STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 10

PASTORI M. BALELE,

Petitioner,

v.

Administrative Agency Review: 30607
Case No. OOCV002877

PERSONNEL COMMISSION,
DEPARTMENT OF ADMINISTRATION
DEPARTMENT OF EMPLOYMENT RELATIONS, and
DIVISION OF MERIT RECRUITMENT AND SELECTION,

Respondents.

DECISION AND ORDER AFFIRMING THE DECISION OF THE STATE PERSONNEL COMMISSION

Petitioner, Pastori Balele (Balele) seeks review under ch. 227 and reversal of the August 28, 2000, Decision and Order of the Wisconsin Personnel Commission (Commission) dismissing his complaints under the Wisconsin Fair Employment Act (WFEA), Wis. Stat. §§ 111.31-111.395.[1] The Commission concluded that the Department of Administration (DOA), the Department of Employment Relations (DER), and the Division of Merit Recruitment and Selection (DMRS) did not unlawfully discriminate against Balele on the basis of race, color, or national origin, and did not retaliate against him for engaging in protected fair employment activities when DOA failed to select Balele for the positions of Director of the Office of Performance Evaluation (OPE) in 1998 and 1999, and Deputy Director of OPE in 1998. The Commission also concluded

[1] Case Nos. 99-0001-PC-ER and 99-0026-PC-ER. The complaints were consolidated by agreement of the parties.

that DOA did not unlawfully discriminate against Balele in retaliation for his having engaged in protected activities under the WFEA when DOA investigated Balele's use of vacation time while he was representing another individual at a hearing before the Commission. Because the Commission properly applied and interpreted the WFEA and because substantial evidence in the record supports the Commission's conclusions, the decision is affirmed.[2]

FACTUAL BACKGROUND

This case arises out of three hiring decisions made by the DOA between 1998 and 1999. Balele alleges that he was discriminated against and retaliated against when other persons where selected for the positions of Director of OPE in 1998, Deputy Director of OPE in 1998, and Director of OPE in 1999. In addition, Balele complains that DOA violated the WFEA when it investigated his use of vacation time during which he represented another individual before the Commission.

A. DOA's Investigation of Balele's Use of Vacation Time

Balele, a black male born in Tanzania, Africa, works for the DOA as contractual services

---

[2] Balele also seeks a sanction for Respondent's reference to an unpublished federal court opinion cited in Respondent's its brief to this court. Rule 809.23(3) Stats. provides:

> An unpublished opinion is of no precedential value and for this reason may not be cited in any court of this state as precedent or authority, except to support a claim of res judicata, collateral estoppel, or law of the case.

Rule 809.23(3) applies only to unpublished decisions of the Wisconsin Court of Appeals. See Brandt v. LIRC, 160 Wis. 2d 353, 466 N.W.2d 673 (1991). Accordingly, I impose no sanction under Rule 809.23(3). Nonetheless, I do not consider the cited, unpublished federal cases as binding precedent or authority.

management assistant in the Bureau of Procurement.(Findings of Fact ("FOF") ¶ 5,8). Over the years, Balele has taken over 40 career executive exams but has never been hired to a career executive position.(FOF ¶ 17) Balele has previously filed one or more Fair Employment Act claims of discrimination with the Commission.(FOF ¶ 9) Balele has also appeared before the Commission as a witness and a representative in Fair Employment Act proceedings brought by Dr Micah Oriedo (Oriedo).

