

appeal from Balele v UW

91-0002-PC-ER, 3/9/94

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STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 14

DANE COUNTY

PASTORI M. BALELE,

Plaintiff,

v.

FRANCIS GEORGE, ROBIN GATES,
LARRY EISENBERG, DEXTER
THUSIUS, and BOARD OF REGENTS
OF UNIVERSITY OF WISCONSIN
SYSTEM,

Defendants.

DECISION AND ORDER
CASE NO. 90 CV 3767
CASE NO. 94 CV 1177

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DECISION AND ORDER

INTRODUCTION

This matter comes before the court on defendants' renewed motion to dismiss and renewed alternative motion for summary judgment in Case No. 90-CV-3767 and plaintiff's motion for summary judgement in the same case. Also before the court, filed under Case No. 94-CV-1177, is a petition filed by the plaintiff pursuant to Chapter 227, Wis. Stats., to review a final decision and order of the Wisconsin Personnel Commission (Case No. 91-0002-PC-ER). The actions filed under Case No. 90-CV-3767 and Case No. 94-CV-1177 were consolidated with the agreement of the parties because the underlying facts in both cases are identical and the issues of law overlap. In both 90-CV-3767 and 94-CV-1177, plaintiff Pastori Balele (hereinafter "Mr. Balele") asserts that the defendants discriminated against him on the basis of race and national origin when he was not hired for the position of Director, Office of

Purchasing Services.

This action was initially filed in this court under Case No. 90-CV-3767. In that case, Mr. Balele asserted: 1) a federal race and national origin claim under Title VII; 2) a federal race claim under 42 U.S.C. § 1981; 3) federal equal protection, due process and free speech claims under 42 U.S.C. § 1983; 4) a federal conspiracy claim under 42 U.S.C. § 1985; 5) a state-law retaliation claim under the whistleblower statute, § 230.83, Wis. Stats.; 6) a state law claim based on a statute which makes it a misdemeanor to corruptly down grade an applicant's examination score, § 230.43, Wis. Stats.; and 7) a state law claim based on a statute which prohibits discrimination in the hiring process based, *inter alia*, on race or national origin, § 230.18, Wis. Stats.

On January 17, 1992, this court issued a decision on the defendants' motion to dismiss and alternative motion for summary judgement in Case No. 90-CV-3767 in which the court dismissed Mr. Balele's Title VII claim because he had not exhausted his administrative remedies. Mr. Balele had already filed a complaint with the Personnel Commission on January 3, 1991. The court also decided, on its own motion, to stay the proceedings as to the claims made under 42 U.S.C. §§ 1981, 1983 and 1985 against the individual defendants pending resolution of Mr. Balele's Title VII claims at the administrative level. However, the court dismissed Mr. Balele's claims under 42 U.S.C. §§ 1981, 1983 and 1985 against the defendant Board of Regents because the Board of Regents is not a "person" within the meaning of 42 U.S.C. §§ 1981, 1983 or 1985.

Finally, the court also dismissed Mr. Balele's state law claims under §§ 230.83, 230.43 and 230.18, Wis. Stats., for failure to comply with notice requirements.

In Mr. Balele's complaint filed with the Personnel Commission on January 3, 1991, Mr. Balele asserted that he was discriminated against based on color, national origin and race and retaliated against based on fair employment activities and whistleblowing. (Personnel Commission Return of Record, Item 28, hereinafter "PC Record"). More specifically, Mr. Balele asserts that the defendants discriminated against him in the interview and selection process for the position of Director, Office of Purchasing Services and retaliated against him for whistleblowing in his effort to protect minorities' interest as provided in the Wisconsin purchasing law. (Id.). In the complaint, Robin Gates, Larry Eisenberg, Francis George, Dexter Thusius and the Board of Regents UW-System are named as defendants by Mr. Balele. (Id.). Further demonstrating the similarity between Case No. 90-CV-3767 and Case No. 94-CV-1177, in a letter from Mr. Balele to the Personnel Commission dated January 21, 1992, Mr. Balele states that he filed the "same complaint" with the Dane County Circuit Court, Case No. 90-CV-3767. (PC Record, Item 27). In the same letter, Mr. Balele also requested to go forward with the hearing because he was comfortable with the discovery he had completed at that point. Id.

On February 19, 1992, the defendants filed a motion to dismiss and an alternative motion for summary disposition on the merits with the Personnel Commission. After Mr. Balele filed a response

to these motions and the defendants filed a reply, the Personnel Commission issued a ruling dated June 15, 1992. In this ruling, the Personnel Commission held that Mr. Balele did not establish that his claim of whistleblower retaliation was filed in a timely manner nor did Mr. Balele, or any of the other evidence submitted, establish a claim of retaliation based on fair employment activity under § 111.322(3), Wis. Stats. Consequently, the Personnel Commission dismissed the claims of whistleblower retaliation and retaliation based on fair employment activity. However, the Personnel Commission denied the motion for summary judgement as to the discrimination claims.

The Personnel Commission then held a hearing on December 7, 1992 at which Mr. Balele called 13 witnesses, conducted direct and redirect examination as to each of these witnesses, testified himself, and submitted 45 exhibits of which 36 were received. (PC Record, Item 31). After considering the evidence, the Personnel Commission sent a proposed order to the parties on January 24, 1994. The parties were also notified of the opportunity to file objections and request an oral argument. (PC Record, Item 3). The Personnel Commission then issued its final decision and order on March 9, 1994 dismissing Mr. Balele's claims of discrimination. (PC Record, Item 2). The Personnel Commission concluded that Mr. Balele failed to show that he was discriminated against on the basis of color, race and/or national origin in regard to the decision not to appoint him to the position of Director, Office of Purchasing Services.

