

1993
Personnel
Commission

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

PASTORI BALELE,

Plaintiff,

vs.

Case No. 92-C-0841-C

JAMES KLAUSER, SECRETARY OF THE
DEPARTMENT OF ADMINISTRATION,
GERALD WHITBURN, DONALD L. BACH,
JEAN ROGERS, and THE WISCONSIN
DEPARTMENT OF ADMINISTRATION,

Madison, Wisconsin
November 23, 1993
11:55 a.m.

Defendants.

STENOGRAPHIC EXCERPT OF COURT'S RULING
BEFORE THE HONORABLE BARBARA B. CRABB

APPEARANCES:

For the Plaintiff: BY: PASTORI BALELE, Pro Se

For the Defendant: State of Wisconsin
Department of Justice
BY: DAVID RICE and
BY: BRUCE OLSEN
Assistant Attorneys General
State Capitol
Madison, WI 53703

MAUREEN BEILKE
Official Court Reporter
United States District Court
120 North Henry Street
Madison, Wisconsin 53703
1-608-255-3821

1 PARTIAL TRANSCRIPT

2 THE COURT: Thank you. I am prepared to rule. I've
3 had an opportunity to look at the exhibits as they've been
4 referred to during the trial and I think I have a good sense
5 of the facts after deciding I think three -- three substantive
6 motions during the course of the pretrial preparation. I am
7 adopting the facts that the parties agreed to in their
8 pretrial -- their joint pretrial stipulation. I will make the
9 additional finding of fact that defendant Whitburn never
10 promised plaintiff a promotion either in return for dropping
11 the Complaint that he had filed in July, July 1988, with the
12 Personnel Commission or for any other reason.

13 With respect to the AO-5 position that Leo Talsky filled,
14 I'm convinced that the plaintiff has failed to show that
15 either Ms. Rogers or Mr. Bach made the decision to choose
16 Talsky over plaintiff either because of considerations of race
17 or national origin or of Mr. Balele's having filed a Complaint
18 with the Personnel Commission.

19 I realize that it seems to the plaintiff as if he's
20 constantly losing jobs for which he applies because of his
21 color or because of his national origin, but he's at a level
22 in state government where these are very individualized
23 decisions that are being made and, at least as far as the AO-5
24 position, he has failed to show that his qualifications were
25 equal to or better than the person who was selected.

1 The employer in the state or in private industry has no
 2 obligation to choose a black person or a woman or a
 3 handicapped person just because of the person's color or sex
 4 or handicap. The employer always has the option of choosing
 5 the most qualified person, as long as the qualifications are
 6 truly job related and are not just a pretext for covering up
 7 discriminatory purposes.

8 Mr. Talsky, at least on paper, had qualifications that
 9 were considerably more impressive than Mr. Balele for the job
 10 of Deputy Administrator. He had lots of contact with people
 11 in Washington, Milwaukee and all around the state from his
 12 former job. He had personal responsibility for managing two
 13 airports. He had responsibility and experience in managing
 14 fleets, not just of cars, but also of airplanes. He
 15 supervised a far-flung operation. He had many division heads
 16 reporting to him as Deputy County Executive in Milwaukee
 17 County and he had a huge range of responsibilities and,
 18 according to people that had worked with him, had carried
 19 those responsibilities out well. That just put him head and
 20 shoulders over Mr. Balele whose prior experience supervising
 21 had been in Africa where I can't -- I can't see anything in
 22 the materials that Mr. Balele submitted that would indicate
 23 the range of experience, the kind of operation, the scope of
 24 work that Mr. Balele performed in Africa that would be
 25 comparable to running a county the size and complexity and

1 diversity of Milwaukee County, Wisconsin.

2 You've got a situation where there are people who are
3 minimally, or at least they meet the qualifications for the
4 job, but the employer is allowed to choose the most qualified
5 person from among those applicants, as I said, so long as the
6 qualifications that the employer considers are job related.
7 In this situation I can't find any indication that any
8 qualification that Mr. Talsky had was relied upon that wasn't
9 job related.

10 Mr. Bach was looking for somebody who could run the
11 department so that he could take on bigger issues of policy
12 and problem solving. That's a legitimate request. That's a
13 legitimate goal for a Deputy Director of the division that
14 Mr. Bach was heading up, and for him to choose somebody with
15 Mr. Talsky's experience does not suggest any sort of pretext,
16 but, to the contrary, good judgment on the part of an
17 administrator.

18 I agree with the defendants that there's no indication of
19 disparate impact. The idea of screening out employees who had
20 not supervised, or screening out applicants who had not
21 supervised 20-plus employees did not have a disparate impact.
22 In fact, the only black applicant, Mr. Balele, was kept in
23 under that screening mechanism. He was eliminated originally,
24 but that turned out to have been a mistake so that it just
25 didn't have a disparate impact on the black member of the

1 group.

2 As far as whether it had a disparate impact on the women
3 in the group, that's not an issue that's before me at this
4 time.

