

respondent filed a motion to dismiss the two complaints for failure to state a claim upon which relief could be granted. On July 20, 1989, the Commission denied respondent's motion and established an issue for hearing. The hearing was conducted on August 21 and 22, 1989, in accordance with the schedule. On August 22, 1989, complainant filed a motion to disqualify the hearing examiner and declined to continue to participate in the hearing. Complainant also indicated at this time that she wouldn't be leaving the U.S. until late November at the earliest and no longer had a concern that the decision be issued before she left. Respondent then filed a motion to dismiss the two complaints for lack of prosecution. The hearing examiner, although invested by the Commission with the authority to finally decide the two cases, declined to rule on the motion to dismiss due to the pendency of complainant's motion for disqualification. The respondent then proceeded to put their case into the record and, once the respondent rested its case in chief, the hearing examiner closed the hearing. Pursuant to a telephone request from complainant, the Commission sent copies of the two complaints to the Equal Employment Opportunities Commission (EEOC) on August 23, 1989. On September 11, 1989, the Commission denied complainant's motion for the disqualification of the hearing examiner. On September 12, 1989, the hearing examiner denied respondent's motion to dismiss for lack of prosecution and established a briefing schedule on the merits of the complaints. Pursuant to this schedule, initial briefs were due from both parties on or before October 2, 1989, and reply briefs on or before October 12, 1989. No initial brief was filed by complainant. On September 20, 1989, complainant advised the Commission that, in her opinion, the effect of the forwarding of copies of her complaints to the EEOC was to deprive the Commission of jurisdiction over these cases.

Findings of Fact

1. Complainant is a native of India. She wears a sari which is a floor-length dress customarily worn by women in India.

2. During August of 1988, respondent received a list of certified candidates for four vacant Clerical Assistant 1 (CA 1) positions in its Central Files Section, Division of Income, Sales, Inheritance and Excise Tax.

3. The Central Files Section is primarily responsible for maintaining the individual tax file folders for all Wisconsin taxpayers.

4. The primary duties and responsibilities of these vacant CA 1 positions were to quickly and accurately pull or file tax returns and a large number of related documents as requested or returned by an auditor or other authorized person; to maintain records relating to requests for such returns and documents; and to become familiar with and to carry out tasks in other units of the section including opening the mail, alphabetizing, and answering phone requests. These duties required the use of ladders and stools to reach files and the use of a computer terminal, a microfiche machine, and a microfilm reader/printer.

5. Seventeen certified candidates, including complainant, were interviewed for these positions. The interview consisted of the following three parts:

a. A simulation exercise. The first part of this exercise required the candidate to alphabetize 25 names. The second part of this exercise required the candidate to indicate whether pairs of names or social security numbers or both were the same or different. An error rate on either of these parts of three or more was considered unacceptable.

b. A physical ability test requiring the candidates to step up on a stool and to climb a ladder. Deanna Mack, Clerical Supervisor, administered this test.

c. An oral interview consisting of the following nine questions:

1. Describe your most recent work experience.
2. What are three words you would use to describe yourself?
3. How would you define your future goals in life?
4. Based on what we have told you and what you have read about this position, what do you feel are the most important characteristics of a person performing it?
5. Describe any classroom or work experience you have had:
 - A. Using a CRT -
 - B. Using a Microfiche Machine -
 - C. Using a Microfilm reader/printer -
 - D. Working in files -
6. Is there any reason why you would be unable to perform any of the duties explained?
7. Why do you want this position?
8. Describe your personal work experience with people from diverse cultural backgrounds.
9. Is there anything you would like to add that we have not covered?

The interview panel consisted of Ms. Mack; Terri Wilke, Chief, Central Files Section; and Roberta Hilgers, Clerical Supervisor.

6. On the simulation exercise, complainant made 5 errors in alphabetizing and 3 errors in matching. On the physical ability test, complainant caught her foot in her sari and her movements were not as quick or as agile as those of the successful candidates. On the oral interview, complainant's answers were not as direct or concise as those of the successful

candidates and question number 2 had to be repeated several times and then rephrased because she didn't understand it. Complainant failed to bring to the interview with her a completed addendum to her application form as she had been instructed to do. Complainant was also late for her interview.

7. The successful candidates for the positions were Jayne Moioffer, Karen Fiene, Elizabeth Tackett, and Donna Kraemer. Each of these candidates' national origin is the United States. Candidates Moioffer, Fiene, and Tackett had perfect scores on both parts of the simulation exercise. Candidate Kraemer had two errors on the matching part. Each of the successful candidates completed the physical ability exercise more quickly and with more agility than complainant. Each of the successful candidates provided more direct and concise answers to the oral interview questions than complainant did. Each of the successful candidates brought a completed addendum to the application form with them to the interview. None of the successful candidates was late for their interview.

