STATE OF WISCONSIN PERSONNEL COMMISSION

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*
WILLIAM C. RUFF, *
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Complainant, *
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v. *
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Commissioner, OFFICE OF THE *
COMMISSIONER OF SECURITIES, *
*
Respondent. *
*
Case Nos. 86-0141-PC-ER *
87-0005-PC-ER *
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DECISION
AND
ORDER
ON
PROBABLE CAUSE

This matter is before the Commission following the issuance of a proposed decision and order, a copy of which is attached hereto. The Commission has considered the parties' objections and arguments and consulted with the examiner.

Complainant has requested a number of changes and additions to the findings in No. 86-0141-PC-ER. The Commission has considered these requested changes and has concluded that no changes are warranted. The Commission will not address each of complainant's contentions. For the most part, they are related to complainant's attempts to dispute the underlying basis of respondent's DPA denial. However, in this case the appointing authority testified that his information regarding the alleged improper disclosures came from Attorney Blanchard, either directly or indirectly, and this was corroborated by her. The Commission's role is not to determine whether the DPA denial was well-founded in a general sense, but rather to determine whether there is probable cause to believe it was discriminatorily motivated. In this case, Commissioner Payne had a

legitimate, non-discriminatory basis for denying the DPA based on, among other things, the reports he received of improper disclosures. Whether or not the source of the reports were in error about what complainant did and said, it would not lead to a conclusion of pretext.

With regard to respondent's objections as to 87-0005-PC-ER, there also is no need to change the proposed decision. Respondent appears to suggest that the proposed decision somehow impinges on its management rights to transfer and utilize personnel as it sees fit. The Commission wishes to emphasize that under the civil service code, management has relatively wide discretion to transfer its employes to meet the needs of the agency. However, it must do so within the parameters of the Fair Employment Act. When an employe is involuntarily transferred over his explicit objection shortly after he has filed a charge of discrimination, and a number of the reasons assigned by management for its decision to choose the complainant for transfer turn out to be contradicted by the facts brought out at a hearing, a conclusion that there is probable cause to believe that retaliation occurred is not surprising.

The Commission also notes that respondent's objections contain a number of contentions about complainant's performance and employment history which are extra-record and which were not included by Commissioner Payne in his testimony as to why he chose complainant for transfer, and which will be disregarded.

ORDER

The attached proposed decision and order is incorporated by reference and adopted by the Commission as its decision on probable cause.

Dated: Sept 26, 1988 STATE PERSONNEL COMMISSION

AJT:jmf
JMF11/2

Attachment

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

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PROPOSED
DECISION ON
PROBABLE CAUSE

NATURE OF THE CASE

Case No. 86-0141-PC-ER involves a charge of sex discrimination with respect to denial of a discretionary performance award. Case No. 87-0005-PC-ER involves a charge of sex and retaliation discrimination with respect to an involuntary transfer. On December 1, 1987, a Commission investigator made an initial determination finding of "no probable cause" with respect to both complaints. Complainant appealed and a hearing on probable cause as to both cases was held on April 27-28 and May 3, 1988.

FINDINGS OF FACT

1. Complainant, a male, began employment with respondent Office of the Commissioner of Securities on June 27,1982, as a Securities Examiner 1. His position was reclassified and he was regraded to Securities Examiner 2 on November 14, 1983, and to Securities Examiner 3 on April 1, 1986. These reclassifications involved movement in a progression series based on the attainment of required training, education or experience. Appellant's regrade could have been denied if respondent had determined pursuant to

§ER-Pers 3.015(2)(a), Wis. Adm. Code, that his performance had not been satisfactory.

2. Throughout this period, and until he was involuntarily transferred to the Division of Securities and Franchise Investment Registration (DSFIR) effective January 20, 1987, complainant was employed in the Division of Licensing and Regulation. (DLR).

3. Complainant initially was under the supervision of Division Administrator Richard P. Carney. Complainant's exhibits reflect the following performance evaluations by Mr. Carney on a scale of Exceptional/Above-Satisfactory/Satisfactory/Below-Satisfactory/Unsatisfactory:

12/16/82 - 6/15/83:	2 tasks Above-Satisfactory, 3 Satisfactory
6/16/84 - 12/26/84:	One Exceptional; 2 Above-Satisfactory, 2 Satisfactory
1/1/85 - 6/12/85:	One Exceptional; 3 Above-Satisfactory, One Satisfactory

Overall, Mr. Carney rated Mr. Ruff's performance as "good." In June, 1985, Mr. Carney left respondent's employment to take a job with a law firm.