5 Mr. Bach's description of the type of person that he
6 wanted to be employed in the position was perfectly reasonable
7 and I don't see that there's any disparate impact on any
8 minority group, and there's been no proof that there would
9 have been.

10 As far as the AO-4 position, the fact is that Mr. Whitburn
11 made the decision to laterally transfer Mr. Gates to the
12 position because he thought Mr. Gates had such outstanding
13 qualifications that he should have broad experience within
14 state government.

15 State government personnel rules, which are
16 extraordinarily restrictive and difficult to understand and
17 difficult, I'm sure, for many people to accept, make it
18 permissible for career executives to be given lateral
19 transfers. That's what Mr. Gates had. It was perfectly
20 legitimate for Mr. Whitburn to do that, unless he was doing it
21 as a coverup for discrimination. But, there's no indication
22 that he was doing it for that reason.

23 It's true that he knew Mr. Balele wanted a promotion, but
24 I'm sure that there were a lot of other people in the
25 department that wanted promotions as well. He had --

1 Mr. Whitburn had done what he had promised to do. He had made
 2 efforts to get Mr. Balele on a career path. As I said, he
 3 never promised Mr. Balele a promotion. He did promise him
 4 that he would start to work on a career path. He assigned
 5 that task to Mr. Bach.

6 Mr. Bach met with Mr. Balele. He suggested a career path.
 7 It wasn't acceptable to Mr. Balele, but that does not mean
 8 that it was not a good faith suggestion. Mr. Balele indicated
 9 that what he really wanted was a reclassification of his
 10 present job. Mr. Bach took steps to see that a
 11 reclassification was attempted. The fact that it wasn't
 12 carried through is not Mr. Bach's fault.

13 It seems to have fallen between the cracks when
 14 Mr. Eisenberg and Ms. Abrahamsen left to go to the university
 15 and it wasn't picked up on. Mr. Bach left soon after, so I
 16 can't say that it was something that he deliberately failed to
 17 do.

18 He had -- He made the effort to get Mr. Balele on a career
 19 path and that was the extent of the promise that Mr. Whitburn
 20 had made.

21 There's no indication that Mr. Whitburn retaliated in any
 22 respect from Mr. Balele's having filed a Complaint with the
 23 Personnel Commission. In fact, Mr. Whitburn went out of his
 24 way to try to work with Mr. Balele to understand what it was
 25 that was discouraging Mr. Balele about the way in which he was

1 treated.

2 We have a situation where chronologically Mr. Balele filed
3 a Complaint and, the next thing that Mr. Whitburn did was not
4 to demote Mr. Balele, to move him to a less promising job, to
5 restrict him in any way. What Mr. Whitburn did was to call
6 Mr. Balele into his office and say, What can we do to help
7 you. What can we do to meet the kinds of concerns that you
8 have about the way that your career is developing. That is
9 not retaliation.

10 I think that I've covered all of the factors that
11 Mr. Balele has suggested to show pretext. Mr. Whitburn's
12 promise of a career path before he knew that Mr. Balele would
13 not get the AO-5 job does not suggest to me any bad intent.

14 Mr. Whitburn was under the understanding that Mr. Balele
15 hadn't made the screening for interviewing for the AO-5 job,
16 so it was perfectly reasonable for him to start talking about
17 alternatives at that point.

18 As far as the destruction of the interview notes by
19 Ms. Rogers, I think that's just a nonissue. There's no
20 requirement that interview notes be kept. She threw them
21 away. She kept the papers that she was supposed to keep and
22 that's the only thing that's important.

23 And, I don't think that there's anything nefarious in
24 Ms. Rogers having appointed herself to the rating and
25 interview panels. She is in a position where she has

1 responsibility for seeing that the rating and interview panels
2 go well, and it's not always easy to find people to serve on
3 those panels and I'm sure that she serves on a lot of those
4 panels, but there's nothing improper about her being on both a
5 rating and an interview panel. As Mr. Rice pointed out, this
6 was a job in which there was special concern that women and
7 handicapped people have access to the job, so it made sense
8 for her to appoint herself because she's a woman and that
9 would fulfill one of the requirements for the panels.

10 So, in short, I just don't find, Mr. Balele, that you've
11 established that there was any kind of discrimination, either
12 intentional on the part of the decision makers Rogers, Bach
13 and Whitburn, or that there was any disparate impact in the
14 actions that were taken or that any of the defendants took the
15 actions that they did in order to retaliate against you for
16 having filed complaints with the Personnel Commission, and I
17 will enter judgment for the defendants.

18 Anything further?

19 MR. RICE: Just two things, Your Honor. First of
20 all, did you want to comment specifically on the disparate
21 impact regarding the AO-4 position or did you -- were your
22 comments generally enough for that?

23 THE COURT: Well, my intention was, what I said about
24 disparate impact applied both to the AO-5 and AO-4 position
25 because I don't see that -- well, Mr. Balele simply didn't put

1 in any proof that the manner in which Mr. Whitburn operated
2 had a disparate impact upon blacks who might have been
3 considered for the job.