Once, when Balele was listed as a witness for Oriedo, the hearing examiner presiding in the matter before the Commission indicated that Balele could not be in pay status if he was in fact appearing as Oriedo's representative.(FOF ¶ 62). After the first day of that hearing, David Vergeront, Legal Counsel for the DER, contacted DOA's Deputy Legal Counsel, Mark Saunders, and advised him that DOA might want to check whether Balele was taking leave time while he was representing Oriedo at the hearing.(FOF ¶ 64). In at least one other instance involving a white male employee with the Department of Public Instruction, Vergeront had raised similar concerns about a state employee improperly serving as a representative in proceedings before the Commission while remaining in pay status.(FOF ¶ 65)

After receiving the call from Vergeront, Saunders contacted Balele's second level supervisor, Jan Hamik, and asked her to check whether Balele had taken leave.(FOF ¶ 66) As part of his job, Saunders routinely had been called upon to investigate complaints about DOA employees who appeared to be engage in an activity inconsistent with being in pay status.(FOF ¶ 68). Hamik spoke to Balele's direct supervisor, Patti Kramer, and it was concluded that Balele had appropriately taken leave time to attend the hearing.(FOF ¶ 67).

B. Hiring Decisions for Director and Deputy Director Office of Performance Evaluation

Director OPE 1998

In 1998, Balele once again applied for a career executive position, Director of the newly created Office of Performance Evaluation (OPE). The Director of OPE reports directly to the Secretary of DOA. To fill this new position DOA ran an open recruitment (career executive recruitment Option 4). There are four options available to an appointing authority for filling a vacant career executive position: 1) Option 1 is to use the agency's own (existing) career executives to fill the vacancy; 2) Option 2 is to use the existing pool of career executives statewide; 3) Option 3 is to consider all current civil service employees; and 4) Option 4 is to open the competition to the general public.(FOF ¶ 16; Wis. Stat. §230.24(2)).

Applications for the 1998 Director position were accepted from persons outside of and within the state civil service.(FOF ¶ 19) Fifty-one candidates applied for the position and a total of 40 person were certified as eligible for further consideration and were at least minimally qualified for the position in question.(FOF ¶ 20-23) Among the 40 eligible, certified candidates, five, including Balele, were racial minorities. (FOF ¶ 25; Resp't Ex. 4).

In the second stage of the hiring process for the Director position, a two person panel interviewed the eligible candidates by telephone. Chuck McDowell, the Administrator of DOA's Division of Administration, and Linda Seemeyer, DOA's Executive Assistant, conducted the interviews. Thirty-one candidates were interviewed, and five of those interviewed were racial minorities. (FOF ¶ 27).

Ms. Seemeyer and Mr. McDowell had the resumes of the candidates when they conducted the telephone interviews. They asked all candidates the same questions and considered only the

interviews and the resumes.(FOF ¶ 28). After the interviews, Mr. McDowell and Ms. Seemeyer recommended David Benner, Orlando Canto, and Jennifer Noyes to the appointing, authority, DOA Secretary Mark Bugher. None of the three finalists were already employed as career executives.(FOF ¶ 29,30).

Balele was certified as eligible for the position, interviewed by McDowell and Seemeyer, but was not recommended to Secretary Burgher and was not hired for the position. In the course of his interview with McDowell and Seemeyer, Balele did not describe experience comparable to the experience of Mr. Benner, Mr. Canto, or Ms. Noyes in terms of the duties of the OPE Director position. (FOF ¶ 35; Tr. II at 43-81, 100-22).

Secretary Burgher interviewed the three finalist for Director and selected Mr Benner because of Mr. Benner's lengthy experience in audit and performance based evaluation.(FOF ¶ 36, Tr. IV at 13). Benner is a certified public accountant and had been a partner at Price Waterhouse in Milwaukee from 1971-1996.(FOF ¶ 31, Resp't Ex. 2). Both the Director and Deputy Director position are part of the Administrator-Senior Executive job group. The Administrator-Senior job group is underutilized for both minorities and women.(FOF ¶ 12,13) All positions in the Administrator-Senior job group are career executive position, but not all career executive positions are administrative senior positions.

When there is a under-representation in DOA for a job group in the classified civil service in terms of minorities or females, and if the person recommended for a position in that job group is not a member of the under-represented group, then there must be a written justification, or by-pass submitted.(FOF ¶ 39).

