STATE OF WISCONSIN PERSONNEL COMMISSION

JOSEPH E. SABOL,
Complainant,

v.

President, UNIVERSITY of WISCONSIN-SYSTEM (Eau Claire),
Respondent.

Case No. 99-0144-PC-ER

FINAL DECISION AND ORDER

NATURE OF THE CASE

This case is before the Commission following the issuance of a proposed decision and order pursuant to §227.46(2), Stats. The parties have filed written objections and arguments. The Commission now adopts the proposed decision and order as its final disposition of this matter, with changes as discussed below.

Finding of Fact #1 is changed to correct errors. The position numbers of the two positions in which complainant was hired are misstated in the proposed decision. They should be A-129 (1997-1998 school year) and A-198 (1998-1999 school year), and that finding is amended accordingly. Also, the proposed decision finds that respondent utilized a faculty search committee as part of the selection process for both positions. In fact, the faculty search committee was used only for the second position, and the finding thus is amended. In the Commission's opinion, this difference is of little weight in the evaluation of the evidence. It remains that respondent used the same search mechanism for the 1998-99 position A-198, which was prior to complainant's OSHA disclosure of November 13, 1998, as it did for the position in question (#A-238, 1999-2000 academic year), which was after the disclosure. This weighs against complainant's contention that the selection process respondent followed for the position in question was improper, contrived, and probative of pretext.

On page 12 of the proposed decision and order there is a quote from an April 19, 1999, departmental evaluation of complainant prepared by Scott Hartsel, the chairperson of the departmental personnel committee (DPC), which is part of Respondent's Exhibit RX 25. The

parties disagree as to whether this exhibit was received in the record. Perusal of the hearing record confirms that this document was *not* received in evidence. Therefore, the reference to the document in the proposed decision and order is deleted. However, this change is of little significance in the Commission's consideration of this case, because there is a considerable amount of other evidence, including Hartsel's actual testimony, which reflects that a number of the department's faculty had negative opinions of complainant's teaching based in significant part on his student evaluations.

On page 11 of the proposed decision, it refers to complainant having 2 years as a primary instructor. This should be changed to 12 years, of which 2 were at UWEC.

The Commission has considered all of complainant's objections to the proposed decision and order and does not find them persuasive with respect to the ultimate decision of this case. Many of his objections are interrelated and/or repetitive. An example is his contention that the department should have treated his status at the end of his second year of employment as that of being "non-renewed," but did not. For instance, he argues: "Respondent had a well-established and unequivocal obligation to record an explicit reappointment recommendation vote on the complainant during the 1998-99 academic year . . respondent completely failed to carry out this process and nonselection of the complainant resulted." Complainant's objections to proposed decision, p. 2. He also argues that David Lewis, then the chairperson of the chemistry department, should have, but failed to have sought, the advice of the chemistry department's incumbent academic staff (i. e., the complainant) in "defining" the position in question and deciding which candidate or candidates to interview. However, the record does not reflect that there was a "well-established and unequivocal" obligation to have treated complainant's status as that of a member of the academic staff who was being considered for reappointment. The most significant factor with regard to the only question before the Commission—i. e., whether respondent was discriminatorily motivated when it made the hiring decision for the position in question—is that the department followed the same process, including not following the reappointment procedures complainant argues it should have, when it earlier hired complainant for his second year of employment (1998-99). Obviously, that earlier proc-

ess preceded complainant's November 13, 1998, "OSHA" email concerning the loosely-capped bottles in the laboratory.

Another contention that provides the basis for many of complainant's objections is that the department's denomination of his appointments as "fixed term, no intent to renew" was contrary to established UW System policies that recognize only fixed term, probationary and indefinite academic staff appointments, and thus probative of pretext. Again, even if complainant's contention about the categories of possible appointment were correct, it can not be gainsaid that the status of "fixed term, no intent to renew" appointments constituted a type of appointment that UWEC routinely used on its printed forms[1], and that respondent used the term "[t]his appointment is not intended to be renewed" in its appointment letters when it hired complainant for the 1997-98 (CX 31, p. 3) and 1998-99 (CX 44, p.1) academic years, which preceded complainant's November 13, 1998, email, and thus any possible OSHA discrimination motivation.

Complainant objects to the proposed decision's failure to mention the difference in testimony between Ms. McEllistrom and the search panel concerning her interview. It was asserted by respondent that she impressed them with her questions, while she testified she had no questions. The Commission agrees that this inconsistency is troublesome, but assigns it little weight because complainant was eliminated from consideration prior to the interviews. Respondent never contended that Ms. McEllistrem was considered preferable to complainant because she had an impressive interview. The successful interview was one of the reasons for the ultimate decision to hire Ms. McEllistrem, but complainant had been eliminated from the "short list" of three applicants after the reference checks and based primarily on concerns about his student evaluations.

Complainant also contends that it can be inferred that respondent did not comply with its affirmative action plan because it did not file a copy of the affirmative action plan with its

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[1] For example, Complainant's Exhibit CX 31 is the UWEC Personnel Action Request Form (PARF) used for complainant's first (1997-98) appointment. It includes among the six printed categories of contract type both "Fixed Term No Intent to Rehire" (which is the category checked) and "Fixed Term." It is clear that UWEC routinely utilized "Fixed Term No Intent to Rehire" as a means of characterizing appointments.

answer to the complaint during the investigative phase of this case: "Respondent's failure to properly answer the original complaint (failure to include its affirmative action plan and its recruitment guide) is evidence of pretext." Complainant's objections to proposed decision, p. 12. However, complainant cites no circumstances that dictates such an inference. Respondent had no obligation to include all of the policy documents relating to such a staffing process as exhibits to their answer.

