

The hiring process for the Flammable and Combustible Liquids System Coordinator position in Green Bay has proceeded through the oral interview stage. A consensus of the interview panel was established, that Robert Kiser is the candidate of choice.

The oral interview panel ranked complainant third.

7. Because respondent's affirmative action plan listed this position as underutilized for women, in this memorandum, Schall provided a rationale for hiring Kiser. The female candidate was ranked last by the interview panel and Schall explained why the female candidate was less qualified.

8. Schall provided the explanation about the female candidate in accordance with respondent's affirmative action plan requirement, regarding women and minority underutilized positions.

9. Respondent's AA plan did not require Schall to provide an explanation for not hiring a handicapped person certified for the position.

10. The Department of Employment Relations (DER), Division of Affirmative Action, the unit responsible for developing state affirmative action guidelines and approving all state agencies' AA plans, has not identified the protected handicap group as underutilized in any of the fifty state job categories.

11. DER has been unable to obtain reliable statistics concerning the handicapped labor market in the fifty job categories and its AA plan guidelines and concomitant administrative rules, provide no preference in the hiring process for the self-identified handicapped, except the Handicapped Expanded Certification (HEC) list.

12. Respondent's AA plan, dated May 25, 1990, lists seventeen job groups underutilized for employees with disabilities. This is in contradiction to DER's conclusion that statistics necessary for such an analysis are not available.

CONCLUSIONS OF LAW

1. This matter is before the Commission pursuant to §230.45(1)(b), Wis. Stats.

2. Complainant has the burden to prove he was discriminated against on the basis of handicap by respondent when he was not hired for the position of Flammable and Combustible Liquids System Coordinator in May 1992.

3. Complainant has failed to sustain his burden of proof.
4. Complainant was not discriminated against by respondent as alleged.

OPINION

This case is considered using the analytical framework employed in most state and federal discrimination cases and as seminally applied in McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973) and further defined in Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).

Complainant asserts that he is handicapped, as provided in WFEA, and respondent does not dispute this allegation. Also the evidence is clear that complainant applied for and was qualified for the coordinator position. Finally, a non-handicapped person was hired, giving rise to the inference of discrimination against complainant because of his handicap.

The evidence shows that respondent, by interview and consensus, believed the successful candidate to be the most qualified for the position. The position supervisor wrote his bureau chief and the AA office as follows:

Mr. Kiser (the successful candidate) has working experience in all areas necessary to successfully carry out the duties of the coordinator. Additionally, Mr. Kiser has expressed a personal philosophy that education and training will result in more effective and efficient voluntary compliance than an authoritative image.

Complainant does not argue that he is more qualified for the position than the successful candidate, but instead that as a handicapped person, he should have been given the same consideration as the female candidate; and that if this approach had been taken, he would have been selected for the position.

The evidence shows respondent's AA plan requires written justification for not recommending eligible women and minorities for hire when such protected group members are underutilized in all job groups, but no justification is required for eligible handicapped persons not hired. However, the uncontroverted testimony of James Lawrence, Assistant to Administrator, Division of Affirmative Action, DER, testified that AA plans are developed to ensure job equal opportunity by promoting certain targeted groups and monitoring the employer's work force. Lawrence testified that DER does an utilization analysis for state positions, that reliable statistics for the 50 state job

groups are not available for handicapped individuals, consequently respondent's AA plan notation in this regard was in error. Lawrence also testified that AA plans do not mandate specific hires in underutilized positions, but provide an additional means of ensuring equal consideration of eligible candidates.

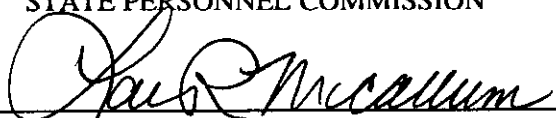
The evidence presented here is not sufficient to sustain a finding of discrimination as alleged. Complainant's arguments are based on an erroneous notation in respondent's AA plan and misconceptions concerning the function and purpose of the AA plan. Complainant's belief that he would have been hired if, like in the instance of the female candidate, written justification for not recommending same had to be provided to respondent's AA officer, is unsupported by the evidence and indicates a basic misunderstanding of the affirmative action process. Contrary to complainant's conception, the evidence makes clear that respondent's AA plan does not dictate the hire, even in instances where there is an underutilization of a particular protected group, and a member of the protected group is an eligible candidate.

ORDER

Complainant's claim of handicapped discrimination against respondent for not selecting complainant for the position with the working title Fire Prevention Coordinator position is dismissed.

Dated: September 21, 1994

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

DRM:rcr


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

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**NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION**

Petition for Rehearing. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.)