

STATE OF WISCONSIN

PERSONNEL COMMISSION

PASTORI M. BALELE,
Complainant,

v.

**Chancellor, UNIVERSITY OF
WISCONSIN - MADISON,**
Respondent.

FINAL
DECISION
AND ORDER

Case No. 00-0012-PC-ER

NATURE OF THE CASE

The following is the issue agreed to at the prehearing conference:

Whether respondent UW-Madison discriminated against complainant based on color, national origin or ancestry, or race, or retaliated against complainant for engaging in protected fair employment activities, as set forth in his complaint of discrimination, with respect to respondent UW-Madison's failure to hire complainant for the position of UW-Madison Director of Purchasing Services. (This issue includes the questions of disparate impact and disparate treatment.)¹ Conference Report dated May 1, 2000.

FINDINGS OF FACT

1. Complainant is black and was born in Tanzania.
2. Complainant received a Certificate in Public Administration and Finance from the Mzumbe School of Management in 1970.
3. Complainant's resume (Complainant's Exh. C16) shows that from January of 1971 until December 1972, he was employed as an administrative officer in Maswa County, Tanzania, and had the following responsibilities:

Assisted the County Executive in planning and implementation of all County affairs; authorized purchases for the county; deputized the County Executive in review of the county budgets including revenue budgets; received and reviewed progress reports from all departmental

¹ Complainant agreed at the hearing to withdraw the retaliation issue. Therefore, the Commission will not address that matter.

programs and in turn briefed the County Executive on sensitive program issues; supervised staff in the executive branch (300-400); was responsible for hiring, discharge and grievance handling of employee in executive branch.

4. Complainant's resume shows that from January 1973 to June 1975 he worked as an accountant and supervised a staff of 12 or more for the Shirecu Association, a cooperative in Tanzania, and that among his responsibilities, he was "answerable for external audits regarding financial policies and procedures."

5. Complainant's resume shows that for the remainder of 1975, he was the general manager of Kigoma cooperative in Tanzania.

6. Complainant attended the Mzumbe School of Management from 1969-70 and received a "certificate" in public administration and finance. Complainant attended the University of Wisconsin-Platteville from 1976 until 1980 and was awarded both a bachelor's degree in "Ag-business" administration and a master's degree in agriculture management.

7 Complainant began working with DOA in May of 1981 as marketing coordinator for the Federal Property Program.

8. From September of 1985, complainant has been employed by DOA as a contractual services management assistant in the Bureau of Procurement.

9. The title of the position in question is Director, Purchasing Services. It is in the limited/academic staff category. This means the position is in the unclassified service, and the incumbent serves at the pleasure of the Chancellor.

10. Respondent was not underutilized for racial minorities with regard to the job group (EEO 11-05) for this position. There were 111 people in this job group of whom 10 were racial minorities.

11 The announcement for this position (Complainant's Exhibit C15) includes the following:

JOB DUTIES: This position serves as chief procurement officer for the UW-Madison, providing strategic planning and leadership in establishing policies and procedures which efficiently and economically procure quality goods and services which meet the needs of the institution and that provide accountability to various Federal, State and

UW System Offices. The position supervises and directs the Purchasing, Materials Distribution Services (Stores), and administrative and support organizations of the institution. It also represents the UW-Madison to governmental and higher education organizations of the institution. It also represents the UW-Madison to governmental and higher education organizations and associations that affect the UW-Madison procurement activities, including the State of Wisconsin, UW System Administration, the Big 10 and CIC Purchasing Consortiums, and the National Association of Educational Buyers. This position reports to the Assistant Vice-Chancellor for Business Services.

QUALIFICATIONS: Well-qualified candidates will have held positions of progressively increasing responsibility in management, preferably in government or higher education. Experience in strategic planning, operation, administration, and financial management of procurement and distribution services operations is desirable. Degree in Business, Public Administration, Financial Management or related field or corresponding job experience in these areas required. Familiarity with data driven computer systems design and electronic commerce essential. Experience in development of contracts essential. Other factors include demonstrated ability to communicate and negotiate at all levels, including vendors, employes, representatives of governmental agencies, and university departmental administrators and faculty; ability to manage a large staff and handle complex personnel issues; and an understanding and appreciation of the academic and research environment. Must be highly motivated and have a strong interest in serving the needs of the institution and its staff. .

