

STATE OF WISCONSIN

PERSONNEL COMMISSION

 PATRICIA G. CHANDLER,
 Complainant,
 v.
 President, UNIVERSITY OF
 WISCONSIN SYSTEM (La Crosse),
 Respondent.
 Case Nos. 87-0124-PC-ER
 88-0009-PC-ER

DECISION
 AND
 ORDER
 ON
 PROBABLE
 CAUSE

NATURE OF THE CASE

This matter involves two charges of discrimination. No. 87-0124-PC-ER alleges discrimination on the basis of age and sex with regard to certain positions in the English Department at the University of Wisconsin - La Crosse (UWLC). No. 88-0009-PC-ER alleges discrimination on the basis of retaliation for having filed the first charge in connection with denial of further consideration for employment. This matter is before the Commission following an appeal of an initial determination of "no probable cause."

FINDINGS OF FACT

1. Complainant is female and was 42 years of age at the time she first applied for employment with the UWLC English Department. Her date of birth is August 9, 1944.

2. In September of 1986, the UWLC English Department promulgated a position vacancy announcement which included the following:

P O S I T I O N D E S C R I P T I O N

Three tenure-track positions at the rank of Assistant Professor for 1987-88. Teaching responsibilities in composition at the freshman

and/or advanced levels, including courses in technical, business, or professional writing.

MINIMUM REQUIREMENTS

Doctorate. Experience preferred.

Respondent's Exhibit 3

3. By letter dated October 4, 1986, to Dr. Michael J. Coulombe, Chair, English Department, complainant applied for these positions. Her resume was attached. See Respondent's Exhibit 9.

4. There were, altogether, 85 applicants for these positions, of whom 35 were female.

5. The applications were screened by the English Department Executive Committee acting as a "search and screen" committee. The committee included one female and six male faculty members.

6. The committee evaluated the candidates using the following criteria:

a) Possession of a doctorate or anticipated possession by the appointment date;

b) area of degree with added value placed on teaching composition;

c) teaching experience with added value placed on experience in teaching composition.

d) Publications were considered as an added attribute or "plus," although not a criterion per se.

7. Subsequent to the initial announcement referred to in Finding #2, three additional positions -- of a similar nature -- became vacant and were filled using a similar process and the same pool of candidates. Complainant was considered for these three additional positions.

8. The six candidates who were hired for these positions are as follows:

a) Diane Cannon, female, age 35 at time of hire. She had a Ph.D. in English and her teaching experience included, at the university level, two years as an Associate Instructor and four years as a teaching assistant, which, pursuant to respondent's standard policy or practice, was counted as two full years of experience. She also had four years of pre-university level experience, which, pursuant to respondent's policy as to such experience, were counted as full years. Therefore, she was given eight years of teaching experience. Her university teaching experience included extensive experience in teaching composition. Her letters of recommendation were excellent.

b) Daniel J. Voiku, male, age 44. He had a Ph.D. in English and a total of 12 years of university-level teaching experience, including substantial experience in teaching composition, and excellent recommendations. He was in his first-year as a lecturer at UWLC.

c) Thomas Pribek, male, age 32. He was expecting a Ph.D. in English and had received it by the time he was hired. He had a total of four and one-half years teaching experience at the university level, including the last three at UWLC with substantial experience teaching composition, and excellent recommendations. He also had several publications.

d) Mary D. McConahay, female, age 37. She was expecting her Ph.D. in English in December 1986. She had a total of eight years teaching experience of which three years were at the secondary level, including some experience teaching rhetoric. She had several publications and excellent recommendations.

e) Carla J. Graham, female, age 42. She had a Ph.D. in English. She had a total of five years teaching at the university level which included extensive experience teaching composition. Her recommendations were excellent.

f) Lola L. Hill, female, age 57. She was expecting to and did receive her Ph.D. in English Composition in May or June 1987. She had a total of 11 years of teaching experience including university level experience, including composition, as a graduate assistant from 1980 and as a lecturer from 1978-1980. Her recommendations were excellent.

