

STATE OF WISCONSIN

PERSONNEL COMMISSION

\* \* \* \* \*  
 RAYMOND L. DAVIS  
                   Appellant,  
 v.  
 President, UNIVERSITY OF  
 WISCONSIN SYSTEM (Stout)  
                   Respondent.  
 Case No. 82-PC-ER-129  
 \* \* \* \* \*

DECISION  
AND  
ORDER

NATURE OF THE CASE

On November 16, 1982, complainant filed a complaint alleging that respondent had discriminated against him on the basis of race in its decision not to appoint him to another term as Coordinator of Black Student Services at the University of Wisconsin-Stout. In an initial determination dated December 27, 1983, one of the Commission's Equal Rights Officers found no probable cause to believe that respondent had so discriminated against complainant. On January 6, 1984, complainant appealed this finding of no probable cause. A hearing was held on July 24 and August 21 and 22, 1984, on the issue of probable cause.

FINDINGS OF FACT

1. Complainant is a black male who was employed as the Coordinator of Black Student Services in the Ethnic Services Center at UW-Stout from September 26, 1980, through May 19, 1982. This position is a fixed-term academic staff appointment and complainant held the position under two consecutive one-year appointments. Section UWS 10.03, Wisconsin

Administrative Code, provides that such fixed term appointments "are renewable solely at the option of the employing institution, and carry no expectation of reemployment beyond their stated term, regardless of how many times renewed."

2. During the 1980-81 academic year, there were three professional staff positions (a director and two coordinators of minority student services) in the Ethnic Services Center at UW-Stout (Center). In March of 1981, Hector Cruz, the director, resigned and Linda Ackley, who had been occupying one of the two coordinator positions (complainant occupied the other coordinator position) was selected as the new director. Ray Rivera was selected for the coordinator position Ms. Ackley had vacated. Ms. Ackley, Mr. Rivera, and complainant occupied the same respective positions during the 1981-82 academic year. The director position functioned as the first line supervisor of the two coordinator positions and the director position was supervised by Richard Anderson, the Dean of Counselling Services.

3. After Ms. Ackley became the director, she adopted a management policy requiring that the center be operated in a more structured way than before. In implementing this new policy, Ms. Ackley indicated to complainant that he should spend more of his working hours in his office and required that prior authorization be obtained from the director before the Center's offices or its staff could be used for certain purposes, e.g., the use of the Center's secretarial services by minority student groups which had formerly been available to such groups on demand were now required to be authorized by the director prior to delivery. This new policy caused friction between Ms. Ackley and the two coordinators who disagreed with this more structured approach and who felt that some of their authority was

being eroded. The friction between complainant and Ms. Ackley intensified to such an extent that others in the Center, including staff and students, noticed the tension between the two. Complainant discussed this conflict with Mr. Anderson.

4. As complainant's first line supervisor, Ms. Ackley was responsible for evaluating complainant's work performance. In December of 1981, Ms. Ackley advised complainant that, to assist her in completing an evaluation of his work performance, he should select faculty or staff members and she would randomly select three students to submit written evaluations of his performance. The two student evaluations which were returned indicated that complainant's performance was satisfactory but one indicated that complainant had not made a difference in the student's life at UW-Stout and the other included the following written comments: "I feel that Raymond should make himself available enough to meet the needs of the student. Also, Ray should separate his social and professional life from the students." The three staff evaluations which were returned indicated that complainant's performance was satisfactory or above average in most areas. One staff evaluation was not returned due to the fact that the evaluator, Susan Storey, the director of Aspire, an academic counselling/assistance service for minority students, didn't feel she could give complainant a favorable recommendation. Ms. Ackley also conducted her own evaluation of complainant's work performance. This included discussions with both the director and the assistant director of the Academic Skills Unit and to both Ms. Storey and the career advisor of Aspire. These individuals indicated that they were disappointed with the relatively small number of black students being referred to their programs by complainant. Ms. Ackley consulted the relevant records and determined that a smaller