8. During the hearing, the hearing examiner had an opportunity to observe complainant and candidates Kraemer and Fiene step up on a stool and ladder under approximately the same conditions that existed when they participated in the physical ability part of the interview described above. Complainant lifted her sari with one hand when climbing the ladder and the stool. Ms. Kraemer and Ms. Fiene had the unencumbered use of both hands when climbing the ladder and stepping up on the stool and demonstrated greater quickness and agility than complainant.

9. The interviewers agreed that candidates Moioffer, Kraemer, Fiene, and Tackett were the best qualified candidates and offered the positions to these candidates. In a letter dated August 31, 1989, respondent advised complainant that she had not been selected for any of the vacant positions.

10. In a letter dated October 24, 1988, complainant was advised by Barb Hilleque, Supervisor, Income Files, Central Files Section, that she had been selected for an LTE Clerical Helper position, that she should report for work at 8:00 a.m. on November 7, 1988, and that her scheduled work hours would be 8:00 a.m. to 12:00 p.m. The purpose of appointing complainant to this position was to provide her six weeks to demonstrate her ability to carry out the duties and responsibilities of a Clerical Assistant 1. During complainant's tenure in this LTE position, Ms. Hilleque was her first-line supervisor and Janet Zingg and Gary Muskat were her lead workers. All three participated in complainant's training.

11. Complainant's duties and responsibilities in this LTE position included pulling files, filing current year returns and return accounts, routing files needing change forms or cross reference forms to leadworker, alphabetizing documents, and checking information on the computer.

12. Part-time Clerical Helpers in the Central Files Section were required to meet a standard of 500 documents pulled/filed each week with a 1% error rate. It usually took one or two weeks of training for a part-time Clerical Helper to achieve such standard. During her eleven weeks in the position, complainant never achieved such standard. It usually took one week of training and experience for part-time Clerical Helpers to be able to work without supervision. During her entire period of employment, complainant required close and constant supervision, frequent retraining, and made the same errors repeatedly. Complainant was absent 15 days during her 11 weeks in the position. This was considered by DOR management to be an excessive amount of leave. On occasion, complainant showed up for work at times other than her scheduled times without prior notice or approval from her supervisor. Complainant requested and received training on the computer

terminal. It usually took one hour to train a part-time Clerical Helper on the computer but, despite the fact that many hours were spent training complainant, she never was able to perform the computer duties of her position without close and constant supervision and frequent retraining. Ms. Hilleque met with complainant on a weekly basis to discuss her performance in response to complainant's request for frequent and immediate feedback.

13. In January of 1989, Ms. Hilleque recommended to Ms. Wilke that complainant be terminated from her part-time Clerical Helper position because she had not met the quantity or quality performance standards for the position, assisting the complainant in meeting the standards would require excessive time and effort on the part of the leadworkers, and complainant had been absent for 15 days out of the 11 weeks of her employment. In a letter from Ms. Wilke dated January 13, 1989, complainant was advised that she was being terminated effective January 20, 1989.

14. During the course of her employment, complainant became acquainted with a co-worker named Lenita Georgiles, who is a native of Brazil. Complainant and Ms. Georgiles had occasional discussions regarding their respective native countries and cultures. During the course of one of these discussions, Ms. Georgiles understood complainant to say that she relied on relatives in India to send her the saris she wore because she couldn't afford to buy clothes. On one occasion, Ms. Georgiles told complainant that she purchased some of her work clothes at Goodwill and suggested that, if complainant was having trouble affording clothes, that she should consider going to Goodwill as well. Complainant took offense at this remark. On occasion, Ms. Georgiles would compliment complainant on her saris. On one occasion, Ms. Georgiles told complainant that she looked "very elegant" that day. Complainant took offense at this remark, started yelling at Ms. Georgiles,

and told Ms. Georgiles that she shouldn't say anything if she couldn't be sincere. Ms. Georgiles became upset because she felt that her remark had been misinterpreted. Ms. Hilleque asked both complainant and Ms. Georgiles to meet with her as a result of this incident. At this meeting, Ms. Georgiles apologized to complainant for the misunderstanding and told complainant that she had meant the remark as a compliment.

15. During November of 1988, candidates were considered for a CA 1 vacancy in the Central Files Section. The list of eligible candidates was derived from the August certification list (see Finding of Fact 2, above); from a newly generated certification list; and from a list of transfer candidates. Candidates who had been interviewed as part of the August recruitment (see Finding of Fact 5, above) were given the option of re-interviewing. Ms. Hilleque asked complainant if she wanted to re-interview but complainant indicated that she did not.

