

STATE OF WISCONSIN

PERSONNEL COMMISSION

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ERROL A. WELCH,

Complainant/Appellant,

v.

President, UNIVERSITY OF  
WISCONSIN SYSTEM (OSHKOSH)

Respondent.

Case Nos. 82-PC-ER-44 &  
82-122-PC

\* \* \* \* \*

ORDER

The Commission has considered the respondent's objections to the proposed decision and the parties' arguments, and has consulted with the hearing examiner. The Commission adopts the proposed decision as its final decision with the addition of the following:

In affirming the proposed decision of the examiner, the Commission does not intend to infer a deviation from definition of probable cause as stated in P.C. 4.03(2), Wis. Adm. Code, which is as follows:

"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."

The Commission is satisfied that probable cause, as set forth in this rule, is present here.

The McDonnell-Douglas test provides a framework for analyzing discrimination cases. The question in the present case is not one of discrimination on the merits as in McDonnell but whether there is probable cause to believe discrimination occurred. While McDonnell may be used as an

analytical tool in cases involving probable cause, it must be utilized in the context of the foregoing definition of probable cause. In the present case the elements for a prima facie case, under McDonnell, are clearly present: The complainant is within a protected class. There was a position available for which the complainant was qualified and for which the complainant was not hired, but a non-minority candidate was. The respondent articulated a legitimate, non-discriminatory reason for its action. Thereafter, the complainant was able to make a sufficient showing of pretext to satisfy his burden in the context of a probable cause hearing.

The Commission believes the record shows that respondent deviated from its stated position selection process with respect to complainant in two ways. First, it incorporated an unsolicited assessment of complainant, which was negative, in its evaluation of complainant. Second, respondent initially screened out complainant because he was "overqualified," but did not screen out a white male with comparable background.

The Commission also believes respondent's instrumentation of its affirmative action policies during the position selection process gives rise to the question of unlawful discriminatory animus. Instead of extending its list of applicants for oral interview by choosing from the next best qualified group, respondent selected the complainant and two females who were in the group of applicants first excluded. The next best qualified group consisted of forty-five applicants, including nineteen females and two minority males. This action by respondent at least suggests that its approach toward affirmative action was procedural and not substantive. While singularly, the variance noted in respondent's treatment of complainant as compared with other job applicants during the screening process and

respondent's superficial approach to affirmative action may not be determinative, the combined effect is sufficient for a finding of probable cause.

Dated: April 5, 1984 STATE PERSONNEL COMMISSION

  
DONALD R. MURPHY, Chairperson

DRM:jmf  
JPDO4

  
LAURIE R. McCALLUM, Commissioner

  
DENNIS P. MCGILLIGAN, Commissioner

Parties:

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PERSONNEL COMMISSION

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ERROL A. WELCH,  
 Complainant/Appellant,

v.  
 President, UNIVERSITY OF  
 WISCONSIN SYSTEM (OSHKOSH)  
 Respondent.

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PROPOSED  
 DECISION  
 AND  
 ORDER

This case involves two actions arising from the same hiring decision. On May 6, 1982, the complainant filed a charge with the Personnel Commission alleging that he was discriminated against by the respondent, University of Wisconsin-Oshkosh, because of his race with respect to filling a Personnel Manager position at that institution. The complainant also filed a separate appeal of the same transaction alleging that respondent had acted illegally or abused its discretion by failing to hire him to the Personnel Management position.

An initial determination was issued for the discrimination case, finding no probable cause to believe that he had been discriminated against because of his race, color and/or national origin. The complainant requested a hearing and the parties agreed to the issue of whether there was probable cause to believe the respondent discriminated against the complainant on the basis of race, color and/or national origin. The parties also agreed to include in the discrimination hearing complainant's allegation that respondent acted illegally and/or abused its discretion when it failed to hire him for the personnel management position.

FINDINGS OF FACT

1. In January, 1982, the respondent University of Wisconsin-Oshkosh (UW-O) posted a servicewide transfer announcement for a Personnel Manager 1 or 2 (PM 1 or PM 2) position in its personnel office. The announcement included all pertinent information about eligibility, filing applications, job pay ranges, job duties, application deadlines and the selection process. The duties listed for the position were as follows:

As Assistant Director of Personnel, coordinate the staffing and classification functions for all classified positions; recommend appropriate classification for positions; write position descriptions and vacancy announcements; interview applicants; ensure all affirmative action rules have been met; provide employment benefits counseling and orientation of new employees, interpret collective bargaining agreements.

2. In February, 1982, the complainant, Errol A. Welch, a black male submitted an application for the PM 2 position to the respondent. At that time he was employed as a Regulation Compliance Investigator 4 at the Department of Industry, Labor and Human Relations (DILHR) and eligible to transfer into the position.