The by-pass process is a review to see if the person identified for hire is more qualified

than the target group candidates. By-passes in DOA are submitted to DOA's Affirmative Action Officer.(FOF ¶ 41). The standard procedure on receiving a by-pass request, is for the Affirmative Action Officer to contact the people involved, get information, and then meet with DOA's Personnel Director to discuss the request. If either the Affirmative Action Officer or the Personnel Director do not agree with the by-pass request, the matter goes to the Secretary's office for a final decision. (FOF ¶ 42).

After an employment offer was extended to Mr. Benner, a by-pass request report was prepared justifying a recommendation to hire Mr. Benner rather than Mr. Canto, the highest ranking minority candidate. (FOF ¶ 43; Complainant's Ex. 11). Because the hiring of the Director had been approved by Secretary Bugher, McDowell, and Seemeyer, the by-pass request was not substantively reviewed by the Affirmative Action Office or the Personnel Director, both of whom, however, signed off on the request.(FOF ¶ 44).

Secretary Bugher confirmed Mr. Benner's appointment as Director in a letter dated March 2, 1998.

Deputy Director OPE 1998

Approximately 10 days after Mr. Benner was hired, DOA decided to use the register they created for the Director position to fill the position of Deputy Director at OPE.(FOF ¶ 45). Balele and the other applicants who had been interviewed for the Director position were sent a notice regarding the position for Deputy Director. That notice stated in part:

> As you are probably aware from our advertisement for the position of Director, Office of Performance Evaluation in the Department of Administration, we had indicated the register from that recruitment might be used to fill other similar positions.
>
> It is our plan to utilize the results of that recruitment to fill the Deputy Director, Office of Performance Evaluation position. As many of the elements of the Director position are similar to the Deputy position, we are considering your candidacy for the Deputy Director position.
>
> We will be reviewing the results of your initial interview and determining a group of candidates to be invited in for a more in-depth second interview. (Resp't Ex. 11).

Balele was not interviewed for the Deputy Directory position. The position was given to Jennifer Noyes one of three final candidates who interviewed for the 1998 Director position. Noyes had been employed by the Legislative Audit Bureau of the State of Wisconsin, an office that conducts program evaluations very similar to the kind OPE would be conducting.(FOF ¶ 33,51) No by-pass request was submitted because Noyes was a woman and the Senior-Administrator job group was under-utilized for women.(FOF ¶ 52)

Director OPE 1999

Benner left the OPE Director position in 1999. Immediately, Ms. Noyes expressed her interest in the Director position. Secretary Bugher considered Mr. Noyes to be extremely well qualified to serve as OPE Director in light of her pervious experience with the Legislative Audit Bureau and as Deputy Director of OPE.(FOF ¶ 55). DOA human resources staff concluded that because the Deputy Director and Director positions were career executive positions and in the same pay range, it was possible to reassign Ms. Noyes to the director position.(FOF ¶ 56) Under the career executive program, a lateral reassignment is permitted within the DOA without notifying or considering similarly situated persons for the position.(Complainant's Ex. 31a). Career executive reassignment is not a promotion, and there is no competitive process

involved.(FOF ¶ 57; Resp't Ex. 14; Complainant's Ex. 31a). Without announcing the position or considering any other candidates, Secretary Burgher appointed Noyes to the OPE Director position via "career executive reassignment."

ISSUES FOR REVIEW

Balele asserts in briefs before this court that the Commission erred in not finding that the Respondents engaged in "pre-selection" and other illegal activities in violation of the civil service laws, Wis. Stat. ch. 230. He also alleges that the failure to follow the statutes and rules violated his constitutionally-protected property interest. As the Commission pointed out in its Decision and Order, contentions of illegal action or abuses of discretion in the hiring process might appropriately be considered as part of an appeal filed with the Commission under Wis. Stat. §230.44. See also, Wis. Stat. §230.45(1)(a). In the present case, Balele filed complaints of discrimination alleging a violation of the WFEA and those issues were properly before the Commission under Wis. Stat. §230.45(1)(b). Nowhere in the pleadings, however, does Balele raise his constitutional claim or request an appeal under §230.44.[3] Prior to the hearing, the parties agreed to a statement of the issues for hearing and those issues are determined in the Commission's Decision and Order. The statement of issues relates to Balele's discrimination