proportion of black students used these academic counselling/assistance programs than students from other minority groups and that complainant had given her inaccurate reports regarding the academic progress of certain black students. Ms. Ackley had also observed that complainant had taken vacation during the last week of the fall semester of 1981 and the first week of the spring semester of 1982, times when she felt it was critical for the Coordinator of Black Student Services to be available. Complainant had requested this vacation time at least a week prior to the first day of his scheduled vacation. Ms. Ackley completed her evaluation of complainant's work performance on December 8, 1981, and discussed the evaluation with complainant on December 9, 1981. Ms. Ackley evaluated complainant's work performance as "well within" the acceptable range. The other two possible categories are "above" the acceptable range and "below" the acceptable range. Ms. Ackley discussed the following with complainant in their meeting of December 9, 1981, (the following language is quoted from Ms. Ackley's notes of such meeting): (1) Shows weakness in working with other support services (i.e. Academic Skills, Project Aspire). (2) Black students are not using these services like they should-no referral? (3) General attitude toward job is lackadaisical, (i.e. comes in late, spends most mornings reading newspapers, often takes longer than necessary breaks, often leaves early). (4) Doesn't hand in reports in a timely fashion (specifically Aspire notebook reports). (5) As a team member, you're not "with us"-could do more initiating and coordinating. (6) General attitude toward me as supervisor seems "disdainful"-how do you see your attitude toward me? (7) Your comments regarding student progress are not "right on"-how much contact you actually have with students regarding their academics is questionable. (8) You don't schedule enough in office

appointments. (9) Your attitude with clericals hasn't changed much--still tend to give them "work at the last minute--want it done now" kind of attitude--talk with secretaries to work out an agreeable pattern. (10) Have to learn to anticipate students "needy" times, be available (i.e. beginning of semester, toward quarter time, end of semester exams)." Complainant indicated to Ms. Ackley that he did not schedule more appointments in his office because many black students felt more comfortable meeting with him in a less official setting, that he had taken his vacation when he did because he was tired and hadn't seen his family in a long time, that he socialized with black students because there were not that many non-student blacks in Menominee, and that he had problems with the secretarial staff because his documents often had to be typed twice because he edited the original draft. Ms. Ackley told complainant that she had overheard one of his counselling sessions with a black student and she thought he had done a good job. Ms. Ackley's written evaluation of complainant's work performance was approved by Mr. Anderson and submitted to and reviewed by Vice Chancellor Face.

5. On the average, the work performance of approximately 80% of the unclassified academic staff employees at UW-Stout are evaluated as "above" the acceptable range. Ms. Ackley interpreted the "well within" the acceptable range category as denoting a work performance which was the minimum required for the position, i.e., as "just hanging in there."

6. In February of 1981, Ms. Ackley, as complainant's first line supervisor, was required to make a recommendation to Mr. Anderson as to whether or not complainant should be appointed to another term. In addition to considering the information obtained in her previous investigation, Ms. Ackley also discussed complainant's work performance with Mr. Rivera,

the other coordinator in the Center. Mr. Rivera did not give complainant a "glowing" evaluation but not an "entirely negative" evaluation either. Ms. Ackley recommended to Mr. Anderson that complainant not be appointed to another term.

7. When Mr. Anderson received Ms. Ackley's recommendation, he conducted an independent investigation of complainant's work performance. Mr. Anderson discussed complainant's work performance with Ms. Ackley; Mr. Rivera; the Center's secretarial staff; Ms. Storey; Mary Riordan, the director of Academic Skills; the director of Admissions; and seven to ten black students. In general, Mr. Anderson concluded from these discussions that Ms. Ackley's recommendation was sound.

8. On February 12, 1982, Mr. Anderson met with complainant, advised him of the decision not to appoint him to another term, and offered complainant an opportunity to resign. In a letter dated February 15, 1982, complainant submitted his resignation effective May 19, 1982, and this resignation was accepted by UW-Stout on February 15, 1982.

9. During the three academic years spanning the period from 1979 through 1982, seven UW-Stout employees serving a fixed term appointment were sent non-renewal notices. These seven are all white. During the same period of time, 117 employees who had been issued fixed term appointments indicating "renewal is not intended" were not appointed to another fixed term. Of these, five are minorities and 112 are white.

