STATE OF WISCONSIN PERSONNEL COMMISSION

**WILLIAM STAPLES,**
***Complainant,***

**v.**

**State Public Defender, OFFICE OF THE STATE PUBLIC DEFENDER,**
***Respondent.***

Case No. 95-0189-PC-ER

INTERIM DECISION AND ORDER

NATURE OF CASE

This is a complaint of discrimination on the basis of race and conviction record with respect to the failure to hire complainant for a number of paralegal positions.

A hearing examiner appointed pursuant to §227.46, Stats., held a hearing on July 30, 1998. Respondent made a motion to dismiss at the close of complainant's case in chief. The examiner then verbally advised the parties that in his opinion the motion should be granted, but that because he lacked the authority to grant the motion, §PC 5.01(2), Wis. Adm. Code, he would issue a proposed decision, §227.46(2), Wis. Stats., embodying this opinion and proposed order.[1]

In the course of preparing the proposed decision, and as a result of further reflection and research, the examiner concluded that the motion should not be granted as to one facet of this case—the claim of conviction record as to the Waukesha position. Therefore, the examiner *sua sponte* rescinded so much of his verbally stated conclusion that said aspect of this case should be dismissed, and issued an examiner's ruling which had the effect of returning this case to the stage of the process where the hearing had been adjourned and continuing with that hearing.

The following findings are based on the record of both parts of the hearing.

[1] The hearing then was adjourned.

## FINDINGS OF FACT

1. Complainant is a member of the black race.

2. Complainant was convicted of attempted murder in 1976, and approximately two other crimes of indeterminate nature and dates.

3. Complainant has experience working in a paralegal capacity as a pro se litigant and by helping others to resolve legal problems.

4. In 1995, complainant applied for a paralegal job with respondent.

5. Complainant was qualified for said employment.

6. Respondent did not hire complainant for any of its vacant positions.

7. The duties of the paralegal jobs in question include conducting investigations, doing research, providing trial assistance for attorneys, and regularly testifying in court and administrative hearings on behalf of criminal defendants.

8. In the legal proceedings in which paralegals testify, they are subject to impeachment on the basis of criminal conviction records under the rules of evidence.

9. The first assistant public defender for the Waukesha region was the effective appointing authority for the two Waukesha vacancies in question.

10. One of the persons hired for the Waukesha vacancies had operated her own private detective agency for 10 years and had extensive other relevant training and experience. The other person hired was already working as a paralegal and had extensive other relevant training and experience. Both the persons hired were substantially better qualified for the position than complainant.

11. The effective appointing authority was aware as a result of a record check that complainant had a criminal conviction record. She did not have any information about that record beyond the fact that complainant had been confined in prison.

12. The effective appointing authority's practice and policy was not to hire as paralegals any applicants who had a criminal conviction record.

13. The parties stipulated, and it is found that complainant's conviction record was a causative factor with respect to respondent's failure to hire complainant in a Waukesha paralegal position.

14. If the effective appointing authority had not considered complainant's conviction record, complainant still would not have been hired, because the persons hired had substantially better training and experience than complainant.

## CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §230.45(1)(b), Stats.

2. Complainant has the overall burden of proving that he was discriminated against on the basis of race or conviction record in connection with respondent's failure to hire him for any of the vacant positions in question.

3. Complainant failed to establish a prima facie case as to his claims of race discrimination as to all the positions in question, and failed to establish a prima facie case as to his claims of conviction record as to all positions except the Waukesha positions, and thus failed to sustain his burden of proof as to those claims for which he did not establish prima facie cases.

4. Respondent did not discriminate against complainant on the basis of race by failing to hire him for any of the positions in question.

5. With the exception of the Waukesha positions, respondent did not discriminate against complainant on the basis of his conviction record by not hiring him for any of the positions in question.

6. Complainant established a prima facie case as to his claim of conviction record discrimination with respect to the Waukesha positions.

7. Respondent admitted that complainant's conviction record was a factor in the decision not to hire complainant for any of the vacant paralegal positions in Waukesha, and thus respondent has the burden of proof to establish the

§111.335(1)(c)1., Wis. Stats.[2], exception to conviction record discrimination with respect to the Waukesha positions.

8. Respondent has failed to sustain its burden of proof under §111.335(1)(c)1., Wis. Stats., with respect to the claim of conviction record discrimination as to the Waukesha positions.

9. Respondent discriminated against complainant on the basis of conviction record with respect to its failure to hire him for the Waukesha positions.

10. Respondent has the burden of proof to establish that it would have reached the same decision with regard to not hiring complainant for either of the Waukesha positions in the absence of consideration of complainant's conviction record.

11. Respondent has satisfied its burden of proof in this regard.

12. Complainant's remedy is limited to a cease and desist order and attorney's fees and costs, if any.

## OPINION

In order to establish a prima facie case of discrimination in hiring, the complainant must show 1) he is a member of a protected group; 2) he applied for a vacancy which the employer was trying to fill; 3) he was qualified for the position in question; 4) he was rejected under circumstances which give rise to an inference of discrimination. *See, e.g., Halsell v. Kimberly-Clark Corp.,* 683 F. 2d 285, 29 FEP Cases 1185 (8th Cir. 1982)

Complainant is in protected groups on the basis of race and conviction record. He applied and was not hired for vacant positions for which he was qualified. Thus he has satisfied the first three elements of a prima facie case. The question then is whether he has satisfied the fourth step—i.e., rejection under circumstances which give rise to an inference of discrimination.

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[2] "(c) Notwithstanding s. 111.322, it is not employment discrimination because of conviction record to refuse to employ . . . any individual who: 1. Has been convicted of any felony, misdemeanor or other offense the circumstances of which substantially relate to the circumstances of the particular job. . . ."

