STATE OF WISCONSIN PERSONNEL COMMISSION

HAYWARD JENKINS,

Complainant,

v.

Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondent.

Case No. 86-0056-PC-ER

FINAL DECISION AND ORDER

Complainant charges that respondent discriminated against him because of his race in violation of the Wisconsin Fair Employment Act, Sections 111.321 - 111.395, Stats., when it failed to hire him for an Institution Aide 4 position at Central Wisconsin Center. Following the issuance of a proposed decision by the hearing examiner, the Commission has considered the objections and arguments of the parties and consulted with the examiner, and now issues the following final decision and order.

FINDINGS OF FACT[1]

S1. Complainant, who is black, was initially hired as an Institution Aide 1 at Central Wisconsin Center in August, 1984.

S2. Some time in 1985, complainant submitted an application for and took the examination for the position of Institution Aide 4 and scored 70

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[1] The parties entered into a stipulation as to certain Findings of Fact. These are designated with an "S". The stipulation included Respondent's Exhibits A1-K11. These exhibits serve as the basis for certain of the Stipulated and Non-Stipulated Findings of Fact. The Non-Stipulated Findings of Fact are designated with an "NS". The Commission has reorganized the proposed findings, added some findings, and modified a few of the proposed findings for reasons which are reflected in this decision.

on the exam. In August, 1985, Complainant and six others were interviewed for a vacant Institution Aide 4 position at respondent's Central Wisconsin Center (CWC). Complainant was certified for this position through minority expanded certification. Expanded certification allows for three minorities to be certified. Complainant was the only minority certified because he was the only eligible minority remaining on the register.

NS3. The duties and responsibilities of this Aide 4 position included the following:

60% A. Supervision of unit staff
1. Conduct interviews with para-professional applicants and effectively recommend hiring.
2. Coordinate orientation and on-the-job training of new para-professional staff.
3. Prepare written evaluations of para-professional staff performance and hold evaluation conferences. Recommend reclassification.
4. Effectively recommend and administer disciplinary action.
5. Assign hours, days off, shift rotations, and work assignments. Grant overtime, vacation and holiday time for unit staff to meet the needs of residents on a 24 hour basis.
6. Maintain posted work schedules and monitor timekeeping records of unit staff.
7. Supervise fair, effective management and enforcement of DHSS work rules, Administrative Orders, and negotiated labor contracts.
8. Hold first step grievance meetings.
9. Plan and conduct unit meetings and ward conferences to provide information to unit staff regarding unit functions, policies and procedures.
10. Provide staff on all shifts with guidance, problem-solving, and resource services.

20% B. Provision of resident program assistance
1. Assist with staff assignments for annual and interim resident program reviews, transdisciplinary and other unit meetings.
2. Assist with resident admissions, transfers, discharges and appointments.
3. Assist with coordination of arrangements for off unit appointments, services and programming.
4. Assist with resident program supervision.

15% C. Maintenance of environment conducive to the physical and emotional well-being of residents

1. Assist in unit budget management.
2. Provide liaison with unit support services.
3. Maintain supplies and equipment.

5% D. Other

1. Utilize opportunities for self-development.
2. Coordinate and assist in special projects, activities and educational programs.
3. Prepare written reports and respond to requests for information and assistance.
4. Participate in Resident Living and other pertinent meetings.

S4. Interviews for the position were conducted by Ms. Barbara Young, Nursing Supervisor 2. Ms. Young had been a nursing supervisor for 20 years. Immediately prior to her supervisory position, she was a staff nurse. She has a three-year nursing diploma program certificate from St. Mary's, Madison, a non-degree program. In August, 1985, and at the time of hearing in this matter, she supervised a staff of between 40 and 50 employes including one LPN 1, seven LPN 2s, three Rn 2s, one RN 3, one Aide 4, and approximately 30 Aide 1s and Aide 2s together. At those times, she also had supervisory responsibilities for one building maintenance helper, one occupational therapist, one physical therapist, one psychologist and one social worker. She has participated in as many as 125 hirings at CWC involving Aide 1s and 2s, LPN 1s and 2s, RN 1-2-3s, Aide 4s, Psychologist 3s and Therapist 1 and 2 classifications. Ms. Young's staff of 40-50 employes did not include any black employes at the time of hearing in this matter.

S5. In the interviews for the Aide 4 position, there was no formal ranking and the questions were not given any numerical value. Ms. Young described the unit and staff to the interviewees and then each was given the opportunity to ask questions.

S6. Ms. Young interviewed a total of seven candidates for the Aide 4 position. She interviewed the top five from the standard certification

request (#216-1965), complainant was included through minority expanded certification and the seventh candidate was seeking reinstatement.

S7. The six candidates other than complainant are white. Two of these six are male.

S8. In complainant's interview, Ms. Young asked complainant either "Are you comfortable supervising white female workers?" or "How do you feel about supervising white female workers?" To the best of Ms. Young's recollection, she did not ask that question or a similar question of any of the other interviewees, or to any other applicant for any other position. Except for this question by Ms. Young of complainant, the interview and hiring process is not alleged to be improper in any other way.

