

JOE L. HARRIS,

Complainant,

v.

Secretary, DEPARTMENT OF
INDUSTRY, LABOR & HUMAN
RELATIONS,

Respondent.

Case Nos. 86-0021, 0022-PC-ER

DECISION
AND
ORDER

NATURE OF CASES

These cases involve complaints filed by Joe L. Harris, complainant, against the Department of Industry, Labor and Human Relations (DILHR), respondent, charging discrimination on the basis of sex, race, and in retaliation for filing other discrimination complaints. These complaints were investigated and a finding of no probable cause to believe that discrimination had occurred on the basis of race, sex or retaliation was issued in both cases on February 3, 1988. The no probable cause findings were appealed by complainant.

The parties agreed to consolidate the cases for hearing based on the following issues:

1. Whether there is probable cause to believe that complainant was discriminated against on the basis of race, sex or retaliation in regard to his not being hired as an Unemployment Benefits Specialist 4 (UBS 4) - Adjudication Leadworker in August of 1985. (Case No. 86-0021-PC-ER)
2. Whether there is probable cause to believe that complainant was discriminated against on the basis of race, sex or retaliation in regard to respondent's decision not to authorize a UBS 4 - Adjudication Lead Worker position at its Racine office in August of 1985. (Case No. 86-0022-PC-ER)

FINDINGS OF FACT

GENERAL¹

1) At all times relevant to the issues involved in the instant cases, complainant, a black male, was employed as an Unemployment Benefits Specialist (UBS) 2 (PR12-03) in the Racine local office of the Division of Unemployment Compensation in DILHR.

2) Complainant reported to a local office manager, Mr. George Thomas. Mr. Thomas reported to the southern area supervisor, Ms. Joann Nichols, who in turn reported to Mr. Robert Schmidt, Director, Bureau of Local Operations. Mr. Schmidt was supervised by a deputy administrator for the Division of Unemployment Compensation.

Case No. 86-0021-PC-ER

3) Complainant took and passed a civil service examination for the position of Unemployment Benefit Specialist (UBS) 4 - Adjudication Leadworker/Random Audit and was placed on the register for these positions established on February 8, 1985.

4) Complainant's name, along with those of four other candidates, was certified from the register for consideration for a UBS 4 - Adjudication Leadworker position in the Milwaukee South Unemployment Compensation (UC) Local Office.

5) Complainant and the other certified candidates were interviewed by Gerald Kleist, the local office manager for the Milwaukee South UC Office, and Terrance Breber, the local officer manager for the Kenosha UC office and acting local office manager for the Milwaukee Central UC office. Complainant was interviewed on June 6, 1985.

6) The certified candidates were comprised of 3 white females, 1 white male and 1 black male (complainant). In addition to complainant, two of the white females were classified as UBS 2's. The third white female and the white male were classified as UBS 3's.

7) In conducting the oral interviews, Messrs. Kleist and Breber used a standard set of questions for all candidates (Respondent's Exhibit #3). Prior to the oral interview, each candidate was given a question and asked to develop a written response. (Respondent's Exhibit #2).

¹ These findings apply to both of the cases which were consolidated for hearing purposes.

8) Messrs. Kleist and Breber did not make any notes concerning the candidates' responses, but rather used the candidates' responses to the interview question and the candidate's written responses (See Finding #5) to develop a one paragraph summary of each candidate to send to Mr. Schmidt. (Respondent's Exhibit #4) As a part of this material, they ranked the candidates and recommended a white female, classified as a UBS 2, be hired.

9) The ranking of the other candidates was as follows:

- 2) White female classified as a UBS 2
- 3) White female classified as a UBS 3
- 4) Black male classified as a UBS 2 (complainant)
- 5) White male classified as a UBS 3

In developing these rankings, neither Mr. Kleist nor Mr. Breber considered whether the candidates had passed a Quality Performance Index (QPI) review.² They were not provided any direction from their superiors as to what criteria to have or questions to ask.

