STATE OF WISCONSIN PERSONNEL COMMISSION

PASTORI M. BALELE,
Complainant,

v.
Secretary, DEPARTMENT OF ADMINISTRATION,
Respondent.

RULING ON MOTION FOR SUMMARY JUDGMENT

Case No. 00-0057-PC-ER

This is a complaint alleging discrimination based on race, color, and national origin or ancestry, and retaliation for engaging in protected fair employment activities in regard to a hiring decision. On August 9, 2000, respondent filed a motion for summary judgment. The parties were permitted to brief this motion and the schedule for doing so was completed on September 18, 2000. In his brief, complainant filed a cross-motion for summary judgment. The following findings of fact are based in information provided by the parties, appear to be undisputed, and are made solely for the purpose of deciding these motions.

FINDINGS OF FACT

1. Robert G. Cramer, who is white, was employed by respondent Department of Administration (DOA) from 1992 to 1996 as an executive policy and budget analyst, and from 1996 to 1999 as an information technology management consultant. During this entire period of time, George F. Lightbourn was employed by DOA as one of Mr Cramer's superiors, and was impressed by the high quality of Mr Cramer's work. Mr. Cramer's positions at DOA and later with Arthur Andersen involved high level management, planning, and policy functions. As a DOA information technology management consultant, Mr. Cramer served as a special assistant to the Administrator of the Division of Technology Management.

2. Mr. Cramer resigned from DOA in 1999 to work as a government services manager for Arthur Andersen in Milwaukee, Wisconsin. Before he left DOA, Mr.

Lightbourn wished Mr Cramer well and told him to let Mr. Lightbourn know if he were ever interested in returning to work for DOA.

3. During Mr Cramer's employment at Arthur Andersen, he and Mr Lightbourn stayed in touch through their work on an "e-government" project. During this period of time, Mr Lightbourn became Secretary of DOA.

4. In late November or early December of 1999, Mr Cramer advised Mr. Lightbourn that he was interested in returning to work at DOA.

5. Some time prior to January of 2000, the position of Administrator, Division of State Agency Services, DOA, became vacant. This is an unclassified position with significant and high level management, policy, and planning responsibilities. DOA did not seek applications for this position.

6. In January or February of 2000, Mr Lightbourn offered this Division Administrator position to Mr Cramer. Mr Cramer accepted the offer, and the appointment was made on March 31, 2000, with an effective date of April 3, 2000.

7 Some time prior to the appointment of Mr Cramer to this Division Administrator position, complainant, who is black and of African national origin and who was employed at the time by DOA in a Contract Specialist position within the State Bureau of Procurement, sent an email message to Mr Lightbourn expressing interest in the vacant Division Administrator position at issue here. Neither in this Contract Specialist position nor in any other position he held in his nearly 20 years of employment with DOA did complainant have any supervisory or management authority, or agency-wide or program-wide policy or planning responsibilities. Instead, during his employment at DOA, complainant served as a line staff employee.

9. At all times relevant to this matter, Mr. Lightbourn was aware of complainant's race and national origin, his position at DOA, and his filing of various fair employment complaints against DOA.

10. In March of 2000, DOA had thirteen (13) unclassified positions. Of these 13 positions, two were held by minorities, one Hispanic and one black.

11. The available data shows that, as of January of 1997, the percentage of racial/ethnic minorities in the relevant labor pool available for classified administrator/senior executive positions was 7.0%.

OPINION

The statement of issue to which the parties have agreed in this case is:

> Whether complainant was discriminated against on the basis of race, national origin or ancestry, or color, or retaliated against for engaging in protected fair employment activities when he was not selected for the position of Administrator, Division of State Agency Services. Complainant has indicated that he intends to prove this discrimination/retaliation using both a disparate treatment and a disparate impact analysis.

The Commission may summarily decide a case when there is no genuine issue as to any material fact and a party is entitled to judgment as a matter of law. *Balele v. Wis. Pers. Comm.*, 223 Wis.2d 739, 745-748, 589 N.W.2d 418 (Ct. App. 1998).

Complainant has offered both a disparate treatment and a disparate impact theory in this case. In reviewing a claim of disparate treatment under the Fair Employment Act, the Commission has frequently relied upon the method of analysis set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 5 FEP Cases 965 (1973), i.e., the initial burden of proof is on the complainant to show a prima facie case of discrimination and, 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. 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) was qualified for a job for which the employer was seeking applicants, and (3) that, despite his qualifications, he was rejected, and the employer continued to seek applicants from persons of complainant's qualifications. *Puetz Motor Sales, Inc. v. LIRC*, 126 Wis.2d 168, 172-73, 376 N.W.2d 372 (Ct. App. 1985).