NS9. After the interviews were completed, Ms. Young concluded that Ms. Peggy Maly was the best qualified candidate for the subject position. Ms. Young's conclusion was based on the fact that Ms. Maly had 12 years of experience supervising staff in the care of nursing home patients; she had a nursing background as an LPN; and she had performed well in the interview, i.e., she had demonstrated good oral communications skills. Ms. Young ranked candidate Sandra Reynolds second and candidate Thomas Ploessl third. Ms. Young felt that a nursing background is an asset because it permits a supervisor to correctly evaluate patients' problems and make proper staffing decisions. Ms. Young felt that complainant's answers to interview questions were vague and didn't show an understanding of the needs of patients on Ms. Young's unit which were different than those of the patients on the units to which complainant had been assigned while employed as an Aide 1.

S10. After the interviews were concluded, Ms. Young reviewed her recommendation to hire Ms. Maly with Ms. Connie Foges, coordinator of

resident living programs. Ms. Foges was not present at any of the interviews for the position of Aide 4. Ms. Foges concurred with Ms. Young's recommendation which was then referred to the personnel office. The personnel office approved the recommendation. Ms. Young was authorized to offer the position to Ms. Maly who accepted the position. The Complainant was advised of his non-appointment by letter dated August 7, 1985. The director of CWC, R. D. Scheerenberger, confirmed the appointment of Ms. Maly in writing by letter dated August 21, 1985. Mr. Scheerenberger had met complainant at a party prior to the date of complainant's interview for the Aide 4 position. Mr. Scheerenberger did not meet and did not know complainant before he was hired as an Aide 1.

S11. Prior to the appointment of the selected candidate, neither Ms. Young nor Ms. Foges was aware of any of the candidates' exam scores. Connie Foges believes that all applicants are considered equal regardless of their test scores. Ms. Foges usually does not know the test score of an individual applicant.

S12. When Ms. Young has made a recommendation that an applicant be hired, the applicant has usually been hired. It is rare that an applicant she recommends be hired is not hired. She was unable in the record to cite an instance in which a person she recommended be hired for her unit was not hired.

S13. Ms. Young's supervisor is Ms. Foges. Ms. Foges is a graduate of a diploma school of nursing, Methodist Hospital, Madison, Wisconsin, and a graduate of the University of Wisconsin with a Bachelor of Science degree in nursing. She supervises between 23 and 25 individuals, including 10 unit coordinators, one of whom is Ms. Young; five shift supervisors; three program assistant 3s; one program assistant 2; and three orderlies. None

of the individuals holding such positions at the time of the hearing are black.

S14. The unit coordinators are nursing supervisor 2s or social service supervisor 1s. Ms. Foges has been coordinator of resident living for 18 years and, prior to that, was assistant director of nursing at CWC. Prior to the appointment of Ms. Maly to the Aide 4 position, Ms. Foges was unaware complainant is black. Ms. Young did not describe the race of any of the candidates to Ms. Foges, although Ms. Foges did know certain of the candidates, including Ms. Maly. Ms. Foges has participated in between 500 and 1,000 hiring decisions at Central Wisconsin Center in the past 18 years. At the time of her deposition, Ms. Foges could not name a single black employe who worked underneath her or underneath any of the individuals that she supervised.

S15. In her deposition Ms. Foges stated that she believed that the question "How do you feel about supervising white, female workers" would not be a proper question in a job interview unless the question was asked of each job candidate.

S16. Complainant graduated from the University of Wisconsin-Oshkosh in January 1984, with a Bachelor of Science degree in political science. Between January and August, 1984, he worked as a security guard at First Wisconsin Bank, Milwaukee, at a rate of $5.25 an hour. In August 1984, complainant was hired as an Aide 1 at CWC and worked rotating shifts first in Building 7, then in Building 6. In June, 1986, complainant initiated a transfer from CWC to Southern Wisconsin Center (SWC), where he worked until July, 1986, when he transferred to the University of Wisconsin-Milwaukee as a Maintenance Helper 2, initially working at $8.05 an hour, and, beginning in July, 1987 and presently, working at $8.26 an hour. The current

beginning salary difference between Aide 1 and Aide 4 is approximately $1.785 per hour. Complainant has never worked as a supervisor and has never worked in a capacity where he exercised supervisory authority.

NS17. Complainant has 40 college level credits in sociology and psychology.

S18. The position of Aide 2 is not a supervisory position and it is not a prerequisite for advancing to the position of Aide 4. The Aide 2 position pays approximately $.25 an hour more than the Aide 1 position.

NS19. Ms. Maly is a white female. Ms. Maly is a licensed practical nurse (LPN) and indicated to Ms. Young during her interview that she had twelve years experience in a nursing home as a supervising LPN. She had subsequently worked at CWC for three years as an LPN 2.

S20. Prior to the interview, Ms. Young and complainant had never met and Ms. Young did not know he was black.

S21. Ms. Young has asked other interviewees in other interview situations how they feel about working with people of varying racial background and varying educational backgrounds. At the time of the hearing, her unit included one part-American Indian man, and an Asian woman but no black employes.

S22. At the time of the hearing, there were 12 Aide 4 positions at CWC, none of which were filled by blacks. There were no black Aide 4s working at CWC in August of 1985 nor as of the date of the hearing. At least ten years prior to the date of the hearing, there was one black RN, Joan Ellis, working at CWC. At some time prior to testifying at the hearing, Ms. Young believed there were no blacks working in supervisory positions at CWC.

