

4. In January, 1978, complainant filed a charge of discrimination against the VTAE Board, alleging race and sex discrimination in the Board's failure to hire him in the summer of 1977 for the position of Administrative Assistant 5 affirmative action officer.

5. The VTAE Districts were also funding sources for the specialist position.

6. The sole appointing authority for the hiring for the specialist position at the Center was Dr. Merle Strong, Director of the Center.

7. Dr. Strong selected an advisory committee of three people to evaluate the applicants for the specialist position and to recommend a candidate for employment; Dr. Strong hoped that the committee would be in agreement in its recommendations and expected to be able to follow its recommendations.

8. The advisory committee members were Judith Sikora, VTAE Board affirmative action officer; Lewis H. Ritcherson, UW-Madison, affirmative action officer; and Richard Harris, Madison Area Technical College affirmative action officer.

9. Ms. Sikora, who is white, was the successful candidate for the position which was contested in Mr. Smith's January, 1978 complaint against the VTAE Board. She was aware of Mr. Smith's complaint against the VTAE Board.

10. Mr. Ritcherson and Mr. Harris, both black, knew Mr. Smith before his job application to the Center; both had known of the VTAE Board complaint, and had in fact encouraged Mr. Smith to file that complaint.

11. After an initial review of the applicants for the specialist position, the advisory committee selected a group of candidates to interview. Neither Mr. Smith nor Ms. Darl Drummond, who ultimately was hired,

were in the first group of candidates, and this part of the hiring process is not at issue.

12. The person initially unanimously recommended by the advisory committee was offered the position, but turned it down. Other candidates from the initial group were then unavailable, so the advisory committee looked over the remaining applicants to select a second group of candidates.

13. Both Mr. Smith and Ms. Drummond were in the second group of candidates considered for the position.

14. During the time period between the initial job offer and the selection of candidates from the second group, Dr. Strong spoke with Ms. Sikora and told her that he had spoken with her supervisor, Mr. Fred Hiestand, who was Assistant Director of the VTAE Board, and that he was aware of the VTAE complaint and felt that the Center could not hire Mr. Smith in the specialist position.

15. Ms. Sikora informed Dr. Strong that she believed his position on the hiring of Mr. Smith could constitute illegal retaliation against Mr. Smith.

16. Ms. Sikora discussed her concern about Dr. Strong's statements with Mr. Erick Erickson, VTAE Board Personnel Director.

17. Mr. Erickson and Ms. Sikora spoke with Mr. Eugene Lehrmann, Director of the VTAE Board about these concerns, but the record does not show what, if anything, Mr. Lehrmann did in response to the discussion with Mr. Erickson and Ms. Sikora.

18. The advisory committee did not discuss among its members or with Dr. Strong the VTAE Complaint of Mr. Smith or any impact of the complaint on the hiring process.

19. After the second round consideration of candidates, the advisory committee unanimously recommended Ms. Drummond for the specialist position.

20. Dr. Strong and all of the committee members believed that Ms. Drummond's personality and manner of conducting herself would be more effective than that of Mr. Smith in working with and achieving cooperation of the VTAE District Directors, which voluntary cooperation was essential to the success of the project for which the specialist position was created.

21. Dr. Strong and all of the members of the advisory committee believed that Ms. Drummond was more likely to succeed in the recruiting goals of the position than was Mr. Smith, although the committee felt that both candidates were objectively qualified for the position.

22. The selection of Ms. Drummond over Mr. Smith was based on legitimate and clearly articulated selection criteria and was not based on any retaliatory motive on the part of Dr. Strong or members of the advisory committee.

OPINION

The complainant in this case alleges the respondent's failure to hire him for the contested position was in retaliation for complainant's having filed a discrimination complaint against the VTAE Board. The Board had an interest in the candidate who was selected to fill the position, although the appointing authority in this case was not an employe of the Board, but did have contact with Board members during the selection process. If complainant meets the burden of proof of showing that retaliatory motives played a part in the hiring decision, he will have shown that respondent violated §111.31 through 111.37, Wis. Stats., the Fair Employment Act.

