

STATE OF WISCONSIN

PERSONNEL COMMISSION

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DR. MAXINE E. BOYCE,  
Complainant,

v.

UNIVERSITY OF WISCONSIN-EXTENSION,  
Respondent.

Case No. 79-PC-ER-33

\* \* \* \* \*

ORDER

The Commission has considered complainant's objections to the Proposed Findings of Fact, Conclusions of Law, Opinion and Order in the Proposed Decision and Order of the hearing examiner in this case, and has consulted with the hearing examiner. Based upon such review and consideration, the Commission adopts the attached Proposed Decision and Order as the decision of the Commission, with one modification of the Opinion at the bottom of page 8 and top of page 9 in order to better conform the language with the Commission's understanding of the elements of complainant's prima facie case. The following language is removed from the Opinion:

"Complainant's prima facie case must show that she is a member of a protected class, that she was qualified to hold her position, that she was not continued in her position and that the reasons given for non-renewal were not borne out in fact."

The following language replaces the deleted sentence:

"In the context of these factors, the elements which complainant must show as part of her prima facie case are that she is a member of a protected class, that she was qualified to hold her position, that she was not continued in her position and that


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the employer decided not to renew her contract while the contract of a male professor was renewed. The complainant has established her prima facie case."

Dated Feb. 17, 1981

STATE PERSONNEL COMMISSION

  
Charlotte M. Higbee  
Chairperson

  
Gordon H. Brehm  
Commissioner

Commissioner Donald Murphy abstained due to his employment with the University of Wisconsin at the time this complaint was filed with the Commission.

AR:mek

Parties:

Dr. Maxine Boyce  
1901 Carver St.  
Madison, WI 53713

Mr. Robert O'Neil  
President  
University of Wisconsin  
1700 Van Hise Hall  
Madison, WI 53706

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PROPOSED  
DECISION  
AND  
ORDER

NATURE OF THE CASE

This is a complaint filed under the Wisconsin Fair Employment Act, §111.31-111.37, Wisconsin Statutes, alleging discrimination on the basis of sex with respect to non-renewal of complainant's appointment as assistant professor and with respect to complainant's salary. The case was heard on the merits by a hearing examiner appointed by the Commission. The non-renewal complaint was heard on the merits of a probable cause determination issued by an Equal Rights Officer. The salary complaint was heard as an appeal of an initial determination of no probable cause issued by an Equal Rights Officer.

FINDINGS OF FACT

1. Complainant, Dr. Maxine E. Boyce, was employed from academic year 1975-6 through academic year 1978-9, as an assistant professor in the University of Wisconsin-Extension, Bureau of Audio-Visual Instruction (BAVI), which was a non-tenure position on a tenure track, subject to yearly renewal.

2. On or about June 9, 1978, Dr. Hal Riehle, complainant's supervisor and Director of BAVI, showed her but did not let her keep a letter signed by himself, which stated that her appointment would not be renewed beyond the 1978-9 academic year. (Joint Exhibit 28)

3. Dr. Riehle told complainant that if she resigned her appointment, the non-renewal letter would not become part of her personnel file. The complainant declined to resign and the non-renewal letter was given effect.

4. Dr. Riehle, in the non-renewal letter, offered to provide the complainant with the reasons for her non-renewal if she asked for the reasons. The letter also states, ". . . in addition, the program in Film Sales and Marketing is being eliminated and the program in Film Selection and Evaluation will be substantially reduced and redirected." (Joint Exhibit 28, emphasis added.)

5. BAVI is one sub-unit of the Extension's Educational Communication Department. BAVI is a self-supporting unit, which offers all Wisconsin residents a variety of resources and services, including an educational film library with a rental and advisory service; access to audiovisual equipment; selected workshops; instruction and curriculum evaluation and development services provided by a professional academic staff. (Joint Exhibit 59)

6. The primary source of revenue for BAVI has been at all times relevant to this case, the film rental service by which its educational film library is made available to the public.