HOW TO APPLY: Apply with a resume including four references, and a letter of interest describing your training and experience in the following areas: 1) Strategic planning, operation, administration, and financial management of procurement and distribution services; 2) data driven computer systems design and electronic commerce; 3) development of contracts; 4) communication and negotiation; 5) management of a large staff and complex personnel issues; and 6) appreciation and understanding of the academic, research, and auxiliary services environment in order to serve the needs of the institution and its staff. Submit application materials . . by December 17 [1999].

12. Complainant submitted application materials, consisting of a letter of interest and resume. Complainant's Exhibit 16.

13. The effective appointing authority and direct supervisor of this position was Don Miner (white), Assistant Vice-Chancellor for Business Services. He established the search and screen process and made the ultimate appointment.

14. Miner had served in the position on an acting basis for about six months in addition to having served as the immediate supervisor for the position for a number of years. He was very familiar with the job and its duties and responsibilities.

15. Miner developed the criteria set forth in the position announcement (FOF 11), a list of "required knowledges, skills and abilities" (KSA's) (Complainant's Exhibit C15), and the position description (PD) (Complainant's Exhibit C15).

16. Miner appointed an eleven member search committee, consisting of one black and ten white persons.

17. The search committee selected a three-person subcommittee to screen the large number (78) of applications. All three members of the subcommittee were white. One of them knew complainant personally.

18. The subcommittee screened the applications using the criteria Miner had developed. They did not otherwise have formal benchmarks or formal training in how to go about the screening.

19. All three members of the subcommittee evaluated each applicant. Each reached the independent conclusion that complainant's qualifications were not sufficient to pass him on to the next stage—screening by the full committee.

20. The reasons why the subcommittee did not select complainant for further consideration are that, based on the materials he submitted, he lacked sufficient experience with data driven computer systems and e-commerce, and sufficient understanding and appreciation of the academic and research environment. His background did not show that he had progressively increasing responsibility in management, and he had no experience in an academic setting. He had no recent experience in high level management or in significant supervisory positions.

21. Subsequent to the subcommittee's action of screening out complainant, he was not further considered by respondent in the selection process.

22. The committee subsequently recommended six applicants (none black) for Miner's further consideration.

23. One of the six finalists (Jan Hamik) did not have a college degree. However, based on her application materials, the committee concluded she had corresponding job experience. Because this position was academic staff, normally the person appointed would be subject to an over-riding requirement² of a bachelor's degree. However, this requirement could be waived if a person had very strong experience. Hamik had a very strong background as indicated by the fact that for nine years she had been the Director of the State Bureau of Procurement in the Department of Administration (DOA), where she had been responsible for the oversight of all state purchasing activity, including the position in question at the University of Wisconsin-Madison. Hamik withdrew from consideration before being interviewed by Miner, due to having received a promotion within DOA. Because she withdrew before an interview, Miner never had to come to grips with the issue of a degree waiver.

24. Miner eventually appointed Mike Hardiman, a white applicant from Washington state, effective June 15, 2000.

25. Hardiman came from a position at Central Washington University, where he had been in a job comparable to the position in question. He was a senior management team member responsible for Purchasing Operations; Contract Development, Review and Approval; Public Disclosure; Public Records; Insurance Programs; Inventory and Surplus Operations; Central Receiving; Duplicating; Central Stores; and Parking Operations. Respondent's Exhibit R 10. He had a background that included progressively increasing management responsibilities, significant experience in developing and administering contracts, significant recent experience in an academic environment, and significant supervisory experience.

26. Because Hardiman was from out of state and had no experience in Wisconsin, he was required by DOA policy to take some basic DOA courses in procurement before he was authorized to sign off on certain procurement documents. Com-

² I. e., above and beyond the specific educational background or equivalent experience mentioned in the job announcement for this position.

plainant had taken these courses some time ago and was fully qualified in procurement when he applied for the job.

CONCLUSIONS OF LAW

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

2. Complainant has the burden of proof to show by a preponderance of the evidence the facts necessary to establish his claims.