The order of proof in a retaliation case is generally the same as is applied in other employment discrimination cases. The complainant must establish a prima facie case, in response to which the respondent must articulate a legitimate, non-discriminatory reason for its actions. If the employer presents such a response, the complainant must show the response was a pretext for discrimination.¹ The burden of persuasion is on the complainant throughout.²

In retaliation cases, the complainant's prima facie case must establish: "(1) statutorily protected participation by the employe; (2) adverse employment action by the employer; and (3) a causal connection between the two."³ The causal connection consists of "evidence showing that a retaliatory motive played a part in the adverse employment action...."⁴

¹ McDonnell - Douglas Corp. v. Green, 411, U.S. 792 (1973).

² Texas Department of Community Affairs v. Burdine, 101 S.Ct. 1089, 25 FEP Cases 113 (1981).

³ Czarnowski v. DeSoto, Inc., 26 FEP Cases 962, 965, (D.C. I11. (1981).

⁴ Id.

Despite this seemingly straightforward formulation, the federal courts do not agree on how large or small a part retaliatory motive must play in an adverse employment decision in order to constitute illegal discrimination. The case law is unclear with respect to the level of proof needed to show a causal connection in the prima facie case, and with respect to the extent of retaliatory intent which must be shown in order to prove pretext. Some courts appear to require complainants as part of their prima facie case to show the causal connection between protected activity and adverse employment decision by showing that "but for" the protected activity, the adverse employment action would not have occurred.⁵ Although the courts disagree, some of the analyses are more persuasive than others. If, as the courts agree, the basic outlines of the order and structure of proof of retaliation are the same as for other forms of discrimination, the prima facie case need only raise the inference that, if the respondent's actions remain unexplained, "it is more likely than not that such actions were [discriminatory]."⁶ To place a heavier burden on the complainant in retaliation cases would be to treat him or her differently than other complainants alleging discrimination, by requiring a complainant to put in the whole case, including proof of pretext, before respondent has offered any legitimate non-discriminatory reason for its actions. The Commission adheres to the Furnco case

⁵ See, e.g., the discussion of the issue in the well-considered and researched footnote in DeAnda v. St. Joseph Hospital, 28 FEP Cases 317, 323, N.13, (CA 5 1981).

⁶ Furnco Construction Corp. v. Waters, 98 S.Ct. 2943, 2949 (1978).

in requiring the complainant as part of the prima facie case to introduce evidence sufficient merely to raise an inference of retaliatory motives.

In the McDonnell-Douglas framework, a complainant succeeds in proving discrimination if he or she shows that the employer acted out of mixed motives.⁷ The complainant does not have to show that discriminatory motives were the sole reasons for the adverse employment action; the employer may have had some otherwise legitimate reasons for the employment action, but if the illegal reasons played a part in the decision, the employer has violated the prohibition against discrimination in employment. Respondent urges the Commission to adopt the "but for" test for determining whether retaliation played a legally sufficient part in the decision. There are several formulations of the "but for" test. One court has stated that retaliation must be the "dispositive cause,"⁸ where there are mixed motives. Many more federal courts have held that retaliatory motives need play only some part in the adverse employment action to support a finding of discrimination.⁹ The cases which respondent cites in support of the proposition that the "but for" test applies here are not Title VII cases, but rather are cases involving First Amendment and Fourteenth Amendment constitutional claims and claims under other federal statutes. The greater weight of case law and of public policy is in favor of requiring a showing that discriminatory motives played a part in the adverse employment action.

⁷ McDonald v. Santa Fe Trail Transport Co., 96 S.Ct. 2574, 2580 n. 10, (1976)

⁸ Williams v. Boorstin, 23 FEP Cases 1669, 1675 (CA D.C. 1980); De Anda v. St. Joseph Hospital, supra.