Respondent urges the Commission to conclude that the undisputed facts here do not demonstrate a prima facie case of discrimination. Specifically, respondent argues that these facts do not show that respondent was seeking applicants for the subject position, one of the elements of a prima facie case. However, this represents an overly mechanical application of the principles enunciated in *McDonnell Douglas, supra.* The importance of *McDonnell Douglas* lies in the general principle that the complainant must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Fair Employment Act. *See, International Bhd. of Teamsters v. United States*, 431 U.S. 324, 358, 14 FEP Cases 1514 (1977). Simply stated, a complainant has established a prime facie case when there is sufficient evidence for the Commission to infer that, if the respondent's actions remain unexplained, it is more likely than not that such actions were based on reasons impermissible under the Fair Employment Act. *See, Furnco Constr. Corp. v. Waters,* 438 U.S. 567; 576, 17 FEP Cases 1062 (1978); *EEOC v. Metal Service Co.*, 51 FEP Cases 1238 (3d Cir 1990).

In addition, respondent's contention that complainant failed to apply for the subject position as required for establishing a prima facie case is not meritorious. In *Cones v. Shalala*, 81 FEP Cases 1650 (D.C. Cir 2000), the employing agency argued that the complainant had never applied for the subject position. The facts showed that both the successful candidate and the complainant had expressed interest in the position to the appointing authority. The court concluded that, if the successful candidate could get the position by expressing her interest to the appointing authority, the complainant could certainly establish a prima facie case by demonstrating that he had done precisely the same thing. Here, it is undisputed that Mr. Cramer, the successful candidate, expressed a general interest in employment with DOA to Mr. Lightbourn and that complainant expressed specific interest in the position under consideration here. Under the standard enunciated in *Cones, supra,* it is concluded that complainant made application for the position sufficient to sustain a prima facie case.

The element of a prima facie case which complainant has not satisfied is that of demonstrating that he was qualified for the subject position. As a result, it is concluded that the undisputed facts do not demonstrate a prima facie case of discrimination.

If a prima facie case of discrimination had been demonstrated, the burden would then shift to respondent to articulate a legitimate, non-discriminatory reason for its action. Respondent has explained that a formal competitive hiring process was not established for the subject position because it was a position in the unclassified service which did not require such a process, and that Mr. Cramer was hired because of his superior qualifications. This explanation is legitimate and non-discriminatory on its face.

The question would then become one of determining whether the facts demonstrate pretext.

Complainant first appears to argue in this regard that respondent was required to engage in a formal competitive process to fill the subject position. However, there is no requirement that this position in the unclassified service be filled through formal competition. This position is one of the relatively few positions that serves at the pleasure of the Governor or, through delegation, one of his subordinate appointing authorities, and may be appointed outside the civil service merit recruitment and selection process. It should be noted, however, this does not mean that appointment to this position is not subject to scrutiny under the Fair Employment Act (FEA). Unlike Title VII, the FEA does not contain an exclusion for "any person elected to public office..., any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office." 42 U.S.C. §2000e(f). The failure of respondent to engage in a formal competitive hiring process for the subject position does not demonstrate pretext.

Complainant also contends in his argument here that the "pre-selection" of Mr. Cramer demonstrates pretext. However, the logic of this argument necessarily fails given the chronology of events here. Complainant appears to point to Mr. Lightbourn's

invitation to Mr. Cramer to let him know if he wanted to return to DOA as the "pre-selection." This occurred, however, prior to complainant advising Mr. Lightbourn that he was interested in the subject position and could not, therefore, have evidenced any intent on Mr. Lightbourn's part to discriminate against complainant.

It is not clear what complainant's other pretext arguments are. Assuming that he is arguing that he was as qualified or better qualified for the subject position than Mr. Cramer, it is concluded that the undisputed facts do not sustain this argument. During his many years of employment with DOA, complainant's duties and responsibilities have never included being a supervisor, being a member of management, or having agency-wide or even program-wide policy and planning authority. These were the types of responsibilities assigned to the subject Division Administrator position. Even though complainant was employed in the Division of State Agency Services for many years, his employment was as a line staff employee. Mr. Cramer, in contrast, had significant recent experience, both at DOA and at Arthur Andersen, performing agency-wide and program-wide management, policy, and planning responsibilities. A comparison of complainant's and Mr. Cramer's qualifications does not demonstrate pretext.