10) Within one week of making their recommendation, Mr. Breber, Mr. Kleist and Mr. Schmidt had a telephone conference call to discuss the recommendation. Mr. Schmidt overruled the recommendation and selected a white female classified as a UBS 3. His decision was made based on the employe's classification level (UBS 3), which he felt demonstrated ability to adjudicate all types of claims and to meet the requirements of the UBS 4 - Adjudication Leadworker position to function under general supervision with limited or no technical assistance in the adjudication area.

11) Complainant was notified by Mr. Kleist in a letter dated August 13, 1985, that he was not selected for the UBS 4 - Adjudication Leadworker position.

12) Some time prior to 1985, UBS's were required to satisfactorily pass a QPI review on a randomly selected number of their cases in order to be reclassified from a UBS 2 to a UBS 3. Before initiation of the QPI system, there was some form of performance evaluation made of employes prior to reclassification but it was not as well defined.

² QPI refers to a system used by DILHR to evaluate completed cases of Unemployment Benefit Specialists using criteria designed to numerically measure and score the quality of the case work on standardized basis.

13) Mr. Schmidt did not know at the time of the hiring decision whether the two UBS 3's who were candidates had passed a QPI review or had reached the UBS 3 level before the initiation of the QPI requirement. The candidate who was selected for the position had successfully completed a QPI review. The other UBS 3 attained that level prior to the QPI review requirement. Mr. Schmidt feels that passing the QPI review is also a good indication of an employee's ability to perform the functions of a UBS 4 - Adjudication Leadworker position, and since January 1, 1985, no employee has been promoted to one of these leadworker positions who has not satisfactorily completed a QPI review.

14) Complainant has previously filed discrimination complaints against respondent. Mr. Kleist and Mr. Breber were aware that there was some kind of legal action involving complainant, but were not aware of the specifics. Mr. Schmidt was aware that complainant had filed charges of discrimination.

15) The complainant was promoted on March 3, 1986 to a UBS 4 position in the Random Audit Unit of the UC Division functioning as a quality control investigator.

16) Complainant filed a timely charge of discrimination on February 12, 1986, alleging that his non-selection for the position of UBS 4 - Adjudication Leadworker in the Milwaukee South UC Local Office discriminated against him on the basis of race, sex and retaliation.

Case No. 86-0022-PC-ER

17) In November, 1984, respondent went through a major restructuring which separated the Job Service operation from the Unemployment Compensation operation (Respondent's Exhibit #9). As a result of this restructuring, UC local offices were established under the direction of a local office manager. This local office manager had responsibility for all professional, paraprofessional, and clerical staff involved in the adjudication function. Leadworker positions were created for adjudication units in local offices that had at least four (4) professional adjudication positions.

18) There were a total of 23 local offices created at the time of the restructuring of which 13 had adjudication leadworkers. All local offices with leadworkers had at least four (4) professional adjudication staff, except Kenosha and Wausau which each had 3.9 professional adjudication staff. No

leadworker positions were identified for the Superior office, with 3.9 professional adjudication staff, and the Oshkosh office, with 3.7 professional adjudication staff. (Respondent Exhibit #8)

19) Prior to August 30, 1985, the Racine UC local office had four (4) professional adjudication positions. These positions were filled by Ms. Jean Roszina, UBS 3, and three employees (one of whom was complainant) classified as UBS 2's.

20) On August 30, 1985, Ms. Roszina retired. Prior to her retirement she had performed some functions similar to those of an adjudication leadworker, but was never formally recognized as such.

21) Mr. Thomas discussed with Ms. Nichols, and then formally requested that Ms. Roszina's vacancy be filled at the UBS 4 level. Ms. Nichols initially indicated support, but stated that the final decision would have to be made in Madison. Mr. Thomas strongly supported the creation of a UBS 4 position citing the Kenosha UC local office as a comparable office with a UBS 4 - Adjudication Leadworker.

