STATE OF WISCONSIN CIRCUIT COURT BRANCH 5 DANE COUNTY

MICHA ORIEDO,
Petitioner,

v.

WISCONSIN PERSONNEL COMMISSION,
DEPARTMENT OF PUBLIC INSTRUCTION, and
DEPARTMENT EMPLOYMENT RELATIONS,
DIVISION OF MERIT RECRUITMENT AND SELECTION,

Respondents.

MEMORANDUM DECISION AND ORDER

Case No. 00 CV 2970

DECISION AND ORDER AFFIRMING THE DECISION OF THE STATE PERSONNEL COMMISSION

I. INTRODUCTION

On March 2, 1998, Micah Oriedo ("Oriedo") filed a complaint of discrimination on the basis of race, color, and WFEA (Wisconsin Fair Employment Act; Subchapter II, Chapter 111, Stats.) retaliation against the Wisconsin Department of Public Instruction ("DPI"). The complaint and amended complaint alleged that DPI engaged in a discriminatory selection process for the career executive position of Education Administrative Director, Director, Title 1 Programs. Specifically, Oriedo alleged that the DPI violated the Wisconsin Fair Employment Act ("WFEA") under both "disparate impact" and "differential treatment" theories of discrimination. Oriedo further alleged DPI had retaliated against Oriedo when the agency failed to select him for the Education Administrative Director position.

On August 4, 1999 and September 8, 1999, the State Personnel Commission ("Commission") held hearings, at which both parties addressed the allegations contained in Oriedo's complaint and amended complaint. On August 28, 2000, the Commission issued a Decision and Order dismissing the complaint on grounds Oriedo failed to satisfy his burden of proof. On September 14, 2000, Oriedo filed a petition for rehearing and a petition for judicial review of the Commission's decision pursuant to Wis. Stat. § 227.52.

II. FACTS

On August 18, 1997, the *Current Employment Opportunities Bulletin* announced the recruitment for the career executive position of Education Administrative Director, Director, Title 1 Programs (the "position").[1] (Findings of Fact ("FOF") ¶ 5.) The announcement set forth the job duties and stated the following requirements:

> **Completed application/examination materials must be received by September 15** [1997]. Application materials will be reviewed and those most qualified will be invited to participate in the next

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[1]Wisconsin Stat. § 230.24(1) provides authority for the career executive program. The provision states:

> The secretary may by rule develop a career executive program that emphasizes excellence in administrative skills in order to provide agencies with a pool of highly qualified executive candidates, to provide outstanding administrative employes a broad opportunity for career advancement and to provide for the mobility of such employes among the agencies and units of state government for the most advantageous use of their managerial and administrative skills. To accomplish the purpose of this program, the administrator may provide policies and standards for recruitment, examination, probation, employment register control, certification, transfer, promotion and reemployment, and the secretary may provide policies and standards for classification and salary administration, separate from procedures established for other employment. The secretary shall determine the positions which may be filled from career executive employment registers.

> step of the selection process. **NOTE: Applicants with Career Executive status need only submit a completed application for the State Employment form... with a current resume.** (FOF ¶ 6.) (emphasis in original).

Oriedo, a black male who did not have career executive status, timely submitted the required materials, which included an Achievement History Questionnaire ("AHQ"). (FOF ¶ 7.) Oriedo and five other applicants were certified for the position on October 6, 1997 (FOF ¶ 8.) Of those applicants, four were non-minorities and two were minorities (complainant and a Native American applicant). Id. The certification of those individuals involved a determination by the Bureau of Human Resource Services ("BHFS") that the certified candidates met the minimum qualifications for the position. (FOF ¶ 9.) In the certification letter, addressed to Juanita Pawlisch ("Pawlisch), immediate supervisor of the position, from Bob Boetzer ("Boetzer"), a member of management in the BHFS, included the following: "Attached is a list of certified eligible applicants to fill this vacancy. You must contact each applicant to arrange an employment interview." (FOF ¶ 10.) (emphasis in original).

None of the applicants on the original certification were eligible for an Option I or Option II appointment under the Career Executive Program according to policies published by Division of Merit Recruitment and Selection ("DMRS") pursuant to § 230.24(1), Stats. (FOF ¶ 11.) Option I is defined as a "lateral, downward, or upward voluntary movement or reassignment *of a Career Executive employe* within the employing department." Option II is defined as a "lateral, downward or upward voluntary movement *of a Career Executive employe* between different departments." Id.