Mr. Balele filed for a judicial review of the Personnel Commission's final decision in Dane County Circuit Court, Case No. 94-CV-1177. Branch 1, Judge DeChambeau was assigned to the case. After consultation with the parties and with Judge DeChambeau, this court recommended that Case No. 94-CV-1177 be consolidated with Case No. 90-CV-3767, Mr. Balele's federal civil rights claims described above. The defendants then filed the renewed motion to dismiss and renewed alternative motion for summary judgement as to the claims asserted under Case No. 90-CV-3767. Mr. Balele also filed a motion for summary judgement and briefed some of the legal issues concerning the court's review of the Personnel Commission's decision. For clarity and in order to be completely fair to both parties, this court then gave the parties extra time to brief the legal issues in the judicial review of the Personnel Commission's decision. On February 13, 1995, the court received the requested supplementary briefs from both parties.

After reviewing the briefs and case law in this matter, the court grants summary judgment for the defendants and denies summary judgement for the plaintiff as to Case No. 90-CV-3767. The court also concludes that the Personnel's Decision must be affirmed.

FACTS

The factual background in this case is set forth in the court's January 17, 1992 decision. Briefly, Mr. Balele was hired by defendant Larry Eisenberg (hereinafter "Mr. Eisenberg") as a Contractual Services Assistant in the Bureau of Procurement in September 1985. Mr. Balele's first-line supervisor from September

1985 until the summer of 1987 was Janet Richardson. In August 1987, Janet Abrahamsen became chief of the procurement services section and became Mr. Balele's first-line supervisor. In the fall of 1989, defendant Robin Gates became Mr. Balele's acting first-line supervisor. In June 1990, the University of Wisconsin System Administration advertised for a position of Director, Office of Purchasing Services. Defendant Dexter Thusius was the incumbent of the position and retiring. Mr. Balele applied for the position by submitting a letter of interest, a detailed narrative resume, a regular resume, a record of examination results for a similar position, course evaluations he had received, and a handout he had prepared for a course he had taught.

Prior to the time any applications were received, defendant Francis George asked defendants Thusius, Gates and Eisenberg to screen the application materials. The four men met once to discuss the criteria on which the candidates would be evaluated and to assign weights to the four categories selected: writing skills; government purchasing experience; supervisory experience; and management, organization and analytic skills. The three reviewers each received a copy of the 60 applications received in response to the advertisement, and ranked the applications against the four evaluation criteria according to their own method. Three candidates were selected for interviews: Janet Abrahamsen, Mark Skukley, and Ellen James. Janet Abrahamsen was offered the position. The resume screeners determined that Mr. Balele was less qualified than the successful candidate in each of the four

categories.

The parties do not argue that the factual findings in the court's January 17, 1992 decision require amendment. Thus, the court bases its decision on the summary judgement motions on its prior factual findings in this case.

As to the appeal of the Personnel Commission's decision, the plaintiff admits to all 24 of the Personnel Commission's Findings of Fact except numbers 15 and 16. (Mr. Balele's September 16, 1994 Brief in Support of His Review and Federal Claims, pp. 22-27). As to Factual Finding number 15, Mr. Balele disputes that defendant Francis George developed the criteria for reviewing the job applicants' resumes. Instead, Mr. Balele asserts that defendants George, Thusius, Gates and Eisenberg met and together determined the criteria to be used in evaluating the resumes. As to number 16, again the defendant contends that the four defendants met and developed their own criteria and that Mr. George did not develop the criteria and present them to Thusius, Gates and Eisenberg.

STANDARDS OF REVIEW

I. Summary Judgement

Summary judgment is a means by which to determine whether a legal dispute must be resolved prior to trial. U.S. Oil v. Midwest Auto Care Services, 150 Wis. 2d 80, 86, 440 N.W.2d 825 (Ct. App. 1989). Under § 802.08(2), Wis. Stats., summary judgment must be granted

if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the

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moving party is entitled to judgment as a matter of law.

Voss v. City of Middleton, 162 Wis. 2d 737, 748, 470 N.W.2d 625 (1991). To make a prima facie case for summary judgment, a moving defendant must show a defense which would defeat the claim. Grams v. Boss, 97 Wis. 2d 332, 338, 294 N.W.2d 473 (1980). Once a moving defendant makes a prima facie case for summary judgment, the burden shifts to the plaintiff to show a genuine dispute of material fact. In re Cherokee Park Plat, 113 Wis. 2d 112, 116, 334 N.W.2d 580 (Ct. App. 1983).

When evaluating the propriety of a motion for summary judgment, the Court employs a standard two-step procedure. The first step requires the Court to examine the pleadings to determine whether a claim for relief has been stated. Voss, 162 Wis. 2d at 747. If a claim for relief has been stated, the Court then determines if there are any triable issues of material fact which preclude summary judgment. Voss, 162 Wis. 2d at 747-48. On a summary judgement motion the court does not decide an issue of fact; it decides whether there is a genuine issue of fact in dispute. Coleman v. Outboard Marine Corp., 92 Wis. 2d 565, 571, 285 N.W. 2d 631 (1979). See also Kremers-Urban Co. v. American Employers Ins., 119 Wis.2d 722, 734, 351 N.W.2d 156 (1984).

When the material presented on the motion is subject to conflicting interpretations or reasonable persons may differ as to its significance, it is improper to grant summary judgment. Maynard v. Port Publications, Inc., 98 Wis. 2d 555, 297 N.W.2d 500 (1980); Schlumpf v. Yellick, 94 Wis. 2d 504, 512, 288 N.W.2d 834

(1980). Summary judgment is appropriate only when material facts are not in dispute and only when inferences that may reasonably be drawn from those facts are not doubtful and lead to one conclusion. Fuller v. Riedel, 159 Wis. 2d 323, 464 N.W.2d 97 (Ct. App. 1990). See also, Continental Cas. Co. v. Wisconsin Patients Compensation Fund, 164 Wis. 2d 110, 473 N.W.2d 584 (Ct. App. 1991).