22) Ms. Nichols was, at the same time, reviewing the staffing mix of the local offices in her area. As a result of this review, Ms. Roszina's vacancy was converted from a UBS 3 to a Job Service Assistant 2, and reassigned from the adjudication unit to the claims processing unit. This action was based on a determination that the claims processing unit was understaffed in permanent positions and that the adjudication workload related to non-monetary determinations did not support having four professional adjudication staff. This decision was communicated to complainant in a November 15, 1985, memorandum from Ms. Nichols which outlined the reasons for the decision and the fact that an adjudication leadworker position would not be established because the office only had three (3) professional adjudication positions. (Respondent's Exhibit #11)

23) In late 1988, a UBS 4 - Adjudication Leadworker position was created in the Racine UC local office. At the time this position was created, the Racine office had four (4) permanent professional adjudication staff and one (1) permanent adjudication aide. The criteria used at this time to determine whether a leadworker was justified for a local office was the existence of five (5) professional adjudication/adjudication aide positions. (Respondent's Exhibit #14) Adjudication aide positions were counted at this time because of

pay range adjustments made to the adjudication aide positions under the Comparable Worth pay adjustments which resulted in the adjudication aide positions being assigned to pay ranges comparable to the professional adjudication staff.

24) Complainant had previously filed charges of discrimination against respondent. Mr. Schmidt and Ms. Nichols were aware that these charges had been filed.

25) Complainant filed a timely charge of discrimination on February 12, 1986, alleging that respondent's failure to authorize a UBS 4 - Adjudication Leadworker position in the Racine UC local office discriminated against him on the basis of race, sex and retaliation.

CONCLUSIONS OF LAW

GENERAL³

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

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

Case No. 86-0021-PC-ER

3) The complainant has the burden of proof to establish that there is probable cause to believe that respondent discriminated against him on the basis of race, sex and/or in retaliation for filing other complaints of discrimination by not selecting him for the position of Unemployment Benefit Specialist 4 (UBS 4) - Adjudication Leadworker in the Milwaukee South Unemployment Compensation (UC) Local Office.

4) Complainant has failed to sustain his burden of proof.

Case No. 86-0021-PC-ER

5) Complainant has the burden of proof to establish that there is probable cause to believe that respondent discriminated against him on the basis of race, sex and/or in retaliation for filing other complainants of discrimination by not authorizing an Unemployment Benefits Specialist 4 (UBS 4) - Adjudication Leadworker position in the Racine Unemployment Compensation (UC) Local Office.

6) Complainant has failed to sustain his burden of proof.

³ Applies to both cases and the issues forming the basis for hearing.

DISCUSSION

These cases involve an appeal of an initial determination of no probable cause to believe discrimination occurred. Probable cause is defined in §1.02(16) Wis. Adm. Code as:

"...a reasonable ground for belief, supported by facts and circumstances strong enough in themselves to warrant a prudent person to believe, that discrimination, retaliation...probably has been or is being committed."

Although the evidentiary standard in a probable cause proceeding is less rigorous than the "preponderance of credible evidence" standard applied in reaching a decision on the merits, it is nonetheless useful to use the McDonnell-Douglas format in analyzing the record in these cases.

Under the Wisconsin Fair Employment Act (FEA), the initial burden of proof is on the complainant to show a prima facie case of discrimination. If complainant meets this burden, the employer then has the burden of articulating a non-discriminatory reason for the actions taken which the complainant may, in turn, attempt to show was a pretext for discrimination. 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).

Case No. 86-0021-PC-ER

Race/Sex

This case involves a decision not to hire complainant. Using the McDonnell-Douglas framework, the complainant has the initial burden to show a prima facie case of discrimination. In the context of a hiring decision, the elements of a prima facie case are that the complainant 1) is a member of a class protected by the Fair Employment Act, 2) applied for and was qualified for an available position, and 3) was rejected under circumstances which give rise to an inference of unlawful discrimination.

