

**PASTORI M. BALELE,**  
*Complainant,*

v.

**Secretary, DEPARTMENT OF  
NATURAL RESOURCES,**  
*Respondent.*

**RULING ON CROSS  
MOTIONS TO DISMISS**

Case No. 98-0046-PC-ER

Respondent filed a motion for summary judgment on August 11, 1999. Complainant then filed a cross-motion for summary judgment. The parties agreed to a briefing schedule whereby the final brief was due on October 28, 1999.

The facts recited below are made solely for the purpose of resolving the pending motions. The recited facts appear to be undisputed unless specifically noted to the contrary.

**FINDINGS OF FACT**

1. The parties agreed to the following statement of the issue for hearing (see Conference Report dated February 2, 1999):

Whether respondent discriminated against complainant based on color, national origin/ancestry or race or retaliated against complainant based on prior Fair Employment activities, with respect to the decisions [made over the time period from July 1997 to January 1998] not to select him for the following positions:

- i) Deputy Administrator, Division of Land;
- ii) Air and Waste Manager, Fiscal and Program Evaluation Section Chief;
- iii) Financial Supervisor 6, Reporting Section Chief; and
- iv) Director, Bureau of Waste Management.

2. Respondent did the widest possible recruitment for each position. Each position was advertised to include as potential candidates current state employees and individuals

outside of state service. (See Exh. 10 attached to respondent's answers to complainant's discovery.)

3. Complainant applied, was certified and interviewed for all four positions listed in the prior paragraph.

4. Complainant filed prior discrimination cases against respondent: *Balele v. DNR, et al.*, 95-0029-PC-ER and *Balele v. DILHR, DNR, et al.*, 94-0020-PC-ER. He has not disputed respondent's contention that he lacks evidence to show that the interviewers or decision makers were aware of these prior complaints.

Deputy Administrator, Division of Land

5. The job duties and knowledge required for the vacant position of Deputy Administrator, Division of Land (hereafter referred to as Land Aor) were described in the job announcement published in the Current Employment Opportunities Bulletin (COB) dated July 14, 1997, as shown below (see Exh. 10 attached to respondent's answers to complainant's discovery):

**JOB DUTIES:** Serve as full-time Deputy to the Land Division Administrator. Direct Wisconsin's programs for managing land based natural resources including wildlife and forest resources, endangered resources, outdoor recreation, and 1.3 million acres of DNR owned lands including state parks, fishery and wildlife areas, state forests, state natural areas, flowages and administrative sites. Duties include policy development, program administration, planning, fiscal management, legislative and intergovernmental liaison, human resources management. Consult with the state legislature, Governor's office, other Wisconsin state agencies, other states, various federal agencies, interest groups regarding land program policy development and legislation. Oversee Land Division Teams and work with bureaus and other divisions to establish consistent, integrated, cross-program policies and procedures.

**KNOWLEDGE REQUIRED:** Broad knowledge of administrative management theory and practice including quality management, team management, policy development, strategic planning, resources allocation, conflict resolution, human resources management; work planning, budget development and legislative procedures; theory and practice of land resources management encompassing terrestrial and aquatic ecology, wildlife management, forestry, parks and

recreation, endangered resources; partnership development; integrated resource management, ecosystem management and land-use planning principles; excellent written, verbal and visual communications skills and techniques.

6. Respondent hired Sara Hurley (white female) for the vacant position Land Aor, effective October 26, 1997. (See Exh. 5 attached to respondent's answers to complainant's discovery.) Complainant does not dispute that she had more relevant experience for this position than he had.

7. The interview panel for the vacant Land Aor position included Ruthe Badger (black female), Gloria McCutcheon (white female), Steve Miller (white male), Darrell Bazzell (black male) and George Meyer (white male). (See respondent's answer to complainant's discovery, interrogatory #5.) This position was part of a job group identified as under-represented for females and minorities. (See Exh. 2 attached to respondent's answers to complainant's discovery.)

8. The interview panel used one pre-prepared question with pre-prepared benchmarks. Every candidate was asked the same question the answer to which was measured by the benchmarks. The question and benchmarks were job-related. (See Exh. 9 attached to respondent's answer to complainant's discovery.)

9. The interview panel rated Ms. Hurley higher than complainant based on the answers given at interview to the pre-prepared question.

10. The selection of Ms. Hurley was in compliance with respondent's affirmative action plan because this position was part of a job group identified as under-represented for females. Accordingly, it was unnecessary for the hiring authority to consult an EEO officer. Nevertheless, Steve Miller, the appointing authority, contacted his designated EEO officer for consultation to clarify the hiring process and provide feedback about the interview questions and benchmarks before any offer of hire was made.

11. Thirty-eight individuals were certified as eligible for interview. The race of one candidate is unknown. Complainant was the only black candidate. The remaining 36 candidates were white. (See Exh. 3 attached to respondent's answers to complainant's discovery.)