Complainant's objections also include the following argument: "The record does contain evidence that Lewis provided a recommendation to reappoint [CX 42][2] complainant for 1998-99. Lewis' positive recommendation to reappoint occurred after the alleged poor student evaluations of Fall 1997, after Eierman's and Hartsel's 1998 reports, and after respondent initiated an external search for 1998-99." *Id.*, p. 14. The Commission is not sure to which reports complainant refers, because CX 42, which is an evaluation and does not contain a recommendation to either appoint or reappoint complainant, is dated January 26, 1998, which is prior to the evaluations. Furthermore, Lewis explicitly states in the evaluation that it "has been prepared in the absence of data from student evaluations of teaching."

Another point complainant stresses in his objections is that he was included in the list of qualified candidates in a search for a 1998-99 faculty position (F82) that was conducted in early 1998. Complainant argues that this implies that respondent considered him to have had at least adequate teaching abilities. The Commission does give this factor some weight, but also considers that this certification occurred early in complainant's UWEC employment—Lewis signed the certification (CX 53) on February 12, 1998, shortly after the evaluation (CX 42) referred to in the preceding paragraph—and that the criteria for this position were different from the criteria for the position in question.

In conclusion, the Commission agrees with the proposed decision's characterization of complainant's November 13, 1998, email concerning bottles that were not tightly capped, and which was not disseminated outside of the chemistry department, as at best a borderline OSHA disclosure. The evidence does not support a conclusion that there is probable cause to believe that respondent was motivated by that email when it made the hiring decision in question.

While complainant had more experience than Ms. McEllistrom, the nature of some of his experience worked against him because of the fact that his student evaluations at UWEC were low and were a source of concern to a number of members of the faculty. Furthermore, there is virtually no evidence other than the ages and genders of the successful candidate and complainant to support his claims of sex and age discrimination. The Commission also agrees with the proposed decision's observation that the real bone of contention in this case is complainant's original claim that Ms. McEllistrem was hired as a result of a "deal" that was made when her husband was hired. Complainant's other alleged bases of discrimination (age, sex, and OSHA retaliation) are essentially makeweight claims that have come to the forefront of complainant's case only after his marital status claim was eliminated from the Commission's jurisdiction by the Court of Appeals decision in *Bammert v. LIRC,* 2000 WI App 28, 232 Wis. 2d 365, 606 N. W. 2d 620. As the proposed decision indicates, the Commission can only consider the remaining bases of discrimination and does not have the authority to evaluate the hiring decision in question from the standpoint of general principles of equity in the context of campus politics or nepotism.

ORDER

1. The proposed decision and order, a copy of which is attached hereto and incorporated by reference, is adopted as the Commission's final disposition of this case with the following amendments[3].

A. Finding of Fact #1 is amended to change the position numbers of the first appointment from A-110 to A-129, and of the second appointment from A-129 to A-198, and to delete the reference to the use of a faculty search committee for the first appointment.

B. Page 12 is amended by deletion of the reference to the April 19, 1999, departmental evaluation, RX 25.

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[2] Brackets in original.

[3] These changes are shown in the attached proposed decision by strikeover of the deleted material followed by the insertion of the underlined new material.

C. Page 11 is amended by changing the statement about complainant's teaching experience from 2 years to 12 years with 2 years at UWEC.

2. This complaint is dismissed.

Dated: January 19, 2001.

STATE PERSONNEL COMMISSION

Laurie R McCallum /jm
LAURIE R. McCALLUM, Chairperson

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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 person-

sonally, 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

STATE OF WISCONSIN PERSONNEL COMMISSION

JOSEPH E. SABOL,
Complainant,

v.

President, UW-SYSTEM (EAU CLAIRE),
Respondent.

Case No. 99-0144-PC-ER

PROPOSED DECISION
AND ORDER

NATURE OF THE CASE

This case involves a charge that respondent, UW-Eau Claire, discriminated against complainant because of his age and sex[1] in violation of the Wisconsin Fair Employment Act (WFEA), Subchapter II, Ch. 111, Stats., and retaliated against complainant for engaging in protected activities related to occupational safety and health reporting in violation of §101.055, Stats., when complainant was not selected for an academic staff position.

The issues for hearing are as follows:

1. Whether there is probable cause to believe respondent discriminated against complainant in violation of §101.055(8)(ar), Stats. (State Occupational Health and Safety Law [OSHA]) when respondent did not select complainant for the Chemistry Lecturer position in question in 1999.

2. Whether there is probable cause to believe respondent discriminated against complainant on the bases of age . . or sex in violation of the WFEA (Wisconsin Fair Employment Act) (Subch. II, Ch. 111, Stats.) when respondent did not select complainant for the Chemistry Lecturer position in question in 1999. Report of prehearing conference held December 17, 1999.

[1] The Commission dismissed complainant's claim of marital status discrimination for lack of subject matter jurisdiction consistent with *Bammert v. LIRC,* 2000 WI App 28, 232 Wis. 2d 365, 606 N. W 2d 620, by an order entered February 15, 2000.

FINDINGS OF FACT

1. Complainant is a male who was 45 years old at the time of the selection process in question. In 1997, complainant was hired for a one-year appointment, as a Lecturer (Position # A-~~110~~129) in the Chemistry Department denominated as fixed term, no intent to renew, to replace a faculty member on leave. In 1998, complainant was selected for a one-year appointment also denominated as fixed term, no intent to renew, as a Lecturer (#A-~~129~~198) in the Chemistry Department to replace a faculty member on sabbatical leave. In ~~both~~ the second cases respondent utilized a departmental faculty search committee as part of the selection process.

2. Sometime in October 1998 complainant discovered some containers of acetone, a flammable solvent, stored overnight in the hoods in the laboratory. He discussed this with Assistant Chemical Stockroom Manager Jason Kuehl and Associate Professor Cheryl Muller [2] There is no evidence that this discussion became known to any of the persons responsible for the hiring decision in question, and the Commission finds it did not.