With regard to race, complainant has failed to establish the fourth step in a prima facie case because there is nothing in the record which creates an inference that he was not hired because of race. While complainant presented some evidence of his own qualifications for these positions, there is no evidence that he was as well qualified, or better qualified, than any of the candidates who were hired. There is no other evidence that suggests he was discriminated against on the basis of race.

With respect to conviction record, there is no evidence (with the exception of the Waukesha positions) that respondent's agents who were responsible for the hiring knew about complainant's conviction record. Thus complainant has failed to establish the fourth element of a prima facie case of conviction record discrimination as to the non-Waukesha positions.

As to the positions in Waukesha, the parties stipulated that complainant's conviction record was a factor in the decision not to hire complainant there, and this was consistent with the testimony of the effective appointing authority. However, §111.335(1)(c)1., Wis. Stats., provides an exception to the prohibition of conviction discrimination: "(c) Notwithstanding s. 111.322, it is not employment discrimination because of conviction record to refuse to employ . . . any individual who: 1. Has been convicted of any felony, misdemeanor or other offense the circumstances of which substantially relate to the circumstances of the particular job. . . ."

Both parties presented testimony that complainant's credibility in court proceedings could be impeached by questioning on cross-examination about his felony conviction. *See, e.g., State v. Kuntz*, 160 Wis. 2d 722, 753, 467 N. W.2d 531(1991) ("Wisconsin law presumes that all criminal convictions have some probative value regarding truthfulness."). Complainant apparently contends that the negative impact of such a line of questioning would be limited, because if he answered truthfully, the questioning could not go beyond the bare fact that he had been convicted of one or

more crimes[3]. Notwithstanding this, the susceptibility to being impeached in this manner has been recognized as a significant problem for someone who has to testify in court. *See Law Enforcement Stds. Bd. v. Lyndon Station*, 101 Wis. 2d 472, 492-93, 305 N.W.2d 89 (1981). However, the party whose witness is impeached in this manner on cross-examination has the right on redirect to attempt to rehabilitate the witness by showing, for example, that the crime was not related to veracity. *See State v. Bailey*, 54 Wis. 2d 679, 689-90, 196 N.W.2d 664 (1972). In this regard, the only information in the record concerning complainant's conviction record is that he has approximately three criminal convictions, one of which was in 1976 for attempted first degree murder.

Respondent has the burden of proof to establish the §111.335(1)(c)1., Stats., exception to conviction record discrimination. *See Gibson v. Transp. Comm.*, 106 Wis. 2d 22, 29, 31 N.W.2d 346 (1982). In deciding whether to hire an employe with a conviction record, the employer is required to make a case by case application of the "substantial relationship" test. Section 111.335(1)(c)1., Stats., provides that it is not employment discrimination to refuse to hire a convicted applicant if the applicant "[h]as been convicted of any felony, misdemeanor or other offense the *circumstances* of which substantially relate to the *circumstances* of the *particular* job." (emphasis added) It is clear from this language that the employer is to consider the circumstances of the conviction as it relates to the circumstances of the job, not merely the fact of a conviction. *See Gibson v. Transp Comm.*, 106 Wis. 2d at 28-29, where the Court pointed out that if it were not appropriate to consider the factual circumstances of the crime, "the 'circumstances of which' language . . . would be superfluous and it is clear from the legislative history of that statute that the legislature specifically intended to include such language in the statute." (footnote omitted)

In the instant case, the record is clear that the effective appointing authority not only had no specific knowledge about the crimes for which complainant had been

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[3] *See e.g., Voith v. Buser*, 83 Wis. 2d 540, 541, 266 N. W.2d 304 (1978).

convicted[4], but also that she followed a blanket policy against hiring anyone with a criminal record as a paralegal.[5] Thus respondent did not sustain its burden of establishing that there was a substantial relationship between the circumstances of complainant's criminal record and the circumstances of the particular jobs in question.

While it is clear that respondent violated the WFEA by considering as it did complainant's conviction record, it also is clear that in the absence of such consideration it would have reached the same hiring decision, due to the marked disparity in the applicants' relative qualifications. Under these circumstances, complainant is entitled to a cease and desist order and attorney's fees and costs (if any), but neither compensation for lost pay nor an order requiring respondent to hire him. *See Hoell v. LIRC,* 186 Wis. 2d 603, 608-09, 522 N. W. 2d 234 (Ct. App. 1994):

> A mixed motive case is one in which the adverse employment decision resulted from a mixture of legitimate business reasons and prohibited discriminatory motives. . . .
>
> In modifying the remedies ordered by the [Administrative Law Judge], LIRC applied the mixed motive test as interpreted under federal Title VII cases . . . 'an unlawful employment practice is established when the complaining party demonstrates that [an unlawful factor] was a motivating factor for any employment practice, even though other factors motivated the practice.' However, if the employer can demonstrate that it would have taken the same action in the absence of the impermissible motivating factor, the plaintiff may be awarded declaratory relief, injunctive relief, and attorney's fees and costs, but not monetary damages or reinstatement. (citations and footnotes omitted)

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[4] She testified that the only thing she knew about complainant's conviction record was that he had spent time in prison.

[5] She testified that "I will not hire anyone [as a paralegal] with a prior record."

ORDER

1. Respondent is ordered to cease and desist from refusing to hire complainant on the basis of his conviction record for any future vacancies for which he might apply, without considering whether the circumstances of complainant's conviction record substantially relate to the circumstances of the particular job.

2. Respondent is ordered to pay complainant's reasonable attorney's fees and costs, if any.

Dated: September 22, 1999.

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

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