[3] Balele's due process argument is not sufficiently developed and is unsupported by legal authority. Generally, claims of deprivations of constitutionally or statutorily protected rights against persons acting under color of state law are raised as a 42 U.S.C. §1983 claim. In order to demonstrate a right to procedural due process, a person must establish that a constitutionally protected property or liberty interest is implicated. See Stripetich v. Grosshans, 2000 WI App. 100, ¶ 24, 235 Wis. 2d 69, 87, 612 N.W.2d 346, 354. Balele has not coherently identified the precise property interest interfered with, nor does he establish the legal underpinnings recognizing the interest as a protected property interest.

claims under the WFEA, but does not include the issue of alleged violation of Balele's constitutionally-protected property interests.

In general, an agency cannot decided matters that are beyond the issues noticed for hearing, and any contrary action would be violative of §111.31 et. seq. See Chicago, Milwaukee, St. Paul & Pac. R.R. v. DILHR, 62 Wis. 2d 392, 399-400, 215 N.W.2d 443, 446-47 (1974). Accordingly, this court will not consider undeveloped arguments and issues that were neither before the Commission nor briefed by the parties for purposes of this review.

Accordingly, the issues properly before the court are as follows:

> 1) Whether the Commission erred when it found that DOA did not discriminate against Balele based on color, national origin or ancestry, or race, or retaliated against him for engaging in protected fair employment activities when DOA did not hire Balele for the three positions in question in the Office of Performance Evaluation.
>
> 2) Whether the Commission erred when it found that DOA's hiring processes (pre-selection, interviews, and option I reassignment) with regards to career executive positions did not discriminate against Balele in violation of the WFEA under a disparate impact theory of discrimination.
>
> 3) Whether the Commission erred when it found that DOA did not discriminate against Balele because of his race and/or national origin or in retaliation for having engaged in protected activities under the WFEA when DOA investigated Balele's use of vacation time.

STANDARD OF REVIEW

Judicial review of an administrative agency decision is not a trial de novo and the reviewing court must affirm the agency's decision "unless it finds a ground for setting aside, modifying, remanding or ordering agency action or ancillary relief under a specific provision

[Wis. Stat. § 227.57]." Wis. Stat. § 227.57(2). The court shall treat separately disputed issues of agency procedure, interpretation of law, determinations of fact or policy within the agency's exercise of delegated discretion. Wis. Stat. § 227.57(3). Thus, standard of review depends on whether the issues presented involve questions of law or fact. In the present case, Balele has presented both issues of fact and law.

First, Balele challenges the Commissions findings of fact regarding the reasons behind DOA's decision not to hire him for the positions in question and its motivation for inquiring about his use of vacation time. The commission's findings of fact must stand if supported by substantial evidence in the record. Wis. Stat. § 227.57(6). "Substantial evidence has been defined to be that quantity and quality of evidence which a reasonable [person] could accept as adequate to support a conclusion." Boynton Cab Co. v. Department of Indus., Labor & Human Relations, 96 Wis. 2d 396, 405, 291 N.W.2d 850, 854 (1980). In other words, ". . judicial review under chapter 227 is limited to whether the evidence was such that the agency might reasonably make the finding that it did." Id. The weight and credibility of the evidence are matters for the Commission to evaluate, not the reviewing court. Bucyrus-Erie Co. v. DILHR, 90 Wis. 2d. 408, 418, 280 N.W.2d 142, 147 (1979); see also Wis. Stat. § 227.57(6). When more than one inference can be reasonably drawn the finding of the agency is conclusive. Vocational Technical & Adult Educ., Dist. 13 v. DILHR, 76 Wis. 2d 230, 240, 251 N.W.2d 41, 46 (1977). The court may not second-guess an exercise of the Commission's fact-finding function, even if it would reach another result if permitted to weigh the facts independently. Vande Zande v. DILHR, 70 Wis. 2d 1086, 1097 (1975).