3. On November 13, 1998, complainant sent the following e-mail message to his "General Chemistry Colleagues"[3]:

> This morning I noticed a bottle of 5% Br2 in hexane on the side bench in P475 with the cap not tight. This bottle is for the Hydrocarbons experiment and is labeled "Use in the hood." None of my lab sections have done this experiment yet. Upon inspection, many other reagent bottles (solvents and acids) also had their caps not tight. I checked all to make sure they were closed before I left.
>
> I am concerned that my students could have been exposed to unnecessary chemical vapors and I ask that you check and make sure all reagent bottles are closed when your lab sections are finished.

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[2] Complainant raised this discussion during the investigative phase of this proceeding, and again in his brief concerning the motion to dismiss. In the February 15, 2000, decision on the motion to dismiss, the Commission recognized it as an amendment to the complaint as one of complainant's alleged protected activities under OSHA. In his post-hearing brief, complainant discusses this activity, but he does not include it in his argument that he engaged in protected OSHA activity. It may be that complainant is not pursuing this aspect of the case because of the fact, mentioned below, that there is no evidence that anyone involved in the selection process was aware of his discussion of the acetone. In any event, complainant failed to establish a prima facie OSHA retaliation case with regard to the acetone.

[3] In his post-hearing brief, complainant specifically identifies this email as a protected activity under OSHA.

4. Nine colleagues received the above message, including Scott C. Hartsel, Robert Eierman, Jason Halfen, David Lewis and John Pladziewicz. One recipient, Judith Lund, responded as follows to the message, "Good point Joe. Thanks."

5. David Lewis, who is older than complainant, was the chair of the Chemistry Department from August 1997 to May 1999. In May 1999, he stepped down as Department Chair, and John Pladziewicz became chair of the Department. Lewis had no significant involvement in the selection process in question.

6. In May 1998, Dr Marcus McEllistrem accepted a faculty, tenure track, position (No. F-82) as Assistant Professor of Analytical Chemistry. This appointment followed a search by a chemistry faculty committee consisting of Hartsel, Eirman, Leo Ochrymowicz, and Phil Chenier. The standards and criteria for screening candidates were as follows:

> 1. Scientific merit and significance of the proposed research. Clarity of written research plans.
> 2. Ability to contribute to the cultural diversity of the department.
> 3. Strength of the letters of recommendation.
> 4. Interest and experience in undergraduate teaching.
> 5. Nature and strength of the educational background and performance record of the candidate.
> 6. Ability to communicate verbally. CX 52 (Complainant's Exhibit 52).

The committee's evaluation placed complainant sixth on the list of qualified applicants. CX 53.

7 On April 22, 1999, the Chemistry Department obtained authorization to recruit for a one-year (8/99–5/00), fixed term academic staff lecturer position (#A-238) to replace a faculty member who was on medical leave. The vacancy announcement stated that the teaching responsibilities of this position were "primarily general chemistry and possibly organic chemistry laboratory. Instructional responsibilities include a total of 15 credit hours per semester or the equivalent." Qualifications for the position included the following: "Master's or Ph.D. degree in Chemistry, the ability to clearly communicate general chemistry concepts and to manage chemistry laboratory work is required. Experience in teaching organic chemistry is desirable." Respondent did not consider this position underutilized for women or minorities.

8. The position vacancy was advertised and complainant, Joseph Ivanecky (male), Laurel McEllistrem (34 years old female and the wife of Marcus McEllistrem who had been hired to a tenure track position in 1998), and Gillian Nicholas (female) applied and were considered for the position. All four candidates possessed a Ph.D. in Chemistry. Complainant was the only candidate who had teaching experience at UW-Eau Claire, and that teaching experience was in a position similar to the position in question. In general, complainant had the most extensive teaching experience of the four candidates.

9. The Departmental search and screen committee consisted of Assistant Professor Jason Halfen (28 year old male) and Professor Robert Eierman (45 year old male).

10. The committee developed a list of nine questions to ask the four candidates' references and contacted one recent teaching reference for each of the four candidates. The reference for both Ivanecky and McEllistrem was Professor John Wright of UW-Madison. Professor Andrew Abell of the University of Canterbury, Christchurch, New Zealand, provided an e-mail reference for Nicholas. Scott Hartsel of UWEC, who was among the references complainant had listed in his application, was contacted as a reference for complainant. Hartsel was chairperson of the Departmental Personnel Commission (DPC), and the Chemistry 101[4] coordinator

11. Based on its review of the four candidates' application materials and references, the committee chose a "short list" of three candidates consisting of Nicholas, Ivanecky, and McEllistrem, but not complainant. Complainant's reference (Hartsel) considered complainant to be below the average of his teaching peers, and advised that complainant's teaching had not improved. Hartsel had never observed complainant teaching but based his opinion on comments by other faculty who had observed some of complainant's classes, as well as written teaching evaluations made by students. The references of the three remaining candidates considered them above or definitely above the average of their teaching peers. The committee concluded that the top three candidates were very effective at communicating chemistry concepts and managing laboratories, and that they showed considerable promise as teachers.

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[4] Complainant had taught this course.

12. On July 14-15, 1999, the search committee conducted telephone interviews with candidates Nicholas, Ivanecky and McEllistrem and recommended these candidates to Department Chairperson and Professor John Pladziewicz (54 year old male) in the following order: Laurel McEllistrem, Nicholas, and Ivanecky. Pladziewicz endorsed their recommendation and forwarded it to Dean David Lund, who is older than complainant. He approved the recommendation and Ms. McEllistrem was hired. None of these individuals either sought or obtained any information about the age of the candidates, although they all had some idea of complainant's age by his appearance and other information. Also, they could have estimated approximate ages of the candidates from the dates of degrees, etc., included in their application materials.

