

REBAIC:2

STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

DEPARTMENT OF HEALTH AND SOCIAL  
SERVICES, STATE OF WISCONSIN,

Petitioner,

vs.

MEMORANDUM DECISION

PERSONNEL COMMISSION, STATE OF  
WISCONSIN (Patrick Busch),

Case No. 81CV2997

Respondent.

The matter is before the court for review of a decision and order of the State of Wisconsin Personnel Commission which determined that the Department of Health and Social Services discriminated against Patrick Busch, a male, on the basis of handicap and sex, in violation of secs. 111.32(5)(f) and (g), Wis. Stats., by declining to appoint him to a Typist 3 position at the McNaughton State Correctional Camp.

The record reveals that Busch applied and took a written test for employment at the Camp as a Typist 3 sometime in 1977, and received the highest ranking of all the applicants. The top three applicants--Busch, a woman, and another male--were interviewed for the position on November 29, 1977, by three members of the camp staff: Terry Haines, the Camp Superintendent; James Resop, the Assistant Superintendent; and Mark Briggs, a camp social worker. The interviewers reviewed the applications and the employment histories contained therein. They noted that Busch's history dated back to 1958 and that he had held various positions in the private sector, including that of radio announcer, auditor and branch manager of a finance company, and in the public sector as a school teacher

and progressively more responsible professional positions with the federal government. Each interviewer independently graded all three applicants using standard "Bureau of Personnel Applicant Evaluation Sheets," which listed 22 evaluation factors under the general headings "Work Experience and Training," "Qualities Relating to the Position," and "Personal Characteristics." Each panelist gave Busch an overall rating and score of "Exceptionally Well-Qualified, 94-100" and each gave the woman applicant an overall rating and score of "Well-Qualified, 86-93."

During the course of the interview, Haines noticed that Busch's work history data sheet indicated that he had retired from federal service at age 41. Haines inquired into why Busch had retired at such a young age and Busch responded that he had retired on employment disability following a period of hospitalization for the treatment of severe depression, and that he was currently on tranquilizing medication which he ingested only at night. In response to Busch's voluntary explanation of his emotional disability, Haines asked Busch how he felt he would handle the inevitable "razzing" he would receive from the 55 male residents since, if selected, he would be a male in a "typically female position." Following Busch's response that he felt he could easily ignore any derision, the panel did not inquire further into Busch's disability, nor were any other references made, direct or indirect, to his being a male applying for a "typically female" position.

After completing all the interviews, the panelists discussed the applicants late into the afternoon and continued the next morning, ultimately selecting the woman applicant. The panel stated that both Busch and the woman could perform the job but that they

had selected her because: (1) she was a local resident whose community contacts could benefit the camp; (2) she was perceived as being both more enthusiastic about the job, and wanting it on a permanent basis, indicating probable long job tenure; and (3) she appeared to have a personality which would be compatible with the rest of the staff.

Subsequent to receiving the letter informing him that he was not selected for the position, Busch filed a discrimination complaint with the Personnel Commission. George Callan-Woywod of the Personnel Commission staff, investigated the complaint by talking informally with the two available interviewers, and on February 14, 1979, issued an initial determination that there was "probable cause" to believe that Busch was discriminated against on the basis of both sex and handicap. An evidentiary hearing was held on June 19, 1979, and nearly two years later the Commission issued a decision and order holding that Busch was discriminated against on the basis of both sex and handicap. Busch was awarded back pay and benefits in the amount he would have received had he been given the appointment, less mitigation, from the date the other applicant was hired until the date of the Commission's decision. The Department seeks review of that decision.

The burden of proof in a discrimination-in-hiring case is well-established. First, the complainant has the burden of proving a prima facie case by the preponderance of the evidence. Second, if the prima facie case is proved, the burden shifts to the employer to articulate some legitimate, nondiscriminatory reason for the refusal to hire. Finally, should the employer carry this burden,

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the complainant will only succeed by persuading the trier of fact that a discriminatory reason more likely motivated the employer, or by showing that the employer's proffered explanation is unworthy of credence. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973); Texas Dept. of Community Affairs v. Burdine, \_\_\_ U.S. \_\_\_, 101 S.Ct. 1089, 67 L.Ed.2d 207, 215-6 (1981). It is important to keep in mind that the ultimate burden of persuasion that the employer intentionally discriminated remains at all times with the complainant. Burdine, 67 L.Ed.2d at 215.

To establish his prima facie case, Busch must show, by a preponderance of the evidence, that: (1) he is a member of a protected class (sex and handicap); (2) that he applied and was qualified for a job for which the employer was seeking applicants; (3) that despite his being qualified he was rejected; and (4) the rejection was under circumstances giving rise to an inference of discrimination. Id.