Complainant also argues that the hiring process and decision here had a disparate impact on him as a minority. Under a disparate impact theory, the burden on the complainant is to show that a facially neutral employment policy has a disproportionate impact on a protected group. *Griggs v. Duke Power Co.,* 40 U.S. 424, 3 FEP Cases 175 (1971); *Dothard v. Rawlinson*, 433 U.S. 321, 15 FEP Cases 10 (1977). The only employment policy which complainant references in this regard is the alleged "pre-selection" of Mr. Cramer. This, however, is not a "facially neutral employment policy" for purposes of application of a disparate impact analysis. *See, Balele v. DOA et al.,* 99-0001, 0026-PC-ER, 8/26/00.

Complainant also appears to be arguing in support of his disparate impact theory that, since there was an "underutilization" of minorities in the relevant job class at DOA, the process DOA was utilizing to fill the position under consideration here and

similar positions was apparently having a disparate impact on minorities. However, even if respondent's recruitment and selection process for unclassified positions could be regarded as a facially neutral employment policy, the facts do not support a finding of disparate impact. First of all, underutilization data generated by the Department of Employment Relations to which complainant is alluding here are not applicable to unclassified positions. Second, the mere existence of an underutilization does not demonstrate disparate impact. Third, even if complainant's strained analysis were applied to the facts here, his theory would not be supported. Specifically, in March of 2000, 15.4% of unclassified positions in DOA were held by minorities and 7 7% by blacks. Given the labor pool availability figure of 7.0% for minorities for administrator/senior executive positions (the highest level of positions for which such information is available here), these figures do not demonstrate that respondent's recruitment process for unclassified positions had a disproportionately unfavorable impact on minorities.

Complainant also argues that he was retaliated against for engaging in protected fair employment activities, i.e., the filing of previous discrimination complaints against DOA with the Commission. His arguments in regard to this theory appear to parallel those offered in regard to the disparate treatment theory he offered for his discrimination claim. The analysis of his retaliation claim would lead to the same conclusion as the above analysis of his disparate treatment claim.

Complainant cites *Bartley v. Thompson*, 198 Wis.2d 323, 542 N.W.2d 227 (Ct. App. 1995) in support of his contention that respondent abused its authority in regard to the subject hire. First of all, it should be noted that an abuse of authority does not necessarily evidence an intent to discriminate. Second, the *Bartley* decision does not place respondent's action here in question but instead validates it. Specifically, the decision, on page 335, citing *Hall v. Pierce*, 307 P.2d 292, 299-300 (Ore. 1957), states as follows:

> It is the duty of the officer having a power of appointing to make the best appointment in his power according to his judgment at the time when he makes the appointment. The public have a right to demand

> this. The public good would be injured if a promise to make an appointment were held to be legally binding, so as to control the exercise of that judgment which the appointing officer ought to exercise when he makes an appointment... The right of appointment is not the property of the appointing officer. And he has no right to barter it, or to dispose of it. It is merely a political power entrusted to him, to be exercised, not to be sold.

At the time of this appointment, Mr Lightbourn exercised his judgment and concluded that Mr. Cramer was well qualified for the subject position. This is the manner in which political power is to be exercised under *Bartley*.

Finally, complainant argues that respondent failed to take affirmative action into consideration as a part of this hire. Complainant appears to argue that, because a minority expressed interest in a position, he should have been hired. This, of course, would be in direct conflict with equal rights policy and law. *See, e.g., Balele v. UW*, 98-0159-PC-ER, 10/20/99.

It is concluded that, based on the undisputed material facts here, respondent is entitled to judgment as a matter of law.

CONCLUSIONS OF LAW

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

2. There is no genuine issue of material fact and respondent is entitled to judgment as a matter of law.

ORDER

Respondent's motion for summary judgment is granted; complainant's cross-motion for summary judgment is denied. This case is dismissed.

Dated: September 20, 2000

STATE PERSONNEL COMMISSION

Laurie R McCallum

LAURIE R. McCALLUM, Chairperson

LRM:000057Cdec1

Judy M Rogers

JUDY M. ROGERS, Commissioner

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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.) 2/3/95