16. The duties and responsibilities of this November CA 1 vacancy were identical to those of the August vacancies (see Finding of fact 4, above). The interview process was also identical (see Finding of Fact 5, above) except that the November interview panel consisted of Ms. Wilke, Ms. Hilleque, and Rosemary Haffele (Clerical Supervisor).

17. The successful candidate for this vacancy was Linda Sauer. Ms. Sauer performed well in all phases of the interview process. On the simulation exercise, Ms. Sauer had no errors on the alphabetizing part and one error on the matching part; she performed the physical ability test without difficulty; and she provided excellent answers to the oral interview questions. The interview panel agreed that Ms. Sauer was the best qualified candidate for the position. The country of Ms. Sauer's national origin is the United States.

18. After Ms. Sauer was appointed to this vacancy, complainant told Ms. Hilleque that she did want to be re-interviewed for the position. Ms. Hilleque told complainant that the position had already been filled and that the interview panel had relied upon her statement to Ms. Hilleque that she had not wanted to be re-interviewed.

19. Pursuant to a telephone request from complainant, the Commission sent copies of the subject complaints to the EEOC on August 23, 1989. In the cover letter to the EEOC, the Commission stated that the subject cases were being cross-filed with the EEOC at the request of the complainant and copies of the two charges of discrimination and the Initial Determination issued with respect to these cases was being enclosed. On the accompanying form, a box was checked next to the statement "Pursuant to the worksharing agreement, this charge is to be initially investigated by the EEOC."

Conclusions of Law

1. These cases are properly before the Commission pursuant to §230.45(1)(b) and §PC 1.02(16), Wis. Adm. Code.
2. The respondent is an employer within the meaning of §111.32(3), Stats.
3. The complainant has the burden to prove that there is probable cause to believe that she was discriminated against on the basis of national origin as alleged in the subject complaints.
4. The complainant has not sustained this burden.

Decision

In McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 5 FEP Cases 965 (1973), the U.S. Supreme Court established the basic allocations of burdens and order

of presentation of proof in cases alleging discriminatory treatment. The initial burden of proceeding is on the complainant to establish a prima facie case of discrimination. This burden then shifts to the respondent to articulate a legitimate, non-discriminatory reason for the actions it has taken. This burden then shifts back to the complainant to show that the reason offered by respondent is a pretext for discrimination. The ultimate burden of persuading the trier of fact that the respondent intentionally discriminated against the complainant remains at all times with the complainant. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 25 FEP Cases 113 (1981). 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 the case of a termination, the elements of a prima facie case are that the complainant (1) is a member of a class protected by the FEA, (2) was qualified for the job and performed the job satisfactorily, and (3) was terminated, despite satisfactory performance, under circumstances which give rise to an inference of discrimination.

In an appeal of a no probable cause determination, a similar analysis is appropriate, although the ultimate burden on the complainant is less. The complainant need not establish that discrimination occurred, but, rather, that there is reasonable ground for belief supported by facts or circumstances strong enough in themselves to warrant a prudent person in the belief that discrimination probably has been or is being committed. (§PC 1.02(16), Wis. Adm. Code)

In regard to the two subject hiring decisions, complainant has established a prima facie case: she is a member of a protected class as a result

of her national origin; she is presumed to have been qualified for the two positions as a result of having been certified as eligible for them; and an inference of discrimination can be drawn from the fact that the successful candidates for both positions had a different national origin than complainant.

Respondent has offered a legitimate, nondiscriminatory reason for both of the subject hiring decisions, i.e., that the successful candidates performed better than complainant on each part of the interview process.

The burden then shifts to complainant to show that this reason is pretextual. It is clear from the record that complainant's performance on one part of the simulation exercise was unacceptable and that she had more errors on the other part than any of the successful candidates; that she had difficulty answering one of the questions on the oral interview and that her other answers were not as direct and concise as those of the successful candidates; that she failed to follow instructions to bring a completed addendum to the application form to the interview with her; and that she was late for the interview. The record also reflects that complainant's performance on the physical ability part of the interview was not as quick or agile as those of the successful candidates.