Balele also challenges the Commission's determination that the Respondent's did not

discriminate against him in violation of the WFEA. The determination of whether facts fulfill the statutory standard is a legal conclusion. Therefore, the court will review that determination as a question of law. Although the court is not bound by the commission's interpretation of law, it must, nevertheless, consider whether the circumstances of the case warrant deference to the agency's interpretation. See Brauneis v. LIRC, 2000 WI 69 ¶ 15, 236 Wis. 2d 27, 35, 612 N.W.2d 635, 640.

An agency's interpretation or application of a statute may be accorded great weight deference, due weight deference, or de novo review, depending on the circumstances. UFE, Inc. v. LIRC, 201 Wis. 2d 274, 284, 548 N.W.2d 57, 61 (1996). Before the court is obligated to give great weight to an administrative decision, four conditions must be met: 1) The legislature must have charged the agency with the duty of administering the statute in question; 2) the agency's interpretation must be uniform and longstanding; 3) the agency must have employed its "expertise or specialized knowledge" in arriving at its interpretation , and 4) the agency's interpretation will provide "uniformity and consistency in the application of the statute." Harnischfeger Corp. v. LIRC, 196 Wis. 2d 650, 660, 539 N.W.2d 98, 102 (1995). A fifth consideration has also been added: when the legal question is intertwined with value and policy considerations. Lisney v. LIRC, 171 Wis. 2d 499, 505-07, 493 N.W.2d 14, 15-17 (1992).

In this case the requirements for great weight deference have been met. The Commission is charged by the legislature with the duty of hearing and deciding discrimination claims and applying the provisions of the act to particular cases. Phillips v. Wisconsin Personnel Comm'n, 167 Wis. 2d 205, 216, 482 N.W.2d 121, 125 (Ct. App. 1992); Wis. Stat. §§ 111.375(2), 230.45(b). Interpretation and application of the WFEA with respect to disparate treatment and

disparate impact claims are of longstanding, and the Commission has developed considerable expertise in interpreting and applying the provisions of the WFEA. See Id. The Commission used its specialize knowledge of the state's civil service system in forming this interpretation. And finally, this interpretation will provide uniformity in processing complaints of discrimination involving state agencies. See Balele v. Wisconsin Personnel Comm'n, 223 Wis. 2d 739, 744, 589 N.W.2d 418, 421 (Ct. App. 1998)(great weight deference given to commission's interpretation of Wis. Stat. §230.45(1)). Accordingly, the Commission's interpretation and application of the WFEA will be sustained if it is reasonable, even if another interpretation may be more reasonable. UFE, Inc., 201 Wis. 2d at 287-88, 548 N.W.2d (1996).

ANALYSIS

Wisconsin law recognizes two theories of employment discrimination: disparate impact theory and the disparate treatment theory. Racine Unified School District v. LIRC, 164 Wis. 2d 567, 476 N.W.2d 707 (Ct. App. 1991).[4] The disparate impact theory is invoked to attack facially neutral policies which, although applied evenly, impact more heavily on a protected group. Id. (citing, Griggs v. Duke Power, 401 U.S. 424, 430-32 (1971)). Under the disparate treatment theory, the complainant must show that the employer treats some people less favorably than others because they belong to a protected class. Id.(citing, International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977). Thus, a complainant asserting a disparate treatment theory must prove discriminatory intent to prevail, while a complainant asserting a

[4] In determining the procedure for establishing a claim of discrimination under the WFEA, courts look to federal employment discrimination decisions for guidance in interpreting state fair employment law. Anderson v. LIRC, 111 Wis. 2d 245, 254 (1983).

disparate impact theory need not offer any such proof. Id. The Commission concluded that Balele had failed to meet the burden of proof necessary to find that the Respondents had discriminated against him under either theory.