Air and Waste Manager, Fiscal and Program Evaluation Section Chief

12. The job duties and knowledge required for the vacant position of Air and Waste Manager, Fiscal and Program Evaluation Section Chief (hereafter referred to as Air/Waste Sec Chief) were described in the job announcement published in the COB dated October 20, 1997, as shown below (see Exh. 10 attached to respondent's answers to complainant's discovery):

JOB DUTIES: As Section Chief, this position is responsible for the Remediation and Redevelopment program's strategic planning, annual work planning; managing program fiscal related issues (grants, cooperative agreements, Environmental Fund and bonding); evaluating and responding to customer needs through peer reviews and internal program reviews to insure consistency; training and safety; and oversight of the program's information management systems. The position will direct the development and implementation of information and education strategies consistent with the program's strategic direction; enhance teamwork, communication, consistency and program integration statewide. A key responsibility will involve gaining customer input and ensuring satisfaction in addition to assuring consistent implementation of the program. Supervise, assist and coach Section staff and team members.

KNOWLEDGE REQUIRED: Management skills to include work planning, strategic planning, public participation, customer service, human resources management; Continuous Quality Improvement (CQI) techniques to develop program direction, team objectives and problem solving skills. Experience with state and federal environmental remediation and redevelopment laws, regulations, policies and guidelines; application of engineering and hydrogeology to site response and containment behavior in the environment; state procurement laws and regulations; federal grants and/or cooperative agreement management, fiscal control and reporting. Effective oral and written communication skills including conflict resolution, negotiation; problem solving and decision making skills.

13. Respondent hired Robert Strous, Jr. for the vacant Air/Waste Sec Chief position, effective February 15, 1998. (See Exh. 5 attached to respondent's answers to complainant's discovery.) Complainant does not dispute that Mr. Strous had more relevant experience for this position than complainant had.

14. The interview panel for the vacant Air/Waste Sec Chief position included Lakshmi Sridharan (Asian/Pacific Islander female), Bruce Urben (white male) and Mark

Giesfeldt (white male). This position was under-represented for females and minorities. (See Exh. 2 attached to respondent's answers to complainant's discovery.)

15. The interview panel used pre-prepared questions with pre-prepared benchmarks. Every candidate was asked the same questions the answers to which were measured by the benchmarks. The question and benchmarks were job-related.

16. The interview panel rated Mr. Strous higher than complainant based on the answers given at interview to the pre-prepared questions.

17. Mr. Strous ranked #2 after interviews. (Suzanne Bangert ranked #1 and was hired for the vacant position as Director of the Bureau of Waste Management.) After the interviews and prior to any offer of hire, respondent wrote reasons why Mr. Strous was recommended for hire as shown below (see Exh. 2 attached to respondent's answers to complainant's discovery). This information was reviewed by Mary Jo Kopecky, the Division's affirmative action designee, and by the Deputy Administrator.

Robert Strous was selected for the following reasons:

- 9 years of experience in program – served as a unit leader administering the State's Environmental Repair Fund – fiscal and technical responsibilities – This is a key responsibility of the section chief job.
- Program/Staff support – demonstrates high ability to solve issues, work with staff and regions.
- Key person in divisional team implementation and supportive of legislative concepts – important to successful reorganization.
- Interpersonal skills are top notch, ability to communicate with me, staff, agency, outside agency. Proven commodity.

18. Complainant ranked #8 after interviews. After the interviews and for review by Ms. Kopecky, respondent wrote the reasons why complainant was not recommended for hire as noted below (see Exh. 2 attached to respondent's answers to complainant's interrogatories):

Mr. Balele ranked 8<sup>th</sup> after the initial interview and scored less than one half of the top candidate – 61 vs. 130. Mr. Balele did not represent a knowledge of generic issues such as problem solving, supervision and effective communication, as represented by his numeric score. Mr. Balele also did not represent a knowledge of the general program area. For these reasons, based upon his interview performance, he was not selected.

19. Thirteen candidates were certified and interviewed. Complainant was the only black candidate. One candidate was an American Indian/Alaskan Native. All other candidates were white. (See Exh. 2 attached to respondent's answers to complainant's interrogatories.)

Financial Supervisor 6, Reporting Section Chief

20. The job duties and knowledge required for the vacant position of Financial Supervisor 6, Reporting Section Chief (hereafter referred to as FS6) were described in the job announcement published in the COB dated November 10, 1997, as shown below (see Exh. 10 attached to respondent's answers to complainant's discovery), using the same emphasis as appeared in the original document:

**JOB DUTIES:** Manage Reporting Section activities to include all facets of the reconciliation of agency accounting records with the Department of Administration, the development of project and federal grant accounting reports, preparation of annual department financial reports. Oversee preparation and submittal of GAAP composite entries to other agencies and complete GAPO statements across multiple funds and fund types to the Department of Administration, State Controller's Office. Conduct compliance audits and program reviews of financial operations in the five DNR regions. Develop, implement and monitor Section goals, objectives and priorities. Supervise and direction Section staff. Serve as a member of the Bureau of Finance Management Team. **Well qualified candidates will have professional academic preparation in accounting and a CPA or equivalent.**

**KNOWLEDGE REQUIRED:** Managerial and supervisory concepts and techniques; Generally Accepted Accounting principles; Governmental Generally Accepted Accounting Principles; audit concepts. Cost accounting techniques and principles; human resources management techniques; effective oral and written communications skills.

