

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 25, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 01-1544

Cir. Ct. No. 00-CV-1116

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

MICAH A. ORIEDO,

PETITIONER-APPELLANT,

V.

WISCONSIN PERSONNEL COMMISSION, DEPARTMENT OF
CORRECTIONS, DEPARTMENT OF EMPLOYMENT
RELATIONS, DIVISION OF MERIT RECRUITMENT AND
SELECTION,

RESPONDENTS-RESPONDENTS.

APPEAL from orders of the circuit court for Dane County:
DAVID T. FLANAGAN, Judge. *Affirmed.*

Before Dykman, Roggensack and Lundsten, JJ.

¶1 PER CURIAM. Micah Oriedo appeals an order affirming the Wisconsin Personnel Commission's (WPC) decision to reject his discrimination complaint and an order denying his motion for reconsideration. Oriedo claims that

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the Department of Corrections, the Department of Employment Relations and the Division of Merit Recruitment and Selection (collectively, DOC or the Department) violated his rights under the Wisconsin Fair Employment Act (WFEA) by canceling a competitive recruitment process under which several minorities had applied for a career executive job within DOC. DOC instead filled the position by the reassignment of a white male through a career executive program established by administrative rules. We affirm because we conclude that WPC reasonably determined that the decision to use the alternate hiring procedure was not intended to treat applicants differently on the basis of race and did not have a disparate impact upon minorities.

BACKGROUND

¶2 DOC announced an opening for the position of Correctional Services Manager, Regional Chief in the February 23, 1998, edition of its *Current Employment Opportunities Bulletin*. The announcement invited candidates with career executive status to submit current resumes along with a state employment form. It further indicated that candidates without career executive status could submit an application and examination materials and that those best qualified among the non-career executive candidates would be invited to participate in the next step of the selection process, along with the career executive applicants.

¶3 Oriedo, an African-American man who previously had been certified for other career executive positions in state service, was one of eleven non-career executive candidates who submitted application materials by the established deadline. Two of the other non-career executive candidates identified themselves as African-American, while seven identified themselves as white and one gave no racial identity.

¶4 Thomas Van den Boom, a white man who held a career executive position in DOC, also applied for the regional chief position by the established deadline. He was the only career executive to apply.

¶5 Eurial Jordan was the supervisor for the regional chief position and authorized to make the final hiring decision. Jordan had known Van den Boom for over twenty years and was well acquainted with Van den Boom's work record with DOC and the Department of Health and Human Services, as well as his volunteer activities with a number of community groups.

¶6 Upon learning of Van den Boom's interest in the position, Jordan contacted human resources to inquire whether reassigning Van den Boom would satisfy the necessary requirements of the hiring process. A human resources employee who, unlike Jordan, was aware of the racial identity of all of the candidates, informed Jordan that the reassignment would be acceptable. Jordan proceeded to approve the career executive reassignment of Van den Boom as the new regional chief without reviewing the application materials of any of the non-career executive candidates. DOC then sent letters to all the non-career executive candidates, informing them that the recruitment process had been cancelled due to the reassignment of a current career executive to the position.

¶7 At the time of Van den Boom's reassignment, DOC employed seventy people in career executive positions, five of whom it classified as racial minorities. The parties stipulated that one of the career executive employees classified as a minority was of Egyptian descent, and they argued over whether his classification as a minority was proper. If only four employees were classified as minorities, the percentage of minority career executives in DOC would drop from 7.1% to 5.7%. The percentage of minorities in the general labor pool who were

qualified for administrative/senior executive jobs such as the regional chief position was 7.5%.

¶8 Oriedo filed a discrimination complaint with WPC alleging that the hiring of Van den Boom and cancellation of the competitive process violated Oriedo's civil rights under the Wisconsin Fair Employment Act. Following hearings and briefing, WPC concluded that Oriedo had failed to meet his burden of proof. Oriedo sought judicial review and the circuit court affirmed.

SCOPE OF REVIEW

¶9 Oriedo argues on appeal that DOC's actions: (1) violated his rights to due process and equal protection under the Fourteenth Amendment; (2) discriminated against him on the basis of race, contrary to the protections afforded by WFEA; and (3) retaliated against him for past civil rights litigation, resulting in a chilling effect. While the record supports Oriedo's claim that he at least mentioned each of these theories before WPC, it also shows that he agreed at a pre-hearing conference that the issues to be submitted were limited to disparate treatment and disparate impact theories. He did not object to the hearing examiner's framing of the issues.

STANDARD OF REVIEW

¶10 We review the administrative agency's decision rather than that of the circuit court. *Stafford Trucking, Inc. v. DILHR*, 102 Wis. 2d 256, 260, 306 N.W.2d 79 (Ct. App. 1981). We cannot substitute our judgment for that of the agency as to the weight or credibility of the evidence, and must uphold its factual findings if there is any credible and substantial evidence in the record upon which reasonable persons could rely to make those findings. WIS. STAT. § 227.57(6)

(1999-2000);¹ *Advance Die Casting Co. v. LIRC*, 154 Wis. 2d 239, 249-50, 453 N.W.2d 487 (Ct. App. 1989).

¶11 We are not bound by an agency's conclusions of law in the same manner as we are by its factual findings. WIS. STAT. § 227.57(5); *Beigel v. LIRC*, 2001 WI App 134, ¶6, 246 Wis. 2d 345, 631 N.W.2d 220. However, we may nonetheless defer to its legal determinations. 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. See *UFE Inc. v. LIRC*, 201 Wis. 2d 274, 284, 548 N.W.2d 57 (1996).