A. The Commission Did Not Err When It Failed to Find Discrimination Under the WFEA Based Upon Disparate Treatment.

In discriminatory-treatment cases a complainant can prove intentional discrimination directly, or indirectly under the well-establish framework first articulated by the United States Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792. Wisconsin courts have adopted the Title VII framework for allocating burdens and the order of presentation of proof in state discrimination suits. See Puetz Motor Sales Inc. v. LIRC, 126 Wis. 2d. 168, 172 (Ct App. 1985). Under the McDonnell Douglas burden-shifting formula, the complainant bears the initial burden of establishing a *prima facie* case of discrimination. A plaintiff establishes a *prima facie* case of employment discrimination based on race, or national origin by showing: (1) he was a member of a protected class; (2) he applied for and was qualified for the position offered; (3) he was rejected despite qualification; and (4) the position was given to a person of a different race who had similar or lesser qualifications. Malacara v. City of Madison, 224 F.3d 727, 729 (7th Cir. 2000). If the plaintiff succeeds in establishing all of these elements, he raises an inference of discrimination.

Next, once a *prima facie* case is established the, burden of production shifts to the respondents to articulate a legitimate, non-discriminatory reason for the action taken. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-54 (1981). If the respondent articulates a

non-discriminatory reason the burden shifts back to the complainant to prove by a preponderance of the evidence that the reasons articulated by employer were not its true reasons, but were a pretext for discrimination. Id., see also, Puetz, 126 Wis. 2d at 172. The ultimate burden of persuading the trier of fact that the employer intentionally discriminated against the complainant remains at all times with the complainant. See Burdine 450 U.S. at 252-54.

Here, the Commission concluded that Balele established a *prima facie* case of discrimination for the 1998 OPE Director and Deputy Director Positions, but DOA met its burden of production in articulating a legitimate non-discriminatory reason for hiring Benner and Noyes and not hiring Balele.[5] Balele was not hired because his qualifications were markedly inferior to those of Benner and Noyes. The Commission also concluded that Balele had failed to establish that this reason was pretextual.

Substantial evidence in the record supports the Commission's conclusions. Balele was rejected from further consideration after the first interview in the hiring process. The panelist who interviewed the candidates testified that Balele's interview responses were not as direct or as in depth as the responses given by the candidates who advanced to the final interview stage. In

---

5 The Commission incorrectly concluded that Balele failed to make a prima facie case under the disparate treatment theory with respect to the 1999 Director position. The Commission relying on analysis by the federal court under a disparate impact theory concluded that no prima facie case could be made because there was no selection process. (Dec. Or. p 15). In a disparate treatment case, Balele would only have to show that he would have applied for the position had he been given the opportunity to do so. See Taylor v. Canteen Corp., 69 F.3d 773, 781 (7th Cir. 1995). Nevertheless, this error is irrelevant to the reasonableness of the Commission's ultimate decision in this matter, as that decision is based on the element of pretext. "Even assuming the complainant has established a prima facie case of discrimination/retaliation with respect to all three of the hiring decisions in this matter, complainant has failed to sustain his ultimate burden of proof in this matter." [Dec. Ord. at 15].

addition, both panelist agreed that Balele's experience in Africa was less relevant than his current experience and qualifications. Finally, both panelist agreed that Balele in his interview and in his written materials, did not exhibit comparable performance evaluation experience to the top three candidates.

In contrast, Benner and Noyes both had significant performance evaluation experience and recent managerial experience. Benner had years of experience in policy analysis related to large organizations in his position as a partner at Price-Waterhouse. Noyes had legislative experience that far outweighed other candidates in terms of her ability and knowledge in the area of program evaluation. These facts support DOA's articulated non-discriminatory reason for rejecting Balele's application. Despite Balele's contrary view of the evidence, when more than one inference can reasonably be drawn the finding of the agency is conclusive. See Vocational Technical & Adult Educ., Dist. 13, 76 Wis. 2d. at 418. This court may not second-guess an exercise of the Commission's fact-finding function, even if it would reach another result if permitted to weigh the facts independently Vande Zande, 70 Wis. 2d at 1097 Substantial evidence in the record supports the Commission's determination that DOA had met its burden.