9. All of the foregoing candidates had been teaching for at least the several years preceding their application. Complainant had been out of teaching since 1976 (see finding 11, below). The committee considered that this made complainant a less attractive candidate than the successful candidates, in part because there had been recent developments in the teaching of composition and rhetoric.

10. The last three of the foregoing candidates (McConahay, Graham, and Hill) were hired after complainant had filed a grievance with the UWLC affirmative action office on April 2, 1987, alleging sex discrimination with regard to her not being interviewed for the initial positions that were filled. This grievance was investigated by Dr. Julie A. Sichler, Director, Affirmative Action Office, who determined that no sex discrimination had occurred.

11. Complainant had a Ph.D. in Linguistics. While a graduate assistant from 1966-1970, she taught composition courses for six to nine hours per semester, as well as during summer sessions. She also had other university level teaching experience amounting to four years, for a total of six years teaching experience. She had no teaching experience after

February, 1976. Due at least in part to the significant lapse of time since her latest experience of teaching, her letters of recommendation, which were from people who had worked with complainant many years before, tended to be relatively uninformative.

12. Complainant's letter of application to Dr. Coulombe, Respondent's Exhibit 9, included the following:

It is possible for me to get letters of recommendation from any of the institutions which have employed me, but, unfortunately, because of attrition, letters from my direct supervisors may not be possible in some cases. Perhaps you would not think such information very important, because, it seems to me, that my not having taught for so long may be the more salient factor in respect to any consideration of me for employment. In point of fact, I have a few reservations about that latter myself. When I began teaching, so long ago now, I had a difficulty with "stage fright," and I have had enough time away to re-develop that problem.

13. Respondent made the same request to all candidates for information about their courses taken and grades. It is not clear from the record exactly how respondent described what was requested, but the record does not support a finding that complainant was treated differently than other candidates by being required to submit an official transcript while other candidates were allowed to submit excerpts or summaries of their coursework.

14. Complainant was never ranked in the top ten applicants by the search and screen committee, and according to respondent's policy she was not given an interview.

15. On September 14, 1987, complainant filed a charge of age and sex discrimination (No. 87-0124-PC-ER) with this Commission.

16. In October 1987, complainant called Dr. Coulombe following her receipt of a copy of a letter written by respondent's counsel (apparently entering his appearance before this Commission) in which he requested that she direct all communications with the English Department concerning this

case through him. The parties have different versions of what was said on that occasion. Complainant contends she was calling to inquire as to how she could apply for further vacancies in light of the aforesaid letter, that she told Dr. Coulombe she did want to apply for such vacancies, and that Dr. Coulombe said nothing about a need for her to submit a further letter to keep her application current for subsequent vacancies, but told her that no further action on her part was necessary. Dr. Coulombe contends that complainant advised him of the fact that she had filed her complaint with this Commission, they discussed some of her concerns about the staffing process, and that she said that the announcement for vacancies for the 1988-89 academic year with the stated requirement of a Ph.D. in English was designed specifically to exclude her, with her Ph.D. in linguistics. Dr. Coulombe stated that he did not interpret her comments about the new positions as indicating an interest in applying for them. The Commission finds that complainant did not express an interest in being considered for the new positions and that Dr. Coulombe did not interpret complainant's remarks as an expression of interest in these new positions.

17. Subsequently, Sharon Jesse and Richard Sullivan were hired for these newly announced positions. They had applied as part of the original (1986-1987) recruitment, and submitted additional letters of interest following the announcements of the additional vacancies. Because complainant had not submitted a letter in response to the announcement of these additional vacancies, she was never considered for them, in keeping with respondent's policy of not automatically advancing applications from year to year.

18. In a letter dated January 15, 1988, to Dr. Coulombe, complainant stated that she noted there were two further new positions available and:

"In that the status of available (or advertised) employment in the English Department is confusing to an outsider, I would like to repeat what I told you by telephone in early November, namely, I am still seeking employment and I have submitted to you all the materials in regard to documentation." Respondent's Exhibit 23.