NS23. As of the date of the hearing, there were minority supervisors in the Food Service unit and Psychology unit but none of them were black.

S24. As of the date of the hearing, there was in place at CWC a panel interviewing process in which a panel, usually of three individuals, including a minority, interviews job applicants. The term "minority" indicates blacks, Asians, American Indians and Spanish surnamed individuals. At complainant's interview, the panel interviewing process was not used. Ms. Young was the only interviewer of complainant. The applicant's grade or rank under this new process is computed by combining three grades: the panel interview grade, a grade given by the supervisor who tours the applicants on a unit, and the physical examination of the applicant. The supervisor who tours the applicants on a unit does not know whether the panel has recommended the applicant prior to the supervisor giving the applicant a grade for the tour. The panel has at times recommended someone for hire whom Ms. Young did not recommend.

S25. In August, 1985, the unit supervised by Ms. Young had a composition of 6 males and 42 females. All are white except 1 male who is American Indian. There were no blacks who occupied the Aide 4 positions at CWC as of the date complainant left CWC and transferred to SWC in June, 1986.

NS26. During the course of her employment at CWC, Ms. Young had recommended the hiring of 4 black candidates at CWC prior to the date of complainant's interview and 2 black candidates since such date.

S27. The Aide 4 position is classified in the paraprofessional category for Equal Employment Opportunity purposes. There were 17 to 20 racial/ethnic minorities in the paraprofessional category from 7/1/85 - 6/30/86 at CWC. Respondent has stated they are unable to provide the

number of black Aides employed because statistics are not subcategorized by racial group. There were 30 total racial/ethnic minorities employed at CWC on July 1, 1985 out of 1,025 employes. Complainant has stated that, in his opinion, there were not more than 6 other black employes out of 1,025 employes at Central Wisconsin Center on July 1, 1985.

S28. In a reorganization, the Aide 4 position held by Ms. Maly was eliminated after 8 months of employment due to budgetary cuts. Ms. Maly's promotion letter to the Aide 4 position contained an effective date of August 18, 1985, but her time sheets reflect an effective date of September 30, 1985. She accepted a voluntary demotion to a Program Assistant 3 position effective May 11, 1986. The present incumbent in the Aide 4 position works in the unit on a part-time (80%) basis and works the additional 20% time on a different unit. This Aide 4 position was converted to part-time (80%) basis.

S29. The last promotional opportunity available, prior to August 1985, in Ms. Young's unit at CWC was 12 years ago.

S30. The respondent states that no one has ever filed a formal or informal complaint against either Ms. Foges or Ms. Young on the grounds of racial or sexual discrimination except as reflected in Ms. Young's deposition and affidavit in this matter.

NS31. In Ms. Young's deposition, she stated that no one besides complainant had ever brought a charge alleging that Ms. Young had discriminated against them on the basis of race. At hearing, testimony showed that an individual named Annette Turner had filed a formal race discrimination complaint against Ms. Young but Ms. Young had had no reason to know such a formal complaint had been filed, although she had been aware that someone had at least complained in an informal sense.

S32. Complainant has never filed a formal or informal complaint alleging discrimination against anyone prior or subsequent to the complaint in this action.

S33. The types of patients on Ms. Young's unit in August 1985, were severely disabled, multiply handicapped, most were profoundly retarded, some able to walk on their own, but most not mobile, many were in diapers and many on seizure medications, and many were bedridden; many required a high degree of skilled nursing care, and some were self-abusive; some were on nasal gastric feeding tubes and all were considered fragile medically.

NS34. An Aide 1 position such as that occupied by complainant at CWC and SWC has the following duties and responsibilities:

A. Provision of daily care and health needs of residents.
   - A1. Provide residents with assistance for their personal hygiene requirements as necessary.
   - A2. Consider resident's individual differences and modify procedures as needed.
   - A3. Maintain a safe, healthful, and pleasant living-unit environment.
   - A4. Promote normal living environment and avoid dehumanizing practices.
   - A5. Perform selected special procedures and treatments.
   - A6. Respond appropriately to emergencies, following written procedures and policies.

B. Provision for development of independent living skills.
   - B1. Use facilitation and positioning techniques to improve resident's eating skills.
   - B2. Teach appropriate mealtime behavior; foster resident's independence and participation.
   - B3. Utilize basic principles of skill development to teach dressing, grooming, and toileting; follow programs.

C. Provision for development of residents' motor skills.
   - C1. Handle and position residents correctly to prevent and/or minimize deformities and disabilities.
   - C2. Perform range of motion exercises according to residents' needs.
   - C3. Carry out programs for motor skills development.

D. Provision of development of socially acceptable behavior.
   - D1. Utilize basic techniques for reinforcing appropriate behavior; avoid reinforcing maladaptive behavior.

D2. Structure living-unit environment to facilitate development of appropriate behavior and prevent maladaptive behavior.
D3. Use recommended techniques to manage disruptive behavior without mistreating the residents.