3. Complainant has not satisfied his burden of proof.

4. Respondent did not discriminate against complainant on the basis of color, national origin or ancestry, or race, with respect to the decision not to hire him for the position of UW-Madison Director of Purchasing Services.

6. The selection process for this position did not have a disparate impact on the complainant based on his race, color, ancestry or national origin.

OPINION

In a case of this nature, the initial burden of proceeding is on the complainant to show a prima facie case of discrimination. If the complainant meets this burden, the employer then has the burden of articulating a legitimate, nondiscriminatory reason for the action taken which the complainant then attempts to show was a pretext for discrimination. The complainant has the ultimate burden of proof. *See Puetz Motor Sales Inc. v. LIRC*, 126 Wis. 2d 168, 172-73, 376 N.W.2d 372 (Ct. App. 1985).

In a failure to hire case such as this, the complainant may establish a prima facie case by showing: (1) he is a member of a group protected by the WFEA, (2) he applied and was qualified for a job which the employer was seeking to fill, (3) despite his qualifications he was rejected, and (4) the employer continued with its attempt to fill the position. *See, e.g., McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L. Ed. 2d. 668, 93 S. Ct. 1817, 5 FEP Cases 965 (1973). Here, complainant is a black person

whose country of origin is Tanzania³. He applied for the position in question. The parties disagree about whether complainant was qualified for the position. However, the record supports a finding that he was at least minimally qualified for the position as indicated by Miner's testimony after he perused complainant's application materials during the hearing.^{4 5} He was screened out of further consideration by the subcommittee, and therefore was not considered further by respondent through the remainder of the selection process. After his rejection, respondent continued with the selection process and appointed a white person to fill the position.

Complainant's evaluation and rejection by the subcommittee was supported by the record, including the testimony of the individuals involved in this process. Complainant's letter of interest was not well organized around the criteria set forth in the announcement.⁶ He did not have a background of progressively increasing management responsibility. He did not have any recent significant higher level management or supervisory experience. He did not have any recent experience in "data driven computer systems design and electronic commerce," Complainant's Exhibit 16, as sought by respondent. He did not have any experience that would have provided him with "appreciation and understanding of the academic, research, and auxiliary services environment." *Id.* He had very limited experience in "contract development."⁷

³ The subcommittee could have inferred this from complainant's application materials. Also, one of the members of the subcommittee knew complainant.

⁴ In any event, since complainant clearly has established the other elements of a prima facie case of race discrimination, and this case was heard fully on the merits, the Commission can proceed directly to the issue of pretext, *see, e.g., United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715, 75 L. Ed. 2d. 403, 103 S. Ct. 1478 (1983).

⁵ While the complainant may have been qualified in the bare minimum sense, the record supports the reasonableness of the substantive decision the subcommittee made to screen out complainant in the first cut. Related to this point is complainant's argument that he had been certified as eligible for other jobs at an equal or higher level. This does not undermine the soundness of the subcommittee's conclusion that there were better qualified applicants.

⁶ Complainant tries to create an issue out of a passing reference to the length of his letter of interest. The thrust of the comment was that complainant had done a poor job of organizing his letter around the areas specifically mentioned in the job announcement.

⁷ His resume (Complainant's Exhibit 16) states that in his current DOA job he "manages and administers statewide contracts for courts [sic] reporters and clipping services."

Complainant argues that pretext is shown by the fact that respondent hired someone (Hardiman) who needed to take the state-provided courses in procurement before he could sign off on certain procurement documents. On the other hand, complainant had worked for the state since 1981 and had already taken those courses and achieved certification for this purpose at the time he applied for the position. In the Commission's opinion, this is not significant evidence of pretext. Respondent was hiring someone for a high level position, responsible for an advanced level of management and supervision. It is significant that the job announcement did not include the State of Wisconsin procurement certification as a requirement or a criterion for this position. This was a technical skill⁸ that could be acquired after appointment by someone like Hardiman, who had the KSA's needed to perform successfully the core criteria laid out in the position announcement.

Complainant also points out that one of the members of the search committee did not have a four year degree. However, there is nothing in the record to support a conclusion that this should have disqualified her from being involved in the search and screen process, or that she was not well qualified to have served on the subcommittee.