19. On January 22, 1988, complainant signed her second charge of discrimination. It was filed January 26, 1988, and alleges that as a result of having filed her earlier charge of discrimination, "I am now denied any consideration for employment ... The department is now seeking additional teachers of English composition. I am being denied competition for employment, because of the University's unfairly prejudicial bias stemming from my earlier, and unresolved, charge of discrimination."

20. By letter of January 25, 1988 (Respondent's Exhibit 24), Dr. Coulombe stated, inter alia:

"As a matter of policy, we don't move applications forward from one year to the next unless we are specifically requested to do so in writing by the applicant. We will treat your letter of January 15, 1988, as such a request and will consider materials which you submitted ... in October 1986, as we evaluate candidates for the positions which are currently being advertised...."

21. Complainant was subsequently considered for employment in the two most recent positions. She was not evaluated high enough by the committee to qualify for an interview. Respondent hired Lolita Pandit and Patricia Radecki.

CONCLUSIONS OF LAW

1. This case is properly before the Commission for a decision on probable cause pursuant to §230.45(1)(b), Wis. Statutes; §§ PC 2.07(2), 1.02(1b), Wis. Adm. Code.

2. Complainant has the burden of proof to establish there is probable cause to believe respondent discriminated against her on the basis of age and/or sex in violation of the FEA (Fair Employment Act) (Subch. II, Ch. 111, Wis. Statutes) with regard to its failure to hire her for the

positions in question and/or on the basis of retaliation with regard to denying her any consideration for employment.

3. Complainant having failed to satisfy her burden, it is concluded there is no probable cause to believe respondent discriminated against her in violation of the FEA on the basis of age and/or sex with regard to its failure to hire her for the positions in question and/or with regard to denying her any consideration for employment.

DISCUSSION

AGE/SEX CHARGE (87-0124-PC-ER)

In cases of this nature, the Commission normally uses the method of analysis set forth in McDonnell Douglas v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 658, 5 FEP Cases 965 (1973), and its progeny, obviously in the context of a probable cause determination as opposed to a decision on the merits.¹

Complainant must establish a prima facie case. Respondent then must articulate a legitimate, non-discriminatory rationale for its hiring decision. Complainant then must attempt to show respondent's articulated rationale is pretextual.

The classic elements of a prima facie failure to hire case are as follows:

- 1) Complainant is a member of a protected class;
- 2) Complainant applied and was qualified for a job for which the employer was seeking applicants;

¹ In a probable cause proceeding the complainant does not have to prove that discrimination actually occurred but rather that it is probable that discrimination occurred. See Winters v. DOT, Wis. Pers. Commn. Nos. 84-0003-PC-ER, 84-0198-PC-ER (9/4/86).

3) Complainant's application was rejected despite being qualified;

4) The employer either continued to seek applicants or hired another person not in the protected category, McDonnell Douglas v. Green.

In the instant case, complainant is in two protected categories, as a female age 40 or over. She applied for a job posting for which she met the minimum qualifications, and her application was rejected. It is somewhat questionable whether the fourth element of a prima facie case is present. Of six vacancies which were filled, four were filled by females and two were filled by males. Three of the six were in the protected age category (40 or over) and the average age of those hired was 41.2. Complainant contends in effect that respondent hired the last three candidates, who were female and two of whom were in the protected age category, in response to her internal grievance charging sex discrimination, but there is no evidence to support this theory. In any event, if one focuses on the individual positions, there is a prima facie case for gender as to two (Voiku and Pribek) and as to age as to three (Cannon, Pribek, McConahay), and a prima facie case will be assumed as to all positions.

Respondent has satisfied its burden of articulating a legitimate, non-discriminatory rationale for its hiring, based on a comparison of the credentials of those hired with complainant. There is a reasonable basis for respondent's preference for the six candidates hired primarily based on more relevant degrees, more recent experience teaching composition, for the most part more teaching experience, and better recommendations.