On October 9, 1997, Dawin Kaufman ("Kaufman"), a white male then holding a career executive position with DPI, contacted Steven Dold ("Dold"), who was Kaufman's supervisor

and advised Dold he was interested in the position. (FOF ¶ 12.) Dold contacted BHFS to inquire whether Kaufman could be considered for the position at the current stage of the process.[2] (FOF ¶ 15.) As a current career executive within DPI, Kaufman was eligible for an Option I lateral voluntary movement appointment. (FOF ¶ 13.) When a Option I appointment is made, the career executive polices set forth in Chapter 281 of the Wisconsin Personnel Manual/Staffing, state a formal announcement, position analysis, or certification is not required. (FOF ¶ 14.) Kaufman then sent an email to Katherine Knudson ("Knudson") of the BHFS requesting that he be transferred to the position. (FOF ¶ 17.) The same day Knudson advised Kaufman that he would be certified for the position and placed Kaufman's name on the certification and advised Dold of what had occurred. Id.

Dold consulted with Pawlisch, who was the immediate supervisor of the position. (FOF ¶ 18.) Dold and Pawlisch agreed that Kaufman was "exceptionally well qualified for the position on the basis of his knowledge, skills and abilities." Id. Dold, who was authorized to make the final hiring decision for the position, and Pawlisch consulted with John Benson ("Benson"), the state Superintendent of Public Instruction and the head of DPI, and he agreed. (FOF ¶ 19.) Benson formally advised Kaufman of his transfer to the position on October 21, 1997, with an effective date of November 23, 1997 Id. Management interviewed none of the six candidates from the original certification list. Id.

During the period in question, the state as an employer was underutilized for minorities for the job group of administrators/senior executives, which included the position, in the sense

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[2] The policy at the time was that BHFS had the discretion to consider applicants after the announced deadline had passed, provided that it was not too late in the selection process to effectively conduct any evaluation that would be needed. (FOF ¶ 16.)

that the state employed less than 80% of the available, qualified labor pool for this group. (FOF ¶ 20.) However, DPI as an employer was not underutilized for minorities in the administrators/senior executives job group. (FOF ¶ 21.) DPI had 8% minorities in this group (2/25), as compared to an available, qualified labor pool of 7.5%. Id. The DPI affirmative action plan had a short-term affirmative action goal with respect to positions in the administrators/senior executive group. (FOF ¶ 22.)

After Kaufman was reassigned to the position, DPI notified the other certified candidates, including Oriedo, by letter dated October 24, 1997 the position had been offered to and accepted by an internal candidate. (Respondent's Ex. 101).

III. ISSUES FOR REVIEW

Oriedo presents six issues on appeal. However, Oriedo's outline of the issues is confusing and inaccurate. In Oriedo's Petition for Review, Oriedo designates the issues as 1. through 4., but has two number 3's and six separate issues. However, in Oriedo's Brief in support of the Petition, he outlines only five issues for review, which are variations from his original six issues. However, only three issues are properly before the court.

Generally, the court will not address issues raised for the first time on review. Goranson v. ILHR Dep't, 94 Wis. 2d 537, 545 (1980); Gallagher v. Indus. Comm'n, 9 Wis. 2d 361, 368 (1960). Here, Oriedo raises issues that were neither before the Commission nor briefed by the Commission or DPI for purposes of this review.[3] (Decision and Order at 1). As such, the

[3]Although Oriedo is pro se in this petition for judicial review, his experience in civil proceedings is extensive. A cursory search on Wisconsin Circuit Court Access (CCAP) showed that Oriedo has 4 past petition's for administrative agency review in the last 4 years (Oriedo v. DOC, 00 CV 001116; Oriedo v. LIRC, 98 CV 002110; Oriedo v. Wisconsin Personnel Commission 98 CV 000260; and Oriedo v DPI, 97 CV 000754). Oriedo's background in

court will not consider them.

The issues reviewable by the court are the three issues that were put before the Commission. As such, the issues properly before the court are as follows:

> 1. Did the Commission err when it failed to find that DPI discriminated against Oriedo based on color or race with respect to the alleged failure to interview, select or appoint Oriedo to the career position of Education Administrator Director, Title I Programs?
>
> 2. Did the Commission err when it failed to find that Option 1 - career executive selection process used to fill the position in question disparately impacted Oriedo on the basis of race?
>
> 3. Did the Commission err when it failed to find retaliation?