E. Provision for stimulation and activities to enhance development.
E1. Integrate techniques of sensory stimulation into all care and contact with residents.
E2. Communicate with residents in ways appropriate to developmental level.
E3. Provide diversion in the living unit environment.
E4. Initiate and/or cooperate in the planning and implementation of outings and activities.

F. Participation as member of CWC interdisciplinary team.
F1. Seek and/or accept assistance from and cooperate with more experienced staff and specialists.
F2. Utilize written tools of communication, for example daybook and resident's record. Record pertinent information; perform follow-up charting on goals.
F3. Contribute to individual program plans. Write assessments, goals, and approaches.
F4. Participate in annual review meetings and conferences.
F5. Maintain good interpersonal relations with co-workers.
F6. Interact appropriately with parents, volunteers, and other visitors.

S35. In addition to the duties outlined in the position description for Aide 1s, the Aides are responsible for 6 patients on a unit containing approximately 45-50 patients. It is the Aides' responsibility to assist in keeping the patients comfortable, repositioning patients on beds and chairs and on the floor, moving patients from one place to another, supervising the patients interpersonally, changing diapers and giving baths. The Aide, at least once a day, would make a report on the patient's chart concerning the patient's behavior that day. It is the Aide's responsibility to improve the quality of the patient's hygiene. At the end of the month, the Aide writes a monthly summary report of the daily entries.

NS36. The duties and responsibilities of an LPN at CWC include the following:

A. Administration of medication to residents and associated procedures with documentation.
   A1. Give oral medication as prescribed by the physician.
   A2. Implement physician's orders under the direct supervision of the professional nurse.
   A3. Order supplies from Pharmacy and Central Supply.
   A4. Maintain medication area and equipment.

B. Performance of and/or assistance with therapeutic treatments for selected residents.

C. Performance and/or assistance with nursing care to selected residents.
   C1. Give direct care, attending to physical, emotional and social needs.
   C2. Assist the professional nurse in giving direct care to residents with complex nursing needs.
   C3. Assist the group parent, parent, or volunteer in meeting individual needs of the resident.

D. Observation and reporting of behavior including symptoms of illness or dysfunction.
   D1. Observe, report, and record pertinent observations concerning resident needs.
   D2. Contribute to the preparation, implementation and continuing evaluation of the plan of care for each resident.

E. Maintenance of and participation in unit programs and services.
   E1. Practice principles of good interpersonal relationships to promote a unit environment conducive to quality resident care.
   E2. Contribute to unit program planning and development.
   E3. Enforce unit health and safety programs to promote the welfare of residents and personnel reporting environmental problems.
   E4. Help with orientation and continuing development of unit staff.
   E5. Make recommendations in the development of policies and procedures to improve nursing care and resident living programs.
   E6. Attend and contribute to inservice programs, staff meetings, and resident care conferences.
   E7. Maintain nursing skills and understanding of developmental care concepts according to CWC standards and procedures; promote high standards and uphold resident's rights.

F. Specific duties of the individual position
   Depending on the type of unit programs, the needs of the residents, and abilities of the individual LPN, specific duties assigned by the Unit Coordinator/delegate may include the following:

F1. Assist with administrative responsibilities.
F2. Perform routine clerical tasks.
F3. Assist with planning for and expenditure of budgetary resources.
F4. Encourage active participation of unit staff in programs, cooperating with interdisciplinary efforts.
F5. Assist with special projects.

S37. In addition to the responsibilities outlined in the position description for an LPN position, LPN's responsibilities on a unit included making up, distributing and handing out medications, seeing to it that medical treatments, dressing changes and dressing treatments were done correctly, charting the medications, medical conditions and illnesses for all the patients on the unit.

S38. Prior to the interview in August, 1985, complainant did not think that CWC was discriminating against blacks. After the interview in August, 1985, complainant did believe that CWC was discriminating against blacks because of the question he was asked in the interview regarding how he felt about supervising white females or whether he was comfortable supervising white females, and because only 6 out of 1,025 employes at Central Wisconsin Center were black.

S39. The successful Aide 4 candidate was to share offices with Ms. Young.

CONCLUSIONS OF LAW

1. This Commission has jurisdiction over complainant's claim of discrimination under §§230.45(1)(b) and 111.375(2), Wis. Stats.

2. Complainant has the burden of proving by a preponderance of the evidence that respondent violated the Fair Employment Act because of its failure to hire him for the position in question.

3. Complainant failed to prove under the McDonnell Douglas[2] format

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[2] McDonnell Douglas v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668, 5 FEP Cases 965 (1973).

that respondent's articulated reasons for the hiring decision were pretextual. However, he did establish through direct evidence that race played a motivating factor in the hiring decision, and therefore respondent has the burden of proving by a preponderance of the evidence that it would have reached the same hiring decision in the absence of any racial factor.

4. Respondent having sustained the aforesaid burden, it is concluded respondent did not violate the Fair Employment Act with regard to complainant's not being hired as an Aide IV in 1985.

DISCUSSION

In analyzing the indirect evidence of discrimination in a case such as the instant one, the Commission generally uses the method of analysis set forth in McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668, 5 FEP Cases 965 (1973), and its progeny, to determine the merits of the complainant's charge. In this regard, the Commission notes that, under the Wisconsin Fair Employment Act, the initial burden is on the complainant to establish the existence of a prima facie case of discrimination. The employer may rebut this prima facie case by articulating legitimate, non-discriminatory reasons for the actions taken which the complainant may, in turn, attempt to show were in fact pretexts for discrimination.