21. Respondent hired Brian Lamprech for the vacant position of FS6, effective January 4, 1998. (See Exh. 5 attached to respondent's answers to complainant's discovery.) Complainant does not dispute that Mr. Lamprech had more relevant experience for this position than complainant did.

22. The interview panel for the vacant FS6 position included Herb Zimmerman (white male), Barb Schultz (white female) and Norm Hawkins (black male). This position was

part of a job group identified as under-represented for minorities. (See Exh. 2 attached to respondent's answers to complainant's discovery.)

23. The interview panel use pre-prepared questions and benchmarks. Each candidate was asked the same questions the answers to which were measured against the benchmarks. The questions and benchmarks were job-related. (See Exh. 9 attached to respondent's answers to complainant's discovery.)

24. The interview panel rated Mr. Lamprech higher than complainant based on the answers given at interview to the pre-prepared questions.

25. The Bureau of Finance Director, Herb Zimmerman, discussed the selection of Mr. Lamprech with the EEO officer prior to offering the position to anyone.

26. Eleven individuals were certified and interviewed. Complainant was the only black candidate. The other candidates were white. (See Exh. 2 attached to respondent's answers to complainant's discovery.)

#### Director, Bureau of Waste Management

27. The job duties and knowledge required for the vacant position of Director, Bureau of Waste Management (hereafter referred to as Waste Director) were described in the job announcement published in the COB dated January 12, 1998, as shown below (see Exh. 10 attached to respondent's answers to complainant's discovery):

JOB DUTIES: Administer an integrated and cohesive statewide Waste Management program, ensuring the environmentally safe and technically sound management of all types of solid waste. Provide direction, support and guidance for all aspects of the program including solid waste management, waste tire recovery, hazardous waste management, metallic/non-metallic mining, oil and gas exploration and production, and solid waste reduction and recycling. Manage development of overall program policies, strategies, administrative rules and statutes, budgets, objectives, work plans and strategic direction statewide. Ensure partnerships with external groups, associations, state/federal agencies, and other states. Utilize Continuous Quality Improvement processes to improve the quality of program activities and meet the needs of program customers. Promote teamwork, program communication, consistency and integration throughout the state. Administer human resources and team management activities. Direct, assist and coach Bureau Section Chiefs

and staff. Initiate the establishment of teams; develop and implement a program-wide evaluation process to receive customer feedback and make continuous improvements. This position advises the Secretary's Office on administrative, policy and management issues in the waste program.

**KNOWLEDGE REQUIRED:** Management and administrative skills to include program accountability procedures, program planning and reviews, work planning, budget/grant tracking; Continuous Quality Improvement approaches, team management and empowered team methods; human resources management. Sound understanding of legislative process including assessing fiscal implications, program implications, effects on regulated community, legislative committee procedures; local institutions involved in waste management and recycling activities including designated agencies, planning institutions and other environmental program contractors and cooperators; environmental policy, skills in developing waste management policy, and coordination with other environmental disciplines. Excellent oral and written communication skills, including the ability to communicate and explain complex environmental issues to a wide variety of audiences.

28. Respondent hired Suzanne Bangert for the vacant position of Waste Director, effective April 12, 1998. (See Exh. 5 attached to respondent's answers to complainant's discovery.) Complainant does not dispute that Ms. Bangert had more relevant experience for this position than he did.

29. The interview panel for the vacant position of Waste Director included Mary Jo Kopecky (white female), Ruthe Badger (black female), Norm Niedergang (white male), Jay Hockmuth (white male) and Stan Druckenmiller (white male). This position was part of a job group identified as under-represented for females and minorities. (See Exh. 2 attached to respondent's answers to complainant's discovery.)

30. The interview panel used pre-prepared questions and benchmarks. The same questions were asked of each candidate and were scored by the benchmarks. The interview panel rated Ms. Bangert higher than complainant based on the answers given at interview to the pre-prepared questions.

31. After the interviews, and for review by respondent's affirmative action office, respondent wrote reasons for recommending Ms. Bangert for this position as shown below (see Exh. 2 attached to respondent's answers to complainant's discovery):



Ms. Bangert brings broad experience from a number of DNR programs – Waste, Industrial Wastewater, Watershed Management – as well as work in the private sector. She is very adept at bringing people together to solve problems. She worked as assistant bureau director for water quality programs and most recently held a similar position in the Air Management program, working with industry to reduce air emissions. She was the U.S. Delegate in negotiating Lake Superior Pollution prevention Agreements with the Canadians. She has excellent oral and written communication skills. She was in the top 2 in both sets of job interviews.<sup>1</sup>

32. The selection of Ms. Bangert was in compliance with respondent's affirmative action plan because the position was underutilized for females. Accordingly, it was unnecessary for the appointing authority to consult an EEO officer. Nevertheless, Jay Hochmuth, the appointing authority, contacted his designated EEO officer for consultation to clarify the hiring process and provide feedback about the interview questions and benchmarks before any offer of hire was made.

33. Fifteen individuals were certified as eligible for interview. One candidate withdrew, so fourteen were interviewed. Complainant was the only black person certified. One interviewed candidate was an Asian/Pacific Islander. All other interviewed candidates were white. (See Exh. 2 attached to respondent's answers to complainant's discovery.)