The Commission also correctly concluded that Balele failed to prove that DOA's articulated nondiscriminatory reasons were pretext for discrimination. Once DOA presented a legitimate nondiscriminatory reason for not hiring Balele, the burden shifted back to Balele to prove the DOA's stated reason was pretextual. A complainant may establish pretext either directly by showing that a discriminatory reason more likely motivated the employer, or indirectly by showing the employer's proffered explanation is to be unworthy of credence. Puetz, 126 Wis. 2d at 175,(citing Burdine, 450 U.S. at 256). Balele contends that DOA' s failure to follow the by-

pass procedure coupled with Benner's short tenure as OPE Director demonstrate pretext, because these facts show that Balele's inferior qualifications were not the true reason DOA did not hire Balele. He also alleges that the true reason Benner was hired was because he was "pre-selected" by the office of the Governor. The record supports the Commission's finding that the Office of the Governor had no involvement in the decisions to select Benner or Noyes. The Commission concluded that there was not sufficient credible evidence to reject DOA's explanation that Balele was not hired because his qualification were markedly inferior. The weight and the credibility of the evidence are matters for the Commission to evaluate, not the reviewing court. See Bucyrus-Erie Co., 90 Wis 2d at 418; cf. Reeves v. Sanderson Plumbing Products Inc., 530 U.S. 133, 120 S.Ct. 2097 (2000). The Commission could reasonably conclude that Balele had failed to establish pretext.

B. The Commission Did Not Err When it Failed to Find Discrimination Under the WFEA Based Upon Disparate Impact.

Balele contends that the Commission erred by not finding that DOA's hiring practices had a disparate impact on racial minorities. The Commission's third conclusion of law states: "It is complainant's burden of proof to show that the hiring process in question somehow discriminated against him because of his race based on a disparate impact theory. He failed to meet his burden." (Dec. Order p. 13).

In order to establish a *prima facie* case of disparate impact, a plaintiff must first isolate and identify "the specific employment practices that are allegedly responsible for any observed statistical disparities." Vitug v. Multistate Tax Comm'n, 88 F3d 506, 513 (7th Cir. 1996)

(citing, Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 994, 108 S.Ct. 2777, 2789 (1988)). Once a plaintiff has indicated these allegedly discriminatory practices, he must demonstrate causation by offering "statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of the applicants for jobs or promotion because of their membership in a protected group." Id. Thus, a *prima facie* case can be established by showing either a gross statistical disparity or a statistically significant adverse impact coupled with other evidence of discrimination. See Victory v. Hewlett Packard Co., 34 F. Supp. 2d 809, 822 (E. D. NY 1999).

In this case, Balele contends that three practices, taken as a whole, have a disparate impact based upon race (1) pre-selection and fraud, (2) post-certification interviews and discretionary decisions, and (3) Option I reassignment of career executives.

First, the Commission correctly concluded that Balele failed to establish that the practice of "pre-selection and fraud" had a disparate impact on minorities. Balele has failed to present any evidence of pre-selection. Here, Balele is not asserting a facially neutral employment practice has a disparate impact. He is alleging that DOA's failure to follow an employment practice has a disparate impact. Notwithstanding, the Commission could reasonably find that there was no practice of pre-selection, much less any evidence that this alleged practice had an adverse impact on racial minorities.

Second, to the extent that Balele challenges the subjective or discretionary post-certification actions, his burden in establishing a *prima facie* case goes beyond the need to show that there are statistical disparities in the employer's work force. See Watson, 487 U.S. at 994, 108 S.Ct. at 2188. To establish his *prima facie* case Balele must produce statistics to show that DOA's use of

subjective interviews results in a disproportionate failure to hire minority applicants.