13. In a letter dated July 27, 1999, Ronald N. Satz, Provost and Vice Chancellor for Academic Affairs, formally offered the position to Laurel McEllistrem and she was hired.

CONCLUSIONS OF LAW

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

2. The complainant has the burden of proof to establish probable cause to believe respondent discriminated against complainant in violation of §101.055(8)(ar), Stats. (OSHA) when respondent did not select complainant for the Chemistry Lecturer position in question in 1999.

3. The complainant did not sustain his burden of proof.

4. There is no probable cause to believe respondent discriminated against complainant in violation of OSHA when it did not select complainant for the position in question.

5. The complainant has the burden of proof to establish probable cause to believe respondent discriminated against complainant on the basis of age in violation of the WFEA when respondent did not select complainant for the Chemistry Lecturer position in 1999.

6. The complainant did not sustain his burden of proof.

7. There is no probable cause to believe respondent discriminated against complainant on the basis of age in violation of the WFEA when it did not select complainant for the position in question.

8. The complainant has the burden of proof to establish probable cause to believe respondent discriminated against complainant on the basis of sex in violation of the WFEA when respondent did not select complainant for the Chemistry Lecturer position in 1999.

9. The complainant did not sustain his burden of proof.

10. There is no probable cause to believe respondent discriminated against complainant on the basis of sex in violation of the WFEA when it did not select complainant for the position in question.

OPINION

This is a probable cause determination. In order to make a finding of probable cause, facts and circumstances must exist that are strong enough in themselves to warrant a prudent person to believe that a violation probably has been committed as alleged in the complaint. § PC 1.02(16), Wis. Adm. Code. The Court of Appeals addressed the meaning of this definition[5] in *Boldt v. LIRC,* 173 Wis. 2d 469, 475-76, 496 N. W 2d 676 (Ct. App. 1992):

> The concept set out in [the rule] focuses on probabilities, not possibilities. *Pucci v. Rausch,* 51 Wis. 2d 513, 519, 187 N. W. 2d 138, 142 (1971), discusses the difference between these terms. *Section Ind 88.01(8) adopts the viewpoint of a prudent, rather than a speculative, imaginative or partisan person. As such it contemplates ordinary, everyday concepts of cause and effect upon which reasonable persons act.* It is LIRC's duty to consider the facts of each case and determine whether they meet this fluid concept.
>
> Though the standard of proof at a probable cause hearing is low, the burden of showing probable cause rests on Boldt [the complainant]. (emphasis added)

[5] The Commission's definition is the same as the rule (§Ind 88.01(8), Wis. Adm. Code) discussed in the *Boldt* case.

Under the WFEA, the initial burden of proof is on the complainant to show a prima facie case of discrimination. 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 unlawful discrimination. *Puetz Motor Sales, Inc. v. LIRC,* 126 Wis. 2d 168, 172, 376 N. W 2d 372 (Ct. App. 1985).

Complainant contends he was not selected for the position in question in retaliation against him because he had engaged in OSHA activities and because of his age and sex.

PRIMA FACIE CASE—OSHA RETALIATION-BROMINE INCIDENT

The establishment of a prima facie case of OSHA retaliation requires a showing that 1) complainant participated in a protected activity, 2) the alleged retaliator was aware of that participation, 3) there was an adverse employment action, and 4) there are circumstances which give rise to an inference of unlawful motivation.[6] *See, e. g., Strupp v. UWW,* 85-0110-PC-ER, 7/24/86; *affirmed,* Milwaukee Co. Cir.Ct., 715-622, 1/28/87

The Commission discussed the first element in a February 15, 2000, ruling on respondent's motion to dismiss:

> Section 111.055(8)(ar), Stats., provides in part:
>
> No public employer may discharge or otherwise discriminate against any public employe it employs because the public employe filed a request with the department [of commerce], *instituted or caused to be instituted any action or proceeding relating to occupational safety and health matters under this section,* testified or will testify in such a proceeding, reasonably refused to perform a task which represents a danger of serious injury or death or *exercised any other right related to occupational safety and health which is afforded by this section.* (emphasis added)
>
> Clearly, if complainant's activity is to be covered by the law, it has to fall within the parameters of the emphasized language in the statute. Any interpretation of this language must consider the "intent" language the legislature inserted at §101.055(1):

[6] In a failure to hire case involving membership in a protected group—e. g., age, sex--a causal connection is usually shown by establishing that the complainant was qualified for the job but was not hired because the employer appointed someone not in the protected group. However, in a retaliation case protection does not come from membership in a protected group per se, but from engaging in a protected activity. Thus the prima facie case usually is different.

> (1) INTENT It is the intent of this section to give employes of the state . rights and protections relating to occupational safety and health equivalent to those granted to employes in the private sector under the occupational safety and health act of 1970 [federal OSHA].

Therefore, the state law, which closely tracks the federal OSHA, must be interpreted in the context of that law. This context includes not only the statute itself, but also federal rules issued by the Department of Labor (DOL) and federal court decisions interpreting the federal OSHA. Also, since OSHA is a remedial statute, it must be liberally interpreted. *See, e. g., Butzlaff v. Wisconsin Personnel Commission,* 166 Wis. 2d 1028, 1033, 480 Wis. 2d 559 (Ct. App. 1992).

The federal law has been interpreted liberally to cover a range of activities as within the ambit of the language: "has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this chapter." 29 USC §660(c)(1).

The Commission cited federal authority which illustrates the broad coverage of the federal law, and, by necessary implication, the state OSHA.