A prima facie case is established in a case such as the instant one by a showing that the complainant is a member of a protected class; that he applied and was qualified for a job for which the employer was seeking applicants; that, despite his qualifications, he was rejected; and that the employer continued to seek applicants, or hired another person not in the same protected category.

There does not appear to be any dispute in the instant case that complainant has established a prima facie case; he is a member of a

protected class on the basis of his race: black; as a certified candidate for the subject position, complainant is presumed to be qualified for the position; complainant was not hired for the subject position; and a candidate of a different race was hired for the subject position.

The burden then shifts to respondent to articulate legitimate, non-discriminatory reasons for its actions. Respondent has offered in this regard that the successful candidate, Ms. Maly, had 12 years of relevant supervisory experience while complainant had none; had performed better on the interview than complainant; and was an LPN and complainant was not. On their face, these reasons are both legitimate and non-discriminatory.

The burden then shifts to complainant to demonstrate that these reasons are a pretext for discrimination.

Complainant argues in this regard that his 40 college credits in sociology and psychology and the more direct patient care experience he acquired as an Aide 1 made him a more qualified candidate for the position than Ms. Maly. The record clearly does not support complainant's argument. Furthermore, for the reasons set forth below the Commission cannot agree with the statement in the proposed decision that: "Whether or not complainant was, in fact, more qualified than Ms. Maly cannot be determined by the record. No rigorous information about the Aide 4 position or the credentials of complainant or Ms. Maly was presented by the parties...." p. 11.

The Aide 4 position at issue here involves the supervision of a staff involved in direct care of medically fragile, multiply handicapped patients. It is uncontested that Ms. Young understood that Ms. Maly had 12 years of experience supervising staff involved in direct nursing care of nursing home patients and three years of experience providing direct nursing care to patients at CWC. Complainant had one year of experience

providing direct care of patients as an Aide 1 at CWC and an equivalent institution and no supervisory experience. It is obvious that Ms. Young could well conclude that Ms. Maly had substantially more relevant experience than complainant both as a supervisor and as a provider of direct patient care in a health care setting. By no stretch of the imagination is one year of work as an Aide equivalent to 15 years of work as an LPN, 12 of those years as a supervisor and 3 of those years at CWC. Even though the staff to be supervised by the Aide 4 position would not be involved in providing the same type of care provided by LPNs at a nursing home or at CWC, the Aides supervised by this position work as a team with the LPNs on the unit and there is an overlap of their duties and the knowledge that is required of each. Finally, complainant failed to show how the 40 college credits he earned in sociology and psychology are directly relevant to the work performed by the Aide 4 position.

Complainant further argues that Ms. Young's reliance on Ms. Maly's licensure and training as an LPN in making the hiring recommendation demonstrates pretext in view of the fact that licensure and training as an LPN is not required of Aide 4s and there are Aide 4s who are not LPNs. However, Ms. Young never suggested that being an LPN was a requirement for the job. It was her opinion, however, that it was desirable for a candidate to have such training in view of the nature of the health care problems of the patients on her units, in view of the close working relationship between the LPNS on the unit and the Aides who would be supervised by the Aide 4, and in view of the types of decisions regarding patient care that the Aide 4 would be required to make. In view of the health care problems of the patients on the subject unit, it is difficult to imagine how a nursing background could not be considered an asset. The Commission

concludes that complainant has failed to demonstrate pretext in this regard.

Complainant also introduced employment statistics in an effort to show pretext. By and large, such statistics indicate how many black persons were employed at CWC during particular periods of time. It is not possible for the Commission to draw any meaningful conclusions from such statistics in view of the fact that there is no evidence regarding how many opportunities respondent had to appoint blacks to positions at CWC during such periods. Complainant has failed to demonstrate pretext in this regard.

Complainant contends that there is direct evidence of race discrimination in regard to the subject hire. It has been stipulated by the parties that Ms. Young asked complainant curing the course of his interview "Are you comfortable supervising white female workers?" or "How do you feel about supervising white female workers?" In view of the fact that the record does not show that Ms. Young asked a similar question of the other male candidates for the subject position (there were no other black candidates) and that the record shows that Ms. Young was unable to provide an explanation for asking such a question of complainant, the Commission concludes that the question is probative of a discriminatory animus, and that race discrimination played a role in the selection process. Therefore, we have what is sometimes referred to as a "mixed-motive" case, since although respondent had a legitimate, non-discriminatory basis for preferring Ms. Maly over complainant, the hiring decision was motivated in part by a discriminatory reason.

Respondent has urged the Commission to abandon the "in-part" test of causation it has followed at least since its 1982 decision of Smith v. UW, No. 79-PC-ER-95. That case involved a claim of retaliation with respect to

hire. The Commission held complainant could prevail and establish liability by showing that the employer's decision was motivated even in part by discriminatory motives. The Commission rejected the argument that in a mixed motive case the complainant had to establish that "but for" the discriminatory element the complainant would have been hired.