In this case, complainant has established a prima facie case in that he is protected by the FEA by virtue of his race (black) and sex (male). He applied for and was qualified for the UBS 4 - Adjudication Leadworker position based on passing a civil service examination and being certified for the position from an appropriate register. Finally, showing that his rejection for the

position gives rise to an inference of race and sex discrimination is established by the fact that the successful candidate was a white female.

The burden of proceeding now moves to the respondent to articulate legitimate non-discriminatory reasons for not hiring the complainant.

Respondent has offered several non-discriminatory reasons for not hiring the complainant. In the interviews conducted by Messrs. Kleist and Breber, all candidates were asked the same questions and evaluated based on these oral responses, as well as their written response to a question they were given prior to the oral interview. The two interviewers gave no weight to an employe's classification level, previous work history, or whether the employe had passed a QPI review in making their recommendation to Mr. Schmidt to hire a white female who, like complainant, was classified as a UBS 2 and had not passed a QPI review.

Mr. Schmidt did not approve of the recommendation made and authorized the hiring of a white female classified as a UBS 3, who had passed a QPI review. Mr. Schmidt testified that he had previously overruled another decision in April, 1985, to hire a UBS 2 for an Adjudication Leadworker (UBS 4) position for much the same reason. Mr. Schmidt's decision was based on the fact that someone who had attained the UBS 3 classification had experience that would prepare them for the independent role of, and lack of technical assistance available to, an employe in an adjudication leadworker position.

Mr. Schmidt also testified that he felt passing of the QPI was a good indicator of the candidate's potential for success, and that since January 1, 1985, no one has been appointed to an adjudication leadworker position who had not passed the QPI review.

The burden now reverts to the complainant to show that respondent's articulated reasons are a pretext for discrimination. In this regard, complainant alleges that the initial interview and ranking process ignores the civil service examination process. While no specific documents were submitted to verify complainant's testimony that he scored higher on the civil service examination than the candidate selected, the Commission will assume for purposes of argument that complainant's statement is true. Complainant then argues based on this fact that Messrs. Kleist and Breber in essence bypassed the system.

This argument is just not persuasive. First, Messrs. Kleist and Breber received no advance direction on what to ask candidates or what specific criteria were to be used in making their recommendation. They (the interviewers) used their own judgment and knowledge of the job as their guide. The questions asked were standardized and the process used was well within an acceptable framework for conducting interviews for civil service positions.

Secondly, a logical extension of complainant's argument concerning the fact that he ranked higher on the civil service list than the successful candidate (and therefore should have been offered the job) would in effect establish a "rule of one," i.e. the person with highest civil service score should be hired. The Commission is of the opinion that the civil service score is important in the sense of allowing an employe to receive specific consideration for a position. However, once an employe is certified to be interviewed for a position, the Commission focuses on the criteria utilized to make the selection decision. Unless there is some showing that the criteria were chosen as a method of practicing illegal discrimination or retaliation, the Commission will look at whether the application of the criteria to the candidates was contrary to the FEA. Here there was no indication that the criteria used by Kleist and Breber were chosen in order not to hire the complainant. The evidence also indicates that the criteria were applied consistently to all of the candidates.

The complainant further argues that Mr. Schmidt's reliance on the classification level, and, more specifically, the QPI review process in making the final hiring decision is both by-passing of the civil service system and a use of discriminatory criteria. In regard to the by-passing of the civil service system, complainant argues that passing a QPI review was not part of announced qualifications for the job. In addition, complainant argues that if passing a QPI review is a qualification, as it seems to be based on hiring decisions made, then the announcement for adjudication leadworker positions should so state.

Mr. Schmidt testified that the reason this is not done is because of the length of time a single register for these adjudication leadworker positions is maintained. Mr. Schmidt testified that during the "life" of the register persons classified as UBS 2's may well pass a QPI review. Obviously, the respondent

feels that excluding these UBS 2's from even applying is not appropriate. Complainant's argument in this regard is basically that respondent should announce the qualifications for adjudication leadworker positions differently. The Commission has consistently held that our role is not to second guess management and determine if something different could have been done, but rather, whether the action taken by management is proper and nondiscriminatory.