4. After Mr. Carney's departure, the Commissioner, Ulice Payne, Jr., a male, took over as acting division administrator while a selection process for a permanent division administrator was being conducted through the civil service process.

5. In March 1986, Mr. Payne granted exceptional performance awards to all eligible employes in the agency, including complainant, basically as a reward for what he considered to have been the extra hard work everyone on the staff had been doing due to the increased workload of the agency associated with the then "bull market" and the associated increase in brokerage staffs, new stock issues, etc.

6. In 1985, the agency was involved in an investigation of a broker-dealer, Charles Schwab & Co., Inc., regarding securities transactions allegedly effected by unlicensed securities agents. Complainant and an attorney in the Enforcement Division, Mary Blanchard, were two of the employes involved in this proceeding, which led to the entry of a negotiated consent order on September 17, 1985, restricting Schwab from opening new accounts with Wisconsin residents for a 10 day period. In addition to these terms, reflected in the consent order, there also was an agreement between respondent and Schwab as part of the resolution of the matter that Schwab would reduce commissions charged to its Wisconsin customers for a period of time until a certain amount of money representing reductions in its usual commissions had been realized. Complainant earlier had expressed to Mr. Payne his substantive disagreement with this settlement as not being a severe enough sanction, although he eventually did sign the settlement agreement.

7. Sometime after the entry of said order, Ms. Blanchard told Mr. Payne that she had spoken to a person who had a complaint pending with respondent against Schwab that was related to the foregoing investigation, and who apparently had been hoping to obtain a monetary settlement against Schwab, and that she had told Ms. Blanchard that complainant had told her that while originally there was to have been a settlement that would have resulted in her receiving some kind of a cash payment from Schwab, this was not going to occur, and she would have to seek any such remedy through a private effort of her own.

8. At another point in time, Mr. Payne was informed by another agency employe (Fred Reed) that Ms. Blanchard had told him (Reed) that she had overheard complainant in a telephone discussion with someone involved

in the representation of an E. F. Hutton employe who was involved in a licensing dispute with respondent. Mr. Reed stated that Ms. Blanchard had said that complainant had disclosed certain non-public aspects of the proceeding that, pursuant to respondent's policy, should not have been revealed. There were two relatively recent former employes of respondent associated with the law firm who were involved in the representation of the Hutton employe in question.

9. Mr. Payne discussed both these matters with complainant. Mr. Payne believed that complainant admitted a degree of culpability concerning disclosure of confidential information with respect to both matters.

10. By memo dated April 17,1986, entitled "Job Responsibilities" complainant conveyed to Mr. Payne certain concerns regarding certain of his pending investigative files, and in which he referred, among other things, to a "serious under-staffing problem" in DLR, and requested that certain changes be made in work assignments that would provide him with some assistance.

11. After reading this memo, Mr. Payne was concerned that he perhaps did not completely understand what was going on in DLR, and he met with the other members of the division to discuss the memo. Their response was that complainant had not consulted with them regarding the matters in the memo, they had not been aware of the memo, while they were a little overworked they felt that were able to get the work done, and they could not understand why the memo had been written.

12. Mr. Payne was upset with complainant for having written this memo, because he (Payne) believed that complainant had not consulted his coemployes before writing it and had misrepresented to some extent the actual state of affairs in DLR. Also, complainant requested reassignment

of a duty (logging in and assigning incoming complaints) that Mr. Payne believed complainant had previously requested.

13. As the agency head, Mr. Payne had the ultimate responsibility for determining discretionary salary adjustments. He received and followed the recommendations of all division administrators with regard to the 1986 adjustments. Since DLR was still without a permanent administrator, and he was supervising the division in an acting capacity, he made the decisions on discretionary salary adjustments for DLR employes himself. Of the 15 employes in the agency who met the criteria to be considered for DPA's (i.e., nonrepresented, permanent status, etc.), all were awarded DPA's except complainant.

14. In determining the distribution of the discretionary portion of salary adjustments that occurred in July 1986, for DLR employes, Mr.Payne took the approach that the "general discretionary award" component should be awarded to eligible employes whose work met minimum standards of at least satisfactory performance. The "discretionary progression award" component (frequently referred to in this record as the "discretionary performance award" or DPA) would be awarded only to employes whose work was over and above minimum standards.