Because summary judgment is a drastic remedy, any reasonable doubt as to the existence of a genuine issue of material fact must be resolved against the granting of the motion. Heck & Paetow Claim Service, Inc. v. Heck, 93 Wis. 2d 349, 356 286 N.W.2d 831 (1980). But the mere existence of some alleged factual dispute does not defeat a summary judgment motion: "the requirement is that there be no genuine dispute of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) (emphasis in original). A factual dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." Id.

As to the materiality requirement, only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted. Id.; Hilkert v. Zimmer, 90 Wis. 2d 340, 342, 280 N.W.2d 116 (1979); Zastrow v. Village of Brown Deer, 9 Wis. 2d 100, 106, 100 N.W.2d 359 (1960). "A summary judgment should be granted when it is clear that a formal trial could serve no useful purpose and could only result in a judgment as a matter of law." Id.

II. Review of Administrative Agency's Decision

The scope of judicial review of an administrative agency's decision is defined by § 227.57, Wis. Stats. That section provides that the court must affirm an agency's decision unless the court finds that: 1) the fairness of the proceedings or correctness of the agency's actions have been impaired by a material error in procedure, § 227.57(4), Wis. Stats.; 2) the agency erroneously interpreted a provision of law, § 227.57(5), Wis. Stats.; 3) the agency's action depends on findings of fact are not supported by substantial evidence in the record, § 227.57(6), Wis. Stats.; or 4) the agency's exercise of discretion is outside the range delegated to it by law or is otherwise in violation of a constitutional or statutory provision, § 227.57(8), Wis. Stats. The court cannot, however, substitute its judgment for that of the agency on an issue of discretion. Id.

The standard of review for an administrative decision depends on whether the issue presented involves questions of fact or law. A court will uphold an agency's fact finding if it is supported by credible and substantial evidence found on the record as a whole. Wehr Steel Co. v. ILHR, 106 Wis. 2d 111, 117, 315 N.W.2d 357 (1982). "Substantial evidence" necessary to support an administrative decision is such relevant evidence as a reasonable mind might accept as adequate to support the conclusion. City of La Crosse Police and Fire Comm'n v. Labor and Industry Review Comm'n, 139 Wis. 2d 740, 407 N.W.2d 510 (1987). In determining whether an agency's factual findings are supported by substantial

evidence, it is not required that the evidence be subject to no other reasonable, equally plausible interpretations. Hamilton v. Department of Industry, Labor & Human Relations, 94 Wis. 2d 611, 288 N.W.2d 857 (1980).

However, a court is free to review a question of law ab initio when it is as competent as an agency to interpret the relevant law, or when material facts are undisputed. Dept. of Revenue v. Milwaukee Refining Corp., 80 Wis. 2d 44, 48, 257 N.W.2d 855 (1977). Nonetheless, a court gives great weight to agency decisions when the agency's expertise is significant to the determination of a legal issue. Nottelson v. DILHR, 94 Wis. 2d 106, 117, 287 N.W.2d 763 (1980). A court will also sustain a reasonable legal conclusion even if an alternative view may be equally reasonable. United Way v. DILHR, 105 Wis. 2d 447, 453, 313 N.W.2d 858 (Ct. App. 1981). Thus, a court should hesitate to substitute its judgement for that of an agency on a question of law if the agency's conclusion has a rational basis. American Motors Corp. v. LIRC, 119 Wis. 2d 706, 710, 350 N.W.2d 120 (1984).

DECISION

I. Collateral Estoppel¹

The defendants argue that under Lindas v. Cady, 183 Wis. 2d 547, 515 N.W.2d 458 (1994), the plaintiff is collaterally estopped from asserting discrimination claims under 42 U.S.C. §§ 1981, 1983 and 1985 by reason of the final decision of the Personnel Commission that the plaintiff did not suffer discrimination by the defendants. In Lindas, the supreme court established a two stage analysis to determine the application of collateral estoppel. Lindas, 183 Wis. 2d at 554. In the first stage, the court must determine a) whether the agency was adjudicating a disputed issue of fact properly before it and b) whether the agency's proceedings provided the parties an adequate opportunity to litigate. Id. If both of these conditions are met, the court then determines whether the agency's decision has preclusive effect under state law. Id.

Lindas involved an unreviewed finding by the Wisconsin Personnel Commission that there was no probable cause to believe that the Department of Health and Human Services discriminated against Lindas because she was a woman. The Personnel Commission

¹ As a clarification, although Case No. 90-CV-3767 has been consolidated with Case No. 94-CV-1177, the claims, causes of actions, and standards of review vary between the two cases and, as such, are treated independently. The doctrine of collateral estoppel does not apply to the issue of whether the court has jurisdiction for the review of the Personnel Commission's decision under Case No. 94-CV-1177. However, collateral estoppel may prevent a plaintiff from relitigating issues decided by an administrative agency in an action filed separate from the appeal of the agency's decision. The following analysis addresses whether collateral estoppel bars the plaintiff from raising in Case No. 90-CV-3767 the issues decided by the Personnel Commission to be reviewed under Case No. 94-CV-1177.

held a 4 day hearing conducted by a hearing examiner from the Department of Industry, Labor and Human Relations at which Lindas called witnesses, cross-examined hostile witnesses and offered approximately 50 exhibits into the record. After the hearing Lindas submitted a legal brief and presented oral arguments. Lindas did not seek judicial review of the Personnel Commission's determination. Instead, she brought an original § 1983 claim in Dane County Circuit Court.

In the instant case, Mr. Balele's discrimination claims were properly before the Personnel Commission which adjudicated the issue of whether Mr. Balele was discriminated against by the defendants. Moreover, the court finds that the Personnel Commission's proceedings provided the parties an adequate opportunity to litigate. As noted above, Mr. Balele called 13 witnesses, conducted the direct and re-direct exam as to each of these witnesses and testified himself. These witnesses included defendants George, Gates, Eisenberg and Thusius. Mr. Balele also submitted 45 exhibits to the record and was given the opportunity to brief and present oral arguments to the Personnel Commission after its initial finding of no discrimination. As the supreme court noted in Lindas, only minimum procedural requirements are necessary for the process to be considered "adequate." Lindas, 183 Wis. 2d at 555-556 citing Kremer v. Chemical Construction Corp., 456 U.S. 461 (1982). Here, Mr. Balele was given the opportunity to present evidence and legal arguments and rebut evidence and legal arguments by the defendants.