While it is clear Mr. Schmidt favors employes who have passed a QPI review, respondent has chosen not to make passing a QPI review an absolute requirement to apply for UBS 4 - Adjudication Leadworker position. The Commission concludes that use of the QPI review as a factor in making a hiring decision is legitimate. Passing a QPI review has been shown to provide information about candidates which is related to the job. The QPI review is not an absolute requirement, and, while all those appointed to an adjudication leadworker position since 1/1/85 have passed a QPI review, there is no information on the record to show the composition of the applicant pool(s) for these leadworker positions in terms of race, sex or passage of a QPI review. The use of a QPI review as a criterion appears non-discriminatory on its face.

Complainant argues further that even if, on its face, the process used to make a hire in this case is non-discriminatory, the QPI process has a discriminatory effect on blacks. In response to a question from complainant, Mr. Schmidt indicated he was only aware of one black male and one black female having passed a QPI review. This amount of information is not determinative of whether the QPI review is discriminatory. The record contains no information on the number of minority or non-minority employes who passed or failed a QPI review. Additionally, there was no statistical information on workforce composition (either in the UBS classification or generally in professional position), pass/fail percentages for minorities and non-minorities, or the average number of times minorities or non-minorities are involved in a QPI review before they pass.

Complainant asserts that minorities, and especially blacks, fail the QPI consistently. As stated above, the record just does not provide any support for this allegation. Without this type of information, the Commission cannot conclude that the QPI review process has a discriminatory or disparate impact on minorities.

Additionally, when Messrs. Kleist and Breber did their evaluation and ranking of the candidates, they did not consider the classification level or whether a candidate had passed a QPI review. Without taking these criteria into consideration, they ranked complainant fourth and ranked a white male classified as a UBS 3 fifth. This ranking establishes that complainant would not have been offered the position even if Mr. Schmidt had not imposed the requirement that the candidate be classified at the UBS 3 level.

Based on the record in this case, the Commission concludes that there has been no showing that there is probable cause to believe complainant was discriminated against on the basis of race or sex in respondent's decision not to hire him for a UBS 4 - Adjudication Leadworker position.

Retaliation

Using the McDonnell-Douglas framework, the complainant must first establish a prima facie case. 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.

The complainant has established that he participated in a protected activity (filing of other discrimination complaints previously). In regard to the issue of knowledge about this previous activity, the record reflects only that Mr. Schmidt actually knew of the filing of discrimination complaints at the time of the hiring decision. Messrs. Kleist and Breber had heard rumors about complainant's legal activities but had no first hand or specific knowledge of whether any complaints had been filed or what issues were involved in complainant's legal activities. For purposes of deciding the issue of retaliation, the Commission will assume that complainant has met the first element in establishing a prima facie case.

The complainant has also met the second element in that his non-selection for the UBS 4 - Adjudication Leadworker position is an adverse employment action.

The final element involves a showing by complainant that there is a "causal connection" between the first two elements. Complainant has not shown that there was a causal connection between the previous discrimination complaints he filed and his non-selection. In testimony,

Mr. Schmidt, Mr. Kleist and Mr. Breber, all stated that complainant's previous filing of charges did not affect or enter into their decisions not to select complainant. Additionally, there is no indication on the record as to how recent (or how long ago) these complainant were filed, whether any action was still pending on any of the complaints filed, and whether any of these previous complainants had been filed against or involved Messrs. Schmidt, Kleist or Breber.

Even if we assume, arguendo that complainant has established a prima facie case of retaliation, the respondent has articulated legitimate, non-discriminatory reasons for their hiring as outlined above in the portion of this case addressing the charge of discrimination on the basis of race and sex.

For the same reasons cited above, complainant has not shown that respondent's actions were a pretext for retaliation. In addition, the record reflects that since January of 1985, Mr. Schmidt has consistently relied on passing the QPI review as a prerequisite for appointment to adjudication leadworker positions.