15. Agency as well as state standards required that written performance evaluations be performed at least annually. At the time in June or July 1986 that Mr. Payne made the decision on discretionary salary adjustments for DLR employes, he had not performed written performance evaluations on any of them. However, he decided he was familiar enough with their work to decide on these adjustments. He did prepare written performance evaluations of these employes in the fall of 1986.

16. The 3 examiners employed in DLR in July 1986 were Judith Wilson, Helen Kleuver, and complainant. All received general discretionary awards.

Both Ms. Wilson and Ms. Kleuver received DPA's. Complainant was denied a DPA.

17. Mr. Payne denied complainant a DPA because, as set forth above, he (Payne) believed complainant had improperly disclosed confidential information to persons outside the agency with respect to the Schwab and Hutton matters and had shown poor judgment with respect to his April 17, 1986, memorandum to Mr. Payne.

18. Complainant filed his complaint of sex discrimination with respect to the denial of his DPA (No. 86-0141-PC-ER) on November 7, 1986. This was served on respondent shortly thereafter, and Mr. Payne was familiar with the complaint when he made the subsequent decision to transfer complainant as discussed below.

19. In September 1986, there was a Securities Examiner vacancy in the Division of Franchise Investment. Respondent decided to try to fill this position at the entry level, Securities Examiner 1, in an attempt to facilitate in-house promotion.

20. Complainant expressed an interest in this position to Stephanie Thorn, Administrator of the Division of Administration, Policy and Budget, and discussed with her what would be involved in his moving to this position. She indicated this would be a two pay range voluntary demotion (Securities Examiner 3 to 1), that there would be no immediate pay cut because his salary was not above the maximum of the Securities Examiner 1 pay range, but that the pay range maximum was below that of the Securities Examiner 3 range, and that he should think long and hard before accepting such a demotion.

21. Complainant decided to proceed to seek consideration for this position on a voluntary demotion basis. However, shortly after he

interviewed with Mr. Payne for the position, complainant advised Mr. Payne by memo dated September 24, 1986, that he had changed his mind and wished to withdraw as a candidate for this position. Mr. Payne had already appointed another employe (Kathryn Rice) to this position on September 23, 1986.

22. As of December 1986, the Division of Franchise Investment had merged with the Division of Registration to form the Division of Securities and Franchise Investment Registration (DSFIR), and respondent was notified of two sudden and unexpected vacancies out of the four examiners in that Division.

23. In December 1986, Mr. Payne and Ms. Thorn met to discuss the situation. Mr. Payne ultimately made the decision to transfer complainant to fill one of these vacancies at the Securities Examiner 3 level.

24. Respondent's articulated reasons for this decision are as follows:

a) The sudden and unexpected nature of these vacancies left a gap that had to be filled. Furthermore, one of the two remaining examiners (Ms. Rice) in DSFIR had only a few months experience, and Ms. Thorn had received some indications from the state budget office that the division might be losing another position as well.

b) Complainant was an experienced examiner and had earlier expressed an interest in one of the positions in the division, as set forth above. In addition, before that in 1986 he had expressed an interest in another examiner position in the then registration division.

c) Time was of the essence as to some of the work in the division, since franchise applications had to be processed within 15 days or were deemed approved.

d) The Division of Licensing and Regulation had recently hired (effective November 10, 1986), a division administrator (Kenneth Hojnacki) who had extensive experience in securities regulation, and Ms. Wilson, an experienced examiner in that division, was to return from maternity leave in January 1987.

e) Ms. Wilson had performed some work for Mr. Hojnacki, and he had been impressed by her work and had requested that she not be transferred. Also, they did not want to transfer her because she was returning from maternity leave.

25. After the meeting between Mr. Payne and Ms. Thorn, Mr. Payne met with complainant on December 16, 1986. Complainant informed Mr. Payne he did not want to transfer and suggested he discuss a possible transfer with Ms. Wilson because she had applied for an examiner vacancy in the then Registration Division a couple of years earlier, and complainant thought she might be interested in one of the impending vacancies. Mr. Payne thanked complainant for the information and said he would check with her, but he never did.

26. Complainant was involuntarily transferred to a Securities Examiner 3 position in the Division of Securities and Franchise Investment Registration effective January 20, 1987. This transaction was a lateral move and involved no adverse effects on complainant's salary or benefits.