10. The black students who testified as complainant's witnesses at the hearing indicated that they had no trouble locating complainant or getting assistance from him, that complainant actively recruited black students for the Center, that they had trouble getting secretarial work done at the Center for the black student groups with which they were

associated primarily because of the Center's secretarial staff, that they felt uncomfortable relaxing in the Center's lounge primarily because of the attitude of the Center's secretarial staff, that they sensed the tension between complainant and Ms. Ackley, and that they had no problems or conflicts with Ms. Ackley.

11. The faculty members who testified as complainant's witnesses at the hearing indicated that they felt the complainant had done a good job, that they had not heard negative comments from black students regarding complainant, and that complainant had discussed with them his conflict with Ms. Ackley regarding the operation of the Center.

12. Complainant acknowledges that he had a "personality conflict" with Ms. Ackley and a conflict with her regarding the manner in which the Center should be operated.

13. A black female was hired as the Coordinator of Black Student Services for the 1982-83 academic year.

#### CONCLUSIONS OF LAW

1. The Commission has authority to hear this appeal pursuant to §230.45(1)(b), Wis. Stats.

2. The burden of persuasion is on the complainant to show the existence of probable cause, as probable cause is defined in §PC 4.03(2), Wis. Adm. Code.

3. The complainant has failed to carry his burden of persuasion.

4. There is no probable cause to believe that complainant was discriminated against on the basis of race with respect to the decision of the respondent not to appoint him to another term.

OPINION

To make a finding of probable cause, there must exist facts and circumstances strong enough in themselves to warrant a reasonable person in believing that discrimination probably has been, or is being committed. Section PC 4.03(2), Wis. Adm. Code.

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668, 5 FEP Cases 965 (1973), as clarified in Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207, 25 FEP Cases 113 (1981), established the basic allocation of burdens and order of presentation of proof in cases alleging discriminatory treatment. First, the complainant has the burden of proving, by a preponderance of the evidence, a prima facie case of discrimination. The prima facie case "in effect creates a presumption that the employer unlawfully discriminated against the employee." Burdine, 101 S.Ct. at 1094. Second, if the plaintiff successfully proves the prima facie case, the evidentiary burden shifts to the respondent "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." McDonnell Douglas, 411 U.S. at 802, 93 S.Ct. at 1824. Third, should the respondent carry this burden, the complainant must then establish by a preponderance of the evidence that the reasons offered by the defendant were a mere pretext for discrimination. This is merely a division of intermediate evidentiary burdens. "The ultimate burden of persuading the trier of fact that a defendant intentionally discriminated against the complainant remains at all time [sic] with the plaintiff." Burdine, 101 S.Ct. at 1093.

The formulation for the establishment of a prima facie case, set forth in McDonnell Douglas, has been applied to discharge cases. Although the instant case is technically not one involving a discharge, a parallel analysis is appropriate.



To establish a prima facie case, complainant must show: (1) that he is a member of a protected class, (2) that he was qualified for the job he was performing and satisfied the normal requirements in his work, (3) that he was not retained in his position by the respondent, and (4) that he was replaced by a non-minority worker or in the alternative, that the hiring of a minority replacement was a pretext to mask an actual discriminatory discharge (Person v. J. S. Alberici Const. Co., Inc., 640 F.2d 916, 25 FEP Cases 399 (8th Cir. 1981)), or, if complainant was not replaced, that non-minority workers with comparable work records were retained (Worthy v. United States Steel Corp., 616 F.2d 698, 22 FEP Cases 102 (3rd Cir. 1980)). Flowers v. Crouch-Walker Corp., 552 F.2d 1277, 14 FEP Cases 1265 (7th Cir. (1977)).

It is uncontroverted that complainant, as a black, is a member of a class protected by the Fair Employment Act and that he was not retained in his position by respondent. In addition, respondent has not alleged that complainant was not qualified to be the Coordinator of Black Student Services.