Turning to the question of pretext, complainant makes a number of arguments.

Complainant cites the makeup of the workforce in the UWLC English Department as evidence of what might be called an ingrained discriminatory bias against women and older persons. This data has little if any probative value because complainant has not provided relevant statistical evidence concerning the makeup of the qualified, available labor pool of university level English teachers. The fact that an employer has a relatively small percentage of females (or other protected group) in a particular job category or level is not significant unless that percentage is less than the availability of that group in the qualified, available labor pool. See, e.g., Hazelwood School District v. U.S., 433 U.S. 298, 308, 53 L. Ed. 2d 768, 777, 97 S. Ct. 2736, n. 13 (1977).

Complainant contends she was treated differently compared to other candidates since she was required to supply a transcript of coursework while some of the other candidates were not, but rather provided truncated versions that allowed them to emphasize the most positive aspects of their academic records. Dr. Coulombe testified that no candidates were required to submit full, official transcripts, and that all candidates were sent the same letter with regard to what had to be submitted² -- i.e., a list of courses taken at the graduate level. Based on this record, it cannot be concluded that complainant was treated differently than the other candidates.

Another example of alleged unequal treatment concerns the fact that some of the successful candidates, unlike complainant, lacked the requisite Ph.D. at the time of application. However, it was not unusual for respondent to decide to hire candidates on the basis that their doctoral degrees

² Neither party submitted a copy of this letter in evidence.

were expected. The fact that some candidates were selected without their Ph.D.'s in hand does not show any unequal treatment of complainant.

Complainant argued that because the gap in her teaching experience worked against her in the hiring process, this ipso facto meant that age and sex considerations were involved in the hiring process:

" ... Dr. Sichler herself stated that women who have not been in the work force for some time can be discriminated against on this basis alone; namely, our having been out of the work force for a period of time. This factor is tautologically related to age and sex." (initial posthearing brief, p. 5)

It appears incontrovertible to the Commission that respondent had a legitimate interest in preferring candidates who had no recent gaps in their teaching experience to a candidate who had not taught in ten years and who stated in her letter of application (Respondent's Exhibit 9):

It is possible for me to get letters of recommendation from any of the institutions which have employed me, but, unfortunately, because of attrition, letters from my direct supervisors may not be possible in some cases. Perhaps you would not think such information very important, because, it seems to me, that my not having taught for so long may be the more salient factor in respect to any consideration of me for employment. In point of fact, I have a few reservations about that latter myself. When I began teaching, so long ago now, I had a difficulty with "stage fright," and I have had enough time away to re-develop that problem.

The fact that complainant's "not having taught for so long" could have a relationship to her gender and age, in the sense that women and people over 40 are more likely to have been out of the work force for a period of time, does not render respondent's hiring decision age and gender-based. This factor would have legal significance only if it could be shown that respondent's preference for candidates without such significant gaps in their teaching experience actually had a disparate impact on women and/or persons 40 or more. See, e.g., Griggs v. Duke Power Co., 401 U.S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158, 3 FEP Cases 175 (1971). In order to establish a

disparate impact, it must be shown that the criterion or standard in question " ... select[s] applicants for hire in a significantly discriminatory pattern." (emphasis supplied) Dothard v. Rawlinson, 433 U.S. 321, 329, 53 L. Ed. 2d 786, 797, 97 S. Ct. 2720 (1977). There has been no such showing. Furthermore, the final results of the hiring process (4 of 6 hired were female, 3 of 6 were in the protected age category) while not dispositive on this point, see Connecticut v. Teal, 457 U.S. 440, 73 L. Ed. 2d 130, 102 S. Ct. 2525 (1982), is inconsistent with the notion of a disproportionate impact.

