

on July 22, 1986, before Dennis P. McGilligan, Chairperson, at which time the parties agreed to the following issue for hearing:

Is there probable cause to believe respondent discriminated against complainant on the bases of race, color, sex, or retaliation in regard to hire, promotion, discharge and providing negative job references?

Hearing in the matter was held on August 21 and October 13, 1986, before Chairperson McGilligan. By letter dated November 24, 1986, a briefing schedule was established. Thereafter in early June of 1987 the parties waived filing of briefs in the matter.

FINDINGS OF FACT

1. The complainant, a black male, began his employment as a Limited Term Employee (LTE) in the position of English Teacher at respondent's Ethan Allen School for Boys (EAS) on April 2, 1984. Complainant's term of employment ended on October 12, 1984, mainly as a result of having attained the maximum of hours (1044) allowed an LTE as prescribed by §230.26, Stats.

2. EAS is a correctional institute for juvenile boys who have been found to be delinquent. In October of 1984, of forty teachers on the staff, complainant was the only black. A black woman had been temporarily employed in the summer of 1984, but chose not to pursue a permanent position. There were approximately fifteen females employed as teachers. There was also one male Asian teacher.

3. The complainant's job responsibilities involved 80% classroom instruction to Jr. High and Sr. High School age students functioning in language at the 5th grade level or above, 18% student evaluation and 2% attendance at faculty meetings and workshops. In addition to his teaching duties, complainant coached the EAS junior varsity football team.

4. In order to fill the permanent position of English Teacher, respondent recruited candidates via state-wide announcement in April of

1984. There were 45 applicants for the position including the complainant, the only black candidate. A little over 30 qualified applicants were sent an Achievement History Questionnaire. After independent evaluators scored these questionnaires, the top five candidates were interviewed by the Academic Supervisor, Ray Malec and Acting Education Director, Don Freeman.

5. Of the five top candidates, two were white males, two were white females and one, complainant, was a black male. The interviews consisted of responses to eight questions posed to the applicants. Each interviewer recorded written responses to the questions. Afterward, the interviewers completed the evaluation portion of the interview which consisted of three categories of observation:

- A. Oral communication.
- B. Outstanding qualifications.
- C. Main shortcomings.

6. Following the evaluations, the applicants were assigned a rating ranging from 1 to 5 (marginal to exceptionally well qualified). Thereafter an overall rank was determined based on the combined evaluations of the Achievement History Questionnaire, interview and resumes or other background documentation. The two interviewers compiled their respective rankings independent from each other.

7. Complainant's evaluation rating was a 2 (adequately qualified), with an initial overall rank of 4 from both interviewers. The successful applicant, a white female, received an evaluation of 3, (well qualified), and she initially ranked third overall. The white female who ranked first, declined the position when offered. As a result of reference checks, the white male who had ranked second dropped to fourth. The successful applicant thereby ranked second and complainant ranked third in the final tally.

8. In evaluating complainant on the interview form, Ray Malec listed complainant's "outstanding qualifications" as experience and educational training. Malec referred to complainant's "main shortcomings" as "had feeling he had all the answers." Don Freeman stated that complainant had a good educational background and experience in correctional education. Freeman critiqued complainant for his "abrasiveness" and "cavalier attitude about rules." Complainant was the only one of those interviewed with experience in teaching in a correctional setting.

9. The candidate who was eventually hired for the position was evaluated by Ray Malec as having experience in education and "concern for the whole student beyond the ABC's." He expressed concern about her becoming too involved with students and her ability to discipline. Don Freeman praised her "humorous approach," writing skills and considerable experience while expressing concern over her emotional capacity.

10. Because respondent was complainant's most recent employer, Don Freeman considered himself the appropriate employment reference for complainant.

11. On October 11, 1984, complainant was informed that he did not get the job. He became upset and returned to his classroom and told the students in his classroom that they would be getting a new teacher, a female. Although complainant told the students to treat their new teacher with respect, he also told them that he felt he was better qualified for the position. Complainant then left the classroom; turned in his keys and terminated his employment with respondent using accumulated compensatory time to complete his LTE appointment.

12. Thereafter, some of complainant's students became very upset and angry over the fact complainant would no longer be teaching at EAS.

Subsequently, a demonstration took place in which students chanted and marched out of the building. There was a lot of concern among the staff at EAS that things would get out of control. However, by the end of the day, the students had calmed down.

13. Don Freeman did not prepare any written evaluations of complainant's performance but felt complainant's performance was "adequate to less than adequate." Freeman initially hired complainant and had been very supportive of him for the first two months. As he became acquainted with complainant's work performance and attitude towards the rules of the institution, Freeman's support of complainant decreased.

14. Don Freeman's primary concern regarding complainant's work performance was Browne's nonchalant attitude towards the institution's rules and regulations. In particular, Freeman complained about complainant violating the rule against smoking in the classroom, a practice which complainant continued even though complainant was issued a memorandum against it. Freeman also criticized complainant for inaccurate reporting on his time sheets, tardiness, giving keys to a resident (lax security), abrasiveness, allowing a loud and disruptive classroom, not paying for lunches, use of profanities and berating of individual students.