However, respondent has alleged that complainant did not satisfy the normal requirements for performance in the position he held. On its face, complainant's December, 1981, performance evaluation indicates that his performance was "well within" the acceptable range. However, Ms. Ackley interpreted this rating as denoting a work performance which was the minimum required for the position, i.e., as "just hanging in there." Ms. Ackley's interpretation is upheld by respondent's records which indicate that approximately 80% of the 400 unclassified academic staff employees at UW-Stout were rated above complainant during the period of time he was employed there. In the judgment of the Commission, "normal" requirements

are not synonymous with "minimal" requirements. In the instant case, Ms. Ackley met with complainant on December 9, 1981, and specifically discussed with complainant those aspects of his work performance which she felt were inadequate. (See Finding of Fact 4). The record confirms that complainant did not work well with the directors and other key staff persons of other programs with which the Center necessarily had to maintain a close working relationship due to the nature of services offered; that black students were using certain support services to which they would have been referred by complainant on a relatively less frequent basis than other minority students; that complainant had a personality conflict with Ms. Ackley arising at least in part from his disagreement with her as to how the Center should be operated; that complainant gave misinformation to Ms. Ackley regarding the academic progress of certain black students; that complainant spent a significant proportion of his working hours outside his office in the Center, contrary to his supervisor's directive; and that complainant took vacation time at the beginning and end of certain semesters, i.e., at a time when students are most likely to be in need of services offered by the Center. The record also confirms that complainant had a good working relationship with certain faculty and staff members and certain black students and that these individuals felt that he was doing a good job in his position. However, the deficiencies in complainant's performance which Ms. Ackley discussed with complainant and which the record confirms, are significant ones in view of the nature of complainant's position. Complainant, therefore, not only did not actually satisfy the normal requirements for performance in his position but he was so advised by his supervisor.

Finally, complainant was replaced by a black person. There has been no showing that the hiring of a minority replacement was a pretext to mask a discriminatory non-renewal and, in view of the nature of the position, the Commission recognizes the unlikelihood of such an occurrence. The complainant has also failed to introduce any evidence to show that non-minority employees with comparable work records were retained by respondent.

Thus, complainant has failed to establish a prima facie case of race discrimination. If he had, the burden of production would have shifted to respondent to articulate a legitimate, non-discriminatory reason for its action. Respondent has detailed its bases for concluding that complainant's work performance was inadequate as well as the lengthy and multifaceted procedure it followed to investigate complainant's performance. The record confirms respondent's findings. Although respondent was also aware that certain faculty, staff and students felt complainant was doing a good job, the Commission will not attempt to second guess the evaluation of complainant's performance completed by respondent. The Commission, in determining whether respondent's basis for its non-renewal decision were legitimate and non-discriminatory, must review complainant's performance but this is done solely to determine whether respondent's criticism of complainant's work performance has some bases in fact or is so groundless as to reveal a discriminatory motive. Eng v. National Academy of Science, 23 FEP Cases 862 (D.C. Dist. of Columbia (1980)). The record in the instant case confirms the deficiencies in complainant's performance upon which respondent's performance evaluation and non-renewal decision were based and the Commission concludes that such deficiencies were significant in view of the position held by complainant. One of the factors upon which respondent

based its decision and which complainant argues by implication is an improper basis for respondent's decision is complainant's personality conflict with Ms. Ackley. However, complainant's ability to accept supervision is a legitimate performance criterion and a legitimate factor upon which to base a non-renewal decision. (Barding v. Board of Curators, 27 FEP Cases 954 (W.D. Missouri. 1980), Brown v. ASD Computing Center, 27 FEP Cases 1533 (S.D. Ohio 1981). Respondent has articulated legitimate, non-discriminatory reasons for complainant's non-renewal.

The burden then shifts to complainant to show that the reasons offered by respondent are a pretext for discrimination.