#### Additional Information

34. In or about September 1995, members of the Wisconsin Association of Black State Employees (WABSE), including complainant, met with DNR Secretary George Meyer and then-DNR Deputy Secretary, Ron Semann. Complainant contends and respondent denies that Mr. Semann stated during this meeting that he was opposed to hiring black people as Bureau Directors or Section Chiefs because black people did not have the expertise of respondent's specialized bureau or section functions. Complainant further contends and respondent denies (based on its denial that the statement was ever made) that Secretary Meyer did not oppose Mr. Semann's statement during the meeting and did not discipline Mr. Semann for making the statement.

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<sup>1</sup> This is an apparent reference to her competition for the Air/Waste Sec Chief position.

35. In or about September 1995 or 1996, complainant telephoned Julie Graziano, an Affirmative Action Officer employed by respondent. Complainant contends he asked her how respondent was implementing its equal opportunity of employment policies. Complainant contends and respondent denies, that Ms. Graziano replied that she had been prevented from enforcing equal opportunities of employment for racial minorities by Martinelli in concert with the Division Administrators and with approval of Secretary Meyer who received advice from Richard Henneger, an attorney for respondent who represents respondent in this case. (Complainant did not explain Martinelli's alleged role.) Complainant further contends and respondent denies that Ms. Graziano also said that officials of the Department of Employment Relations and its Division of Merit Recruitment and Selection already knew that respondent's top officials were opposed to hiring blacks in career executive positions at respondent's headquarters in Madison (at GEF 2).

36. DNR has designated specific EEO officers for each appointing authority as reflected by respondent's answers to complainant's discovery (interrogatory #6, p. 4.) Complainant contends this "was an illegal act by DNR top management," citing §230.04(9)(k), Stats., as support for his argument. He contends such designation is a "ready mechanism for corruption and discrimination against racial minorities"<sup>2</sup> and corrupts the system's checks and balances because, for example, the hiring authority in some instances is the same individual as the designated EEO officer which he believes existed with Mr. Miller (see ¶10 above) in the hiring process for the Land Aor position. Complainant also objects to EEO officers being part of the interview panel such as Mr. Miller (Land Aor position).<sup>3</sup>

37. Complainant contends he noticed "aloofness and anger" from the interviewers at each of the four interviews at issue in this case. Respondent contends that even if this statement is true there are many possible explanations other than discrimination, such as that

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<sup>2</sup> See p. 27 of complainant's cross motion (dated 9/15/99) and pp. 27-30 of complainant's response to respondent's motion (also dated 9/15/99).

<sup>3</sup> Complainant also cited Ms. Kopeck as an example. Ms. Kopeck was the EEO officer for the Air/Waste Section Chief hire where Mark Gesfeldt was the appointing authority. However, she served on the interview panel for the Waste Director position where Mr. Hochmuth was the appointing authority. Accordingly, unlike Mr. Miller, she did not serve on the interview panel for the same position where she was the EEO officer.

the interviewers maintained a serious demeanor for all candidates or that complainant's response to the pre-prepared questions were incorrect or unsatisfactory. (See, respondent's motion dated 8/11/99, p.4.)

38. Complainant contends that the following conversation occurred between him and Darrell Bazzell regarding the interviews at issue in one of his prior cases against respondent; *Balele v. DNR, DMR & DER, 95-0029-PC-ER*. He alleged in the prior case that he perceived the interviewers showed aloofness and anger against him during the interview. He said after the interview Mr. Bazzell telephoned complainant and stated as follows (showing same emphasis as complainant does in his cross-motion, p. 22):

We did get through all the candidates and did invite a small number of folks back two of them. We did not include you Pastori in the group primarily because we have folks who **probably had closer experience to work in this position . . . So we invited those folks back.** If it does not work out we will probably go back and take a look at you and other folks and see how things "pan out."

39. Respondent's Office of Diversity Affairs prepared a document entitled "Section Trends for 1998" (Exh. 3 attached to complainant's arguments dated 9/15/99.) In discussion of the 10 appointments made in the job group "administrators and senior executives" the document notes that the reason cited most often for hire was that the person selected had greater or more relevant experience than the other candidates.

40. The Department of Employment Relations (DER) published a "DER Management Update" in June 1993 (Exh. 6 attached to complainant's arguments dated 9/15/99). Complainant cites a portion of the manual (p. 7), as shown in bold type below. Relevant portions of the entire section (pp. 7-9) are reproduced below to show the context in which the cited statement was made.<sup>4</sup>

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<sup>4</sup> Complainant similarly extracted one and one-half sentences from a document respondent prepared (Exh. 17, attached to complainant's arguments dated 9/15/99) Taken in context, however, the cited excerpt has about the same meaning as the document detailed in ¶40 of the Findings of Fact.

## CONDUCTING EFFECTIVE EMPLOYMENT INTERVIEWS

The employment interview is a critical part of the hiring process. Even in Wisconsin state Government, where we use tests and other objective approaches to evaluate job candidates, virtually every hiring decision hinges on a series of face-to-face interviews. It's therefore essential that we plan and conduct effective interviews.