> The federal OSHA has been interpreted to cover a wide range of activities. In *Donovan v. Commercial Sewing, Inc.*, 562 F. Supp. 548 (D. Conn. 1982), the employe asked her supervisor if he knew the contents of a glue which had been introduced into the work site, and received his permission to leave early because the fumes from the glue had given her a headache. Before she left, she complained to the employer's purchasing agent and asked her to find out its contents before leaving for the day. The next day she came back to work and talked to another member of management about the glue, and inquired of its contents. Later in the day she inspected the glue containers in an attempt to determine its contents, and asked the purchasing agent if she had found out what was in the glue. Later that day she was discharged. The Court held that her activities were covered by the act. This case has precedential value because the covered activity did not involve filing a formal complaint with either an agency or the employer, which is the same situation as in the instant case.
>
> In *Donovan v. Diplomat Envelope Corp.*, 587 F. Supp. 1417, 1424 (E. D. N. Y 1984), the Court held that OSHA covered an employe who had reported an alleged health hazard to his union:
>
> > We must look to the purpose of the statute rather than at its language alone. The purpose of the statute is to encourage employes to come forward with complaints of health hazards so that remedial action may be taken. In the ordinary course of

> events, an employe who notices a health hazard will begin by bringing the matter to the attention of those with whom he deals directly in his daily worklife, such as the employer, supervisors, co-workers, or union officials. This is simple common sense. These persons are the ones most likely to be in a position to obtain information regarding the alleged hazard and to take appropriate action. It would be foolish to invoke the ponderous mechanisms of government to remedy a problem without first trying to resolve the problem through voluntary means.
>
> The Court noted other decisions holding that communications with a newspaper concerning job safety and health hazards was held to be a protected activity, as were complaints to the employer, and even the act of retaining counsel to represent the employe for an attempt to rectify perceived unsafe conditions. Ruling on motion to dismiss, pp. 7-8.

It seems clear that the method or procedure complainant used in this case to communicate his concerns—an email to departmental colleagues—falls within the coverage of OSHA. The question is whether the loosely capped containers complainant reported was a significant enough health or safety issue to make his email a protected activity. There was testimony which supports each party's position. Basically, respondent's position is that the recipients viewed the email as a reminder about a minor matter that was not noteworthy and was barely noticed. For example, there was testimony by a member of the department faculty that complainant's message was akin to a reminder to someone that he or she had forgotten to turn off the lights on a parked car. On the other hand, complainant provided testimony by faculty that the chemical could pose a real hazard to people in the lab. Given the liberal intent of the legislature and the range of issues found to have been covered by either the state or the federal laws, the Commission concludes that, while complainant's case is borderline, in the context of this case there is enough evidence of a possible hazard from the situation described in the email to bring this communication under the coverage of OSHA.

There is no dispute as to whether the communication was known by the alleged retaliator, because the members of the search committee, the faculty member who provided complainant's unfavorable reference, and the departmental chair, were recipients of the message. There also is no dispute that there was an adverse employment action when complainant was not hired for the position in question. The fourth element of a prima facie face requires evi-

dence that a retaliatory motive played a part in the decision. The complainant did present some evidence that the respondent's reason was pretextual. Rather than reviewing this evidence here, a prima facie case will be assumed,[7] *see, e. g., Lorschetter v. DILHR,* 94-0110-PC-ER, 4/24/97; *U. S. Postal Service Bd. Of Governors v. Aikens,* 460 U. S. 711, 715, 75 L. Ed. 2d 403, 410, 103 S. Ct. 1478 (1983), and this evidence will be discussed under the heading of pretext.

PRIMA FACIE CASE-OSHA-ACETONE INCIDENT

This incident is somewhat similar to the bromine incident. Complainant fails to make out a prima facie case here because there is no evidence that anyone involved in the selection process was aware of his discussion of this incident with Associate Professor Cheryl Miller and Chemical Stockroom Assistant Manager Jason Kuehl. In the absence of such evidence, complainant has not made any kind of showing that his discussion could have played any role in the hiring decision in question.

PRIMA FACIE CASE--SEX

Complainant has established a prima facie case of sex discrimination by showing that he is a member of a protected group—males, that he applied and was qualified for the position in question, and that he was not hired and a female was hired. *See, e. g., Bloedow v. DHSS,* 87-0014-PC-ER, 8/24/89.

PRIMA FACIE CASE—AGE

Complainant has established a prima facie case of age discrimination by showing that he is in a member of a protected group—persons aged 40 of more—because his age at the time of hire was 45, he applied and was qualified for the position in question, and he was not hired and a person not in the protected group—age 34—was hired. *See, e. g., Trimble v. UW-Madison,* 92-0160-PC-ER, 11/29/93.

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[7] An element of a prima facie case should not be assumed if the element is also an element of liability. For example, in an age case, if the complainant is under 40 he does not satisfy a requirement of WFEA liability, so a prima facie case should not be assumed. However, when the establishment of the final step of a prima facie case relies on evidence that ultimately runs to the issue of pretext, the inquiries into the existence of a prima facie case and the existence of pretext tend to merge.

PRETEXT/DISCRIMINATORY MOTIVATION—OSHA CLAIM

Respondent articulated a legitimate, nondiscriminatory reason for hiring Ms. McEllistrem. In a nutshell, respondent contends it hired her rather than complainant because she was better qualified for the position in question. The next issue is whether complainant showed that this rationale was pretextual. The major thrust of complainant's case in this regard was an attempt to show that he was the better qualified candidate.

While complainant put in a very extensive case concerning comparative qualifications, it can be summarized briefly. The record establishes that complainant had more experience than Ms. McEllistrem, whose teaching experience was limited to having served as a teaching assistant (TA), while complainant had ~~two~~ twelve years as a primary instructor. Furthermore, two years of his experience was at UWEC in similar positions with similar duties and responsibilities, whereas she of course did not have this background. Complainant also cited other activity such as research, scholarship, and involvement in teaching programs for secondary school students. Respondent argues that because the position in question was fixed term, no intent to renew, its criteria were different than would be the case in a tenure track position. Respondent was primarily looking for someone who had good teaching ability and good communication skills.[8] Ms. McEllistrem's reference was quite positive in these areas. However, the record shows there were concerns about complainant's skills in these areas, and particularly, that his student evaluations were not that good.