In determining whether the Personnel Commission's decision should have preclusive effect in this case, this court follows the Lindas court in applying issue preclusion and the "fundamental fairness" analysis articulated in Michelle T. v. Crozier, 173 Wis. 2d 681, 688-89, 495 N.W.2d 327 (1993). As in Lindas, many of the issue preclusion principles apply to this case. However, this court finds that the instant case differs from Lindas. Here, Mr. Balele filed his action based on the federal civil rights statutes in this circuit court before filing his administrative complaint. More importantly, this court stayed his circuit court action pending the outcome of his case before the Personnel Commission. In considering the factors articulated in Michelle T., this court finds that Mr. Balele's individual circumstances "render the application of collateral estoppel to be fundamentally unfair." Michelle T., 173 Wis. 2d at 689. This court will not collaterally estop Mr. Balele's federal civil rights claims when the court, on its own initiative, imposed the stay on these claims in the first instance. To do such would not be equitable.

II. Motions for Summary Judgement

A. Plaintiff's Federal Civil Rights Claims under 42 U.S.C. §§ 1981 and 1983 and Title VII²

² Defendants contend that Mr. Balele should not be permitted to bring a Title VII claim because such a claim is time-barred. (Defendants' October 18, 1994 Reply Brief). The defendants admit that Mr. Balele received a right-to-sue letter from the U.S. Department of Justice, Civil Rights Division, on March 29, 1994 and that he was given 90 days to bring his action. However, the defendants assert that Mr. Balele failed to move to add the Title VII claim until September 16, 1994, which is 171 days after the right-to-sue letter was issued. The court notes that Mr. Balele moved the court to add his Title VII claim to Case No. 90-CV-3767

The court combines the plaintiff's claims under §§ 1981, 1983 and Title VII for purposes of the summary judgement motions before the court because the standards of proof under §§ 1981, 1983 and Title VII are identical for this purpose. Friedel v. City of Madison, 832 F.2d 965, 971 (7th Cir. 1987); Randale v. LaSalle Telecommunications, Inc., 876 F.2d 563, 568 (7th Cir. 1989). In order to prevail, a plaintiff must establish that he or she has been a victim of intentional discrimination either by direct proof or by the method of indirect proof outlined in Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 67 L.Ed.2d 207 (1981) and McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L.Ed.2d 668 (1973). Friedel 832 F.2d at 972.

The Seventh Circuit Court of Appeals summarized the McDonnell Douglas-Burdine framework for allocating burdens of proof in a disparate treatment case as follows:

The plaintiff carries the initial burden to prove by a preponderance of the evidence the prima facie case of discrimination. This burden is not onerous, but plaintiff must show that "(i) she belongs to a minority; (ii) she applied and was qualified for the job for which the employer was seeking applicants; (iii) that despite her qualifications she was rejected and; (iv) that after her rejection, the position remained open and the employer continued to seek applicants from persons of

on April 8, 1994 in a document entitled "Appellant Issues and Statement of Jurisdiction," p. 3. A letter was attached to this document labelling the same as a "Motion to incorporate plaintiff's federal claims under Federal Statutes Title 42 Sections 1981, 1983, 1985 and 2000e pursuant to this Court order of January 17, 1992." Attached to this letter and document is a copy of the right-to-sue letter. Such a motion is consistent with this court's January 17, 1992 Order and Decision and within the 90-day limit. Therefore, the court decides the summary judgement motions as to Mr. Balele's Title VII claim along with his 42 U.S.C. §§ 1981, 1983 and 1985 claims.

plaintiff's qualifications." The prima facie case raises an inference of discrimination for which defendant carries a burden of rebuttal; defendant need only articulate a legitimate, nondiscriminatory reason for the employee's rejection to successfully rebut this inference. The plaintiff then has the opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were a pretext for discrimination. This burden of proof carried by the plaintiff merges with the ultimate burden of persuading the court that the plaintiff has been intentionally discriminated against. "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." Heerdink v. Amoco Oil Co., 919 F.2d 1256, 1259 (7th Cir. 1990) (citations omitted).

In the case before the court, the parties do not dispute that Mr. Balele has proven a prima facie case of discrimination. The court agrees that Mr. Balele has met this initial burden. Additionally, the court finds, based on undisputed facts, that the defendants articulate a legitimate, nondiscriminatory reason for rejecting Mr. Balele's application.

The defendants contend that the resume screeners had personal experience with the written work product of both Mr. Balele and the candidate chosen, Ms. Jan Abrahamsen. These screeners considered Ms. Abrahamsen's work to be superior. To support this contention, the defendants submitted affidavits by defendants Thusius, Gates and Eisenberg which indicate that based on the established criteria, they thought that Ms. Abrahamsen was better qualified than Mr. Balele. (Thusius' affidavit, paras. 10, 13; Gates' affidavit paras. 3, 7; Eisenberg's affidavit, paras. 4, 13, 16). Additionally, the defendants assert, and the court agrees, that there is a reasonable basis on which the reviewers could conclude

that Mr. Balele's writing skills were inferior to Ms. Abrahamsen's based on the application materials presented. For example, Mr. Balele submitted an application consisting of two resumes and several attachments which reflect inconsistencies in the description of Mr. Balele's job experience. (Gates affidavit, para. 7). Ms. Abrahamsen submitted three pages which described her job experience and duties. (Balele Deposition 83; Balele Deposition Ex. 11).