Based on the record in the case, the Commission concludes that there is no probable cause to believe respondent retaliated against complaint for filing previous discrimination complaints by not selecting him for the position of UBS 4 - Adjudication Leadworker.

Case No. 86-0022-PC-ER

This case involves a claim that respondent's failure to create an Unemployment Benefit Specialist 4 (UBS 4) - Adjudication Leadworker in the Racine Unemployment Compensation (UC) Local Office discriminated against complainant on the basis of race, sex and/or in retaliation for filing previous complaints of discrimination. Complainant alleges that he would have been a likely candidate for the position, based on the fact that he had been previously certified for a similar position in the Milwaukee South UC Local Office, and that his supervisor (Mr. Thomas) had indicated to him that he had a good chance.

Race and Sex

The circumstances in this case are unique in that there is no actual hiring decision involved, and there was never a specific position offered for which complainant could apply. In order to analyze complainant's allegation, the circumstances involved in the instant case would have to be considered as a term or condition of employment. Using this assumption, the Commission

will apply the McDonnell-Douglas framework established by the Supreme Court to analyze the complainant's allegations.

In the context of discrimination regarding terms and conditions of employment, a prima facie case is demonstrated if the evidence shows that 1) the complainant is a member of a protected group; 2) the complainant suffered an adverse term or condition of employment; and 3) the adverse term or condition exists under circumstances which give rise to an inference of discrimination. Complainant meets the first element in that he is a member of a protected group under the FEA by virtue of his race (black) and sex (male).

In meeting the second element in establishing a prima facie case, the complainant must show he suffered an adverse term or condition of employment. The complainant established that he would have been a candidate for the adjudication leadworker position in the Racine UC Local Office had such a position been opened for competition. Certainly this scenario presents a situation which is considerably removed from the typical one in which a position is available to be offered. However, a decision not to make a position available for competition at a certain level is clearly an adverse employment decision for those persons who otherwise would have been able to compete for the position at that level. Consequently, complainant has met his burden to establish the second element in his prima facie case.

The third element in a prima facie case is to show circumstances which give rise to an inference of discrimination. Complainant has established this element of his prima facie case. Complainant has shown that the Racine UC local office had 4 professional adjudicator positions and staff as of November, 1984, and at the time of Ms. Roszina's retirement on August 30, 1985. The fact that no adjudication leadworker position was created, even though the office's staffing pattern met the general rule of 4 professional adjudication positions used to establish such positions, presents circumstances which give rise to an inference of discrimination.

After the complainant has established a prima facie case, the burden of proceeding, using the McDonnell-Douglas framework, shifts to the respondent.

Respondent has articulated legitimate, non-discriminatory reasons for not establishing a leadworker position in the Racine UC Local Office. The staffing patterns for UC local offices were established in November, 1984, as part of the restructuring of the Job Service and UC functions. At that time,

there were 23 local offices established of which 13 had adjudication leadworkers. (Respondent's Exhibit #8) Although the Racine UC local office had 4 professional adjudicators, no leadworker position was established in November, 1984, even though that staffing pattern met the general rule of 4. There is no testimony on the record or any exhibits which explain why a leadworker position was not created in Racine. The Commission will draw no conclusion based on this fact other than that complainant did not challenge that specific decision.

As indicated in Finding #18, there were some anomalies in the staffing pattern established in November, 1984, for UC local offices relative to adjudication leadworker. While the general rule of thumb was four (4) professional adjudicators, the Kenosha and Wausau offices had a leadworker with only 3.9 professional positions, while Superior (with 3.9 professional staff) and Oshkosh (with 3.7 professional staff) did not have a leadworker. Other than Ms. Nichols' testimony that the adjudication leadworker position in Kenosha was inherited as part of the restructuring done in 1984, there is nothing on the record to indicate that the decision relative to adjudication leadworker positions for these four offices was made for other than legitimate, non-discriminatory business reasons.