3. The complainant held a bachelors degree in international studies, a masters in history, a two year certificate in education, and a two year certificate in agriculture/business management and administrative law. His work experience included functioning as acting manager of a Job Service branch office. As acting branch manager, he prepared position descriptions and vacancy announcements, recruited, interviewed, selected and hired personnel, dealt with transfers, layoffs, compensation and fringe benefits, prepared reports for affirmative action purposes and handled other similar managerial personnel responsibilities.

4. The respondent received ninety applications for the position. Screening of the applications was initiated immediately by the respondent's Director of Personnel, Mr. Edmonds, and his assistant, Ms. Koepp.

5. Mr. Edmonds contacted about thirty applicants by telephone, including the complainant. The applicants were asked whether they were still interested in the job and about their work experience. Mr. Edmonds also evaluated the applicant's telephone poise. Mr. Edmonds retired February 19, 1982, and left his interview notes with Ms. Koepp, who succeeded him as Director of Personnel.

6. The applications were initially screened on the basis of good communication skills, education and work experience in the state personnel system. Further, Ms. Koepp grouped the applications into three categories: qualified, not qualified and overqualified. Ms. Koepp set specific parameters for these categories.

7. Thirty-two of the ninety applicants were eliminated by Ms. Koepp in the initial screenings. Seven applicants were determined unqualified and twenty-five applicants, including the complainant, were eliminated for having qualifications significantly beyond those required or desired for the position. Most of the "unqualified" applicants were eliminated because they were not eligible. Those noted "over qualified" had advanced degrees and extensive supervisory or managerial work experience.

8. From the remaining sixty-eight applicants, Ms. Koepp identified thirteen as the best qualified. Of those thirteen, nine were white males, three were white females, and one was a black male. One of the white males and one of the white females were handicapped. Another white male had twenty-one credits toward a graduate degree, over three years of

supervisory experience and was classified at a higher pay range than the announced position. The next best qualified group consisted of forty-five applicants, including nineteen white females and two minority males.

9. In order to have a better racial and gender composition in the pool of interviewers, Ms. Koepp added two white females and the complainant from the group she had previously identified as overqualified. This group of sixteen applicants were then all interviewed personally.

10. After the interviews but before the selection of the finalists, Ms. Koepp contacted references provided by some of the candidates. Copies of the complainant's latest performance evaluations, signed by his supervisor, had been provided to Ms. Koepp. However, complainant's supervisor was not contacted although he was listed as a reference. Ms. Koepp did include in her evaluation of the complainant an unsolicited recommendation from a local job service director, who had never supervised the complainant. This recommendation was less favorable than recommendations obtained for several other candidates.

11. After the in-person interviews, Ms. Koepp eliminated the complainant and selected three people as finalists for the position. Two were white males and one a white female. Ms. Koepp's reasons for eliminating the complainant as a finalist were the same as those articulated previously when he was eliminated prior to his reinstatement for affirmative action purposes, i.e. overqualification.

12. Ms. Koepp selected a white male for the position. He was hired at the Personnel Management 1 level. The successful candidate had been a Job Service Specialist, held a bachelors degree in education and had worked for four months as a limited term employe in the Bureau of Personnel of the

Department of Administration where he assisted in writing position descriptions and vacancy announcements.

13. The two white female candidates who originally had been determined to be overqualified but were added to the list along with the complainant for affirmative action compliance also failed to reach the finalist stage.

14. Most of the applicants in the overqualified group worked for ~~as~~ DILHR in supervisory positions and several had work experience and educational qualifications comparable to the complainant's.

15. The three candidates selected as finalists had no supervisory experience and all had been employed as Job Service Specialist 2s.

#### CONCLUSIONS OF LAW

1. The Commission has authority to hear these matters pursuant to §§230.44(1)(d) and 230.45(1)(b), Wis. Stats.

2. The respondent is an employer within the meaning of §111.32, Wis. Stats.

3. The complainant has the burden of proof to show that there is probable cause to believe that respondent discriminated against him because of his race and/or to show that respondent's decision not to hire him was an illegal action or abuse of discretion.

4. The complainant has sustained his burden of proof and shown there is probable cause to believe that he was discriminated against on the basis of race by the respondent.

5. The complainant has failed to sustain his burden of proof, except as it may pertain to allegations of unlawful discrimination under Subch II, ch. 111, Stats., that respondent's actions were illegal and an abuse of discretion.