Complainant has raised a number of issues about the paperwork involved in the process. For example, she points out that the two forms L-1349 (applicant list) attached to Respondent's Exhibits 3 and 8 refer in the space for "Position No." to only four of the six positions in question -- i.e., to position numbers 4484, 8089, 1453, and 1417, respectively. Dr. Sichler testified that as the process progressed and additional positions opened up, reranking occurred on the original forms, and that the documents submitted as Respondent's Exhibits 3 and 8 constitute all the documents used in the selection process for the six positions. Notwithstanding that the Form L-1349 included in Respondent's Exhibit 8 was not amended to include the additional position numbers (7817 and 1256), as was the Form L-1345 in Respondent's Exhibit 3, it is apparent from Dr. Sichler's testimony and the face of the document³ that it was utilized in the ranking and hiring of candidates for all three positions.

³ It shows that both Lola Hill and Carla Graham were hired (they filled positions no. 1256 and 7817, respectively) as well as Mary McConahay, who was hired for the position originally listed on the form (1417).

Complainant also refers to Respondent's Exhibit 21, a list of "applicants for positions 1453, 8089, 4484 and 1417," which was prepared for submission to the Commission as part of the investigation, as confusing. It begins with what is referred to as the "Top 10 Candidates, alphabetical order," followed by the "Remainder of candidates, alphabetical order." With respect to the former group, only the first five are listed in alphabetical order. Dr. Sichler testified that this group also was not in rank order. The Commission agrees that this document is somewhat confusing. However, it does not appear to misrepresent anything, other than not being in alphabetical order as it purports, and the Commission simply sees no basis to attach to it the same degree of significance as does complainant.

Complainant made a number of arguments with respect to comparative qualifications, but produced little, if any, evidence that the committee's evaluation of those hired as better qualified was pretextual.

For example, complainant objected to the committee considering pre-university education in its compilation of years of teaching experience. However, Dr. Sichler testified that this was respondent's standard practice, and there was no evidence to the contrary. Therefore, regardless of what opinion complainant or anyone else may have regarding the advisability of this practice, the fact that some of the candidates were given credit for pre-university level teaching is not evidence of pretext.

Complainant argued that Thomas Pribek had less teaching experience than she, that he was given proportionately more credit for teaching assistant experience, and that his publications did not relate to the teaching of English composition. While complainant does have more teaching experience (six years versus four and one-half), Pribek's experience is completely in English, largely in composition, and is more recent. He was

given 2 years credit for work as a teaching assistant from 1980-1983, see Respondent's Exhibit 30, when pursuant to respondent's policy he should only have received 1½ years credit. Respondent never addressed this point, and it is not known why this occurred. While his publications are not in composition, it still constitutes an impressive record that gives him an obvious edge over complainant in this area. In addition, he had excellent recommendations as compared to complainant's uninformative recommendations, and a doctorate in English versus complainant's doctorate in linguistics. Finally, unlike complainant, he did not have a 10 year hiatus from teaching accompanied by an application letter in which complainant herself airs her reservations about this very issue. In conclusion, there is no basis for a determination that the committee's grounds for preferring Pribek over complainant were pretextual. Given the overall difference in qualifications, the one-half year discrepancy in the evaluation of his teaching experience does not appear that significant.

Respondent's faculty and academic staff recruitment policy (Respondent's Exhibit 2) provides at Paragraph III. C. 2., p. 3, as follows:

Search and Screen Committees must realize that academic records of women and minorities may vary from the traditional. Appointing women and minorities to Search and Screen Committees who are sensitive to alternate career paths is one mechanism for accomplishing an equitable assessment of nontraditional academic preparation. The department or unit has responsibility for careful screening and ranking of all candidates.