4 MR. RICE: The second thing is only a small thing
5 going to costs. We took Mr. Bach's testimony by deposition
6 and we agreed to pay for the cost of the deposition, and so in
7 applying for costs, should we do that? Would those costs be
8 exempted from costs normally available to us?

9 THE COURT: Right.

10 MR. RICE: Thank you.

11 * * * * *

I CERTIFY THAT THE FOREGOING IS
A CORRECT TRANSCRIPT FROM THE
RECORD OF PROCEEDINGS IN THE
ABOVE-ENTITLED MATTER.

Maureen Beille 12.14.93
OFFICIAL COURT REPORTER DATE

NOV 30 1993

Personnel
Commission

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

PASTORI BALELE,

Plaintiff,

v.

ORDER

92-C-841-C

JAMES KLAUSER, SECRETARY OF THE
DEPARTMENT OF ADMINISTRATION,
GERALD WHITBURN, DONALD L. BACH,
JEAN ROGERS, and the WISCONSIN
DEPARTMENT OF ADMINISTRATION,

Defendants.

For the reasons stated from the bench at the conclusion of the trial in this case, the clerk of court is directed to enter judgment for defendants.

Entered this 24th day of November, 1993.

BY THE COURT:

Barbara B. Crabb
BARBARA B. CRABB
District Judge

50-116

UNITED STATES DISTRICT COURT
Western District of Wisconsin

PASTORI BALELE,

JUDGMENT IN A CIVIL CASE

Plaintiff(s),

Case No.: 92-C-841-C

vs.,

DOCKET NUMBER	116
U.S. DISTRICT WEST. DIST. C.	
NOV 24 1993	
FILED JUDGE CLERK NUMBER	

JAMES KLAUSER, SECRETARY OF THE
DEPARTMENT OF ADMINISTRATION,
GERALD WHITBURN, DONALD L. BACH,
JEAN ROGERS, and the WISCONSIN
DEPARTMENT OF ADMINISTRATION,

Defendant(s).

This action came for consideration before the court with U. S. DISTRICT JUDGE BARBARA B. CRABB presiding. The issues have been considered and a decision has been rendered.

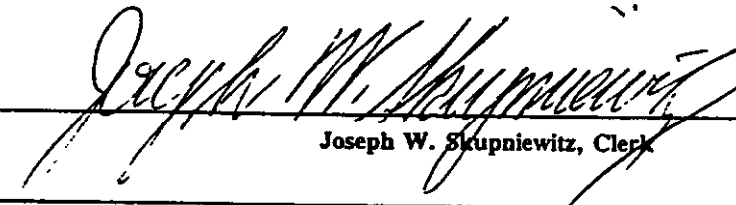
IT IS ORDERED AND ADJUDGED

That judgment is entered against the plaintiff and in favor of the defendants and this case is closed.

NOV 30 1993

Personnel
Commission

Copy of this document has been
provided to: Pit &
AA6 Rick
this 24th day of Nov, 19 93
By Skupniewitz
Deputy Clerk



Joseph W. Skupniewitz, Clerk

~~By Deputy Clerk~~

Nov. 24, 1993
Date

DEC 17 1993

Personnel
Commission

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

PASTORI BALELE,

Plaintiff,

v.

ORDER

92-C-841-C

JAMES KLAUSER, SECRETARY OF THE
DEPARTMENT OF ADMINISTRATION,
GERALD WHITBURN, DONALD L. BACH,
JEAN ROGERS, LEO TALSKEY, PETER OLSON,
PATRICIA THYSSE, THE CHAIRPERSON
WISCONSIN PERSONNEL COMMISSION, THE
WISCONSIN DEPARTMENT OF ADMINISTRATION,
RICHARD LORANG, JEFFREY RUSSEL, ROBIN
GATES, AND ADMINISTRATOR/DIVISION OF
MERIT RECRUITMENT AND SELECTION,

Defendants.

Plaintiff has moved for a new trial pursuant to Fed. R. Civ. P. 59. The motion will be denied.

Although plaintiff contends that the court was confused as to the agreed issues and a number of other matters, I do not share plaintiff's view of the situation. To the contrary, I am convinced that plaintiff failed to prove that he was the victim of direct discrimination or discrimination by disparate impact.

Plaintiff had a full opportunity to try all of the issues raised in his lawsuit. His suggestion that he add testimony or that defendants stipulate to certain facts is untimely.

A copy of this document
has been mailed to the following:
DELEAF ? ANG RICE
this 13th day of December, 1993 by
M Dye Secretary to Judge Crabb

ORDER

IT IS ORDERED that plaintiff's motion for a new trial is DENIED. With the denial of this motion, plaintiff's motion to delay a decision on costs pending resolution of the motion for a new trial is DENIED as unnecessary.

Entered this 13th day of December, 1993.

BY THE COURT:

Barbara B. Crabb
BARBARA B. CRABB
District Judge