[8] The announcement for the position (CX 10) listed "the ability to clearly communicate general chemistry concepts and to manage chemistry laboratory work" as the only required criteria other than an advanced degree.

The record includes two written evaluations of complainant's performance prepared by the department after complainant had requested[9] formal performance evaluation. CX33 includes a March 23, 1998, report from Eirman which refers to student evaluations of complainant as "disturbingly low." This exhibit also contains the departmental evaluation dated April 3, 1998, which was prepared by the chairperson of the departmental personnel committee (DPC), Scott Hartsell, and states that "[t]he student evaluations for the semester were a cause for concern to the committee." ~~The April 19, 1999, departmental evaluation, also prepared by Hartsel, includes the following:~~

> ~~The student evaluation results for Chemistry 213 for fall and spring semesters of 1997-98 are well below department norms in most categories and reflect substantial student dissatisfaction with your teaching of the class. . . .~~
>
> ~~The student evaluations for Chemistry 101 lab sections for fall, 1998, are difficult to interpret because of our lack of comparable data for lab only instruction. However, they also are well below typical evaluations in most categories. Again, the lowest responses are in clear communication, productive use of class time and overall teaching performance. . . .~~
>
> ~~In conclusion, the committee recognizes your conscientious efforts to fulfill your teaching responsibilities, your interest in improving our laboratory work in general chemistry and your continuing scholarly activities. We have serious concerns however about the effectiveness of your teaching. Respondent's Exhibit 25 (RX 25), p. 2.~~

In his testimony in this case, Hartsel said complainant had the lowest student evaluations he had seen in his tenure on the DPC. Another colleague with 30 years experience in the UWEC chemistry department, Phil Chenier, characterized complainant's student evaluations as some of the lowest he had seen. The first two of these departmental evaluations of complainant occurred prior to his bromine report, and illustrate that the concerns about complainant's teaching predated his OSHA disclosure. Also, Chenier had not even been a recipient of complainant's disclosure and had no apparent reason to have been biased against complainant.

Part of complainant's attempt to show pretext is an attack on the uses the department made of the student evaluations. Professor Leo Ochrymowicz testified that the evaluations

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[9] The record supports a finding that it was understood in the chemistry department that a formal review was not required of a faculty member having complainant's status—i. e., academic staff, fixed term, no intent to rehire. This is discussed below.

amount to little more than popularity contests, and that they should not be relied on in performance evaluation. However, the great weight of the evidence supports a finding that, whatever their theoretical weaknesses,[10] the department in general did take the student evaluations seriously and relied on them. For example, the Faculty and Academic Staff Handbook (CX 27), p. 5.40, §1.a., provides: "The performance review of teaching academic staff will follow procedures at the departmental level similar to those employed for probationary faculty for peer review *including the evaluation of student ratings*." (emphasis added) There is some evidence that complainant's evaluations improved over time, but it remains that they were low.

Complainant also argues that his more extensive experience and strong points in other areas (primarily scholarship, research, and service) should have outweighed the fact that his student evaluations were so low. Complainant had the most significant teaching experience of the four applicants and was a known quantity due to his previous teaching experience at UWEC. However, notwithstanding a number of positives, he was not known as a particularly good teacher Thus his experience at UWEC worked for him in some areas, but against him in others. While Ms. McEllistrem was a less known quantity, she had a very positive reference, particularly in the area of teaching skills. That respondent chose someone with less experience than complainant, but with a promise of better teaching skills, provides little, if any, evidence of pretext, particularly in light of the temporary nature of this position and the fact that the main criterion the department had established for this position involved teaching ability.

In his reply brief, complainant asserts that the two primary criteria for an academic search are experience and performance, and goes on to criticize respondent's handling of this selection process, arguing that the committee should have ranked the candidates on the basis of experience, and then should have conducted the interviews. This argument is unpersuasive because it does not address the academic search in question. This position was fixed term, no intent to renew, and not tenure track, and respondent was not looking for someone with the same qualifications as would be expected in an academic search for another type of position.

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[10] In a case of this nature, the Commission can not address the general question of the pros and cons of the use of student evaluations.

For essentially the same reasons, the Commission puts some but not great weight on the fact that complainant made the list of qualified candidates (ranked sixth of eight) during the earlier hiring process which resulted in Mr McEllistrem's hire in Position F-82. That was a tenure track position with regard to which academic achievements, research, and professional service were more important than for a fixed term, no intent to renew position, and it involved a different set of candidates than the search in question, where complainant was ranked fourth of four candidates.

Complainant raises a number of procedural issues, primarily related to a debate concerning the consequences, if any, that should follow from the department's denomination of his appointment as fixed term, no intent to renew, versus just fixed term. In some failure to hire discrimination cases, the question of whether the employer followed its mandated procedures in the selection process is a significant factor in the decision of the case. In a situation where it is relatively clear that the agency violated its own procedural policies, this could indicate a discriminatory motivation. *See, e. g., Sherkow v. Wis. Dept. of Public Instruction,* 17 FEP Cases 1527, 1533 (W D. Wis. 1978), where the court noted that the employer's extension of the employe's probation was "absolutely improper" under a specific provision of the administrative code, as ultimately admitted by the employer. The court found that the testimony of the employer's experienced personnel director that he did not know the extension was illegal was disingenuous. The instant case is not like *Sherkow.* Here, unlike in *Sherkow,* the record reflects a difference of opinion about the interpretation of the rules and policies, but that respondent handled complaint's situation in accordance with its usual procedures, in keeping with its understanding of UWS and UWEC written rules and policies.