27. Of the foregoing reasons respondent advanced for the decision to transfer complainant as set forth in Finding #24, all are supported by the record except e) and part of b). As to sub e), the parties stipulated that

Ms. Wilson started her maternity leave the same day (November 10, 1986) that Mr. Hojnacki started work with the agency. Ms. Wilson testified that she did not do any work for the agency while she was on maternity leave in 1986. Furthermore, respondent's purported concern about Ms. Wilson with regard to her return from maternity leave is inconsistent with the fact that no attempt was made to determine if she would be interested in such a transfer once complainant had told Mr. Payne about her prior interest. As to sub. b), there was no evidence that complainant ever expressed an interest in an examiner position in the Registration Division, as Mr. Payne stated in his January 6, 1987, letter to complainant notifying him of the transfer (Complainant's Exhibit 30F).

CONCLUSIONS OF LAW

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

2. Complainant has the burden of proof.

3. Complainant has not sustained his burden of proof as to No. 86-0141-PC-ER. Complainant has sustained his burden of proof as to No. 87-0005-PC-ER as to retaliation but not as to sex.

4. 86-0141-PC-ER: There is no probable cause to believe that respondent discriminated against complainant on the basis of sex in violation of the FEA with respect to the denial of complainant's discretionary progression award in 1986.

5. 87-0005-PC-ER: There is no probable cause to believe that respondent discriminated against complainant on the basis of sex in violation of the FEA with respect to his involuntary transfer to the vacant Securities Examiner 3 position in the Division of Securities and Franchise

Investment Registration effective January 20, 1987. There is probable cause to believe that respondent discriminated against complainant in retaliation for having filed complaint No. 86-0141-PC-ER, in violation of the FEA, in connection with his the aforesaid transfer.

DISCUSSION

These matters are before the Commission for a determination as to probable cause. In such a proceeding, the burden of proof is less that prevailing at a hearing on the merits. §1.02(16), Wis. Adm. Code; Winters v. DOT, Wis. Pers. Commn. Nos. 84-0003-PC-ER, 84-0199-PC-ER (9/4/86).

In cases of this nature, the Commission usually employs the method of analysis set forth in McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668, 5 FEP Cases 965 (1973), obviously in the context of a probable cause determination as opposed to a decision on the merits.

The first step is to determine whether the complainant has established a "prima facie" case -- i.e., facts which, if unexplained by the employer, give use to a presumption of discrimination. Once a prima facie case has been established, the burden of proceeding shifts to the respondent to articulate a legitimate, non-discriminatory rationale for its action, after which the burden of proceeding shifts back to the complainant to attempt to show that the respondent's articulated rationale was in fact a pretext to attempt to mask an underlying discriminatory motivation for the action.

In the most general sense, a prima facie case arises from facts which are indicative of discrimination. For example, in a hiring case, a prima facie case usually consists of a showing that the complainant is a member of a class protected by the FEA, that he or she applied for an available

position for which he or she was qualified, and the respondent rejected complainant and hired someone from a different class or continued to seek applicants.

With regard to Case No. 86-0141-PC-ER, complainant has failed to establish a prima facie case of discrimination on the basis of sex. While it is true that he was denied a DPA while the two female examiners in the division were granted DPA's, the Commission cannot ignore the fact that the appointing authority who made this decision was male. In a case such as this where there is no suggestion that the transaction in question (here, a DPA denial) involved an affirmative action component, it is inherently improbable, although not impossible, that a male would discriminate against another male because of the latter's gender.

If a prima facie case were assumed, respondent has articulated a legitimate, non-discriminatory reason for the denial of the DPA based on Commissioner Payne's testimony that he received reports that complainant had improperly released confidential information, and that complainant had exercised poor judgment in his April 17, 1986, memo which misrepresented working conditions in DLR and which complainant had not discussed with his co-workers prior to its issuance.

In an effort to show pretext, complainant presented testimony from the complainant against Schwab and the law firm representing the Hutton employe that there had been no disclosures of confidential information by complainant. However, the record is undisputed that the source of Mr. Payne's information in these matters was an attorney employed by respondent in the Enforcement Division, who based her disclosures on a conversation with the Schwab complainant and on overhearing Mr. Ruff discussing the Hutton matter over the telephone. Furthermore, Mr. Payne testified, although this was

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disputed by complainant, that when he (Payne) first confronted him with these accusations, complainant admitted he had acted incorrectly.