V. STANDARD OF REVIEW

Judicial review of an administrative agency decision is not a trial *de novo* and the reviewing court must affirm an agency's decision unless it finds grounds to do otherwise under § 227.57, Stats. Barns v. DNR, 178 Wis. 2d 290, 302 (1993). The court must consider and treat separately findings of fact, interpretations of law, and issues of agency procedure. Wis. Stat. § 227.57(3).

An agency's findings of fact will be upheld if supported by substantial evidence. Wis. Stat. § 227.57(6). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Gateway City Transfer v. Public Service Comm., 253 Wis. 397, 405-06 (1948). It is not required that the evidence be subject to no other reasonable, equally plausible interpretation. Hamilton v. DIHLR, 94 Wis. 2d 611, 617 (1980).

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administrative agency court procedures, therefore Oriedo is aware that issues not brought before the hearing examiner can not be brought before this court.

When two conflicting views of the evidence may be sustained by substantial evidence, it is for the agency to determine which view of the evidence it wishes to accept. Robertson Transport Co. v. Public Service Comm., 39 Wis. 2d 653, 658 (1968). Furthermore, no court may substitute its judgment for that of the agency as to the weight of the evidence on any finding of fact. Advance Die Casting Co. v. LIRC, 154 Wis. 2d 239, 250 (Ct. App. 1989).

A court will review agency interpretations of law independently. Wis. Stat. § 227.57(5). A court may defer to an agency interpretation of law, however, if the agency's interpretation is aided by expertise, technical knowledge, or special knowledge of the legal question is intertwined with a question of fact. Sauk Co. v. WERC, 165 Wis. 2d 406, 413 (1991). The construction and interpretation of a statute by an administrative agency charged with the responsibility of applying the law is entitled to great weight. NCR Corp. v. DOR, 128 Wis. 2d 442, 447-48 (Ct. App. 1986). Therefore, a reviewing court ought not to reverse an agency's interpretation of a statute if there exists a rational basis for the agency's conclusion even if the court does not entirely agree with the rationale. Id. at 448. See also Luetzow Indus. v. DOR, 197 Wis. 2d 916, 923 (Ct. App. 1995).

The Commission is charged by the legislature with the duty of hearing and deciding discrimination claims and applying provisions of the act to particular cases. Phillips v. Wisconsin Personnel Comm'n, 167 Wis. 2d 205, 216, (1992)., Wis. Stat. § 111.375 (2). The Commission has long dealt with these sorts of claims. Accordingly, the Commission's conclusions of law are entitled to great weight in the case at bar.

VI. ANALYSIS

In its decision, the Commission found that the Respondent did not discriminate against complainant on the basis of color or race with respect to the failure to interview, select or appoint Petitioner to the position in question; Respondent did not retaliate against Petitioner for having engaged in fair employment activities by not hiring him for the position in question; and Option I career executive process used to fill the vacancy in question did not have a disparate impact on Petitioner on the basis of race.

The Commission's decision is reasonable and correct. The court affirms with the Commissions' decision.

A. The Commission Did Not Err When it Failed to Find that DPI Discriminated Against Oriedo On the Basis of Color or Race in Violation of the Wisconsin Fair Employment Act.

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). In McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the United States Supreme Court set forth a three-step burden-shifting test to be applied by courts when considering employment discrimination claims. Under the test, Oriedo bears the initial burden of establishing a prima facie case of discrimination. Id. at 802. If Oriedo meets this burden, DPI must then articulate a legitimate, non-discriminatory reason for the action taken. Id.; Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981). If DPI articulates such a reason, the burden shifts back to Oriedo to show that the reason proffered by DPI is only a pretext for discrimination. McDonnell Douglas, 411 U.S. at 804; See also Hamilton v. DILHR, 94 Wis. 2d 611, 619

(1980).

i. The Commission's Conclusion that Oriedo Established a Prima Facie Case is of Employment Discrimination Based on Race is supported by substantial evidence.

In order to establish a prima facie case of employment discrimination based on race, Oriedo must show that: (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 his qualification; and (4) the position was given to a person of a different race who had similar or lesser qualifications. Malacara c. City of Madison, 224 F.3d 727 (7th Cir. 2000).