15. Don Freeman did not treat complainant differently than white employees. (Nor did complainant receive a different level of supervision than other LTE employees.) Generally, Freeman didn't go out of his way to help any employees in their work responsibilities or in adjusting to the institutional setting. An exception was Yvonne Kuma, a black female, who Freeman gave a lot of assistance and personal attention to apparently in an attempt to get her to stay at EAS.

16. A lot of teachers at EAS disliked complainant, in part because of his assertive, aggressive style of teaching and interacting among staff and students.

17. Despite his difficulties, complainant served as a good role model for at least some of the 360 students at EAS, 221 of whom were black.

18. Don Freeman did not promise complainant the permanent position or characterize it as a promotion. The record does not support a finding that Freeman encouraged the complainant to compete for the job so that complainant would not leave his LTE position prematurely, leaving the position vacant until the permanent hiring process was completed. Freeman encouraged complainant to compete for the permanent position because he felt complainant had the requisite qualifications. Freeman congratulated complainant on his success in scoring within the top five applicants.

19. Respondent feels that complainant was responsible for the afore-said student agitation and has noted that incident in response to employment references. In at least one instance, a prospective employer was informed by respondent that complainant turned the students against the staff.

20. The record does not support a finding that respondent treated complainant differently from other employees in regard to hire, promotion, discharge and providing negative job references.

CONCLUSIONS OF LAW

1. The Personnel Commission has jurisdiction over this discrimination complaint pursuant to §230.45(1)(b), Stats. and §PC 4.03(3), Wis. Adm. Code.

2. The respondent is an employer within the meaning of §111.32(3), Stats.

3. The complainant has the burden of proving that there is probable cause to believe that respondent discriminated against him on the basis of race, color, sex or retaliation in regard to hire, promotion, discharge and providing negative job references.

4. The complainant has not satisfied his burden.

DECISION

This is a probable cause proceeding. Section 4.03(2), Wis. Adm. Code defines probable cause as follows:

(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.

In his complaint, complainant contends that discrimination took place because respondent failed to hire him for a permanent position as an English Teacher subsequent to his experience as a Limited Term Employee in the same position. Complainant also contends that respondent failed to promote him and that his release from employment was a discharge. Complainant further contends that following the filing of a complaint with the Equal Employment Opportunity Commission, respondent retaliated by giving him negative employment references.

Although the evidentiary standard in a probable cause proceeding such as the one before us is not as rigorous as that applied in reaching a decision on the merits, it is nonetheless useful to use the McDonnell-Douglas format in analyzing the record before the Commission in this complaint.

Under the Wisconsin Fair Employment Act, the initial burden of proof is on the complainant to show a prima facie case of discrimination. The employer then has the burden of demonstrating a non-discriminatory reason

for the actions taken which the complainant may, in turn, attempt to show was in fact a pretext for discrimination. See McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Dept. of Community Affairs v. Burdine, 540 U.S. 248 (1981).

In the context of a hiring decision, the elements of a prima facie case are that the complainant 1) is a member of a class protected by the Fair Employment Act, 2) applied for and was qualified for an available position, and 3) was rejected under circumstances which give rise to an inference of unlawful discrimination.

Race/Color/Sex

The evidence establishes a prima facie case in regard to the bases of sex, race and color. Complainant is protected by the FEA by virtue of his race and color (black) and by virtue of his sex (male). He applied for and was qualified for the position of English Teacher as was noted in his interview for the position and high score on the questionnaire.

The final element, showing his rejection occurred under circumstances giving rise to an inference of race, color and sex discrimination is established by the fact that the successful candidate was a white female.

Having established a prima facie case of discrimination, the next step is to permit the employer to articulate legitimate, non-discriminatory reasons for making the decision not to hire complainant.

Respondent has offered several non-discriminatory reasons for making the decision not to hire complainant. In general, respondent contends that the person hired was more qualified than complainant. She scored higher on the exam and at the interview. She had more experience than complainant. She also had excellent writing skills. In addition she had better employment references.

Complainant, although scoring high on the questionnaire, did not have as high a score as the successful candidate and was not able to overcome this difference at the oral interview. The most critical aspect of complainant's rejection was his inferior job reference, which consisted of respondent's first-hand knowledge of complainant's work performance. Complainant was well known by both interviewers whereas none of the other candidates were previously known to them. This knowledge worked to complainant's disadvantage. Don Freeman, as complainant's supervisor, was critical of complainant's performance on the very job he was seeking on a permanent basis. Freeman felt that complainant demonstrated an inability to adhere to the rules of the school and showed evidence of not maintaining emotional control both in the school and on the football field. (See Findings of Fact 13 and 14) These non-discriminatory reasons for its actions sufficiently satisfy respondent's burden in rebutting complainant's prima facie case.

