

STATE OF WISCONSIN

PERSONNEL COMMISSION

**SANDRA BOHLING,**  
*Complainant,*

v.

**Secretary, DEPARTMENT OF HEALTH  
AND FAMILY SERVICES,**  
*Respondent.*

FINAL  
DECISION  
AND ORDER

Case No. 97-0032-PC-ER

#### NATURE OF CASE

This is a complaint of discrimination by complainant, Sandra Bohling, alleging respondent, Department of Health and Family Services, retaliated against her for engaging in fair employment activities, in violation of the Wisconsin Fair Employment Act (WFEA), Subchapter II, Ch. 111, Wis. Stats. The issue at hearing was:

Whether respondent retaliated against complainant due to her participation in activities protected under the Fair Employment Act in regard to respondent's decision in January 1997 to hire someone other than complainant for a Cook I position.

The parties filed post-hearing briefs.

#### FINDINGS OF FACT

1. Complainant started working at respondent's Central Wisconsin Center (CWC) in 1988 as a Food Service Worker.

2. At all times relevant, complainant worked at CWC as a Food Service Worker (FSW) 3.

3. In March 1996, Robert Alexander filed an informal complaint with the DHFS (respondent) Affirmative Action Office, alleging respondent illegally discriminated against him based on his race. Complainant submitted statements supporting Alexander's complaint.

4. In October 1996, Alexander filed a complaint with the Personnel Commission alleging respondent illegally discriminated against him based upon his race and, again, complainant submitted statements supporting Alexander's complaint.

5. On October 29, 1996, a Notice of Transfer Opportunity was posted in CWC announcing the vacancy of a Cook I position in the food service department of CWC.

6. The process CWC Food Service department follows to hire for vacant positions is as follows. First, CWC posts a Notice of Transfer Opportunity in-house for a period of five days to provide eligible employees, interested in transferring into the vacant position, an opportunity to sign up for the position. If at least five eligible employees sign the posted notice, interviews are scheduled; but if less than five eligible employees sign up, the department is required to request a certified list of eligible candidates from the Department of Employment Relations (DER) before interviews can be scheduled. Next, interviews are scheduled, the eligible candidates are interviewed by a three member panel, reference checks are made of all the candidates interviewed and, finally, the panel selects the candidate it believes is the most qualified candidate for the position. Afterwards, the panel forwards its recommendation for the position to the CWC personnel department for final approval. The successful candidate is notified by telephone of his/her selection by the CWC personnel department. Later, CWC sends letters to the other candidates, notifying them of the results of the interview.

7. Regarding the position at issue, complainant and two other eligible employees signed the posted Notice of Transfer Opportunity. One person signed twice. In accordance with its procedure, CWC obtained two additional names for a certification list of applicants for Cook I positions from DER. Three of the five candidates were interested in an interview, including complainant, David Fass and Steve Gipson.

8. By letter dated January 2, 1997, Food Service Administrator Susan Moritz informed the applicants that interviews for the Cook I position would be held

January 15, 1997. Interested applicants were requested to schedule an interview time with Gee Hale at (608) 243-2246 before noon on January 10, 1997.

9. On January 15, 1997, a three-member panel interviewed the three candidates for the Cook I position. The members of the interview panel were CWC Food Service Administrator Susan Moritz, CWC Financial Specialist 2 Paul Scallon, formerly a Food Service Supervisor 1, and CWC Food Service Administrator 1 Claire Nagle, who supervised the first line FSW supervisors.

10. All three candidates for the position were asked to answer the same written and oral questions.

11. Each of the panel members rated Fass and Gipson higher than complainant for the oral questions portion of the interview.

12. The candidates' written responses to the written portion of the interview were rated only by panelist Moritz. Fass was rated the highest, then Gipson and complainant third.

13. Reference checks for Fass, Gipson and complainant were made by the CWC personnel office. Complainant received a negative reference from panelist Scallon, who had supervised complainant for several years. In response to the question, "Would you rehire?" Scallon checked the NO box; and in answer to the question, "Why?" he wrote, "Attitude toward job and fellow staff very negative, attendance not good." Fass and Gipson received either positive or neutral responses from references.

14. The panel considered David Fass the most qualified candidate for the position. Fass held a Food Service diploma from Madison Area Technical College, he had worked as a cook in a food production facility—University Housing—similar to CWC, had the best interview and had positive references. Fass was offered the position, but declined.

15. The position was then offered and accepted by Steve Gipson. The panel believed Gipson was the second best qualified candidate for the position. Gipson held an associate degree in restaurant and hotel cookery from Milwaukee Area Technical

College and, like Fass, had experience in large food production areas as a cook. Gipson accepted the position.

16. Complainant held no degree or certificate in food preparation, had no formal training in cookery and never held a position as cook in a large production food facility.

#### CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §240.45(1)(b), Stats.

2. Complainant has the burden to show she was retaliated against in violation of the WFEA by respondent.

3. Complainant has failed to sustain her burden of proof.

4. Complainant was not retaliated against by respondent as alleged.

#### OPINION

Under the Wisconsin Fair Employment Act (WFEA), the burden of proof is on complainant to show a prima facie case of discrimination. If complainant meets this burden the employer has the burden of articulating a non-discriminatory reason for the actions taken which complainant may, in turn, attempt to show was a pretext for discrimination. *McDonnell-Douglas v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 5 FEP Cases 965 (1973), *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 25 FEP Cases 113 (1981).

Complainant alleges that respondent failed to hire her for a Cook I position in retaliation for engaging in fair employment activities. In application of the type of analysis set forth in *McDonnell-Douglas, id.*, complainant established a prima facie case of retaliation under the WFEA, and this is not disputed by respondent. However, respondent joined the matter by presenting testimonial and documentary evidence supporting its non-discriminatory explanation for hiring the successful candidate, because he was better qualified for the position than complainant.

The question remaining is whether complainant presented evidence showing that respondent's stated reason for its decision was pretextual. With respect to this question complainant makes several arguments. First, complainant argues that she was treated differently than Anna Capadona, who was hired to a Cook I position in August 1998<sup>1</sup>. Complainant argues:

when [Moritz] hired Anna Capadona in '98 she was the only one on the transfer posting. Ms. Moritz claims she went to the register and contacted two people on this list and they declined. As a result Anna Capadona was the only one interviewed. Anna Capadona stated she had no degree in her testimony. When Paul Harris cross-examined, he asked if her references were checked. [Capadona] said no and that she knew this because she had asked her references if they had been contacted. The point being that Ms. Moritz handled my transfer differently because she did not want to hire me but did want to hire Anna Capadona.

The evidence on record does not substantiate this argument. The uncontroverted testimony of Moritz was that four names were obtained from the DER Cook I certification list in the Capadona hiring; invitations to be interviewed were sent to the applicants, but none on the DER register responded; and that CWC interviewed Capadona knowing that it was not required to appoint any candidate to the position who was determined to be unacceptable. Capadona testified that respondent never contacted persons she listed as references but acknowledged she did not know whether respondent contacted persons with her past employers or current employer other than those she listed as references. Capadona also testified that she was aware that it was the common practice of respondent, in the hiring process, to contact the past employer or current employer of the job applicant. When Capadona was hired as a Cook I at CWC in August 1998, she had worked there for almost six years and had a well established work record.

Complainant argues that "past practice in food service has always been that they take current state employee transfers" to fill Cook I positions and that "[m]any of the

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<sup>1</sup> Complainant filed her complaint on March 20, 1997. Anna Capadona was hired to the Cook I position one week before the hearing on this matter.

FSW's that were hired as Cook 1's had no degree or institutional experience." In support, complainant provided in her brief a purported listing of CWC Cook I hires since 1988. This information was not submitted at the hearing. Nor was any testimonial or documentary evidence provided at hearing showing the alleged differences between such hires and the hire at issue.

Also, complainant argues that she was not given credit for the quality of her work or her on the job training, leading her to believe the hiring process "was done differently for [her] because [she] defended Robert Alexander in writing." Complainant points to no evidence that supports this belief. As previously noted, the panel consisted of two current supervisors and one former supervisor. The testimony of panelists Moritz and Scallon expressed specific knowledge of complainant's job knowledge, duties and responsibility. Moritz's un rebutted testimony was that complainant never performed the Cook I responsibility of preparing food.

Similarly, complainant argues that she had a good attendance record for more than a year prior to the hire at issue and CWC did not hire her because she defended Robert Alexander. The ratings of the three interview panelists (Resp. Exh. 5-7) note that complainant's attitude toward her job was negative and her attendance at work poor. These ratings by panelists Nagle and Moritz were based on the CWC job reference report. Former supervisor Scallon testified to complainant's poor job attitude and attendance record. Scallon's comments regarding complainant's job attitude were written in complainant's 1991, 1994 and 1995 annual performance evaluations (Comp. Exh. 1), well before complainant's support of Alexander in March 1996. Also, contrary to complainant's assertion, Moritz testified that complainant had a poor job attendance record in the twelve months prior to hiring Gipson.

Complainant did present witnesses to testify that she did not have a bad attitude. However, some witnesses, including complainant, testified to controversies between complainant and other staff members.

Finally, complainant argues that "Administrative Directive 55.1" states that "personalities and attendance should not be used [in interviews and references]."

Complainant questioned Moritz and Scallon about this directive, but neither was aware of this particular directive. Other than complainant's questions to Moritz and Scallon, no information about this directive was provided. The directive was not shown to the witnesses or offered as evidence.

Based on the record and for reasons as expressed, the Commission believes complainant has failed to establish her claim of retaliation.


ORDER

Complainant's claim against respondent of retaliation in violation of the WFEA is dismissed.

Dated: July 20, 1999.

DRM:rjb:970032Cdec2

STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

  
DONALD R. MURPHY, Commissioner

  
JUDY M. ROGERS, Commissioner

Parties:

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Secretary, DHFS  
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NOTICE

OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW  
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

**Petition for Rehearing.** Any person aggrieved by a final order (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set

forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

**Petition for Judicial Review.** Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.)

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