In its opinion, the Commission agreed that Oriedo was a member of protected class as he is a black male, that he applied for the position, "for the purposes of argument" the Commission assumed that he was qualified for the position and that the person hired has similar or lesser qualifications. (Decision and Order at p. 7). The Commission held that Oriedo did establish a prima facie case. Id. While the court may have found otherwise with regard to the last two factors at a de novo hearing, the court may not substitute its judgment for that of the agency as to the weight of the evidence on any findings of fact. Advanced Die Casting Co. v. LIRC, 154 Wis. 2d 239, 250 (Ct. App. 1989). Moreover, the respondents are not challenging this finding.

Accordingly, this factual finding is upheld.

ii. The Commission Correctly Concluded DPI Advanced a Legitimate, Non-Discriminatory Reason for Failing to Appoint Oriedo to the Career Executive Position.

Once Oriedo established a prima facie case of employment discrimination, the burden shifted to DPI to show a legitimate, non-discriminatory reason for its failure to appoint Oriedo to the position. Burdine, 450 U.S. at 254. The Commission found that the position was filled

properly by DPI's reassignment of a career executive pursuant to Option I policy. (Decision and Order at p. 7). A review of the record supports the Commission's decision. In its decision, the Commission considered DPI's proffered rational did not establish a pretext for decision motivated by Oriedo's race or color. Id. First, two of the three employes responsible for the substantive employment decision, Benson and Dold, were unaware of who had been certified when they decided to appoint Kaufman. Id. at 8. Second, Dold, Benson, and Pawlisch had familiarity with Kaufman's qualifications and demonstrated competent job performance with DPI. These facts evidence DPI's articulated a non-discriminatory reason for its failure to appoint Oriedo to the position. The Commission correctly held that DPI met its burden.

iii. The Commission's Concludsion that Oriedo Failed to Demonstrate that DPI's Actions were Pretext for Racial Discrimination is supported by substantial evidence.

Once DPI presented a legitimate, non-discriminatory reason for its failure to appoint Oriedo to the career executive position, the burden shifted back to Oriedo to prove that the stated reason was pretextual. McDonnell Douglas, 411 U.S. at 804. All of Oriedo's vague allegations of pretext are correctly rejected in the Commission's decision.

In considering whether Oriedo established pretext, the question for the Commission was not whether DPI's actions were correct or desirable, but whether DPI honestly believed the reasons given for the action in question. Tincher v. Wal-Mart Stores, Inc., 118 F.3d 1125, 1130 (7th Cir. 1997). If DPI honestly believed in the non-discriminatory reasons for the actions, Oriedo loses "even if those reasons are foolish or trivial or even baseless." Brill v. Lante Corp., 119 F.3d 1266, 1270 (7th Cir. 1995). In order to prevail, Oriedo is required to produce evidence tending to show that DPI is lying by "specifically [giving] a phony reason for some

action." Russel v. Acme-Evans Co., 51 F.3 64, 68 (7th Circuit 1995). In the present case, none of Oriedo's evidence rise to the level of proof required.

First, Oriedo argues that the decision-maker knew or should have known that Oriedo had applied for the position, and such knowledge demonstrates pretext. (Pet. Brief at 28). Oriedo's vague assertion of pretext is conclusory and without merit.

Next, Oriedo asserts that DPI's failure to give him equal consideration is discrimination per se because Kaufman did not have the qualifications to meet the position at a lateral transfer. (Pet. Brief at p. 30-31). Oriedo bases that assertion on the fact that Dold testified at hearing that Kaufman sought the position to pursue a "new challenge." Id. Oriedo's assertion that Kaufman's aspirations to be challenged does equate that he is not qualified for a lateral transfer. Regardless, DPI honestly believed that Kaufman had the necessary qualifications to perform the position. (FOF ¶18 & 19.) This establishes a non-discriminatory reason for DPI's actions and therefore Oriedo's argument fails. Brill at 1266.

Additionally, Oriedo contends that Pawlisch's omission to contact and interview the originally certified applicants establishes pretext. (Pet. Brief at 29-30). At hearing, the Commission determined the memo pre-dated Kaufman's internal application. (Decision and Order at p. 9). At that time, the directive was applicable to the existing certification. However, once Kaufman became a candidate and was certified, that fact superseded the directive and is fatal to Oriedo's argument.

Lastly, Oriedo asserts that DPI violated provisions in the Wisconsin Personnel Manual/Staffing Chapter 232 CERTIFICATION. (Pet. Brief at p. 24-25). This issue has been properly addressed in the Commission Decision and Order. (Decision and Order at p. 9).