7. When Dr. Boyce was first appointed as an assistant professor, her responsibilities were to include teaching, conducting workshops and seminars; however the primary focus of her job was her function as coordinator, film

library acquisitions. (Joint Exhibits 8, 18)

8. Complainant's responsibilities with the film library included preview of films considered for addition to the collection, evaluation and selection of films for purchase; some booking (rental) of films to users, a relatively small amount of outright sales to users, and consulting with users about selection of films for sale or rental.

9. Most of BAVI annual income was generated by film rental and sales.

10. Dr. Boyce is well-respected in the professional educational community for her expertise in the area of evaluation, selection, and use of educational films.

11. The high quality of Dr. Boyce's professional work was not questioned and she was not given reason to think that her performance was less than satisfactory at any time.

12. BAVI had a serious budget problem prior to complainant's non-renewal. The classified staff of the Bureau was greatly reduced in the years before the 1978-9 academic year, at which time it had been reduced to a bare minimum.

13. The decision to decrease the size of the unclassified professional staff was made by Dr. Luke Lamb, Dean of Education Communications, at the Extension, after consulting with Dr. Riehle and the BAVI Budget Officer about declining bookings and about the general condition of the BAVI budget and projected budgets. Budget projections were made at least one year in advance of the budget year.

14. The final decision of Dr. Lamb and Dr. Riehle was to eliminate one of the two untenured faculty positions from among the eight professional staff members. The staff consisted of two tenured faculty, two untenured faculty, and four educational specialists.

15. The other untenured faculty position was that of Bruce Dewey, an assistant professor who worked with University faculty in the area of curriculum development.

16. Bruce Dewey's position generated no income for BAVI.

17. Dr. Boyce's position generated income for BAVI through encouraging the rental of films and generating sales of films.

18. Even though Dr. Boyce's position generated income to BAVI, film bookings income had decreased and was expected to decrease in the future, while the costs of continuing the preview and other functions continued to increase.

19. Dr. Boyce was the first professional staff member who was non-renewed for economic reasons and was the only female professional staff member at BAVI.

20. Dr. Lamb decided to retain Mr. Dewey, instead of Dr. Boyce, because he had determined that Mr. Dewey's position was more important to BAVI than Dr. Boyce's, based on the teaching responsibilities of Mr. Dewey.

21. During Dr. Boyce's final academic year appointment at BAVI, and after she left, the film sales program continued only to the extent that incoming requests to purchase were filled, primarily through clerical work. Previewing of films for potential buyers was discontinued, and the previewing process for film library acquisitions was substantially changed so that films were no longer previewed prior to purchase. Individual films

could still be previewed on request by BAVI staff, University faculty, or students. Workshops have been completely eliminated from the BAVI program because they were too costly to provide.

22. Dr. Reihle wrote two letters to Dr. Boyce in which he discussed the reasons for her non-renewal. The letter notifying her of the decision, dated June 9, 1978, states that the reasons for the action will be given to her, upon request, but also mentions elimination and/or reduction of major portions of her position as "additional information". (Joint Exhibit 28) The second letter, dated July 14, 1978, is in response to Dr. Boyce's request for reasons, and states that the elimination or curtailment of the film program was the reason for non-renewal. (Joint Exhibit 32)

23. In spite of the apparent inconsistencies in the two letters written to Dr. Boyce by Dr. Riehle, the evidence presented by the respondent rebutted the inference raised by the complainant that the reason for non-renewal was not the reduction in the film program, but rather, was an impermissible discriminatory attitude towards the complainant.

24. The non-renewal of Dr. Boyce's appointment beyond the academic year 1978-9, was based on major reductions in the program in which she worked, and is a legitimate, non-discriminatory reason for non-renewal.

25. The non-renewal was not based upon impermissible reasons.

26. Dr. Boyce was employed by BAVI from 1970 to 1975 as an educational specialist, during which time she worked toward her Ph.D. Her pre-BAVI work experience consisted of teaching elementary school in several Wisconsin towns from 1960 to 1969.

27. Complainant's salary for the 1975-6 academic year, the first year in which she was an assistant professor, was \$14,560.