Ms. Nichols, the Southern Area manager, testified that she had played a significant role in making the determination not to create a leadworker position when Ms. Roszina retired (Finding #21). Ms. Nichols had asked all UC local office managers to review and identify to her any staffing problems or adjustments they wanted to make in existing staff assignments if vacancies should occur. Mr. Thomas (Racine UC Local Office Manager) did not respond to Ms. Nichols' request, but did indicate to her his strong support for filling Ms. Roszina's vacancy at the UBS 4 level as an adjudication leadworker.

Based on Ms. Nichols' own evaluation of the staffing mix and workload in the Racine office, she denied the request for a UBS 4 - Adjudication Leadworker, and recommended that the position be transferred from the adjudication unit to claims processing and be converted to a Job Service Assistant 2. This left only 3 professional adjudication positions and the office did not, therefore, meet the criteria of 4 professional staff to be authorized a leadworker. There is no indication in the record of who, if anyone, further approved of this transaction, but the Commission will assume that at least

Mr. Schmidt was aware of this decision. This is in part based on Mr. Schmidt's testimony that with the reduced workload and staff cutbacks that were occurring, he didn't feel creating higher level jobs was appropriate or necessary.

Ms. Nichols' decision was based on her analysis of the workload in the adjudication area (which she determined did not support 4 professional adjudication positions), and the claims processing function (which she determined was short of staff). Ms. Nichols provided this information to complainant in a memorandum dated November 15, 1985. (Respondent's Exhibit #11) There is no information on the record concerning how the analysis was done or what factors were considered, and the complainant did not refute the decision on a factual basis.

The burden of proceeding now shifts back to the complainant to show that this decision was a pretext for discrimination. The complainant argues first that the decision was made just to avoid the possibility of him being able to compete for an adjudication leadworker position. While this is a possible hypothesis, there is just no information on the record to indicate that respondent's decision was made on the basis of anything other than legitimate, non-discriminatory program and workload considerations. Complainant did not show (other than to assert his theory of why the action was taken) that these kinds of changes have or have not been made in other offices, and/or that the underlying analysis done by Ms. Nichols is faulty or not consistent with what has been done in evaluating the staff mix in other UC local offices

Complainant also pointed out that in Respondent's Exhibit #11, there was a chart that showed a vacant seasonal professional adjudication position. In determining whether a UC local office met the criteria for an adjudication leadworker, the respondent did not count Limited Term Employees (LTE's) and only counted seasonal positions as a percentage of full time based on the number of hours an employe filling the position was scheduled to work. Apparently, seasonals account for the .9 professional positions identified for some offices.

Complainant indicated that the seasonal position had been filled by a Ms. Engels. If this seasonal position was filled, there would then be 4 professional adjudication positions (3 permanent and 1 seasonal). The issue of the amount of time the seasonal employe actually worked or was scheduled to

work then becomes critical. Again, the record does not show when or how long Ms. Engels worked or whether the seasonal position was ever filled on a continual basis. Ms. Nichols' and Mr. Schmidt's testimony is that after Ms. Roszina left there were only 3 filled professional adjudication positions.

Complainant also argued that respondent's action to create an adjudication leadworker in the Racine UC local office in late 1988 also showed that their initial action denying an adjudication leadworker position was a pretext for discrimination. In addition, complainant points out in Respondent's Exhibit #14 that the criteria for justifying an adjudication leadworker had changed from 4 professional adjudication staff to 5 professional adjudication/adjudication aide staff. Respondent (in Ms. Nichols' testimony and Exhibit #14) stated that the reason for adding a leadworker was increased workload caused by Chrysler closing the old AMC plan and moving out, and the need to provide training to new staff in the office.

A part of this training need was created when an adjudication aide position (and the incumbent) was converted to a professional adjudication position. This conversion resulted in part from the need for more professional staff, and in part from pay range reassignments made as a part of Comparable Worth which put the professional adjudicator and adjudication aide positions in comparable pay ranges (Finding #23).