**Research on interviewing effectiveness has shown interviewing is often the least effective way to predict job performance and make selections.** That's one reason why, in state service, we combine the interview with other selection tools like multiple choice exams . . .

Nevertheless, because managers and supervisors rely heavily on interviews to make hiring decisions, we must conduct interviews that are fair, job-related, and free of potential legal problems . . .

### THE INTERVIEW AS INFORMATION-GATHERING

The interview is really an information-gathering activity, for both sides . . . Therefore, a good employment interview should:

- Provide the employer with facts and information to make a decision about whether a match exists between the required knowledge, skills, and abilities (KSAs) and the candidate's KSAs.
- Provide the candidate with information to help make a decision on whether a match exists between his/her interests, goals, and KSAs, and the organization's needs.
- Treat all candidates fairly, professionally and appropriately. This can help the agency select the best candidate, convince a candidate to accept a job offer, and also prevent public relations and legal problems.

### COLLECTING INFORMATION TO MAKE A HIRING DECISION: THE EMPLOYER'S PERSPECTIVE

From the interviewer's standpoint, a good interview provides facts and information to decide if the candidate has the KSAs the job requires. How do we collect this information?

The most effective interview approach is to obtain specific examples that demonstrate that the candidate has these critical KSAs . . .

**PLANNING THE INTERVIEW.** Effective interviews . . . must be carefully planned. That is, job-related questions should be developed and the interviewers must assess how the information they will collect will be used to assess the candidates. To develop good interview questions, interviewers should:

1. Analyze the job: identify the critical-knowledge, skills and abilities to focus on . . .
2. Develop questions, based on this KSA analysis, to collect information indicating whether the candidate can do the job. These questions can take several forms:
  - Situational questions ask the candidate to provide specific examples of how and when he or she has successfully performed certain activities that are important to the target job.
  - Job knowledge questions assess whether the candidate has the required technical knowledge to do the job.
  - Simulation questions require the candidate to analyze job situations and describe how they would react or perform.
  - Background questions focus on job-related areas like education, experience . . .

In all cases, the interviewer must know what a “good” answer is. The best approach here is probably to develop benchmark responses that will enable the interviewers to systematically (qualitatively or quantitatively) evaluate each candidates’ responses.

If you can, use more than one interviewer – this maximizes the possibility of reliable evaluations and reduces “rating error.”

41. Respondent provided complainant (in answer to discovery) with a list of career executive positions as of July 6, 1998 (Exh. 4 attached to complainant’s arguments dated 9/15/99). This data shows that statewide respondent employs 199 individuals in career executive positions, of which one is black, two are Asian/Pacific Islanders and the rest are white. Out of the total positions, 100 are located at respondent’s central office<sup>5</sup> and all are filled by white people.

42. Respondent provided (in answer to discovery) data for 1997 (see Exh. 1, pp. 2-3 attached to complainant’s arguments dated 9/15/99). In 1997, respondent employed 204 individuals in “administrators-senior executive positions” Of this figure, four were racial minorities including one black person.

43. Respondent provided information (in answer to discovery) about the “availability factor for qualified racial minorities in administrators-senior executive job group

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<sup>5</sup> Complainant said 120 positions were at the central office but the document shows the correct number is one hundred.

in 1998.” According to respondent this figure was 7.5%. (See Exh. 11 attached to complainant’s arguments dated 9/15/99).

44. In 1998, respondent hired 10 individuals in the job group entitled “administrators and senior executives.” (See Exh. 2 attached to complainant’s arguments dated 9/15/99.) Respondent interviewed 125 applicants for the ten positions, including 5 minorities<sup>6</sup>, 37 women and 83 white males. Respondent hired no minorities, 3 women and 7 white males.

45. Complainant contends that when respondent underwent a reorganization (date not provided) that respondent “took the advantage of DNR reorganization to either demote, layoff or remove racial minorities from GEF.” He indicates that the following employment transactions occurred (he did not provide the first name of the referenced individuals): Lasksmi was transferred to Milwaukee, Badger to the South Central Office and Oriedo did not have a job for almost a year. He provided no information about the demotion, layoff or transfers of non-racial minorities.

#### CONCLUSIONS OF LAW

1. The Commission has jurisdiction of the case pursuant to §230.45(1)(b), Stats.
2. It is respondent’s burden to show entitlement to summary judgment.
3. Respondent met its burden in regard to its hiring decisions for the following vacant positions:

- Air and Waste Manager, Fiscal and Program Evaluation Section Chief,
- Financial Supervisor 6, Reporting Section Chief, and
- Director, Bureau of Waste Management

3. Respondent met its burden with respect to claims of disparate impact but not with respect to claims of disparate treatment in regard to its hiring decision for the following vacant position:

- Deputy Administrator, Division of Land

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<sup>6</sup> Complainant accounts for four of the five minorities because he applied for four of the ten vacancies.

4. It is complainant's burden to show entitlement to summary judgment. Complainant has not met this burden.

#### OPINION

The arguments complainant raised in his cross motion for summary judgment are essentially the same as he offered in opposition to respondent's motion for summary judgment. The Commission has first considered respondent's motion and concluded respondent was entitled to summary judgment for three of the hiring decisions, with no need to review complainant's cross motion separately. The Commission's reason for denying respondent's motion with regard to the remaining position is the same reason why complainant's cross motion was denied. The Commission's rationale is discussed in the following paragraphs.