Balele presented statistics comparing the number of minorities within the pool of certified career executive applicants from the years 1994-1996 with the number of minorities employed as career executives in DOA and statewide in 1998-1999. The Commission found that Balele presented several bits of statistical information in support of his disparate impact claim, but the information referenced did not satisfy the Balele's burden in establishing a disparate impact claim.(Dec. Order p. 21). This conclusion is reasonable; it is supported substantial evidence in the record; and it is consistent with the legal standards for establishing a disparate impact claim. See e.g Wards Cove Packing Co. v Atonio, 490 U.S. 642 (1989); Victory v. Hewlett Packard Co., 34 F. Supp. 2d 809, 822 (E. D. NY 1999); and Racine Unified School Dist. v. LIRC, 164 Wis. 2d at 597

Third, the Commission correctly concluded that the practice of reassigning career executives from one career executive position to another vacant career executive position within DOA, pursuant to longstanding regulatory law, did not have disproportionate impact on Balele or a protected group. The Commission observed that the policy does not have an actual impact on the number of racial minorities in the career executive program because the pool of career executives merely shifts one career executive from a specific position to another, rather than changing the makeup of the pool itself. This is supported by evidence in the record showing that career executive reassignment is not considered a promotion.

Balele relies on Caviale v. Department of Health and Social Service, 744 F2d 1289 (7th Cir. 1984) to support his claim that the Career Executive program has a disparate impact on racial minorities. In Caviale the court struck down a state agency's use of career executive reassignment

when the record indicated that reassignment would result in an applicant pool composed entirely of men. Id. at 1291. The court did not, however, hold that career executive reassignment is unlawful *per se*. Id. at 1296.

Moreover, for an individual plaintiff to bring a disparate impact suit in federal court the individual alleging the claim must show that he or she would have been hired absent the discrimination. See Melendez v. Illinois Bell Telephone, 79 F3d 661, 668 (7th Cir. 1996), Caviale, 744 F.2d 1289, 1296 (7th Cir. 1984)("Title VII was not intended to 'guarantee a job to every person regardless of qualifications'" (citing Griggs 401 U.S. at 430)). Here, substantial evidence in the record supports the conclusion that Balele was not hired because he was not as qualified as the other candidates for the OPE positions. The Commission's factual findings support its conclusions that Balele failed to establish a disparate impact claim.

C. The Commission Did Not Err When it Failed to Find Retaliation

In order to show a *prima facie* case for retaliation under WFEA, Balele must show: (1) he engaged in activity protected by the WFEA, (2) he suffered an adverse employment action; and (3) there was a causal link between the protected activity and the adverse action. See Filpovic v. K&R Express Sys., Inc., 176 F.3d 390, 398 (7th Cir. 1999); and Stripetich v. Grosshans, 2000 WI App. 100, ¶ 15, 235 Wis. 2d 69, 84, 612 N.W.2d 346, 352. The Commission concluded that Balele had not made a *prima facie* case for retaliation under the WFEA regarding the hiring decisions and the investigation of his use of vacation time. Substantial evidence in the records supports this conclusion. The record reveals no adverse employment actions taken against Balele, and no link between the protected activity and the hiring decisions. Consequently, the Commission

did not err when it failed to find retaliation.

CONCLUSION AND ORDER

For the reasons stated above and based on the record herein, the Commission's Decision and Order is hereby affirmed in all respects.

NO FURTHER WRITTEN ORDER IS CONTEMPLATED BY THE COURT.

Dated this 17 day of August, 2001.

BY THE COURT

Angela B. Bartell
Circuit Judge, Branch 10

cc:

PASTORI M BALELE
2429 ALLIED DR #2
MADISON WI 53711

AAG DAVID RICE
WI DEPT OF JUSTICE
PO BOX 7857
MADISON WI 53707-7857