From this undisputed evidence, the court concludes that the defendants have met their burden of rebuttal and have articulated a legitimate, nondiscriminatory reason for the employer's rejection. Moreover, the court notes that the employer decides the facially neutral qualifications for employment and the court may not interfere or substitute its judgement as to proper hiring practices of the employer. Heerdink, 919 F.2d at 1260-1261. In this case the resume reviewers choose four facially neutral categories to evaluate all 60 of the submitted applications received: writing skills; government purchasing experience; supervisory experience; and management, organizational and analytic skills. The plaintiff argues that the selection of this criteria was flawed but offers no evidence that shows that these criteria were not racially neutral.

The plaintiff argues that the four criteria selected were not legitimate criteria. In sum, the plaintiff argues that defendants George, Eisenberg, Gates and Thusius impermissibly changed the qualifications for the position after the position was advertised

and resume materials were received. Specifically, Mr. Balele asserts that these four defendants removed the required degree, the five years professional experience in purchasing and three years as a supervisor in a major purchasing agency. (Plaintiff's Brief in Support of His Review and Federal Claims, pp. 31-32; Plaintiff's "Brief in Support of Motion to Deny Defendants' Motion to Dismiss," p. 16-18).

Mr. Balele does not dispute that advertisement published for the position in question read as follows:

Bachelors degree required (equivalent training and experience considered). Managerial experience in government purchasing. A good understanding of the constraints and ethics of government purchasing and the experience to provide problem resolution within those constraints. Excellent written and verbal skills to provide the necessary communications between State administrators, University administrators; faculty and various University purchasing staffs. To lead the management reviews and the biennial meetings, a thorough knowledge of the State Purchasing Manual will be required within three months of hire. Normally more than 5 years of professional level experience as a purchasing director or senior purchasing agent with a minimum of three years in a supervisory/managerial position in a large or major agency or comparable procurement and management experience would be necessary to gain the required knowledge. (Third Amended Complaint, Exhibit 1)

This advertisement clearly states that a Bachelors degree is not mandatory for the position because equivalent training and experience would be considered. Moreover, nowhere does the advertisement specifically state what this equivalent training and experience means. The advertisement does give applicants an idea of the experience the employer seeks by stating that "(n)ormally more than 5 years of professional level experience... with a minimum of three years in a supervisory/managerial position...would

be necessary to obtain the required knowledge." (emphasis added). The underlined language indicates that such experience is not required but is rather the amount of experience most people need to have in order to perform the job at the level expected by the employer. Thus, this court finds that based on undisputed facts, Mr. Balele is incorrect when he states that the advertisement required a Bachelor's degree, five years of professional level experience as a purchasing director or senior purchasing agent with three years in a supervisory/managerial position in a major procurement agency. (Plaintiff's Brief in Support of His Review and Federal Claims, p. 29; also stated repeatedly in Plaintiff's "Brief in Support of Motion to Deny Defendants' Motion to Dismiss").

More importantly, the court finds that based on undisputed evidence, the criteria used by the defendants to rate the applications accurately reflect the requirements posted in the advertisement. The advertisement states that "excellent written and verbal skills," "(a) good understanding of the constraints and ethics of government purchasing and the experience to provide problem resolution within those constraints," and "(m)anagerial experience in government purchasing" are needed skills. Writing skills; government purchasing experience; supervisory experience; and management, organizational and analytic skills are the four criteria used by the defendants who screened the resumes.

Consequently, Mr. Balele has failed to submit evidence that the legitimate, nondiscriminatory reasons for his rejection for the

position at issue were a pretext for discrimination. Based on undisputed evidence, this court determines that Mr. Balele cannot meet his burden of persuading the trier of fact that the defendant intentionally discriminated against him. Therefore, the court must grant summary judgement in favor of the defendants on Mr. Balele's §§ 1981, 1983 and Title VII claims and deny the same for Mr. Balele.³

B. Plaintiff's claims under 42 U.S.C. §§ 1985

The plaintiff also makes a claim under 42 U.S.C. § 1985(3) alleging conspiracy against him based on race and/or national origin. (Third Amended Complaint, para. B.1; Plaintiff's Brief in Support of His Review and Federal Claims, p. 84). To prevail under § 1985(3), a plaintiff must prove: (1) that the defendants conspired, (2) that they did so for the purpose of depriving, either directly or indirectly, a person of equal protection of the laws; (3) an act done in furtherance of the conspiracy; and (4) whereby the person was injured or deprived of any right. Griffin v. Breckenridge, 403 U.S. 88, 102-103 (1971); Carpenters v. Scott, 463 U.S. 825, 829 (1983). However, § 1985(3) is not intended to

³ Mr. Balele also argues that the alleged change in required qualifications has a disparate impact on racial minorities. Basically, he asserts that the pool of racial minorities would have been larger if the advertisement had not required the Bachelor's degree and experience. The court finds that Mr. Balele agrees to the contents of the advertisement and that he misinterpreted the minimum qualification specified in this advertisement. Because Mr. Balele's disparate impact claim lies solely in a misinterpretation of the published advertisement without further substantiated and admissible evidence that the candidates interviewed and selected for the position did not meet the qualifications of the advertisement, this court does not further address his disparate impact claim.

apply to all tortious, conspiratorial interferences with the rights of others. Griffin, 403 U.S. at 101. The conspiracy must aim at the deprivation of the equal enjoyment of rights secured by the law to all. Id. at 102.

Even a *pro se* litigant, such as Mr. Balele, must "allege something in the way of facts before his allegations of conspiracy may be deemed to state a claim." Tarkowski v. Robert Bartlett Realty Co., 644 F.2d 1204, 1208 (7th Cir. 1980). The plaintiff must allege that the defendants acted unconstitutionally through a mutual understanding and such an allegation must be supported by factual allegations suggesting a meeting of the minds. Id. at 1206. "Mere conjecture that there has been a conspiracy is not enough to state a claim." Id. at 1208.