In arguing for overruling Smith, respondent points to certain language in the declaration of policy in the Fair Employment Act at 111.31, Stats.:

> 111.31 Declaration of policy. (1) The legislature finds that the practice of unfair discrimination in employment against properly qualified individuals by reason of their age, race, creed, color, handicap, marital status, sex, national origin, ancestry, sexual orientation, arrest record, conviction record or membership in the national guard, state defense force or any other reserve component of the military forces of the United States or this state substantially and adversely affects the general welfare of the state. Employers, labor organizations, employment agencies and licensing agencies which deny employment opportunities and discriminate in employment against properly qualified individuals solely because of their age, race, creed, color, handicap, marital status, sex, national origin, ancestry, sexual orientation, arrest record, conviction record or membership in the national guard, state defense force or any other reserve component of the military forces of the United States of this state deprive those individuals of the earnings which are necessary to maintain a just and decent standard of living.
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> (2) It is the intent of the legislature to protect by law the rights of all individuals to obtain gainful employment and to enjoy privileges free from employment discrimination because of age, race, creed, color, handicap, marital status, sex, national origin, ancestry, sexual orientation, arrest record, conviction record of membership in the national guard, state defense force or any other reserve component of the military forces of the United States or this state, and to encourage the full, nondiscriminatory utilization of the productive resources of the state to the benefit of the state, the family and all the people of the state. It is the intent of the legislature in promulgating this subchapter to encourage employers to evaluate an employe or applicant for employment based upon the employe's or applicant's individual qualifications

> rather than upon a particular class to which the individual may belong.
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> (3) In the interpretation and application of this subchapter, and otherwise, it is declared to be the public policy of the state to encourage and foster to the fullest extent practicable the employment of all properly qualified individuals regardless of age, race, creed, color, handicap, marital status, sex, national origin, ancestry, sexual orientation, arrest record, conviction record or membership in the national guard, state defense force or any other reserve component of the military forces of the United States or this state. Nothing in this subsection requires an affirmative action program to correct an imbalance in the work force. This subchapter shall be liberally construed for the accomplishment of this purpose (emphasis added)

Respondent argues inter alia as follows:

> ...Wisconsin's Fair Employment statute explicitly states that the discrimination with which it is concerned is that which denies employment SOLELY because of race, etc. In other words, in mixed motive cases, as in this case where the department has shown legitimate non-discriminatory reasons for Mr. Jenkins' non-promotion, the complainant must show that the "sole reason" for the negative job action against Mr. Jenkins, was because of his race..." Objections to proposed decision, p. 11.

The word "solely" is used in one place among several statements of policy underlying the FEA. It is nowhere to be found in the operative sections of the law, see, e.g., §111.321, Stats.:

> ...no employer... may engage in any act of employment discrimination as specified in §111.322 against any individual on the basis of age, race, creed, color....

If the prohibition against discrimination were restricted to situations where the only basis for the employment action was a discriminatory one, the FEA would be severely weakened, since in many if not most cases an employer bent on discrimination can find at least a make-weight legitimate basis for its action. This point was recognized even by a source on which respondent relies, the dissent in Watertown Public Library v. Labor and

Industry Review Commission, No. 86-0884 (1987), an unpublished decision of the Court of Appeals, at note 1: "A 'sole factor' standard would render the WFEA wholly nugatory...."

The word "solely" means not only "exclusively" or "only," but also "merely." WEBSTER'S NEW WORLD DICTIONARY (Second College Edition, 1972), p. 1355. By the use of the word "solely" in §111.31(1), Stats., the legislature underscored its disapproval from a policy standpoint of employers relying on factors that should be irrelevant in employment decisions, such as race, creed, etc. This was not meant to imply that reliance on such factors was all right as long as those factors weren't 100% determinative of the decision.

Respondent argues in the alternative: "...the federal law has determined that the complainant must show that 'but for' the discriminatory act of the employer, the applicant would have received the job promotion." Objections to proposed decision, p. 11. Subsequent to the filing of these objections, the U.S. Supreme Court on May 1, 1989, announced a decision which has clarified federal law on this subject.

Price Waterhouse v. Hopkins, 57 U.S. Law Week 4469 (5/1/89), involved a Title VII proceeding in which the trial court found that the plaintiff had been passed over for partnership in part because of legitimate, non-pretextual concerns about her interpersonal skills, and in part because of her sex "by consciously giving credence and effect to partners' comments that resulted from sex stereotyping." 57 LW at 4472. The District Court therefore held that Price Waterhouse had unlawfully discriminated but could avoid the imposition of equitable relief by proving by clear and convincing evidence that it would have made the same decision even if there had been

no discriminatory aspect to the transaction, but determined it had not met this burden.

The Court of Appeals for the District of Columbia Circuit affirmed the District Court except to the extent that it held that the employer not only could avoid equitable relief, but also could avoid liability altogether by proving by clear and convincing evidence that it would have reached the same conclusion in the absence of an improper motive.