⁹ See, e.g., Czarnowski v. DeSoto, Inc. supra; Mitchell v. Visser, 27 FEP Cases 1312 (DC Ka 1981); Brunetti v. Wal-Mart Stores, 27 FEP Cases 466 (DC Ark 1981); Barding v. Board of Curators, 27 FEP Cases 954 (DC Mo1980); EEOC v. Bronson; Methodist Hospital, 27 FEP Cases 884 (DC Mrch 1979).

It would be an absurdity and would nullify the entire remedial purpose of federal and state equal employment legislation to hold that even though a complainant has in fact shown that an employer had retaliatory motives and that these motives actually played a part in the adverse employment decision, the employer is nevertheless permitted to base management decisions on impermissible motives. Once there is a finding that such motives were present, and that they were operative in the decision, the question of whether their operation was such that "but for" the illegal intent, there would have been no adverse action appears redundant. . If such a motive was operative, the action was illegal. Attempts by the courts to differentiate between degrees of operation of impermissible motives is actually a way for the courts to explain whether they found any retaliatory motives at all.

Under the circumstances of this case, the complainant introduced evidence of a statement by Dr. Strong from which it could be inferred that he acted from mixed motives when he offered the specialist position to Ms. Drummond instead of to Mr. Smith. This constitutes the prima facie case. In response to this evidence, the respondent has shown that in the opinion of all concerned in the decision, Ms. Drummond was the unanimous choice. Dr. Strong, was informed that his consideration of the VTAE complaint could be construed as discriminatory.

Given the composition of the advisory panel, and the nature of the position at issue, and the lack of any other evidence whatsoever to support the allegation of retaliation, the Commission concludes that complainant has failed to meet his burden of persuasion to show by a preponderance of credible evidence that the failure to hire him for the specialist position was based on retaliatory motives. It is more

logical to conclude from the credible evidence in the record that after his discussion with Ms. Sikora, Dr. Strong did not continue to consider the VTAE complaint as a factor but that he agreed with the unanimous recommendation of the advisory committee, including Ms. Sikora, that Ms. Drummond was the most suitable candidate available for the position.

CONCLUSIONS OF LAW

1. The Commission had jurisdiction of this appeal pursuant to §111.33(2) and §230.45(1)(b), Wis. Stats.
2. The burden of persuasion is on complainant to show by a preponderance of credible evidence that respondent violated §111.31-111.37, Wis. Stats., in failing to hire him for the specialist position at the Wisconsin Vocational Studies Center in part based on retaliatory intent in response to complainant's previous discrimination complaint filed against the state VTAE Board.
3. The complainant has not met his burden of persuasion.
4. Respondent did not retaliate against complainant in violation of §111.31-111.37, Wis. Stats.

ORDER

The action of respondent in failing to hire complainant for the specialist position at the Wisconsin Vocational Studies Center was not in violation of §111.31 - 111.37, Wis. Stats., and is affirmed and the complaint is dismissed.

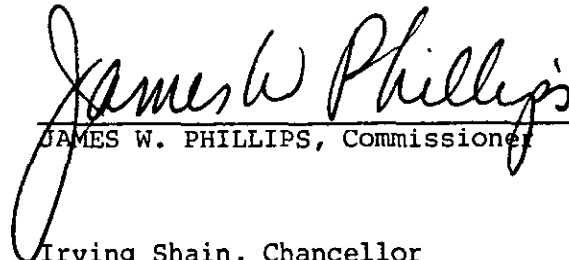
Dated: June 25, 1982

STATE PERSONNEL COMMISSION

AR:jmf


DONALD R. MURPHY, Chairperson


LAURIE R. MCCALLUM, Commissioner


JAMES W. PHILLIPS, Commissioner

Parties

Bolling B. Smith, Sr.
6213 Piedmont Road
Madison, WI 53711

Irving Shain, Chancellor
158 Bascom Hall
500 Lincoln Drive
Madison, WI 53706