However, these provisions do not apply to career executive transactions. Wis. Stat. § 230.24(1) provides "The appointing authority shall consider the guidelines under s. 230.19 when deciding how to fill a vacancy under this paragraph." Section 230.19 states, "The [DMRS] administrator shall provide employes with reasonable opportunities for career advancement, within a classified service structure designed to achieve and maintain a highly competent work force, with due consideration given to affirmative action." In accordance with the statute, the Commission correctly found Kaufman's lateral transfer to be effectively neutral from an affirmative action perspective because it created another vacancy in a job at the same level. (Decision and Order at p. 10). For the above reason, Oriedo's assertion is without merit.

B. The Commission Did Not Err When it Failed to Find that the Practice of Reassigning Career Executives From One Career Executive Position to Another Vacant Career Executive Position Violates the Wisconsin Fair Employment Act on the Basis of Color or Race.

Under a disparate impact theory of employment discrimination based on race or color, 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., 401 U.S. 424 (1971); Dothard v. Rawlinson, 433 U.S. 321 (1977). The Commission correctly concluded that Oriedo cannot meet his burden, as he is unable to establish that the practice of reassigning career executive position to another vacant career executive position with DPI, pursuant to a long-standing regulatory law, had a disproportionate impact on him or a protected group.

As a result of Kaufman's appointment, six candidates did not receive an interview or further consideration for the position by DPI. (Decision and Order at p. 12). Two of those candidates were minorities; Oriedo, an African-American, and a Native-American. Id. However, the four other candidates were white. Id. The impact on all of the candidates was

equal in that they were not considered for the position. Id. The Commission found that the state as an employer was and is underutilized for minorities in the job group of administrators/senior executives, which most closely corresponds to the career executive pool. Id. However, the record reflected DPI was not underutilized for minorities in that job group. (Decision and Order at p. 12-13). The Commission concluded that pursuant to the affirmative action plan, Kaufman's lateral transfer did not have a negative affirmative action implication since it opened Kaufman's previous position to competition. (Decision and Order at p. 12). The Commission correctly concluded that because DPI had 2 minority career executives of the 25 total, DPI therefore was not underutilized by minorities. (Decision and Order p. 13). There is nothing in the record that establishes that the policy in question had a disparate impact on Oriedo specifically or persons in protected classes generally.

Furthermore, the Commission correctly concluded that the policy of career executive reassignment within an agency does not have a different impact on minority career executives than it has on white career executive, as both are eligible for reassignment. Additionally, the policy does not have any actual impact on the number of racial minorities in the career executive program because the pool of career executives merely moves one career executive from a specific position to another, rather than changing the makeup of the pool itself.

Oriedo arguments regarding the disparate impact of minority candidates are without merit.[3] First, Oriedo contends that racial minority candidates outside the career executive pool who are not allowed to compete for the those positions effectively foreclosed by Option I. (Pet.

[3]Oriedo's fourth and fifth arguments on this issue are variations of his third argument. Thus, I will not address them separately.

Brief at p. 33). Second, Oriedo argues that prospective applicants will be discouraged from applying to open positions in fear that an Option I applicant will also apply. (Pet. Brief at p. 33-34). As previously stated in this opinion, DPI is not underutilized for minorities in the administrators/executive job group, thus Oriedo's argument fails.

Therefore, the Commission correctly concluded that application of the policy in the present case did not have a disproportionate effect on the opportunities of racial minorities to compete for the position.

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

In order to show a prima facie case of retaliation under WFEA, Oriedo must show: (1) he participated in an activity protected by the WFEA, (2) the alleged retaliator was aware of the activity; (3) there was an adverse employment action; and (4) there is evidence which creates an inference of retaliatory discriminatory motive on the part of the employer.

In the present case, Oriedo has failed to establish a prima facie case. Oriedo offered no evidence or testimony to establish a prima facie case of retaliation. Further, the Commission found no evidence to support that DPI management knew of Oriedo's prior WFEA claim. Therefore, the Commission did not err when it failed to find retaliation.

VII. CONCLUSION

For the reasons discussed above, the Commission's Decision and Order is affirmed.

This 29th day of May, 2001, Madison, Wisconsin.

BY THE COURT,

Diane Nicks

Diane M. Nicks, Judge
Circuit Court, Branch 5

cc:
AAG Michael J. Losse
Micah A Oviedo