Complainant's contends in essence that the written rules and policies of the UWS and the UWEC do not recognize any other kind of academic staff appointments other than fixed term, probationary, and indefinite, and that the designation of appointments as fixed term, no intent to renew therefore is improper He further contends that the department's failure to have followed rules and policies applicable to fixed term appointments is evidence of pretext. However, if respondent followed its customary procedures in the selection process in question, this is inconsistent with a finding of pretext.

The record shows that the limited term, no intent to renew appointment was routinely used at UWEC. This was supported by the testimony of Janice Morse, the UWEC administrative officer for academic affairs, who was the primary resource on campus for academic staff appointments, as well as documents in the record. For example, CX 8, the UWEC "Request to Recruit" form used in the search in question has four categories of academic staff: Fixed Term No Intent To Rehire,[11] Fixed Term, Probationary, and Limited. CX 29 includes the "Request to Recruit" form that was used in respondent's initial appointment of complainant in 1997, and which also has the fixed term, not intent to renew category checked. This category of academic staff is also included on the UWEC Personnel Action Request Form (PARF), CX 44, p. 2. This form, which was used in connection with complainant's employment in 1998-99, also is involved in another bone of contention.

This form has a section entitled "B. NEW APPOINTMENTS OR ACADEMIC STAFF REAPPOINTMENTS." The instructions for this section is to "Complete 1 OR 2," and has a check-off box for each. The first box is labeled "New Hire" and the second box is labeled "Reappointment." On this exhibit the "Reappointment" box has been checked. Complainant argues that this shows that the status of his employment was that of being reappointed rather than simply having separate and unrelated appointments, and that this supports his contention that respondent should have handled the appointment for 1999-2000 (which is at issue in this case) as a denial of reappointment, and accordingly should have taken certain steps that did not occur. Morse testified that checking Box 2 was a mistake by an inexperienced chairperson (Lewis) and that the new hire box (Box 1) should have been checked. Also, Barbara Stephens, the UWEC affirmative action officer, testified that after complainant's first term of employment, some of his fringe benefits were different than during his first year, when he clearly was in the new hire category. Given the potential for confusion as to which box was more applicable to complainant's status, the Commission places little weight on the fact that the "reappointment" box was checked off on this form.

A related contention by complainant is that respondent should have dealt with his situation in the context of a non-reappointment of a fixed term position, rather than as essentially a

[11] This is the category checked off.

new appointment. This involves a provision in the Faculty and Academic Staff Handbook (CX27) which states that the department chair must make a recommendation to reappoint or not reappoint each fixed term academic staff teaching position by a date certain "so that proper notification can be given if the decision is not to reappoint." CX 27 p. 5.42. Complainant argues that "respondent's failure to provide the required reappointment recommendation is an obvious part of the conspiracy to hire a lesser qualified candidate over the complainant." Complainant's reply brief, p. 9. Respondent took the position that this, as well as other requirements, were not applicable to complainant because, due to the nature of his appointment, there was no reappointment issue as such. Again, there is no indication that respondent did not follow its approach in other comparable situations, such as when complainant was being considered and subsequently hired for his second year of employment. In his reply brief, complainant addresses this point when he argues that "[t]he fact that similar circumstances [not making a reappointment recommendation] occurred around filling the 1998-99 position A-198 [i. e., the position occupied during complainant's second year of employment] does not lessen the complainant's case; it provides material evidence that respondent has a record of not following its reappointment procedures." P. 9. What this contention misses is that if respondent followed a certain approach with regard to deciding to hire him for the 1998-99 position, which was *before* his OSHA disclosure, and then followed the same approach when it decided not to hire him for the 1999-2000 position, which was *after* the OSHA disclosure, this is *not* probative of pretext, regardless of whether the approach used was contrary to any rule or policy. Furthermore, if indeed respondent has a *record* of *not* following procedures required by UWEC and UWS written rules and policies, as complainant contends, this would undermine his contention that the alleged failure to follow required UWS and UWEC rules for the search in question is probative of pretext.

Another related aspect of complainant's case is Ochrymowicz's testimony that the departmental chair could have appointed complainant to the position in question without using a search committee, and his failure to have done this is probative of a contrived selection process. This opinion is undermined by the fact that the department used the same approach (search committee) in hiring complainant for positions A~~-110 and A-129~~198, which occurred

before the OSHA disclosure, as it did when it did not hire complainant to position A-198, after the OSHA disclosure.

Another of these disputes involves the provision in the faculty and academic staff handbook, CX 27, p. 5.40, s. 1.a., which addresses the subject of the performance review of fixed term, academic staff positions, and requires that the DPC conduct annual performance reviews, forward them to the department chairperson, etc. This process was not followed in complainant's case, although the DPC did do two formal evaluations of complainant's performance in response to the complainant's specific requests. The documents involved in these evaluations reflect that both the DPC and the complainant were operating under the belief that these evaluations were *not* required of the DPC due to the nature of his appointment. For example, CX 33, p. 1, is complainant's January 26, 1998, request to Hartsel for a review of his performance for 1997-1998. It states "[a]lthough I have no contract for 1998-99, evaluation of my 1997-98 performance would serve many purposes . . ." Hartsel's January 27, 1998, reply (CX 33, p. 2.) states: "[s]ince this review is not a required duty of the DPC . . this review is not required of the DPC or the university . . ." Also see CX 55, p. 1.