In Mr. Balele's "allegations of facts," Mr. Balele states that he was suspicious that evaluation of the applications was unfair and that he had heard rumors that the candidate selected was hand-picked and that the defendants "jointly or separately worked together to falsely down grade plaintiff's exam responses to disqualify him." (Third Amended Complaint, paras. C.3, C.5). In these "allegations of facts," Mr. Balele also explains why he believes the defendants acted to conspire against him. (Third Amended Complaint, paras. C.6 - C.23). However, Mr. Balele does not substantiate his suspicion or these rumors by further evidence. Again, mere conjecture is not sufficient to state a claim. Tarkowski, 644 F.2d at 1208. More importantly, the asserted facts do not lead to an inference that the meeting of the minds necessary

to establish a conspiracy existed. Mr. Balele does not offer any evidence which controverts the defendants' reasons for rejecting him nor evidence which leads to an inference that the defendants engaged in a conspiracy. Therefore, the court must grant summary judgement for the defendants on this claim and deny the same for the plaintiff.

C. Plaintiff's Claim of Retaliation for Exercising His Freedom of Speech

Mr. Balele also claims that the defendants failed to hire him in retaliation for exercising his freedom of speech. Specifically, Mr. Balele asserts that his application was evaluated low because defendants Eisenberg, George, Gates and Thusius were angry with him for promoting the rights and interests of minority businesses in the bidding and purchasing processes when he was employed as Contractual Services Assistant, Department of Administration. (Plaintiff's Brief in Support of His Review and Federal Claims, pp. 72-80).

The Wisconsin Supreme Court articulated a four-step analysis required when a public employee such as Mr. Balele claims to have been impermissibly punished for exercising his freedom of speech:

First, the court must determine whether a public employee's speech touches upon a matter of public concern. Second, if the statement satisfies the public concern inquiry, the court must then balance the interests of the employee against the public employer's interest in the effective and efficient fulfillment of its responsibilities to the public. Third, assuming that both previous elements have been found in favor of the plaintiff, he or she then must prove that the protected speech "was a 'motivating factor' in the detrimental employment decision." Fourth and finally, if the plaintiff makes this showing, the burden then shifts to the employer to show by a preponderance of evidence that

it would have reached the same decision in the absence of the protected activity. Barnhill v. Board of Regents, 166 Wis. 2d 395, 417, 479 N.W.2d 917 (1992) (citations omitted).

Assuming, arguendo, that Mr. Balele can meet the first two elements of this four-part analysis, the court finds that based on undisputed evidence, Mr. Balele has not submitted any evidence that could lead to an inference that he could meet the third element. That is, Mr. Balele has failed to show evidence that would raise an inference that the defendants who rated his application materials took into account Mr. Balele's speech activities. Mr. Balele argues in his brief that defendants Eisenberg, Gates, George and Thusius were aware of the alleged incidents giving raise to Mr. Balele's retaliation claim based on his speech activities. (Plaintiff's "Brief in Support of Motion to Deny Defendants' Motion to Dismiss," pp. 32-39). However, Mr. Balele also admits that defendants Eisenberg, Gates and Thusius all submitted affidavits stating the reasons for rating the plaintiff and the individuals chosen for the interviews the way they did. None of the reasons given by the defendant's in the sworn affidavits indicate that the reasons were other than the neutral reasons described above. Additionally, Mr. Balele does not offer any depositions, answers to interrogatories, admissions or affidavits, which show that there is any genuine issue as to whether his protected speech was a "motivating factor" in the failure to hire him. To survive summary judgement by refuting the articulated legitimate reasons offered by the employer, the plaintiff must do more than challenge the judgement of the defendants through his own self-interested

assertions. Dale v. Chicago Tribune Company, 797 F.2d 458, 464-65 (7th Cir. 1986). Therefore, the court must grant summary judgement for the defendants on this claim of retaliation and deny the same for the plaintiff.

D. Plaintiff's Due Process Clause Claim

The plaintiff also argues that the defendants denied him "due process toward equal opportunity of employment." (Third Amended Complaint, para. E2). Mr. Balele asserts that he would have been selected for the position at issue if defendants George, Gates, Thusius and Eisenberg were not on the review and interview panel. (Plaintiff's "Brief in Support of Motion to Deny Defendants' Motion to Dismiss," p. 39).

The existence of a property right is critical in establishing a due process claim. Here, the plaintiff fails to establish a property right to the position in question. Mr. Balele was an applicant and had no property right to the job. In order to survive a motion for summary judgement, the plaintiff must make a showing sufficient to establish the existence of an element essential to the plaintiff's the claims for which he has the burden of proof. Transportation Ins. Co. v. Hunzinger Const. Co., 179 Wis. 2d 281, 292, 507 N.W.2d 136 (Ct. App. 1993). Mr. Balele fails to establish such an element. Thus, the court must grant summary judgement for the defendants on this issue and deny the same for the plaintiff.

III. Review of the Personnel Commission's Decision⁴

Concerning the appeal of the Personnel Commission's (hereinafter "Commission") decision, Mr. Balele takes issue with two of the 24 factual findings of the Commission and argues that the Commission abused its discretion by ignoring issues and evidence that he presented. Although Mr. Balele argues that the Commission failed to consider certain issues and evidence, he does not argue that the proceedings in front of the Commission were unfair due to procedural errors. Finally, Mr. Balele argues that the Commission erroneously applied the law to the facts of his case.

Mr. Balele disputes the Commission's Factual Findings numbers 15 and 16. Mr. Balele contends that these two findings of fact "overruled" this court's findings of fact in the court's January 17, 1992 Decision and Order. (Plaintiff's Brief in Support to Reverse the Judgement from the Personnel Commission, para. D.1, hereinafter "Plaintiff's Brief"). The plaintiff argues that the Commission incorrectly found that the defendant Mr. George "developed" the criteria for reviewing the job applications instead of finding that defendants George, Gates, Eisenberg and Thusius developed the criteria together. The criteria at issue are the four criteria described above: writing skills; government purchasing experience; supervisory experience; and management,

⁴ For the purposes of the judicial review of the Personnel Commission's decision, the court limits its decision to the record before the Personnel Commission. However, the court notes that much of the record overlaps with the record before the court for the summary judgement.

organization and analytic skills.