#### I. Standard for Summary Judgment Analysis

Summary judgment should only be granted in clear cases. See *Grams v. Boss*, 97 Wis. 2d 332, 338-9, 294 N.W.2d 473 (1980), wherein the court stated:

On summary judgment the moving party has the burden to establish the absence of a genuine, that is, disputed, issue as to any material fact. On summary judgment the court does not decide the issue of fact; it decides whether there is a genuine issue of fact. A summary judgment should not be granted unless the moving party demonstrates a right to a judgment with such clarity as to leave no room for controversy; some courts have said that summary judgment must be denied unless the moving party demonstrates his entitlement to it beyond a reasonable doubt. Doubts as to the existence of a genuine issue of material fact should be resolved against the party moving for summary judgment.

The papers filed by the moving party are carefully scrutinized. The inferences to be drawn from the underlying facts contained in the moving party's material should be viewed in the light most favorable to the party opposing the motion. If the movant's papers before the court fail to establish clearly that there is no genuine issue as to any material fact, the motion will be denied. If the material presented on the motion is subject to conflicting interpretations or reasonable people might differ as to its significance, it would be improper to grant summary judgment.

## II. General Analysis for FEA Retaliation and Discrimination Cases

Complainant alleged that respondent's decisions not to hire him for any of the positions at issue were based upon retaliation for his participation in an activity protected under the Fair Employment Act (FEA) and constituted discrimination on the bases of his color, national origin/ancestry or race. Under the FEA, the initial burden of proof is on the complainant to show a prima facie case of discrimination. If complainant meets this burden, the employer then has the burden of articulating a non-discriminatory reason for the actions taken which the 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).

## III. FEA Retaliation

Complainant based his claim of FEA retaliation upon the prior discrimination cases he filed against respondent (see ¶4 of the Findings of Fact (FOF)). To establish a prima facie case in the retaliation context, there must be evidence that 1) the complainant participated in a protected activity and the alleged retaliator was aware of that participation, 2) there was an adverse employment action, and 3) there is a causal connection between the first two elements. A "causal connection" is shown if there is evidence that a retaliatory motive played a part in the adverse employment action.

Complainant failed to establish a prima facie case of FEA retaliation. Specifically, he has not disputed respondent's contention that he lacks evidence to show that the interviewers or decision makers were aware of the discrimination complaints he previously filed with the Commission. Accordingly, respondent is entitled to summary judgment on the issue of FEA retaliation.

## IV. Discrimination

Complainant claimed that respondent did not hire him for any of the positions at issue because of his color, national origin/ancestry or race. In the context of a hiring decision, the elements of a prima facie case are that the complainant 1) is a member of a class protected by



the Fair Employment Act, 2) applied for and was qualified for an available position, and 3) was rejected under circumstances which give rise to an inference of unlawful discrimination.

Respondent concedes for each of the positions at issue that complainant established a prima facie case of discrimination because white individuals were hired. Respondent has asserted a legitimate, non-discriminatory reason for not hiring complainant. Specifically, respondent asserts, and complainant does not dispute, that each selected individual had more relevant experience in the job-related program areas than complainant did.

A. Disparate Impact

Complainant contends that discrimination occurred under the theory of disparate impact. Specifically, he asserts that the interview process had a disparate impact. He also claims that respondent's "post-certification decisions" had a disparate impact. He does not specifically define what he means by post-certification decisions but it appears he is arguing that it is discrimination to base a hiring decision on the conclusion that the person selected had greater or more relevant experience than the other candidates. (See ¶¶38-39, FOF.) (See complainant's brief in opposition to respondent's motion, pp. 21-32.) (Also see complainant's brief in support of his motion for summary judgment, pp. 11-28.)

Complainant bases his argument on Title 42, §2000e-2(k), U.S.C., the text of which was recited as follows:

- (1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if:
  - (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or
  - (ii) the complaining party makes the demonstration described in subparagraph(C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.
- (B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular

challenged employment practice causes a disparate impact, except that if the complainant party can demonstrate to the court that the elements of a respondent's decision making process are not capable of separation for analysis, the decision making process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of alternative employment practices.

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.

The Commission does not reach the question of whether the cited federal law is applicable to claims raised under the FEA. Such question is unnecessary to resolve because even if complainant's legal arguments were accepted as applicable, he has failed to show disparate impact.

Complainant contends that the interviews and "post-certification decisions" created a disparate impact. The Commission discussed use of the 80% rule to establish disparate impact in *Balele v. UW System*, 98-0159-PC-ER, 10/20/99, as noted below in relevant part:

Mr. Balele contends that use of the 80% rule supports an inference of discrimination in his case. One problem with his argument is that he "plugged" the wrong figures into the 80% formula. He complains that the requirement of five years of successful senior level university experience created a disparate impact on minorities. The correct figures to plug into the formula, accordingly, are the pass/fail rates resulting from the contested requirement . . .