#### SEX DISCRIMINATION

In determining whether Busch proved a prima facie case for sex discrimination, I note that the first three elements are undisputed--Busch is a male, who applied for and was qualified for the vacancy, yet was rejected. More difficult, however, is the question of whether Busch proved circumstances that would give rise to an inference of sex discrimination. The only reference to-- indeed the only acknowledgement of--Busch's sex was Haines' question as to how Busch felt he would handle himself if derided by the correctional camp residents about being in a "typically female" position. Substantial testimony was taken at the hearing regarding

this point, and the following excerpts from the transcript indicate Haines' explanation of the reasons for asking the "typically female position" question:

"Q Is it fair to say then, sir, the only reason the mental condition of Mr. Busch was at issue was because of your concern that a male occupying a typist position would potentially be harrassed (sic) by the inmate population, and if he had a mental problem there may be serious consequences of the harrassment (sic)?

A That's exactly the context. (Tr. 164-5)

\* \* \*

A All right, Because, you know, I am not, you know--I did not feel we had discriminated against anyone, sexually. It was very difficult for me to believe a charge had even come about. So Mr. Woywod (sic) asked me about what transpired during the interviews. And keeping, you know--at that time, naturally, I kept in mind talking about a sexual discrimination. I was trying to relate to Mr. Woywod how these questions with regards to disability had come up. I was concerned. I would be concerned about any male, you know, secretary, getting that kind of harrassment (sic) or any staff member. We would ask that question of anybody taking a position at the Camp, can they handle harrassment from residents, verbal harrassment from residents. I was somewhat more concerned about that as a result of Mr. Busch's disclosure to us with regards to his depression and disability." (Tr. 172-3)

I believe these excerpts demonstrate that Haines' asking the allegedly sexist question of Mr. Busch during the interview does not give rise to an inference of sex discrimination, but rather that the question was asked because: (1) a male secretary might very well have been the subject of derision; and (2) because Haines felt that an individual with a history of mental depression of the nature Busch had just related, might have difficulty handling verbal harassment.

The "other circumstances" which Busch and the Commission argued gave rise to an inference of discrimination was the fact

that Busch was much better qualified than the woman who was hired. The position in question required that 75-80 percent of the employee's time be spent typing invoices, forms, resident histories and Parole Board summaries, and that the other time be spent handling medical records, transmittals and miscellaneous business matters for the camp. As indicated earlier, Busch had an extensive work background in varying professional positions. The woman, at the time of the interview, was enrolled full-time in an associate degree accounting program at Nicolet College in Rhinelander and, if selected for the Typist 3 position, planned to continue the program in the evening. Additionally, during the five years prior to the interview, she had handled all clerical and accounting duties for her husband's construction business. It is clear then that both she and Busch were qualified for the position, and I do not consider the fact that the interviewers all ranked Busch as "exceptionally well-qualified" (while all ranked the woman as "well-qualified") to alter this conclusion since all the interviewers testified that their rankings were of the applicants' job experience and did not necessarily relate to how they perceived each candidate would perform in this particular Typist 3 position.

In sum, then, I cannot find that Busch has proven circumstances giving rise to an inference of discrimination by a preponderance of the evidence. I conclude, therefore, that Busch did not establish his prima facie case of sex discrimination, and the Commission decision, insofar as it held otherwise, will be reversed.

#### HANDICAP DISCRIMINATION

Considering whether Busch established a prima facie case

of handicap discrimination, I note again that the first three elements are satisfied: Busch was handicapped within the meaning of sec. 111.32(f), Stats.,; he applied for and was qualified for the position; and he was rejected. I consider also that the final element-- that Busch was rejected under circumstances which give rise to an inference of handicap discrimination--has been satisfied. The investigator, Callan-Woywod, went to the camp to talk to the three interviewers as part of his investigation of the complaint, which, at the time alleged sex discrimination only. Callan-Woywod testified as follows:

"Q Did you specifically ask Mr. Haines if--why. . . (the woman). . . was selected over Mr. Busch?

A Well, I think the entire interview dealt with that. And so as we went back and forth, I think Mr. Haines measured different positive and negative qualities of each individual with me as we did discuss it. It wasn't as if he gave a one or two sentence answer to the question of why he preferred. . . (the woman). He did explain that there was--he felt that the committee felt that both were well qualified and they did have difficulty reaching a decision and that they waited until the following morning until they did make the final decision.

Q And did Mr. Haines give you a specific reason why they hired. . . (the woman), the factor that would tip the scale, so to speak?