Complainant attempted to rebut the testimony of the interview panel members' testimony to this effect and thereby demonstrate pretext by having the hearing examiner observe both complainant and two of the successful candidates attempt to replicate their performance on this part of the interview. First of all, it is not possible to conclude on the basis of a subsequent performance what happened during the original performance since the circumstances and conditions are not identical. However, the hearing examiner did observe that candidates Kraemer and Fiene had no

difficulty stepping up on the stool and climbing the ladder and did so more quickly and with more agility than complainant. The hearing examiner also observed that complainant, as a result of the sari she was wearing, had to use one hand to hold her dress while she was stepping up on the stool and climbing the ladder. This certainly lends credence to the testimony that complainant had more difficulty with the physical ability part of the interview than the successful candidates and to the testimony that complainant caught her foot in her sari during the physical ability part of the interview. Complainant has failed to show pretext in this regard.

There is simply no evidence in the record from which it is possible to conclude that the hiring criteria used for the subject positions were not related to the duties and responsibilities of these positions; that these criteria were not uniformly applied to the candidates, including complainant; that complainant was treated differently in any manner than the other candidates; or that respondent in any way discriminated against complainant on the basis of her national origin in regard to the two subject hiring decisions.

In regard to complainant's termination from her LTE position, complainant has failed to establish a prima facie case. Even though complainant is a member of a protected class as a result of her national origin and is presumed to have been qualified for the position as a result of her certification for CA 1 positions with similar but even more advanced duties, complainant has failed to show that her performance in her position was satisfactory. In fact, it is clear from the record that, during the entire course of her employment in this LTE position, complainant failed to meet quantity or quality performance standards; that she required close and constant supervision, frequent retraining, and made the same errors repeatedly; that

she had changed her work schedule on occasion without prior notice or approval; and that she took what was considered an excessive amount of leave.

If complainant had established a prima facie case, the burden would then have shifted to respondent to articulate a legitimate, non-discriminatory reason for its action. The reason offered by respondent is both legitimate and non-discriminatory: the failure of complainant to meet performance and attendance standards.

The burden would then shift to complainant to demonstrate that the reason offered by respondent is a pretext for discrimination. The only evidence offered in this regard is that regarding the Georgiles incidents. However, the record clearly shows that Ms. Georgiles did not intend to insult or demean or discriminate against complainant in any way as a result of her comments. It is difficult to understand how complainant could have felt that Ms. Georgiles was insulting her as a result of the "Goodwill" remark since Ms. Georgiles had indicated to complainant that she herself often bought her work clothes at Goodwill. It is also difficult to understand how complainant could have taken offense at the "elegant" remark since Ms. Georgiles had complimented her on several previous occasions and complainant had accepted the compliments. Even more important for our purposes here, respondent took immediate action to address the situation once it received notice that a possible problem existed. Complainant has failed to demonstrate pretext in this regard.

There is simply no evidence in the record to support a finding that the standards used to evaluate complainant's performance were different than those used to evaluate the performance of other employees in positions comparable to complainant's; that these standards were applied to complainant's performance in a manner different than that used to apply

them to the performances of other employees in positions comparable to complainant's; that complainant did not understand what these standards were or that she was not satisfying them; or that the actions taken by respondent in regard to complainant's employment were related in any way to complainant's national origin.

The one remaining issue relates to complainant's allegation that the Commission no longer has jurisdiction over these cases but that such jurisdiction has been transferred to or assumed by the EEOC. It is clear from the record that the Commission had no intention to "transfer" such cases to the EEOC. Not only was the language checked on the form (see Finding of Fact 19, above) obviously checked in error, i.e., it would be absurd to request that the EEOC "initially investigate" the subject complaints since the Commission had already investigated them, but also the accompanying letter made it clear that the Commission's intent was to cross-file the complaints with the EEOC in response to a request from the complainant and to provide copies of the complaints to the EEOC. It is also clear from the applicable law that the Commission does not have the authority to "transfer" its jurisdiction to the EEOC and that the assumption of jurisdiction over a case by the EEOC has no effect on the jurisdiction of the Commission over that case. This issue was discussed by the Commission in Acharya v. DOA, Case No. 88-0197-PC-ER (10/3/89) as follows:

(Complainant) appears to contend that since a copy of the complaint in this case was cross-filed with the U.S. Equal Employment Opportunities Commission (EEOC), this has somehow deprived the Commission of jurisdiction. Complainant cites no legal authority for this proposition and the Commission is aware of none. To the contrary, see Alexander v. Gardner - Denver Company, 415 U.S. 36, 47-49, 94 S.Ct. 1011, 1019-1020, 39 L.Ed.2d 147 (1974):

". . . Title VII provides for consideration of employment-discrimination claims in several forums. . . and, in general, submission of a claim to one forum does not preclude a later submission to another. Moreover, the legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes. The clear inference is that Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination"

Order

There is No Probable Cause to believe that complainant was discriminated against on the basis of national origin as alleged in the subject complainants and these cases are dismissed.

Dated: November 3, 1989

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

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