A court upholds an agency's factual finding if it is supported by credible and substantial evidence on the record. Wehr, 106 Wis. 2d at 117. In reviewing the Commission's Record, the court finds credible and substantial evidence to support Factual Findings, numbers 15 and 16. At the December 7, 1992 Commission hearing, on direct exam by Mr. Balele, Mr. George testified that he set up the criteria that he wanted the resume reviewers to use. (PC Record, Item 31 ["transcript"], p. 115). Additionally, on cross-examination, Mr. George testified that he developed the criteria himself and then called the three defendants selected to review the applications and discussed the criteria with them. (Transcript, p. 133). Mr. Balele did not object to this testimony. From this testimony, it is reasonable to reach the conclusions that the Commission did in Factual Findings 15 and 16.⁵ Additionally, the court determines that the record also supports the Commission's other Factual Findings which Mr. Balele admits. Therefore, the court holds that all of the Commission's findings of fact are supported by the record and thus are conclusive on review.

Second, Mr. Balele argues that the Commission abused its discretion by ignoring issues and evidence he presented.

⁵ Moreover, Factual Findings 15 and 16 are not inconsistent with this court's factual findings as Mr. Balele asserts... The court's Decision and Order states: "The four men met once to discuss the criteria on which the candidates would be evaluated and to assign weights to each category." (January 17, 1992 Decision and Order, p. 4). This finding does not preclude a finding that Mr. George developed and then presented the criteria to the other three defendants for discussion.

Specifically, Mr. Balele asserts that the Commission failed to adjudicate his claims of conspiracy and retaliation and failed to properly consider the testimony of Mariam Swoboda (Director, Office of Equal Opportunity Programs and Policy Studies, University of Wisconsin System). (Plaintiff's Brief, paras. D.2, D.3, D.4, D.5 and D.8).

The court holds that Mr. Balele's assertions that the Commission failed to address his claims of retaliation and conspiracy are without merit. The Commission did rule on Mr. Balele's retaliation claim in its decision on the summary judgement motion dated June 15, 1992. In this decision, the Commission found that Mr. Balele did not file his whistleblower retaliation claim in a timely manner and thus dismissed this claim. Additionally, Mr. Balele's complaint to the Commission never asserted a claim of conspiracy nor that the University of Wisconsin acted with gross negligence enabling the defendants to conspire to discriminate and retaliate against him as he asserts. (Charge of Discrimination, PC Record, Item 28). However, Mr. Balele's conspiracy complaint was properly brought before this court in the action filed under Case No. 90-CV-3767 and is analyzed above.

Moreover, the court cannot engage in additional fact finding in a judicial review of the Commission's decision. The Commission's findings of fact are conclusive on review if they are supported by substantial evidence. §227.57(6), Wis. Stats. Here, the court determined that the findings of fact are supported by

substantial evidence.⁶ On judicial review of an agency's decision, the issue is not whether evidence exists to support findings that were not made, but whether there is evidence to support the findings that were made by the agency. Brickson v. ILHR Department, 40 Wis. 2d 694, 699, 162 N.W. 2d 600 (1968). However, any conclusion drawn by the Commission from its findings of fact is a question of law subject to independent judicial review. §227.57(5), Wis. Stats.; Applied Plastics, Inc. v. LIRC, 121 Wis. 2d 271, 276, 359 N.W.2d 168 (Ct. App. 1984). Thus, the court turns to Mr. Balele's assertions that the Commission erroneously applied the law to the facts of his case.

Finally, Mr. Balele argues that the Commission erroneously applied the law when it: (a) failed to find that the appointment of Janet Abrahamsen was discriminatory because the defendants

⁶ Furthermore, the court also notes the Ms. Swoboda was permitted to testify at length at the hearing. (Transcript, pp. 84-113). Ms. Swoboda's testified regarding the University's Affirmative Action requirements and examined the advertisement at issue. Concerning the advertisement, Ms. Swoboda testified that the position required either a bachelor's degree or equivalent training and the equivalent training "could be interpreted as normally more than five years of professional level experience... or at the minimum of three years of supervisory managerial position." (Transcript, p. 94). Ms. Swoboda also testified about the prior job application of the plaintiff for a position that the plaintiff alleged was analogous to the position at issue. Regarding the prior application, Ms. Swoboda stated that she was not aware of any comparability between the two positions. (Transcript, p. 105). At this point the hearing examiner interrupted Mr. Balele from further pursuing the line of questioning concerning the comparison of positions, stating that Ms. Swoboda's answer would not make a difference in the examiner's decision. The hearing examiner's reaction is reasonable once the witness testified that she did not see the comparison between the two positions. The hearing examiner's interruption is not a refusal to admit facts testified by Ms. Swoboda.

developed their own criteria to measure the applicants' qualifications; (b) failed to find that the defendants discriminated against the plaintiff based on his race and national origin, and (c) failed to find that the plaintiff should have been selected for the position in question. (Plaintiff's Brief, paras. D.6, D.7, and D.9).

In the Commission's final decision and order dated March 9, 1994 (hereinafter "PC Decision"), the Commission made the following conclusions of law:

1. This matter is before the Commission under §230.45(1)(b), Wis. Stats.
2. Complainant has the burden to show that he was discriminated against by Respondent on the basis of color, race and/or national origin or ancestry in regard to the decision not to appoint him to the position of Director, Office of Purchasing Services.
3. Complainant has failed to sustain his burden.
4. Complainant was not discriminated against as alleged.