If the committee had failed to follow this policy, this would provide evidence of pretext. There is no basis for a conclusion that the committee violated this policy in its assessment of complainant's background. For example, there has been no showing that complainant's degree in linguistics, rather than English, could be attributed to a nontraditional academic record that is gender or age-related. The only aspect of her background

that apparently fits into that category is the ten year absence from teaching. However, it is difficult to fault the committee for considering this a negative factor in light of complainant's own concerns about this that she raised in her letter of application. The letters of recommendation could also be related to this point, since the authors' difficulties providing information about complainant were related to some extent to the passage of time. However, it is difficult to see what the committee could have done to alleviate the problem other than to arbitrarily have decided to equate complainant's recommendations to the favorable recommendations of the higher-ranked candidates. Furthermore, Dr. Coulombe testified that it was common for people to maintain files of current evaluations by obtaining letters of recommendation while they were at institutions. Complainant stated that this practice was unknown to her when she was teaching, but Dr. Coulombe testified that this was a standard practice with which he was familiar when he was at Purdue in 1968-69.

In conclusion, there is no probable cause to believe respondent discriminated against complainant on the basis of age or sex with respect to its failure to have hired her for the positions in question. The selection process resulted in hiring four out of six females and three out of six in the protected age category, including one woman who was 57. Respondent presented valid reasons for preferring the candidates actually hired over complainant, and it cannot be concluded that its reasons were pretextual.

RETALIATION CHARGE (88-0009-PC-ER)

The framework for analysis of a charge of discrimination based on retaliation is as follows:

"... The plaintiff must first establish a prima facie case of retaliation by showing that she engaged in a protected activity, that

she was thereafter subjected by her employer to adverse employment action, and that a causal link exists between the two... To show the requisite causal link, the plaintiff must present evidence sufficient to raise the inference that her protected activity was the likely reason for the adverse action... Essential to a causal link is evidence that the employer was aware that the plaintiff had engaged in the protected activity....

Once the plaintiff has established a prima facie case, the burden of production devolves upon the defendant to articulate some legitimate, non-retaliatory reason for the adverse action... The defendant need not prove the absence of retaliatory intent or motive; it simply must produce evidence sufficient to dispel the inference of retaliation raised by the plaintiff... If the defendant meets this burden, the plaintiff must then show that the asserted reason was a pretext for retaliation... The ultimate burden of persuading the court that the defendant unlawfully retaliated against her remains at all times with the plaintiff...." Cohen v. Fred Meyer, Inc., 686 F. 2d 793, 29 FEP Cases 1268, 1270 (9th Cir. 1982) (citations omitted).

Complainant established a prima facie case by showing that she filed an internal sex discrimination grievance and a complaint of age and sex discrimination with this Commission, that she was not considered for the two vacancies for academic year 1988-89 for which Sharon Jesse and Richard Sullivan were hired, that Dr. Coulombe was aware of her complaints, and that the respondent's failure to have considered her for these two positions occurred in close proximity both to the filing of the complaints and to the telephone conversation she had with Dr. Coulombe wherein she alleges she advised him she was interested in applying for these two other positions. Respondent has met its burden of "articulating a legitimate, non-retaliatory reason for the adverse action," id., by Dr. Coulombe's testimony that complainant did not submit a letter renewing her application for these two additional positions in accordance with the department's policy not to carry applications forward from year-to-year, and that he had not understood complainant to have stated in the aforesaid conversation that she wished to be considered for the two positions in question. With respect to pretext, the principals have provided different accounts of what

complainant said in that telephone call. It cannot be concluded that complainant has satisfied her burden of proof concerning this matter.

Dr. Coulombe's version of this call is supported by his notes, (Respondent's Exhibit 22), albeit they were prepared some weeks later.

Complainant argues in her reply brief at p. 14, note 28, that Dr. Coulombe's notes reflect that she stated she had written the chancellor, whereas she did not make such a statement, she never wrote the chancellor, and if "this sworn statement, presented under oath, had been true, Mr. Tallman must necessarily have presented the letter as one of his numerous exhibits." The difficulty with this argument is that it cannot be inferred no such letter exists because of the fact that it was not introduced by respondent. There was no apparent reason at the hearing for respondent to have attempted to show that such a letter had been written, since this was but an apparently minor and collateral part of the account of the conversation.