There is no pretextual showing on the record that the addition of a professional adjudication position, the conversion of an adjudication aide to a professional adjudication position, and the establishment of an adjudication leadworker were based on other than legitimate, non-discriminatory business reasons related to training and program (workload) needs, and the Commission concludes based on all of the above information that there is no probable cause to believe that respondent discriminated against complainant on the basis of race or sex by not creating a UBS 4 - Adjudication Leadworker in the Racine UC local office.

Retaliation

In analyzing cases involving charges of retaliation, the three step framework identified in McDonnell-Douglas by the Supreme Court will again be used (See page 7). First, the complainant must establish a prima facie case. The first element involves showing that complainant engaged in a protected activity and the alleged retaliator(s) were aware of his participation. The

complainant has established this element in that he filed previous complaints of discrimination and both Mr. Schmidt and Ms. Nichols were aware that he had filed complaints.

The complainant has also established the second and third elements of the prima facie case for the same reasons as were discussed in the context of complainant's race and sex claims.

Complainant having established a prima facie case, the burden of proceedings now shifts to respondent. Respondent has met its burden to articulate legitimate, non-discriminatory business reasons for not establishing an adjudication leadworker position in Racine. These reasons were discussed under the sex and race portion of this case and will not be reiterated here.

Complainant next has an opportunity to show that respondent's reasons are a pretext for discrimination. In this regard, complainant argues that the leadworker position was not created, even though it met certain criteria, in retaliation for filing previous discrimination complaints. Complainant's argument that the Racine UC local office didn't get a leadworker even though they had four professional staff does not totally reflect the situation.

From the date of the reorganization (November, 1984) until Ms. Roszina's retirement (August 30, 1985), the Racine office had four professional adjudicators. After her retirement the Racine office had only three professional adjudicators. While it is true that the Racine office had four positions (four + positions if the vacant seasonal adjudicator position is considered), there were only three professional adjudication staff. It is clear from the record that leadworkers were authorized based on the actual numbers of staff employed in an UC Local Office and not the number of positions. Vacant positions would not be counted unless they were to be filled, which in the case of the Racine office resulted in only three professional adjudication positions being assigned to the office when the vacant adjudicator position was converted to a Job Service Assistant 2.

Complainant states that the initial action denying a leadworker position, and the subsequent creation of an adjudication leadworker position in the Racine office shows pretext for discrimination. Without reiterating the previous discussion of respondent's legitimate, non-discriminatory reasons for their decision, the record contains no information with which to refute

respondent's assertion that the actions were taken only for the reasons they stated, and that there was no discriminatory bias in their actions regarding the adjudication leadworker position.

The Commission, based on the record in these cases, concludes that there is no probable cause to find that respondent retaliated against complainant for filing previous complaints of discrimination by not creating a UBS 4 - Adjudication Leadworker position in the Racine UC Local Office.

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In summarizing the decision in both of these cases, it is clear that respondent made certain decisions that complainant did not agree with. In reviewing these decisions, the Commission does not "second guess" respondent's action and independently determine what we would have done. Rather, we review the decision made, as we did in these cases, to determine if there is any discriminatory bias. Based on this record, there is no probable cause to believe discrimination on the basis of sex, race or retaliation occurred.

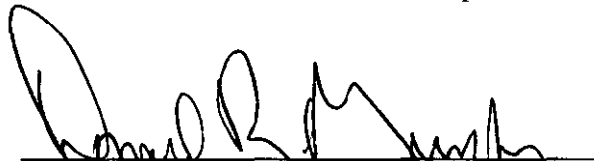
ORDER

The initial determination of "no probable cause" issued in Case No. 86-0021-PC-ER and Case No. 86-0022-PC-ER are affirmed, and these cases are dismissed.

Dated: February 22, 1990 STATE PERSONNEL COMMISSION


LAURIE R. MCCALLUM, Chairperson

GFH:gdt


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner

Parties:

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