28. Bruce Dewey was hired as an assistant professor in academic year 1974-1975, at a salary of \$18,000.

29. Although Bruce Dewey did not have a Ph.D. when hired by BAVI, he had completed the course work for the degree, and came to Wisconsin with prior professional experience in New York's higher educational facilities.

30. Some of the educational specialists at BAVI were also working toward Ph.D degrees, some had been at BAVI in a professional capacity longer than Dr. Boyce. The salary figures submitted by the parties showed no pattern of salary disparities which would lead to the conclusion that Dr. Boyce may have been discriminated against with respect to wages on the basis of her sex. (Joint Exhibit 1)

#### CONCLUSIONS OF LAW

1. The Commission has jurisdiction pursuant to §230.45(1)(b), Wisconsin Statutes.

2. The burden of proof is on the complainant to show by a preponderance of evidence that the respondent discriminated against her on the basis of her sex with respect to the non-renewal of her appointment as assistant professor at BAVI.

3. The complainant has failed to carry the burden of proof because she failed to prove that respondent's articulated legitimate business reason for non-renewal was a pretext for discrimination, made illegal under §111.32(5)(g) and §111.325, Wisconsin Statutes.



4. The burden of proof is on complainant to show that there is probable cause to believe that respondent discriminated against her on the basis of sex with respect to her salary.

5. The complainant has failed to carry her burden of proof on the issue of probable cause.

6. The respondent has not discriminated against complainant on the basis of sex with respect to her non-renewal.

7. There is no probable cause to believe respondent discriminated against complainant on the basis of sex with respect to her salary.

#### OPINION

The issues presented in this case are:

1. Did the employer discriminate against complainant on the basis of her sex with respect to the non-renewal of her contract?

2. Is there probable cause to believe that the employer discriminated against complainant on the basis of her sex with respect to her pay?

Where appropriate and where consistent with Wisconsin law, state courts and administrative agencies follow federal employment discrimination case law with respect to the allocation of the burden of proceeding and the burden of proof in employment discrimination cases brought under the Fair Employment Act, §111.31 through 111.37, Wisconsin Statutes. Goodyear Tire and Rubber Co. v. DILHR 87 Wis. 2d 56 (1978). In this case, the merits of the non-renewal complaint are decided by reference to both state and federal case law. The burden of proof is to show discrimination by a preponderance of evidence. The issue of probable cause with respect to complainant's pay is decided according to the standard set out in Wisconsin Administrative

Code, Chapter PC 4.03(2), which states:

"(2) Probable Cause Defined. Probable cause exists when there is reasonable ground for belief supported by facts or circumstances strong enough in themselves to warrant a prudent person in the belief that discrimination probably has been or is being committed."

On the issue of non-renewal, the burden is on complainant to show that the employer discriminated against her. She must first present a prima facie case from which the hearing examiner can infer that it is more likely than not that the employer's actions were based on impermissible criteria. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978). If the complainant establishes the prima facie case, it is then the burden of the employer to articulate a legitimate, non-discriminatory reason for the action taken. If the employer does articulate such a reason, the complainant, in order to succeed on the merits, must show that the employer's stated reason is merely a pretext for an action taken for impermissible reasons. McDonnell Douglas, 411 U.S. at 803-805; Furnco, 438 U.S. at 576-577.

The showing necessary to establish a prima facie case will vary according to the nature of the case and the allegations upon which it is based. In this case, the complainant argues that the reasons given for the non-renewal of her contract were not the reasons which actually motivated the decision. She does not contest respondent's allegations that BAVI was suffering from serious budget problems, but only argues that those problems were not the reason for her non-renewal. Complainant's prima facie case must show that she is a member of a protected class, that she was qualified to hold her position, that she was not continued in her position and that the