Even were the Commission to conclude that the alleged disclosures by complainant never occurred, this still does not mean that respondent did not have a legitimate, non-discriminatory reason for its action at the time it was taken, based on Attorney Blanchard's statements. This is not a disciplinary case where the employer has the burden of proving the facts necessary to establish just cause. Rather, it is the employe's burden to establish that the employer's articulated reasons for its actions were pretextual, in a probable cause context. On this record, it is undisputed that Mr. Payne received reports from attorney Blanchard that complainant had improperly divulged confidential information. Furthermore, Mr. Payne testified, although this was disputed by complainant, that complainant essentially admitted that he had acted improperly. If this case involved a more traditional kind of claim -- e.g., if the employe were female and the appointing authority male, or if there were some kind of contention that there was an affirmative action component involved in this transaction, complainant's evidence that the underlying misconduct had not occurred might be a sufficient basis for a conclusion of probable cause. However, in this case the Commission must evaluate this evidence in conjunction with the inherent unlikelihood that Mr. Payne would have discriminated against Mr. Ruff because of the latter's gender. Even if the Commission were to resolve all the disputed facts regarding complainant's alleged conversations in favor of complainant, the facts remain that Mr. Payne had the reports of complainant's improper communications emanating from Attorney Blanchard, and there is no apparent reason why he would be inclined to discriminate against complainant because of sex. Therefore, it would be

far more likely to attribute his reliance on these reports to a mistake rather than to sex discrimination.

With respect to the other reason given for the DPA denial -- complainant's April 17, 1986, memo -- complainant's attempt at demonstrating pretext consisted largely of trying to show that the content of the memo was accurate. Again, the Commission's role is not to act as an arbitrator to determine whether the employer or the employe was right with respect to their dispute over the DPA, but to determine whether there is probable cause to believe it was denied because of complainant's gender. While the inquiry into pretext can involve an attempt by the complainant to show that the reasons advanced by the employer are so flimsy as to be unworthy of credence as the real reasons for the decision, complainant's case falls far short of such a showing. It is undisputed that after Mr. Payne received this memo, he went to the other two examiners in the unit and they both contradicted parts of the memo and confirmed that Mr. Ruff had not made them aware of the memo prior to its issuance. While there was a factual dispute as to whether complainant had specifically requested that the duty of distributing incoming complaints be assigned to him, on this record it cannot be said respondent's reliance on this point was probative of pretext. Furthermore, this is but a small part of Mr. Payne's overall concern with this memo. Regardless of whether one were to side with complainant or Mr. Payne concerning the accuracy of, and judgment reflected by the issuance of this memo, there is no basis for a conclusion that Mr. Payne's reliance on this memo as one of his reasons for denying the DPA was pretextual.

There are a number of other things complainant contends are probative of discrimination.

Complainant presented evidence that Mr. Carney had rated his perfor-

administrator, and complainant also pointed to his reclassifications. This is of little significance since the DPA was denied on the basis of three incidents of perceived poor judgment, not because of overall poor performance.

Complainant also pointed out that he received an EPA a few months before he was denied a DPA. However, the record is clear that everyone in the agency received an EPA.

Complainant also cites the formal written performance evaluations done by Mr. Payne in the fall of 1986 as evidence of sex discrimination. He contends that Mr. Payne's rating of the examiner's performance in conducting field investigations favored the female examiners, contrary to the actual statistics. Mr. Payne testified that he based his evaluation of complainant on a failure to have met his self-generated goals. On this record, the most that this amounts to is a difference of opinion.

In conclusion, on this point, the Commission is unable to conclude there is probable cause to believe that respondent's stated reasons for denying complainant's DPA were a pretext for sex discrimination.

With respect to the transfer (Case No. 87-0005-PC-ER), a prima facie case of retaliation consists of the following elements:

1) Complainant participated in an activity protected under the FEA;

2) Respondent was aware of this;

3) Respondent took an adverse employment action against complainant;

4) This occurred under circumstances that are indicative of retaliatory intent, which can consist merely of a close relationship in time between the protected activity and the adverse action.

In this case, complainant has established a prima facie case. He filed a complaint of sex discrimination (No. 86-0141-PC-ER), respondent was aware of the complaint, and within a few months he was involuntarily transferred to a different position in another division. While there is some question whether this transfer should be considered an adverse employment action, since complainant did not suffer any loss of pay or benefits and was not required to move to a different locale, the fact that he considered the new position less desirable and did not wish to transfer is sufficient, particularly at the probable cause stage of this proceeding.

Moving to the next stage of analysis, respondent has articulated a legitimate, non-discriminatory rationale for its decision. There was a sudden and unexpected loss of personnel in the Division of Securities and Franchise Investment Registration, which was required to process certain kinds of applications in only 15 days, complainant was an experienced examiner who earlier had shown interest in transferring to other positions in components of the recently merged unit, the staffing situation was looking better in DRL, and Mr. Hojnacki had been impressed by Ms. Wilson's work and had requested she be retained in his division.