Even if the Commission were to conclude that a disparity of qualifications or other circumstances leads to a determination that respondent's rationale was pretextual—i. e., an attempt to disguise another, unlawful factor that was the true motivation for the decision, this would not necessarily end the inquiry. As discussed above, before complainant can prevail in this case there must be sufficient evidence to lead to a conclusion of probable cause to believe that it was an illegal reason which was the underlying reason actually motivating the decision and was underneath the rationale articulated by the respondent. Under some circumstances, but not always, this conclusion can be inferred from a showing of pretext alone. *See Reeves v. Sanderson Plumbing Products, Inc.*, __U. S.__, 120 S. Ct. 2097, 147 L. Ed. 2d 105, 82 FEP Cases 1748 (2000). However, in this case the circumstances are such that a finding of pretext would not compel a conclusion that respondent's proffered rationale for the hiring decision was a pretext for a motive to retaliate against complainant because of an OSHA activity. Complainant's email about the bromine bottle with the cap not tightened amounted at best to a borderline OSHA disclosure. The commission believed that the faculty members who testified that

this email was an insignificant event that was of no moment, were credible witnesses. There is no evidence in the record, other than complainant's opinion, that this was a communication that did, or would have been likely to have left any lingering resentment on the part of the members of the department. This email was sent on November 13, 1998. It would beggar both common sense and any reasonable interpretation of the evidence in this case to give any credence to complainant's contention that as a result of this message, several members of the faculty were sufficiently upset to conspire together to deny complainant the position in question several months later.

PRETEXT/DISCRIMINATION--SEX

The issue of pretext regarding this alleged basis of discrimination covers much the same ground as the OSHA retaliation issue. The commission also concludes that the respondent's articulated rationale for its decision was not a pretext for sex discrimination. While there is little evidence that would lead to a conclusion of probable cause to believe complainant was retaliated against because of an OSHA disclosure, there is virtually no evidence to support a conclusion of probable cause to believe gender discrimination occurred. It is obvious that the people who were responsible for the hiring decision were male. It is highly unlikely that a male would be biased against another male under circumstances like this, no less that a group of males would conspire together, as complainant contends, to deny a job to another male because of his gender *See Bloedow v. DHSS,* 87-0014-PC, 8/24/89, where the Commission recognized that while the fact that the appointing authority and the complainant both were of the same gender did not necessarily preclude a probable cause determination of discrimination on the basis of sex, it was probative of an absence of sex discrimination. Furthermore, complainant has not pursued a reverse discrimination case (e. g., arguing that respondent favored a female candidate because of affirmative action considerations), and in any event such a theory would be inconsistent with the fact that respondent was not underutilized for women with regard to the position.

PRETEXT/DISCRIMINATION--AGE

Again, the question of pretext involves pretty much the same material discussed above under the OSHA retaliation/pretext heading. Also, this record lacks any real evidence that re-

spondent's rationale for its decision, even if it were pretextual, was a pretext for age discrimination. Most of the people who had any active role in this process were similar in age to complainant, who was 45. Of the search and screen committee, while Halfen was 28, Eirman was 45. Pladziewicz, the department chair who made the recommendation to hire Ms. McEllistrem to Dean Lund, was 54. Former chairperson Lewis who allegedly played a negative role in the process,[12] and Lund, who had formal responsibility for the appointment and accepted Pladziewicz's recommendation to hire Ms. McEllistrem, were older than complainant. There is no evidence of any ulterior motive related to complainant's age. Complainant argues that the department had an incentive to have hired Ms. McEllistrem over him because complainant's salary was $930 higher than the upper limit for the position in question, and because, as a new hire, the respondent would have not had to have paid Ms. McEllistrem's health insurance for the first six months of her employment. These contentions are speculative and add little, if anything, to complainant's case.

CONCLUSION

The Commission's role in this case is not to sit as an arbiter to determine whether respondent's decision was right or wrong in the context of general concepts of fairness, personnel management, or campus governance, or whether the Commission would have made the same decision if it had that responsibility. The only question here is whether there is probable cause (considering the definition of probable cause discussed above), to believe that the respondent's motivation for this hiring decision involved discrimination on the bases of age, sex, or OSHA retaliation. Complainant presented some evidence probative of such discrimination, but the record does not support a conclusion of probable cause. If complainant were challenging this personnel transaction in some other context, such as a grievance, some of his many criticisms of the decision and the process that preceded it might be more significant, but the Commission is a forum of statutorily-limited jurisdiction.

By way of dictum, the Commission notes that it was obvious over the course of this proceeding, which included a significant amount of discovery and involved five days of hear-

[12] Complainant failed to establish his contention in this regard.

ings at UWEC, that complainant was very bitter over respondent's appointment decision. It appears that he was unable to challenge the decision through the UWEC grievance procedure, due at least in part to the fact that he did not have five years of employment with UWEC.[13] Complainant's operative theory of this case originally was that the driving force behind the hiring decision was a "deal" between UWEC and Marcus McEllilstrem that he would accept a position with UWEC only on the condition that it subsequently would hire his wife, Laurel McEllistrem. As mentioned above (note 1), the Commission concluded in an earlier decision in this case that the WFEA marital status discrimination provision does not apply to a "spousal identity" case, and thus complainant could not establish liability under this heading. It was only after this decision, and some evidentiary rulings which made it clear that not only could complainant not establish liability under the aforesaid spousal deal theory, but also that to the extent it was shown that this deal actually was the driving force behind the hiring decision in question, this would be inconsistent with his remaining legally viable theories—i. e., that age and sex discrimination and OSHA retaliation were what really motivated the hiring decision, did complainant drop the spousal deal theory. However, while his other theories are all that complainant has left, this case is a very poor fit for trying to establish that kind of liability.

[13] See Faculty and Academic Staff Handbook (CX 27), §10.04.1., p. 5.44.

ORDER

The Commission having concluded that there is no probable cause to believe that complainant was discriminated against as alleged, this complaint is dismissed.

Dated: _____, 2000. STATE PERSONNEL COMMISSION

_____
LAURIE R. McCALLUM, Chairperson

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JUDY M. ROGERS, Commissioner

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