A He said they were very worried about turnover. Well, he said there were several things, I guess, when I first approached the subject as to Mr. Busch and. . . (the woman). I don't know how it was brought up, but those were the two people under consideration. Mr. Haines said that there were some factors which he felt had to be considered when looking at Mr. Busch. And he said that, one, was that Mr. Busch was drawing disability pension and he'd been suffering from depression. And there was some concern with that because of the type of setting that Mr. Busch was to be working in, and that it, at the prison farm, and that there might be some concern about that kind of drugs being on the grounds.

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At that point in the interview, I told Mr. Haines there might very well be a problem taking that into consideration, since emotional illness most likely was a handicap and that handicapped persons were protected. At that point, Mr. Haines then, instead--or moved from mentioning Mr. Busch's depression, moved to what he felt was the positive points with. . .(the woman). And he said at that time that . . .(she)--he felt she would be more permanent and that Mr. Busch would be just using his job as a stepping stone to some other position. So, particularly, he mentioned Mr. Busch's depression." (Tr. 146-7)

\* \* \*

"Q Did Mr. Haines say to you during the interview of January 11th that Mr. Busch's mental health was a deciding factor?

A When I asked him that, he told me they had deliberated-- had a debate. They felt that they were two well-qualified candidates, and it was a tossup. And he went on to tell me how it was a struggle and they had to deliberate. And I asked what the factors were that made the difference. And this was one of the factors that made a difference.

Q He did not say it was a deciding factor?

A Well, I cannot remember the exact words, deciding factor and making a difference as to what is-- That seems to be a matter of semantics. The first thing he brought up when I asked him about the decision was Mr. Busch's emotional well being. That was the very first thing mentioned. I then stopped the interview and said that I think we have a problem here I think we should discuss and explained to him why I felt his statement jeopardized the Respondent's position.

\* \* \*

Q Can you tell me then, to the best of your recollection, what Haines said to you concerning this particular matter, this mental health question?

A He told me the fact that Mr. Busch was drawing disability benefits for depression was a problem because, one, the type of setting that Mr. Busch would be working in, and two, he was concerned about having drugs on the grounds." (Tr. 156-7)

Callan-Woywod's testimony clearly portrayed circumstances which gave rise to an inference of discrimination and Busch, therefore, satisfied his burden of proving a prima facie case.<sup>1</sup> The burden

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(Footnote, page 9)



then shifted to the employer to articulate legitimate, non-discriminatory reasons for the refusal to hire. As indicated earlier, the Department stated that the woman was selected because she (1) was a local resident with potentially helpful community contacts; (2) was perceived as more committed to long tenure with the Department; and (3) appeared to have a more compatible personality. Having articulated these reasons, the burden shifted back to Busch to show either that a discriminatory reason more likely motivated the Department or that the proffered reasons were pretextual. Again, I consider Callan-Woywod's testimony to be dispositive for it is clear that Mr. Busch's handicap was a determinative factor-- a factor which "made a difference"--in the decision not to hire Busch, and therefore Busch satisfied his burden of proving that a discriminatory reason more likely motivated the department. To be sure, the employer's other, proffered reasons may well have entered into the decision and, in fact, they do not appear to be wholly "unworthy of credence." But the law is settled that the discriminatory motive does not have to be the sole factor motivating the employer's actions, but only a factor which "made a difference." Loeb v. Textron, Inc., 600 F.2d 1003, 1019 (1st Cir., 1979) and the testimony demonstrates that Busch's handicap was a determining factor.<sup>2</sup> In sum, then, I consider the Commission

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<sup>1</sup>It is clear that Busch was qualified for the position despite his emotional disability, for his doctor had given him a full medical release to return to work, and the medication he took was ingested only at night, rendering unfounded the Department's concern that Busch might bring drugs onto the camp premises.

<sup>2</sup>The interviewers, Haines, Resop and Briggs, each testified that the handicap was not a factor in the decision. However, it is the function of the agency, not the reviewing court, to evaluate the credibility of the witnesses. Sec. 227.20(6), St. Bucyrus-Erie Co. v. ILHR Department, 90 Wis.2d 408, 418 (1979).

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to have properly determined that Busch carried his burden in proving that he was discriminated against on the basis of handicap.

Counsel for the Commission may prepare an appropriate order for the court's signature.

Dated at Madison, Wisconsin, this 9 day of March, 1982.

BY THE COURT:



WILLIAM EICH  
CIRCUIT JUDGE

cc: Ned Sahar, AAG  
Robert Vergeront, AAG  
Roger Buffett