Complainant contends that the screening process was flawed because the subcommittee did not have formally-defined benchmarks or any training on how to go about their task. This does provide some evidence of pretext, but is of limited weight because of the fact that Miner had developed a set of desirable criteria which was available to the screeners. Also, the three members of the subcommittee independently reached the conclusion that complainant should be screened out on the first cut, and the record amply supports the reasonableness of this decision.

The Commission will next address complainant's disparate impact claim. Complainant proceeds on a mistaken view of the concept of disparate impact, and he does not have anything resembling an adverse impact claim.

Under a disparate (or "adverse") impact theory, an employer's facially neutral policy or practice may be unlawful—even without a showing of discriminatory intent --

⁸ The record reflects that Hardiman had someone on his staff who could sign the necessary documents while Hardiman was obtaining the needed training and certification.

because it has a significantly adverse impact on a protected group. Federal case law discussing the disparate impact theory is "relevant and persuasive" in analyzing a claim under Wisconsin's Fair Employment Act. *Racine Unified School Dist. v. LIRC*, 164 Wis. 2d 567, 595 n. 14, 476 N.W.2d 707 (Ct. of App., 1991). The allocation of the burden of proof in a disparate impact case is as follows:

(1) *The prima facie case*: A court will consider statistical evidence offered by both the plaintiff and the defendant to determine whether, on the basis of those statistics that are most probative, the challenged practice or selection device has a substantial adverse impact on a protected group. The burdens of production and persuasion at this stage are on the plaintiff.

(2) *Business necessity*: If impact is established, the inquiry becomes whether the practice or selection device is "job-related for the position in question and consistent with business necessity." The burdens of production and persuasion at this stage are on the defendant.

(3) *Alternatives with a lesser impact*: To rebut the employer's proof of business necessity, a plaintiff can show that the employer refused to implement an effective alternative practice or selection device that would have a lesser adverse impact. (Footnotes omitted) Barbara Lindemann & Paul Grossman, *Employment Discrimination Law* 87 (3^d ed. 1996)

In the instant case, complainant presents neither any statistics nor other evidence of disparate impact as defined above. Complainant does not really have a case for disparate impact other than to the extent he is arguing that since he did not get selected for the Purchasing Director position as a result of having been screened out in the first cut made by the subcommittee, respondent's decision had an adverse *effect* on him which he mistakenly equates to an adverse impact. *See, e. g.*, Complainant's post-hearing brief, pp. 8, 11.

In a disparate impact case, the plaintiff must prove that the challenged practice is discriminatory because it had **direct** disparate impact on him and is unjustified by the defendant's legitimate business needs. *Allen v. Seidman*, 881 F. 2d 375, 379 [50 FEP Cases 607] (7th Cir. 1989). In order to recover under the disparate impact theory, complainant must first identify policies, practices or acts of commission or omission that have disparate impact on him based on his protected status.

It was clear at the hearing that complainant was removed from further consideration for the position by the first screening process .

Therefore the first screening process had **disparate** impact on him based on his race and national [origin].

Now once Balele identified and demonstrated that first screening process had direct disparate impact on him based on his race and national origin, the UW Madison had the burden to demonstrate with evidence its reasons for removing Balele from further consideration were job related.

Allen v. Seidman involved a disparate impact claim with regard to a promotion-related exam that was passed by 39% of black examinees and 84% of the white candidates. It provides no support for complainant's apparent and erroneous theory that a claimant only needs to show that a selection vehicle adversely affected the claimant to establish a prima facie case of disparate impact, *see, e.g., Balele v. UW-Madison, 99-0169-PC-ER, 2/26/01.*

In conclusion, the Commission notes that while it has considered all the arguments complainant raised in his post-hearing briefs, it has only tried to address those it considers the most pertinent.

ORDER

This complaint is dismissed.

Dated: July 2, 2001.


AJT:000012Cdec1.1.doc

Parties:

Pastori M. Balele
2429 Allied Drive, #2
Madison, WI 53711

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


JUDY M. ROGERS, Commissioner

David Ward
Chancellor, UW-Madison
158 Bascom Hall
500 Lincoln Drive
Madison, WI 53706-1314

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.

2/3/95