Complainant's argument that respondent's reasons are pretextual is based on his allegation that there have been few if any black teachers at EAS. Complainant also alleged that EAS had a terrible record with respect to employing female teachers. However, even if these allegations are true, it does not follow that complainant's rejection was discriminatory. Don Freeman hired complainant as an English teacher on an LTE basis. This hiring allowed complainant to become experienced in the position as well as permitted respondent the opportunity to assess complainant's performance. In fact, respondent encouraged complainant to compete for the disputed position. Finally, at or about this same time, respondent went out of its way to encourage a black female to remain at EAS as a teacher.

Complainant does not dispute most of the reasons respondent has given for criticizing complainant's work performance. Complainant does challenge respondent's criticism of him for allowing a student to use his keys without direct supervision. Indeed, the record does contain some evidence that other staff also allowed students similar use of keys without suffering adverse employment consequences. However, this was only one of many factors considered by respondent in failing to hire complainant. In addition, there is no persuasive evidence that respondent's criticism of complainant was racial in nature.

Complainant also alleges that Freeman assured him that the job would be his and referred to the position as a promotion. It is true that Freeman encouraged complainant to pursue the permanent position. However, the record contains no persuasive evidence that Freeman ever promised complainant the position or characterized it as a promotion. In fact, by the time complainant actually interviewed for the position, Freeman had lost his initial enthusiasm regarding complainant teaching at EAS due to Browne's past work performance.

It is indeed unfortunate that someone as highly motivated and enthusiastic about teaching at EAS as complainant, was not able to compete successfully for the permanent position. It is doubly unfortunate since minority students at EAS could have used a positive role model and there were indications complainant played such a role. However, there is no persuasive evidence that complainant's rejection was based on sex, race or color. Rather, the record is clear that respondent, particularly in the person of Freeman, was dissatisfied with complainant because of their experience with him. Respondent chose another more qualified person to fill the permanent teacher position.

The record is also clear that complainant was not terminated for his behavior or work performance. Instead, complainant merely completed his LTE employment using compensatory time to finish his 1044 hours. Nor was there a failure to promote complainant, as the employment action was simply a hire situation and respondent chose not to hire him for the permanent position.

Retaliation

To establish a prima facie case in the retaliation context, there must be evidence that 1) the complainant participated in a protected activity and the alleged retaliator was aware of that participation, 2) there was an adverse employment action, and 3) there is a causal connection between the first two elements. A "causal connection" is shown if there is evidence that a retaliatory motive played a part in the adverse employment action. See Jacobson v. DILHR, Case No. 79-28-PC, (4/10/81) at pp. 17-18, and Smith v. University of Wisconsin-Madison, Case No. 79-PC-ER-95, (6/25/82) at p. 5.

In applying this standard to the facts here, the first element is undisputed. Complainant's protected activities were the filing of the complaints of discrimination, with the EEOC on October 16, 1984, and with the Personnel Commission on May 13, 1985 and respondent was aware of this fact upon being served with these complaints.

Secondly, the matter of an adverse employment action is also clear. Complainant has alleged that retaliation took the form of adverse employment references. This was, in fact, the case. Therefore, the second element of the prima facie case is established.

The third element, however, is not satisfied. A "causal connection" has not been established. Respondent has already established that its

less than positive job references regarding complainant's poor work performance were a major factor in not hiring complainant. It follows that respondent could reiterate this conclusion to other employers. Furthermore, it was not unreasonable for respondent to include the incident that occurred on complainant's last day at EAS in responding to prospective employer inquiries. There is no persuasive evidence that a retaliatory motive played a part in the negative references. Although it is unfortunate that complainant may have been deprived from other employment due to a negative reference, the facts and circumstances are not strong enough to warrant a prudent person in believing that discrimination on the basis of retaliation probably has occurred.

Although the record supports a finding that complainant did not establish a prima facie case of retaliation, assuming arguendo that he did, complainant's case still must fail. As noted above, respondent has demonstrated a non-discriminatory reason for giving complainant poor job references -- a poor work record. Complainant may, in turn, show this reason was in fact a pretext for discrimination. Complainant, in fact, attempted to demonstrate this without success. The record, contrary to complainant's assertions, indicated respondent did not retaliate against complainant with respect to job references.

Based on the aforesaid definition of probable cause and all of the above, the Commission finds that the answer to the issue stipulated to by the parties is NO, there is no probable cause to believe respondent discriminated against complainant on the basis of race, color, sex or retaliation in regard to hire, promotion, discharge and providing negative job references. Generally, the record evidence supports a finding that

respondent failed to hire complainant and gave him poor job references due to his bad work performance. Therefore, this complaint must be dismissed.

ORDER

The initial determination of "no probable cause" is affirmed and this case is dismissed.

Dated: August 5, 1987 STATE PERSONNEL COMMISSION


DENNIS P. MCGILLIGAN, Chairperson

DPM:jmf
JANE/2


DONALD R. MURPHY, Commissioner


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