The correct analysis under the 80% rule is shown below . . . (The analysis shown below is based upon guidance found in Sullivan, Simmer, Richards, *Employment Discrimination 2d ed.*, §4.2.3.2.)

	<u>Racial Minorities</u>	<u>Whites</u>
Total applicants	3	20
Number Selected	1	12
Passing Rate	33%	60%

The resulting “ratio of rates” is 33/60 (or 55%), is less than 4/5ths (or 80%) and, accordingly, could be viewed as raising an inference of disparate impact.

The results of applying the 80% rule are insufficient in this case to raise an inference of discrimination due to the small sample size involved. The Uniform Guidelines on Employment Selection Procedures, 28 CFR §50.14 contains the following pertinent discussion in section 4D (emphasis shown is in the original document): [Footnote: The referenced uniform guidelines were issued initially in 29 CFR 1607, effective September 25, 1978, with clarification in question-and-answer format published in 44 Fed. Reg. 11,996, 3/2/79. No substantive changes occurred with respect to the discussion in this ruling.]

D. Adverse impact and the “four-fifths rule.” A **selection** rate for any race, sex or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact . . . Greater differences in **selection** rate may not constitute adverse impact where the differences are based on small numbers and are not statistically significant . . .

Further guidance has been provided in “Q & As on Uniform Guidelines on Employee Selection Procedures” published in 44 Fed Reg 11,996, 3/2/79, the following relevant excerpts are shown below (emphasis shown is in the original document):

**20.Q. Why is the 4/5ths rule called a rule of thumb?**

A. Because it is not intended to be controlling in all circumstances . . . [A] difference of more than 20% . . . may not provide a basis for finding adverse impact if the number of persons selected is very small. For example, if the employer selected three males and one female from an applicant pool of 20 males and 10 females, the 4/5ths rule would indicate adverse impact . . . yet the number of selections is too small to warrant a determination of adverse impact. In these circumstances, the enforcement agency would not require validity evidence . . .

**21. Q. Is evidence of adverse impact sufficient to warrant a validity study or an enforcement action where the numbers are so small that it is more likely than not that the difference could have occurred by chance? . . .**

- A. No. If the numbers of persons and the difference in selection rates are so small that it is likely that the difference could have occurred by chance, the Federal agencies will not assume the existence of adverse impact, in the absence of other evidence . . . Generally, it is inappropriate to require validity evidence or to take enforcement action where the number of persons and the difference in selection rates are so small that the selection of one different person for one job would shift the result from an adverse impact against one group to a situation in which that group has a higher selection rate than the other group.

The circumstances present in Mr. Balele's case are that a difference of one minority candidate in the passing rate would result in a higher passing rate for minorities than for whites. The total minority applicants would be 3 and the number selected 2, with a resulting passing rate of 66 percent for minorities as compared to the 60% passing rate for white candidates. Accordingly, use of the 80% rule in Mr. Balele's case is insufficient to demonstrate adverse impact. Mr. Balele correctly pointed out that it is the UW's burden to show that the requirement of five years of successful senior level university experience is a job-related requirement (see complainant's brief dated 7/2/99, p. 5). This burden, however, arises only if the complainant establishes that a disparate impact occurred - a prerequisite not met in this case.

The pertinent statistics for each of the four hires in the present case are noted in ¶¶11, 19, 26 & 33, FOF. The sample sizes are too small to raise an inference of disparate impact under the 80% rule, because a difference of one minority hired would result in a higher passing rate for minorities than for whites.

In apparent recognition of the fact that the sample sizes for the hires at issue are too small, complainant attempted to use alternative statistics to establish disparate impact. Paragraphs 41 and 42 of the FOF have data for individuals in career executive positions for 1997-8. The data is insufficient to raise an inference of disparate impact because there is no indication of how many minorities applied for any of the positions. Paragraph 44 of the FOF has data regarding the ten hires respondent made in 1998 in the job group entitled "administrators and senior executives." Again, the sample size is too small to raise an inference of disparate impact because the hire of one minority candidate would result in a higher passing rate for minorities than for whites.

Complainant offers as an argument of disparate impact that DNR failed to properly utilize its Affirmative Action Office. This claim is based on his alleged conversation with Ms. Graziano (see ¶35, FOF), as well as his perception that respondent acted illegally by designating specific EEOs for each appointing authority (see ¶36, FOF). Complainant cites no specifics about his allegation that respondent prevented Ms. Graziano from being effective in her job except his citation to §230.04(9)(k), Stats., which requires that an affirmative action officer be designated for each appointing authority. In this case there was an EEO designated for each appointing authority. It appears complainant is arguing that the designated EEO is required to be a member of respondent's Affirmative Action Office. There is no such requirement stated in the statute.

Based on the foregoing, respondent's motion to dismiss complainant's claims of disparate impact is granted. Also, complainant's cross motion is denied.

**B. Disparate Treatment**

Complainant contends discrimination occurred under the theory of disparate treatment. He contends the this theory is invoked when the complainant establishes that the employer treats some people less favorably than others because of their membership in a protected class. He bases this theory on the disparate impact arguments already rejected in the prior section of this ruling and on alleged direct evidence of discrimination as discussed in the following paragraphs. (See complainant's brief in opposition to respondent's motion, pp. 32-36.)