The employee may establish pretext in a variety or combination of ways including: (1) comparative evidence—proof that white employees with similarly poor work performances or employment records were retained while complainant was not. McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 283-84, 12 FEP Cases 1577 (1976); McDonnell Douglas Corp. v. Green, supra, 411 U.S. at 804; (2) statistical evidence showing that the employer had a pattern or practice of discrimination against persons of plaintiff's race or sex; McDonnell Douglas Corp. v. Green, supra, 411 U.S. at 804-805; Lieberman v. Grant, 630 F.2d 60, 23 FEP Cases 505 (2d. Cir. 1980)—a non-particularized determination that the employer was guilty of a general pattern of discrimination, however, while helpful, may not be controlling as to an individual discharge decision, especially when an otherwise justifiable reason for discharge is presented. McDonnell Douglas Corp. v. Green, supra, 411 U.S. at 805 n.19; Lieberman v. Grant, supra, slip op. at 4575; (3) direct evidence of subjective intent, McDonnell Douglas Corp. v. Green, supra, 411 U.S. at 804-05; Rodriguez v. Bd. of Educ. of Eastchester Union Free School Dist. 620 F.2d 362 at 367, 22 FEP

Cases 1259, Docket No. 80-7013 (2d Cir. May 2, 1980). 524 F.2d 1321 (2d Cir.) Wade v. N.Y. Telephone Co., 25 FEP Cases 1298 (S.O.N.Y. 1980); and/or (4) evidence that the reasons articulated by respondent were not the actual reasons for the action.

In the instant case, complainant has not shown that white employees with comparable work records were retained or has he introduced direct evidence of subjective intent. Although complainant has alleged that Ms. Ackley had a bad attitude toward blacks, the black students who testified at the hearing indicated that they had no direct contact with Ms. Ackley in which such an attitude was apparent nor any direct knowledge that she was responsible for the problems they were experiencing with the Center. The record also shows that black students did not single Ms. Ackley out for criticism in their discussions with Mr. Anderson. The record contains no other evidence regarding the subjective intent of those who made the non-renewal decision. The statistical evidence introduced by respondent shows that each of seven staff persons who were sent non-renewal notices were white and 112 of 117 staff persons whose appointments indicated renewal was not intended were white. In the absence of evidence regarding the number of minorities in the appropriate pool, it is difficult to draw any conclusions as to the statistical significance of this evidence. Certainly, minorities are not disproportionately represented in the non-renewal group and do not appear to be disproportionately represented in the "renewal not intended" group. The complainant has not shown that respondent's failure to accept his explanations for the deficiencies in his performance cited by Ms. Ackley demonstrate pretext. Although it may be true that many black students felt more comfortable meeting with

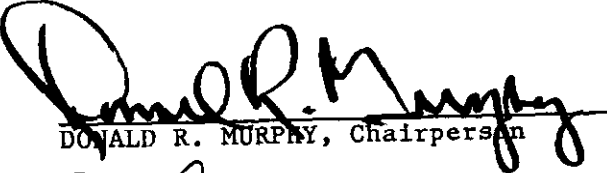
complainant outside his office, the fact remains that complainant's supervisor had directed complainant to hold such meetings in his office. Complainant failed to show that the time during which he scheduled his vacation was the only time his family would be available for him to visit or any other necessity for taking his vacation at that particular time. In addition, the record does not show that complainant offered explanations for certain of the other deficiencies cited by Ms. Ackley, e.g., the failure of black students to utilize certain support services, the misinformation regarding the academic progress of certain black students. Complainant has thus failed to show that the reasons offered by respondent for its decision not to appoint complainant to another term were a pretext for discrimination.

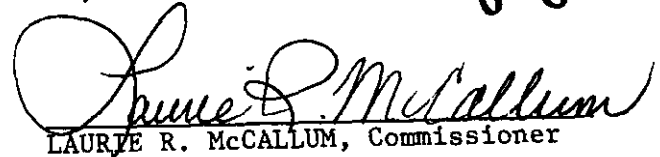
Applying the probable cause standard to the above analysis, the Commission concludes that complainant has failed to demonstrate that there is probable cause to believe that respondent discriminated against complainant on the basis of his race in making its decision not to appoint complainant to another term.

ORDER

This complaint is dismissed.

Dated: Jan 17, 1985 STATE PERSONNEL COMMISSION

  
DONALD R. MURPHY, Chairperson

  
LAURIE R. McCALLUM, Commissioner

  
DENNIS P. MCGILLIGAN, Commissioner

LRM:jab  
ORDER

Parties

Raymond Davis  
654 Fuller Avenue  
St. Paul, MN 55104

Robert O'Neil, President  
1700 Van Hise Hall  
1220 Linden Drive  
Madison, WI 53706