In assessing Mr. Balele's discrimination claims, the Commission addressed the theories of disparate treatment and disparate impact. With regard to the disparate treatment claim, the Commission applied the analytical framework of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). (PC Decision, pp. 5-6). This analytical framework is detailed by the court above. (Supra, pp. 15-16).

Applying this analytical framework, the Commission found that Mr. Balele established a prima facia case of discrimination and that the defendants had rebutted the same. (PC Decision, p. 6).

Neither of the parties dispute these findings of the Commission. Turning to whether the defendants' reasons not to hire Mr. Balele were a pretext for discrimination, the Commission found that Mr. Balele's arguments were not supported by the record. Mr. Balele argued that the defendants did not use the advertised qualifications when screening the applications and that they were motivated to change the qualifications by racial animus against African Americans. However, the Commission found that, contrary to Mr. Balele's allegations of facts, the advertisement indicated that a candidate could qualify for the position on the basis of a bachelor's degree or equivalent experience. (PC Decision, p. 6). In addition, the Commission determined that the criteria used to evaluate the candidates were substantially the same to the required qualifications as advertised. (PC Decision, p. 5). The Commission also found that Mr. Balele's testimony from which he infers racial hatred did not suggest such hatred. (PC Decision, p. 8). These conclusions are supported by the evidence before the Commission. Moreover, the court finds that the Commission correctly interpreted and applied the McDonnell Douglas-Burdine disparate treatment analysis.

Concerning Mr. Balele's disparate impact claim, Mr. Balele argues that the defendants' employment practices operated to disqualify a disproportionate number of minority candidates. The Commission accurately and succinctly summarized the disputed employment practices as: "removing advertised qualifications after resumes had been received; scoring based on hearsay or past

impressions about candidates; and having an all-white resume panel, consisting of the incumbent and former supervisors." (PC Decision, p. 5).

Mr. Balele correctly states that even neutral employment practices are unlawful if such practice causes a disparate impact on racial minorities. Griggs v. Duke Power Co., 401 U.S. 424 (1971). However, Title VII "does not command that any person be hired because he was formerly the subject of discrimination, or because he is a member of a minority group." Id. at 431. What is required by Title VII is that the employer remove artificial, arbitrary and unnecessary barriers to employment when such barriers operate to discriminate against a protected group. Id.

Here, the Commission dismissed Mr. Balele's disparate impact claim, in part, because the Commission found that the statistical data presented by Mr. Balele was equivocal and inconclusive. The court agrees that the statistical data presented is insufficient to establish a prima facie case of discrimination. Additionally, the Commission's decision as to the disparate impact claim does not lie solely in a rejection of the statistical data. As stated above, the Commission also found that despite Mr. Balele's assertion, the advertised qualifications were not changed after the resumes were received. A bachelors degree was optional and the criteria used to evaluate the resumes coincided with the advertised qualifications. Thus, the Commission found that the four criteria used to evaluate the applications did have a relation to the employment in question and were not arbitrary or unnecessary. Again, the Commission

found, and the court agrees that the record supports, that the defendants did not reject Mr. Balele due to racial animus. The record does not support a disparate impact claim.

In sum, the Commission did not erroneously apply the law when it found that the defendants did not discriminate against the plaintiff based on his race and national origin.

CONCLUSION

Because the court granted a stay in Case No. 90-CV-3767 at its own initiative, the court believes that it is not equitable to apply collateral estoppel to bar Mr. Balele's racial discrimination claims in Case No. 90-CV-3767 based on the Personnel Commission's decision. The court concludes that the supreme court's decision in Lindas v. Cady, supra, applying collateral estoppel to issues adjudicated by the Personnel Commission is distinguishable from this case. The court bases its conclusion on the fundamental fairness analysis in Michelle T. v. Crozier, supra. Consequently, the court addresses the merits in this case to determine whether or not to proceed to trial.

After examining the pleadings and record, the court finds that there are no genuine issues of material fact which preclude summary judgment. Voss, 162 Wis. 2d at 747-748. Thus, the court determines that a trial would only result in a judgment as a matter of law. In Case No. 90-CV-3767, the plaintiff has failed to show any material facts which show that the defendants intentionally discriminated against him. Additionally, the plaintiff has not shown a genuine issue as to any material fact

concerning the plaintiff's burden of proof.

As to the court's review of the Personnel Commission's decision, the court holds that the Personnel Commission's decision meets the required criteria under § 227.57, Wis. Stats. First, Mr. Balele does not argue nor does the court find the Commission's proceedings were in any way unfair. Mr. Balele was permitted to call witnesses, testify and submit ample evidence. Second, the Commission correctly interpreted the law as to employment discrimination and properly dismissed Mr. Balele's retaliation claims. Third, the Commission's findings of fact are supported by the record. Finally, the Commission's exercise of discretion was not contrary to the law. Therefore, under § 227.57, Wis. Stats., the court must affirm the Commission's decision.

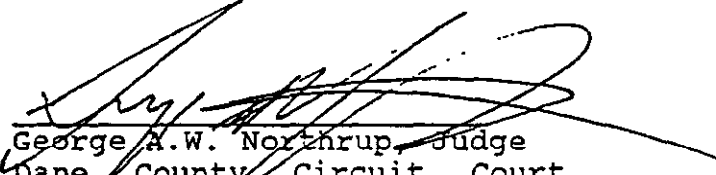
ORDER

The defendants' motion for summary judgment on the claims in Case No. 90-CV-3767 is GRANTED. Plaintiffs' motion for summary judgment as to these same claims is DENIED. All claims under Case No. 90-CV-3767 are therefore DISMISSED. The Personnel Commission decision filed under Case No. 94-CV-1177 is AFFIRMED.

IT IS SO ORDERED.

Dated this 17th day of February, 1995.

BY THE COURT:



George A.W. Northrup, Judge
Dane County Circuit Court,
Branch 14

cc: Pastori M. Balele
Bruce A. Olsen