Complainant claims he has direct evidence of discrimination based on comments allegedly made in September 1995, by then-Deputy Secretary Ron Semann and allegedly unopposed by Secretary Meyer (see ¶34, FOF). The Equal Employment Opportunity Commission (EEOC) issued a guideline on analysis of such claims. *Revised Enforcement Guidance on Recent Developments in Disparate Treatment Theory*, 7/14/92. The following excerpt from the EEOC guideline noted above is relevant here (emphasis added):

Direct evidence of discriminatory motive may be any written or verbal policy or statement made by a respondent or respondent official that on its face demonstrates a bias against a protected group and is linked to the complained of adverse action . . . .

[D]irect evidence of bias, standing alone, does not necessarily prove that a discriminatory motive was responsible for a particular employment action. As the Supreme Court noted in *Price Waterhouse*:<sup>7</sup>

[r]emarks at work that are based on sex stereotypes do not inevitably prove that gender played a part in a particular employment decision. The plaintiff must show that the employer actually relied on her gender in making its decision.

*Price Waterhouse v. Hopkins*, 490 U.S. at 251. In other words, direct evidence of “discrimination in the air” will not by itself prove discriminatory motive for an action; rather, the discrimination must be shown to have been “brought to ground and visited upon an employee.” *Id.* See also *Randle v. LaSalle Telecommunications, Inc.*, 876 F.2d 563, 569, 50 EPD Par. 39,074 (7<sup>th</sup> Cir. 1989) (direct evidence must speak not only to intent but also to the specific employment decision in question).

Thus, a link must be shown between the employer’s proven bias and its adverse action. For example, evidence that the biased remarks were made by the individual responsible for the adverse employment decision or by one who was involved in the decision, **along with evidence that the remarks were related to the decisionmaking process**, would be sufficient to establish this link . . .

Accordingly, whenever there is proof of unlawful bias, the investigator must make a factual determination whether evidence establishes a link between the proven bias and the adverse action that is close enough to constitute direct evidence of discrimination . . . .

Example 4 – CP files a charge alleging discriminatory discharge on the basis of sex (female). In her charge, CP states that she was told by one of R’s supervisors that he did not think that women could or should perform construction work and he would never allow a woman to work for him. CP, however, did not work for this particular supervisor, and he had no authority over CP regarding her work with R. The supervisor admits that he made the biased statement to CP but asserts that the statement was his own opinion, expressed in a private conversation with DP. Evidence shows that CP was terminated because of excessive absenteeism and that she had been treated in the same manner as other male employees who had similar problems while working for R. The statement made by R’s supervisor would constitute direct evidence of

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<sup>7</sup> This is a reference to *Price Waterhouse v Hopkins*, 490 U S. 228, 250 (1989).

bias on his part, but since it neither represented R's policy toward CP or women in general, nor had an adverse effect on CP's employment, it would not constitute direct evidence of discriminatory motive in her discharge . . . .

Example 5 – Same facts as in Example 4, except that CP did work for the biased supervisor and he decided to fire her soon after becoming her supervisor. Furthermore, the supervisor made his comment to CP about women's inability to perform construction work at the time of the firing. The supervisor's biased statement is sufficiently linked to the adverse action as to constitute direct evidence that CP was unlawfully discharged because of sex.

As required for the present motion, the Commission accepts as true complainant's statement, which was supported by his affidavit, that Mr. Semann made the alleged comment and Secretary Meyer did nothing about it. (See ¶34, FOF.) The EEOC guideline notes that complainant must also show a link between the alleged statements and the fact that he was not hired for the positions at issue. Complainant failed to establish the requisite link for the Air/Waste Sec Chief position, the FS6 position and the Waste Director position. This is true because Secretary Meyer was not part of the hiring process for those positions and complainant does not dispute that the individuals hired had more relevant experience than he did. Respondent's motion for summary judgment is granted as to these positions.

Secretary Meyer was involved in the hiring process for the Land Aor position as one of the interview panel members (¶7, FOF). Again, in the context of the current motion, the Commission must accept as true complainant's statement that Mr. Semann made the alleged comment and Secretary Meyer did nothing about it. As a result, a dispute of material fact exists as to whether this alleged direct evidence of discrimination resulted in discrimination playing a part in the hiring process for the Land Aor position.

Even though complainant does not contest that the person hired had more relevant job experience than he did, respondent's motion for summary judgment is denied as to this position. The alleged direct evidence of discrimination, if found credible at hearing, is relevant to the question of whether a discriminatory motive played a part in the decision to hire someone other than complainant for the Land Aor position. Under the mixed motive analysis,

the burden would then shift to respondent to show that it would have taken the same decision absent the discrimination. If respondent makes the required showing, complainant would be entitled to a cease-and-desist order and costs. *Hoell v. LIRC*, 186 Wis.2d 603, 608-609 (Ct. App., 1994).

ORDER

Complainant's motion for summary judgment is denied. Respondent's motion for summary judgment is granted in part and denied in part, as detailed in this ruling.

Dated: January 25, 2000.

STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

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JUDY M. ROGERS, Commissioner

Commissioner Donald R. Murphy did not participate in consideration of this matter.

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