Complainant tried to show that the staffing situation was problematical in DLR. For example, Mr. Payne had expressed great concern about understaffing in DLR to the legislature and the media in connection with budget requests. However, this cannot gainsay the sudden and unexpected staff losses in DSFIR. In the final analysis, while arguments could be made both ways, respondent's conclusion that it was more desirable to transfer someone from DLR into DSFIR was well within a reasonable range of discretion and does not tend to show any discriminatory intent.

However, there were two decisions involved in this transaction. One was the decision to fill one of the positions in DSFIR by transfer. The other was the decision to transfer complainant, as opposed to someone else.

As to the latter, one of the reasons respondent articulated for this decision simply not supported by the record. Ms. Thorn testified that one of the reasons for Mr. Payne's decision was that Ms. Wilson had done some work for the new DLR administrator, Mr. Hojnacki, and he had expressed satisfaction with her work and said he didn't want to lose her. However, the parties stipulated that Ms. Wilson started her maternity leave on November 10, 1986, the same day that Mr. Hojnacki started as division administrator. Also, Ms. Wilson testified that she had not done any work for the agency while she was on maternity leave.

Another indication of pretext with regard to the decision to transfer complainant is that when complainant met with Mr. Payne prior to the implementation of the transfer, complainant told Mr. Payne not only that he did not want to transfer to this position, but also that he had reason to believe Ms. Wilson would have an interest in the job due to her background and an expression of interest a couple of years earlier. Mr. Payne said he would check this out with her, but he never did.

These facts are related to two of the reasons respondent gave for selecting complainant for transfer. One is the fact that complainant had recently expressed an interest in transferring to a position in the then Division of Franchise Investment. After the aforesaid conversation, respondent was aware that notwithstanding complainant's earlier expression of interest in that position, he was not currently interested in a transfer to the position in question in the newly merged DSFIR. (It is also noted that there is no evidence that complainant ever expressed an interest in an

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examiner position in the Division of Registration as stated by Mr. Payne in the notice of transfer, Complainant's Exhibit 30F.) The second is the reason described by Ms. Thorn, that the agency did not want to transfer Ms. Wilson because she was returning from maternity leave. The exact basis for this was not enunciated, but presumably it was inferred by management that under these circumstances, Ms. Wilson would consider a transfer to be problematical. In any event, once Mr. Ruff had informed Mr. Payne of his reasons for thinking that she indeed might welcome such a transfer, the fact that the agency did not check with Ms. Wilson but rather proceeded with its decision to transfer complainant casts doubt on the credibility of its asserted rationale for its decision.

When these factors are combined with the point that the allegation that Hojnacki had been impressed with Ms. Wilson's work and wanted to keep her is completely at odds with the record evidence, and this is viewed in the context of complainant's lesser burden of proof at this stage of the proceeding, there is a basis for a probable cause finding as to retaliation, particularly when it is considered that pursuant to Commission precedent, an action even partially motivated by a discriminatory reason violates the FEA. Smith v. UW, Wis. Pers. Commn. No. 79-PC-ER-95 (6/25/82).

With respect to sex discrimination, while it is questionable whether there is a prima facie case, one will be assumed given that this issue was fully tried and is still at the probable cause stage. While much of the preceding discussion concerning respondent's rationale for its action and complainant's attempt to show pretext would apply to the charge of sex discrimination, an additional factor that must be considered is that complainant and the appointing authority, Commissioner Payne, are both

male. Again, as in the case of the DPA denial, there has been no suggestion that there was any affirmative action element involved in the transaction. The inherent improbability of a male discriminating against another male under these circumstances is so great that even with the evidence of pretext that is present as to this transaction, the Commission is unable to conclude that probable cause is present with respect to the sex discrimination claim.

ORDER

The Commission having concluded there is no probable cause as to Case No. 86-0141-PC-ER, that complaint is dismissed. The Commission having concluded that there is probable cause with respect to the charge of retaliation contained in No. 87-0005-PC-ER, and no probable cause as to the sex discrimination charge, so much of Case No. 87-0005-PC-ER that charges sex discrimination is dismissed. The retaliation charge contained in Case No. 87-0005-PC-ER is to be scheduled for a prehearing conference/conciliation.

Dated: _____,1988 STATE PERSONNEL COMMISSION

AJT:jmf
JMF10/3

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DONALD R. MURPHY, Commissioner

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GERALD F. HODDINOTT, Commissioner

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