Furthermore, regardless of the actual content of this conversation, it cannot be concluded that Dr. Coulombe deliberately ignored a statement by complainant that she wanted to be considered for the new vacancies. Complainant's initial brief indirectly alludes to this at page 3:

" ... he neglected to mention two main points: the purpose of my call, and his failure to inform me that I would need to send a letter reiterating the statements as to my interest in being considered for the most recent openings in composition -- 'updating' my file, as it was termed later. Whether this was oversight, poor memory, inefficiency or deliberate misinformation, the situation casts grave doubts as to the veracity of Professor Coulombe's testimony."

In conclusion, there is no probable cause with respect to the charge that respondent denied complainant consideration for employment in retaliation for having filed her charge or charges of discrimination.

PROCEDURAL MATTERS

Complainant refers in her brief to a number of denials of requests for public information. The Commission can only deal with those matters which are of record. At the end of presenting her case at the hearing on March 8, 1989, complainant requested that the hearing be adjourned while respondent produced and she inspected certain documents enumerated in letters dated March 4, 1989, to respondent's counsel and the examiner, and which had not been received by them as of the commencement of the hearing, but copies of which were made available at the hearing. The documents sought included copies of the personnel files and publication lists for the candidates appointed, certain affirmative action forms, etc. Respondent objected to complainant's request for a recess so the discovery could occur, and the request was denied.

The initial determination in this matter (Complainant's Exhibit 3) was dated May 13, 1988. The file reflects that complainant filed an appeal on May 19, 1988, but that complainant advised that she would be out of the country until September. A prehearing conference was scheduled for November 14, 1988, but after an exchange of correspondence the parties agreed that no prehearing conference was necessary, although a conference call between the examiner and complainant was held on January 12, 1989, to discuss some procedural questions. By letter dated January 13, 1989, the examiner provided official notice of hearing on March 8-9, 1989, with the proviso that exhibits and names of witnesses had to be served and filed no later than March 3, 1989, pursuant to §PC 4.01, Wis. Adm. Code.

On February 20, 1989, complainant's husband requested by letter of even date to Dr. Sichler the names of the individuals hired for eight of the positions that figure in this case. This information was provided by

respondent's counsel, Mr. Tallman, by a letter dated February 20, 1989, wherein he reiterated his request of October 7, 1988, that she communicate with respondent's agents concerning this case through him, and stating that he had advised his clients to refer any communications to him. His letter also included the following:

I understand that you have requested access to application information, including transcripts and letters of reference, of successful applicants for positions at issue in your cases. You would like to examine those documents shortly before the hearing. The UW-La Crosse Affirmative Action Officer, Dr. Julie Sichler, is the custodian of files containing that information. I am able to meet with you in Dr. Sichler's office, 136 Main Hall, on the university campus mid-afternoon, Tuesday, March 7. Kindly advise me of a time that afternoon when you can appear at her office to inspect the documents.

Finally, he advised that he would be out of the office for several days ending March 3rd but that complainant could communicate with his law clerk (Andrea Paff) in his absence.

By letter to Mr. Tallman dated February 21, 1989, complainant repeated the request made by her husband to Dr. Sichler and also requested the dates of those candidates' appointments. By letter to the examiner dated February 24, 1989, and copied to Mr. Tallman, complainant requested the position numbers and closing dates for candidates McConahay, Graham and Hill. Complainant also stated, inter alia:

" ... I cannot address the issue of my discovery requests currently, for the reason which I have stated both to Ms. McCallum who telephoned me from the Personnel Commission on Monday (February 20) and also to Mr. Tallman whom I telephoned on the same day. The reason is simple; namely, my discovery requests will be based partially on the public information which I have requested...."