reasons given for non-renewal were not borne out in fact. The complainant has shown, with no opposition, that she is a member of a protected class, that she was qualified for her position, and that she was not continued in that position. The major contested issue is whether the reasons given for her non-renewal were the actual reasons for the decision. Complainant's supervisor, Dr. Hal Riehle, Director of BAVI, wrote complainant two letters concerning her non-renewal. One letter suggests reasons other than budgetary ones. The other letter suggests that the budgetary problems were in fact responsible for elimination of many of the services complainant had been performing and therefore were responsible for the elimination of her position. Complainant testified that the services were not in fact eliminated and cited the involvement of Steve Stuelke in continued sales of films. One of complainant's witnesses testified that Dr. Riehle had told her that faculty preview services would not be curtailed. Dr. Riehle testified in response to the prima facie case, that Stuelke did indeed oversee sales of films, but that such sales were conducted only on request of a prospective purchaser and the primary function of BAVI in these cases is simply to fill the orders, which could be done primarily by clerical staff. The preview service provided by BAVI before complainant's non-renewal was a comprehensive program of services. This program was discontinued. University faculty could still request preview of particular films, but not as part of an on-going service. The evidence put in by complainant, which constituted her prima facie case, showed an apparent

inconsistency in the letters written to her by Dr. Riehle. Complainant's testimony also went to show that the services which had allegedly been curtailed or eliminated, had not in fact been affected. Respondent's witnesses including Dr. Riehle, rebutted the prima facie case by testifying that a large portion of complainant's responsibilities had been eliminated, and that there was not enough work left to justify her position. Dr. Boyce was unable to produce any evidence or testimony which would show that this legitimate reason articulated by respondent's witnesses was merely a pretext for discrimination. Credibility was not an issue in this case. All witnesses were credible and their testimony did not conflict. Dr. Boyce testified that some of her responsibilities were continued after she was notified of non-renewal. Dr. Riehle testified that many of her responsibilities were curtailed not that every single one was eliminated. On balance, the evidence of record shows there was a legitimate business reason for non-renewal and there was no showing of discriminatory intent or attitude toward complainant.

Even though complainant's position was a money-making one for BAVI, the rental income was decreasing as the number of bookings had been decreasing over several years, while the cost of providing services had not gone down. The decision to eliminate many of the services was not therefore a pretext for discrimination. This determination is based on uncontraverted testimony of respondent's witnesses, Dr. Hal Riehle and Dr. Luke Lamb. If, under the circumstances, these individuals decided that Mr. Dewey's position was more important to BAVI than Dr. Boyce's

position, the Commission will not second guess the business reasons behind that determination.

On the issue of probable cause with respect to discrimination in salary, the Commission finds there is no probable cause to believe discrimination occurred. The findings of fact numbered 26-30 do not lead to a conclusion of probable cause. The complainant's allegations are based on the fact that she is a female assistant professor who was hired into that position at a lower salary than a male hired into the same level position, and that complainant had a Ph.D. when she was hired and that the male assistant professor did not. Respondent offered the opinion of its witnesses that Mr. Dewey had broader experience outside of BAVI in the area of higher education than did Dr. Boyce, and that he had fulfilled all course work requirements toward his Ph.D. The exhibits showed that Dr. Boyce was below some of the professional staff in salary and above some of the staff in salary. She was below the two tenured faculty in salary, below Mr. Dewey, below Mr. Stickels, an educational media specialist, in salary, and slightly below Mr. Sobania. She was above Mr. Larson, and educational media specialist, and above Mr. Stuelke, another audio visual specialist. (Joint Exhibit 1). The budget staff detail information contained in Joint Exhibit 1 shows several vacant assistant professor and specialist positions at different annual salaries within each position in any given year. The fact that different salaries were all given to individuals hired as assistant professors or as specialists does not therefore raise an automatic inference of discrimination. That

Mr. Dewey did not have his Ph.D. when he was hired at a higher salary than complainant does not raise an inference of discrimination where he had more varied experience to which BAVI gave greater weight.

ORDER

Based on the Findings of Fact, Conclusions of Law and Opinion set out above, this complaint is hereby dismissed.

Dated: \_\_\_\_\_, 1981.

STATE PERSONNEL COMMISSION

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Charlotte M. Higbee  
Chairperson

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Gordon H. Brehm  
Commissioner

AR:jmg

\* Commissioner Murphy abstains from voting due to previous employment with the University.