp alleges that, as a result of her layoff effective June 30, 1985, from the JSS 2 position she had held in respondent's Wisconsin Rapids office, she had mandatory rights to the subject position and that respondent's failure to appoint her to such position was, therefore, illegal.

§ER-Pers 22.10, Wis. Adm. Code, provides that the mandatory restoration rights claimed by app/comp shall be granted to:

An employe or former employe who transfers or demotes to another agency as a result of layoff under §ER-Pers 22.08(1) or (2) and is terminated while on probation, exercises displacement rights as a result of layoff under §ER-Pers 22.08(3), is demoted as a result of layoff under §ER-Pers 22.08(2), or is terminated as a result of layoff....

It is clear from the record that app/comp's situation at the time of the subject recruitment is not included within this list. App/comp accepted a transfer to another JSS 2 position within the same agency and did not

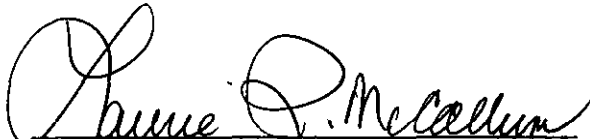
exercise displacement rights, and was not demoted or terminated. App/comp has, therefore, failed to show that respondent's actions in this regard were illegal as alleged.

The record contains evidence regarding certain personnel transactions involving app/comp which occurred prior and subsequent to the date of the subject selection decision, i.e, prior and subsequent to January of 1986, and which were unrelated to such decision. In view of the issues governing the instant cases, there is no need to address these other transactions in this decision.

ORDER

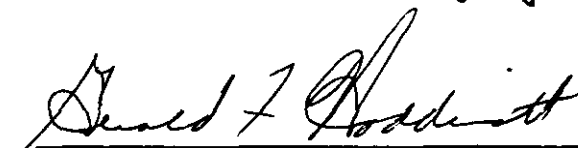
These cases are dismissed.

Dated: January 12, 1989 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

LRM:jmf
JMF05/3


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner

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