OPINION

The complainant argues that he and another black male were systematically excluded by the respondent from consideration for a vacant Personnel Manager position. He contends that he applied for the position and was then telephoned by Mr. Edmonds on February 10, 1982, and told he would be given an in-person interview. He contends that on February 15, 1982, he was notified by Ms. Koepp, the newly appointed personnel director, and scheduled for a personal interview on March 1, 1982. Finally, the complainant contends that Ms. Koepp first became aware he was black during the interview, that she thereafter eliminated him from consideration and fabricated reasons why he was not hired.

In support, complainant points to what appear to be variations in Ms. Koepp's explanations of the screening process. In a letter dated April 2, 1982 (Respondent's Exhibit 47) Ms. Koepp wrote that, ninety applications were received and seventy-four were screened out, leaving sixteen applicants including two minorities, the complainant and a Hispanic. On April 14, 1982, Ms. Koepp wrote (Respondent's Exhibit 45) that ninety applications were received but sixty-two applicants instead of seventy-four were eliminated. On April 21, 1982, Ms. Koepp wrote (Respondent's Exhibit 49) that thirty-two applicants including complainant were initially eliminated by being placed in the overqualified group and that thirteen applicants were then selected from the remaining fifty-eight for in-person interviews. Later, the complainant and two white females, from the group of least desired applicants, were reconsidered for affirmative action purposes.

The complainant also argues that Ms. Koepp was inconsistent and did not adhere to the screening parameters she had established. Ms. Koepp states she rejected the complainant because he was overqualified. Yet

Bradley Paul Czebatar, a white male with twenty-one credits beyond a bachelors degree, with over three years of supervisory experience and classified at a higher pay range than the announced position, was included in the final group of sixteen selected for in-person interviews.

Complainant also contends that during the screening process, Ms. Koepp received an unsolicited and unfavorable evaluation of his work credentials even though the evaluation came from a person who had never directed or supervised him and that Ms. Koepp failed to verify the information by contacting complainant's current or prior supervisor.

The question before the Commission is not whether complainant's specific beliefs are correct but whether there is sufficient evidence to support a claim within reasonable probabilities that the respondent discriminated against the complainant due to his race. James B. Marshall v. Industrial Commission of Wisconsin, Wis. Cir. Ct., Dane County, No. 120-078, February 23, 1967.

In Marshall the court held:

Probable cause as used in Sec. 111.36(3), Stats., must be construed to mean such a state of fact in the mind of the Commission based upon competent evidence as would lead a quasi-judicial officer to believe within reasonable probabilities that the respondent is guilty of unlawful discrimination.... Probable cause ... does not mean proof to a reasonable certainty by a preponderance of evidence. It does mean proof within reasonable probabilities that a full hearing will establish the fact to a reasonable certainty by a preponderance of the evidence.

The Commission is satisfied that the evidence is sufficient to establish a prima facie case of reasonable probability that respondent discriminated against the complainant for reasons of his race. The complainant is a member of a group protected by the Fair Employment Act, he applied for and was qualified for the position of Personnel Manager 1 or 2, he was

rejected for the position by the respondent, and the respondent continued to seek applicants with qualifications no better than complainants'.

The Commission is also satisfied that there is sufficient evidence to support a finding of probable cause. Three acts of the respondent support this conclusion: 1) in evaluating the complainant, the respondent reviewed unsolicited information, which was negative, from a person who neither directed nor supervised the complainant and failed to confirm that information with someone else; 2) the respondent placed a white male with graduate work and extensive supervisory experience in the final applicant group of sixteen but eliminated the complainant with a comparable background as being overqualified; and 3) to comply with affirmative action policies, respondent added the complainant and two females from the overqualified applicant group for personal interview despite the availability of other minority and female applicants determined by the respondent to be more appropriately qualified.

With respect to the question of illegal behavior or abuse of discretion, little if any evidence was presented outside the context of the equal rights position of this case. Respondent's selection criteria for the position were reasonable except as to those acts which later may be determined unlawful discrimination under the Fair Employment Act.

The complainant's equal rights case effectively subsumes the civil service appeal. There is no remedy or benefit that would be available in Case No. 82-122-PC that is not available in the equal rights proceeding. Therefore, there is no apparent reason to continue the appeal in light of the pendency of Case No. 82-PC-ER-44.

ORDER

1. Respondent's motion to dismiss this complaint on the basis that the complainant failed to establish a prima facie case on the question of probable cause is denied.
2. Complainant's appeal pursuant to §230.44(1)(d) is dismissed.
3. The initial determination of no probable cause is reversed and this matter shall be set for hearing.

Dated: \_\_\_\_\_, 1984      STATE PERSONNEL COMMISSION

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DONALD R. MURPHY, Chairperson

DRM:jmf  
JPDO4

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LAURIE R. McCALLUM, Commissioner

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