¶12 Great weight deference is appropriate when: (1) the agency is charged by the legislature with the duty of administering the statute in question; (2) the agency's interpretation of the statute is one of long-standing; (3) the agency employed its expertise or specialized knowledge in interpreting the statute; and (4) the agency's interpretation will provide uniformity and consistency in the application of the statute. *Id.* We are satisfied that WPC's legal determinations are entitled to great weight deference here because WPC has long been charged with hearing and deciding discrimination claims and has developed expertise in that area. See WIS. STAT. § 111.375(2); *Phillips v. WPC*, 167 Wis. 2d 205, 216, 482 N.W.2d 121 (Ct. App. 1992). We will therefore affirm the agency's decision so long as there was a rational basis for it, regardless of whether it is the conclusion we might have reached. *UFE*, 201 Wis. 2d at 287.

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

ANALYSIS

¶13 WFEA prohibits an employer in Wisconsin from refusing to hire an individual on the basis of race. WIS. STAT. §§ 111.321 and 111.322(1). The test for establishing a discrimination claim under state law parallels that under federal law. *Racine Unified Sch. Dist. v. LIRC*, 164 Wis. 2d 567, 594-95 & n.14, 476 N.W.2d 707 (Ct. App. 1991). Discrimination claims under WFEA may therefore be made under either of two theories: disparate treatment or disparate impact. *Id.*

Disparate Treatment

¶14 A disparate treatment claim arises when an employer intentionally treats a person less favorably than others because of his or her membership in a protected class. *Id.* at 595. A claimant seeking to show disparate treatment in the hiring process has the initial burden of presenting a *prima facie* case that: (1) the claimant is a member of a protected class; (2) the claimant was qualified for the position he or she sought; (3) the claimant did not obtain the position; and (4) the position was filled by a person not in the same protected class. *See Puetz Motor Sales, Inc. v. LIRC*, 126 Wis. 2d 168, 172-73, 376 N.W.2d 372 (Ct. App. 1985). Upon such a showing, the burden shifts to the employer to provide an explanation which, if believed, would show that the employer's actions lacked a discriminatory purpose. *Id.* The burden then shifts back to the claimant to show that the explanation offered by the employer was merely pretextual. *Id.*

¶15 WPC was not persuaded in the first instance that Oriedo had made a *prima facie* case for disparate treatment. While we do not necessarily agree with that assessment, we are satisfied that WPC's subsequent conclusions that DOC provided a legitimate, non-discriminatory reason for its action, and that the reason

was not pretextual, are reasonable. WIS. ADMIN. CODE § ER-MRS 30.01(1) explains that the career executive program is designed:

to provide state agencies with a pool of highly qualified executive candidates for competitive appointment to executive level positions in such a way as to achieve and maintain a balanced work force; to provide employes with the opportunity for advancement as well as flexibility and mobility within and between state agencies; and to make optimum use of employes' managerial and administrative skills.

The career executive program is completely neutral with respect to race and gives no suggestion of a discriminatory purpose.

¶16 Oriedo nonetheless claims that the use of the career executive program was pretextual because it was improperly implemented here. He asserts that DOC had a ministerial duty pursuant to § III.D.2 of its delegation agreement from the Division of Merit Recruitment and Selection to examine all of the applicants before making a hiring decision. However, WPC pointed out that the provision cited by Oriedo applies only to competitive hiring processes, and WPC reasonably determined that Van den Boom was hired through a career executive reassignment rather than through a competitive process. We see nothing in the delegation agreement which would preclude the cancellation of a competitive hiring process in favor of a non-competitive career executive reassignment.

¶17 Moreover, even assuming that there were anything irregular about the cancellation of the competitive hiring process, Oriedo still failed to show that the *motive* for canceling the hiring process was to discriminate against minority candidates. It is undisputed that the supervisor who made the hiring decision was African-American himself and that he had no knowledge of the race of any of the

non-executive candidates. We therefore affirm WPC's ultimate conclusion that Oriedo failed to prove disparate treatment in the hiring process.

Disparate Impact

¶18 A disparate impact claim arises when a facially neutral employment practice unevenly burdens members of a protected class and cannot be justified by a *bona fide* business necessity. See *Racine Unified Sch. Dist.*, 164 Wis. 2d at 594-95. No proof of discriminatory motive is required under a disparate impact theory. *Id.*

¶19 Reassignment within the career executive program is facially neutral with respect to race because it treats minority career executives in the same manner as white career executives. Oriedo claims that DOC's use of career executive reassignment has a significantly disproportionate effect on the opportunities of minorities to compete for open positions because the percentage of minorities in the DOC career executive program is less than the percentage of minorities available in the relevant labor pool.

¶20 Oriedo's claim rests first upon his assertion that only 5.7% of DOC career executives were minorities, as compared to 7.5% of qualified administrators in the general labor pool. WPC determined, however, that 7.1% of DOC career executives were minorities. Oriedo claims that one of the career executives was improperly classified as a minority because the parties stipulated that the employee was of Egyptian descent. Oriedo points to an application for state employment form which defines "White—Not of Hispanic origin" to include "persons having origins in any of the original peoples of Europe, North Africa, or the Middle East." Oriedo then argues that the difference between 5.7% and 7.5% represents a significantly disparate impact because the federal Equal Rights

Division uses an “80% rule” in evaluating adverse impact for the purposes of affirmative action.

¶21 We need not resolve the dispute over whether the Egyptian employee was properly classified as a minority because we conclude that WPC was not required to adopt such a rule, and its conclusion that even the difference between 5.7% and 7.5% was not significant enough to establish a disparate impact in this case was a reasonable one.

By the Court.—Orders affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5.