By letter to Mr. Tallman dated February 26, 1989, complainant requested certain additional information concerning the successful candidates. By letter to the examiner dated February 26, 1989, complainant expanded on her difficulty in carrying out discovery without access to the information requested of Mr. Tallman. By letter of February 28, 1989, Mr. Tallman's

law clerk provided complainant with the information requested in her earlier letters, although complainant in her March 4th letter to Mr. Tallman contends that she provided the date each candidate commenced his or her duties rather than the "hiring date."

It is not apparent why at least some of the information sought, as set forth in the attachment to the March 4, 1989, letter to the examiner (the personnel files, publication lists and four L-1349 rankings for the successful candidates and the affirmative action forms for certain of the positions) and the March 4, 1989, letter to the examiner (position announcements for position numbers 7817, 1256 and 1417 and where they were advertised) could not have been sought earlier.

Furthermore, to the extent that some of the information sought could not have been requested before complainant received the information contained in Ms. Paff's letter of February 28th, (according to complainant, on February 28th), it must be remembered that complainant did not begin to seek information until February 20th, only 10 days before the deadline for the filing and exchange of exhibits.

With respect to the scheduled March 7th meeting to review the candidates' credentials, Mr. Tallman's February 20th letter reflects the understanding that they would meet on that afternoon in Dr. Sichler's office, and he requested that complainant advise him "of a time that afternoon when you can appear at her office to inspect the documents." Complainant stated at the hearing that it was her understanding that she would have the opportunity to review the material in Ms. Sichler's office sometime after 1:00 p.m. on March 7th with Mr. Tallman present. She further stated that because he was not in La Crosse that afternoon, she was denied that opportunity. Complainant did not indicate she made any attempt to advise Mr.

Tallman when she would be available to inspect the documents, and in the Commission's opinion the respondent cannot be held responsible for the failure of this conference to have occurred.


Complainant also mentions in her brief the fact that Respondent's Exhibit 30 was not submitted in advance of the hearing in accordance with §PC 4.02, Wis. Adm. Code. This document is a resume of Thomas Pribek. At the hearing, respondent provided the explanation that this document had not been exchanged beforehand because it had just been discovered that the resume that previously had been submitted as an attachment to Respondent's Exhibit 14, the application letter, was in fact the resume that had been submitted at an earlier date when he had applied for a job at UWLC as an instructor. This earlier resume was taken from his personnel file in error instead of Respondent's Exhibit 30, which is a more recent resume that actually had been submitted with his letter of application. It contains more recent information, particularly publications. Under §PC 4.02, Wis. Adm. Code, it is discretionary whether to admit a document that has not been exchanged. In the instant case there is no reason to doubt respondent's contention that the failure to have submitted this document was due to a good faith oversight. Furthermore, at the hearing, complainant was advised by the examiner that she had the opportunity to request a continuance if necessary to respond to the exhibit.

At the close of complainant's case, respondent moved to dismiss the charges. The examiner took the motion under advisement in light of §PC 5.01(2), Wis. Adm. Code ("... no hearing examiner shall decide any motion which would require final disposition of any case..."). At this time, inasmuch as it has been concluded that although complainant failed to prevail as to the ultimate issue in each case, she did establish a prima facie case as to each charge, said motion is denied.

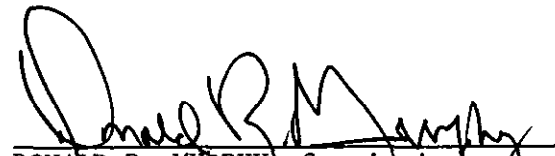
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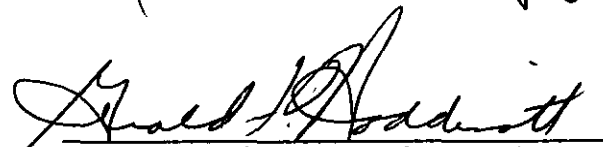
Based on the determinations that there is no probable cause to believe that discrimination occurred as alleged by complainant, these charges of discrimination are dismissed.

Dated: August 24, 1989 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

AJT:rcr
VIC03/1


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner

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