The Supreme Court plurality (Justices Brennan, Marshall, Blackman and Stevens) set forth the conflicting points of view on causation as follows:

> The specification of the standard of causation under Title VII is a decision about the kind of conduct that violates that statute. According to Price Waterhouse, an employer violates Title VII only if it gives decisive consideration to an employee's gender, race, national origin, or religion in making a decision that affects that employee. On Price Waterhouse's theory, even if a plaintiff shows that her gender played a part in an employment decision, it is still her burden to show that the decision would have been different if the employer had not discriminated. In Hopkins' view, on the other hand, an employer violates the statute whenever it allows one of these attributes to play any part in an employment decision. Once a plaintiff shows that this occurred, according to Hopkins, the employer's proof that it would have made the same decision in the absence of discrimination can serve to limit equitable relief but not to avoid a finding of liability.[2] We conclude that, as often happens, the truth lies somewhere in-between.

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[2]This question has, to say the least, left the Circuits in disarray. The Third, Fourth, Fifth, and Seventh Circuits require a plaintiff challenging an adverse employment decision to show that, but for her gender (or race or religion or national origin), the decision would have been in her favor. See, e.g. Bellissimo v. Westinghouse Elec. Corp., 764 F. 2d 175, 179 (CA3 1985), cert. denied, 475 U.S. 1035 (1986); Ross v. Communications Satellite Corp., 759 F. 2d 355, 365-366 (CA4 1985); Peters v. City of Shreveport, 818 F. 2d 1148, 1161 (CA5 1987); McQuillen v. Wisconsin Education Assn. Council, 830 F. 2d 659, 664-665 (CA7 1987). The First, Second, Sixth, and Eleventh

> Circuits, on the other hand, hold that once the plaintiff has shown that a discriminatory motive was a "substantial" or "motivating" factor in an employment decision, the employer may avoid a finding of liability only by proving that it would have made the same decision even in the absence of discrimination. These courts have either specified that the employer must prove its case by a preponderance of the evidence or have not mentioned the proper standard of proof. See, e.g. Fields v. Clark University, 817 F. 2d 931, 936-937 (CA1 1987) ("motivating factor"); Berl v. Westchester County, 849 F. 2d 712, 714-715 (CA2 1988) ("substantial part"); Terbovitz v. Fiscal Court of Adair County, Ky., 825 F. 2d 111, 115 (CA6 1987) ('motivating factor"); Bell v. Birmingham Linen Service, 715 F. 2d 1552, 1557 (CA11 1983). The Court of Appeals for the D.C. Circuit, as shown in this case, follows the same rule except that it requires that the employer's proof be clear and convincing rather than merely preponderant. 263 U.S. App. D. C. 321, 333-334, 825 F. 2d 458, 470-471 (1987); see also Toney v. Block, 227 U.S. App. D. C. 273, 275, 705 F. 2d 1364, 1366 (1983) (Scalia, J.) (it would be "destructive of the purposes of [Title VII] to require the plaintiff to establish... the difficult hypothetical proposition that, had there been no discrimination, the employment decision would have been made in his favor"). The Court of Appeals for the Ninth Circuit also requires clear and convincing proof, but it goes further by holding that a Title VII violation is made out as soon as the plaintiff shows that an impermissible motivation played a part in an employment decision -- at which point the employer may avoid reinstatement and an award of backpay by proving that it would have made the same decision in the absence of the unlawful motive. See, e.g., Fadhl v. City and County of San Francisco, 741 F. 2d 1163, 1165-1166 (CA9 1984) Kennedy, J.) ("significant factor"). Last, the Court of Appeals for the Eighth Circuit draws the same distinction as the Ninth between the liability and remedial phases of Title VII litigation, but requires only a preponderance of the evidence from the employer. See, e.g., Bibbs v. Block, 778 F. 2d 1318, 1320-1324 (CA8 1985) (en banc) ("discernible factor"). 57 LW at 4472.

The Court went on to hold that "...once a plaintiff in a Title VII case shows that gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving [by a preponderance of the evidence] that it would have made the same decision even if it had not allowed gender to play such a role...." id. at 4474. The Court

explicitly rejected plaintiff's argument that once she showed that gender played a motivating factor in the employment decision, "she was entitled to a finding that Price Waterhouse had discriminated against her on the basis of sex; as a consequence, she says, the partnership's proof could only limit the relief she received...." id. at n. 10.

It is clear from the foregoing that the Court has rejected under Title VII the "in part" test of causation on which this Commission has relied in administrative proceedings under the Wisconsin FEA. While there is no ipso facto incorporation of parallel federal law into the Wisconsin FEA, see American Motors Corp. v. ILHR Dept., 101 Wis. 2d 337, 353, 305 N.W. 2d 62 (1981), both the Wisconsin courts and this Commission have relied heavily on interpretations of Title VII by the federal courts for guidance in interpreting the Wisconsin FEA. Anderson v. Labor and Industry Review Commission, 111 Wis. 2d 245, 254, 330 N.W. 2d 594 (1983); Hiegel v. LIRC, 121 Wis. 2d 205, 216, 359 N.W. 2d 405 (Ct. App. 1984); Paul v. DHSS, 82-0156-PC, 82-PC-ER-69 (Wis. Pers. Commn. 1986). In determining the weight to be accorded the U.S. Supreme Court's analysis of mixed-motive causation under Title VII in Price Waterhouse, it has to be particularly significant that in a case that produced four separate opinions, not one justice supported the "in part" test of causation urged by the plaintiff (and to which this Commission has adhered) -- i.e., that if an improper basis played any causative role in the employment transaction, the employer is liable, but may limit damages by showing that the action would have occurred even without the illegal taint. Furthermore, the consensus of the Court is as a practical matter not that much different from the "in part" test. The plurality opinion recognizes that Title VII is meant to prohibit any consideration of a prohibited basis in an employment transaction, but

allows the employer in a mixed motive case to avoid liability by establishing, as an affirmative defense, that it would have reached the same result even in the absence of the improper motive:

> Congress' intent to forbid employers to take gender into account in making employment decisions appears on the face of the statute... gender must be irrelevant to employment decisions.... Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations. When, therefore, an employer considers both gender and legitimate factors at the time of making a decision, that decision was "because of" sex and the other, legitimate considerations -- even if we may say later, in the context of litigation, that the decision would have been the same if gender had not been taken into account.
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> * * *
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> To say that an employer may not take gender into account is not, however, the end of the matter, for that describes only one aspect of Title VII. The other important aspect of the statute is its preservation of an employer's remaining freedom of choice. We conclude that the preservation of this freedom means that an employer shall not be liable if it can prove that, even if it had not taken gender into account, it would have come to the same decision regarding a particular person....
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> * * *
>
> ...once a plaintiff in a Title VII case shows that gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed gender to play such a role... the employer's burden is most appropriately deemed an affirmative defense: the plaintiff must persuade the factfinder on one point, and then the employer, if it wishes to prevail, must persuade it on another. 57 LW at 4472-4474 (emphasis added) (footnotes omitted).

There is not a great deal of difference between an approach in mixed-motive cases that says the employer acted contrary to the statute by considering gender but can avoid liability by proving, as an affirmative defense, that it would have reached the same employment decision in the absence of

consideration of gender (Price Waterhouse test) and an approach that says the employer acted contrary to the statute by considering gender and must be considered liable, but can avoid the imposition of certain remedies (back pay, reinstatement, etc.) if it can show that it would have reached the same decision in the absence of consideration of gender ("in part" test).

For these reasons, the Commission is of the opinion that it must abandon the "in-part" test it originally espoused in Smith v. UW, supra, and follow the causation test set forth in Price Waterhouse.

Applying that test to the instant case, since complainant established that race played a part in the hiring decision, respondent has the burden of proving by a preponderance of the evidence that the hiring decision would have been the same even if race had not played such a role. The Commission concludes that respondent has satisfied that burden. Ms. Maly was substantially better qualified for this position than complainant, in light of her extensive supervisory experience and background as an LPN, and would have been hired in the absence of any racial element in the hiring decision.

While the bottom line on this case under the Price Waterhouse approach is that there was no violation of the Fair Employment Act, the Commission wishes to emphasize that it does not condone the presence of a racial element, regardless of how causally significant or insignificant its role, in any hiring decision. As the plurality in Price Waterhouse stated:

> "Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations. When, therefore, an employer considers both gender and legitimate factors at the time of making a decision, that decision was 'because of' sex and the other, legitimate considerations -- even if we may say later, in the context of litigation, that the decision would have been the same if gender had not been taken into account."

Similarly, the Wisconsin Fair Employment Act was meant to condemn any racial element in a hiring decision, and the racial element in this case must not be condoned, notwithstanding respondent has avoided liability because of the causation calculation.

ORDER

Based on the conclusion that respondent did not violate the Fair Employment Act with regard to not hiring complainant as an Aide IV, this complaint is dismissed.

Dated: June 14 ,1989 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DRM/LRM/AJT:jmf
JMF04/7

GERALD F. HODDINOTT, Commissioner

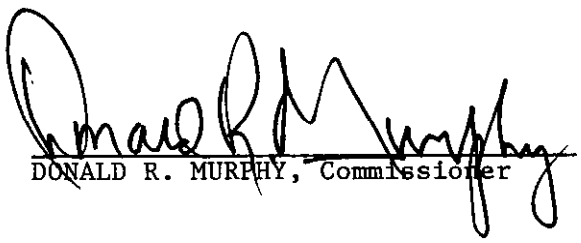
CONCURRING OPINION

I agree with the Commission's analysis and interpretation of Price Waterhouse. I also agree with the Commission's application of Price Waterhouse to the facts in this case and its conclusion that respondent was not liable under the Fair Employment Act.

Under the declared policy of the Fair Employment Act, race has no place as a consideration in employment decisions. As Justice O'Connor noted in Price Waterhouse, the Supreme Court has long recognized that the inclusion of race as a consideration in a decisional process harms both society and the individual.

This commission, in deciding respondent was not liable, found that race was a factor in the hiring process. Clearly, the conduct of respondent was against both state and federal policy.

I believe the legislature, in adopting the Wisconsin Fair Employment Act, did not intend to tolerate the kind of conduct exhibited by respondent. However, under Price Waterhouse, a cease-and-desist order appears inappropriate. Recent Title VII case decisions are eroding hard-won equal protection laws. Even though I agree with the application of the Price Waterhouse case in these particular circumstances of the instant case, I believe Wisconsin courts and administrative bodies, in light of Wisconsin's statutorily declared fair employment policy, should reconsider their continuing deference to such decisions.



DONALD R. MURPHY, Commissioner

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