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 WILLIAM G. WEAVER,  
                     Complainant,  
 v.  
 Chancellor, UNIVERSITY OF  
 WISCONSIN - Madison,  
                     Respondent.  
 Case No.      93-0022-PC-ER  
 \* \* \* \* \*

FINAL  
 DECISION  
 AND  
 ORDER

After reviewing the Proposed Decision and Order, and after consulting with the hearing examiner, the Commission adopts the attached Proposed Decision and Order as the Final Decision and Order in the above matter, with the following modifications:

1. Finding of Fact 10 is amended and revised to read:

Terry Pribbenow, white, who also ~~had gone~~ went to the Physical Plant Office on June 23, 1992, ~~seeking employment as an LTE carpenter, like Weaver, was only told by Wildeck that they were not hiring. He did not tell Pribbenow to come back in one or two weeks. Later, Pribbenow was hired by Wildeck as an LTE carpenter on June 29, 1992.~~

2. Findings of Fact 11, 12, 13 and 14 are renumbered 13, 14, 15 and 16 respectively.

3. The new Finding of Fact 11 reads:

When Weaver appeared at respondent's Physical Plant Office on June 23, 1992, seeking an LTE carpenter position, the carpenter shop needed additional carpenters and Wildeck had made such a request, but had not yet been given authorization to hire more carpenters.

4. The new Finding of Fact 12 reads:

After Wildeck was given oral permission to hire additional carpentry help, he went to the union hall to obtain a list of carpenters for LTE carpenter positions. Wildeck inquired about Weaver, but was told he was not on the out-of-work list.

5. In the Opinion section, the last paragraph on page 5, which continues on page 6, is amended to read:


The nub of this case is whether respondent's claim that there were no LTE carpenter jobs when Weaver sought same on June 23, 1992, was pretextual. The evidence shows that on June 22, 1992, Jerry Studnicka, who shares responsibility of hiring LTE's in respondent's Physical Plant with shop supervisor Robert Wildeck, made a request by telephone for two carpenters to begin work on June 23, 1992. In response, the union sent the complainant, an African-American, and Terry Pribbenow, a white American. Neither was hired by respondent on June 23rd, and both reported back to the union that day. Wildeck testified that while work was available, no authority had been given to hire and he imparted that information to all applicants. Wildeck testified that six days later, after receiving authorization to hire LTE carpenters, he contacted and hired four white carpenters, including Terry Pribbenow. Pribbenow testified that Wildeck gave him no explanation for not hiring him when he first applied, but Pribbenow just returned to the office a week later, on his own, and was hired by Wildeck. Although the testimony of Weaver and Pribbenow establish that Wildeck, contrary to his testimony, was inconsistent in his responses to applicant's seeking carpenter positions on June 23, it also establishes that such inconsistencies were not based on race. Pribbenow, a white applicant, was given the same information about LTE carpenter positions as the complainant Weaver.

These changes more accurately reflect the record.

Dated: November 3, 1994 STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

DRM:rcr

  
DONALD R. MURPHY, Commissioner

  
JUDY M. ROGERS, Commissioner

Parties:

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David Ward  
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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.)

\* \* \* \* \*

WILLIAM G. WEAVER,  
 Complainant,

v.

Chancellor, UNIVERSITY OF  
 WISCONSIN - Madison,  
 Respondent.

Case No. 93-0022-PC-ER

\* \* \* \* \*

PROPOSED  
 DECISION  
 AND  
 ORDER

This matter is before the Commission on a complaint on the basis of racial discrimination or retaliation in violation of the Wisconsin Fair Employment Act (WFEA). The following is based on an evidentiary hearing and after considering post-hearing briefs filed by the parties. To the extent any of the opinion constitutes a finding of fact, it is adopted as such.

FINDINGS OF FACT

1. Complainant, William G. Weaver, an African-American, is a carpenter with several years of experience.
2. Over the years, Weaver has worked for union construction concerns in and around Madison, Wisconsin. He usually obtains these jobs by being referred from the carpenters' union office.
3. Weaver has also worked for respondent and in 1991 settled a racial discrimination claim against them when he was terminated prior to completing work as a Limited Term employee.
4. On June 22, 1992, James Weiss, business agent for the Milwaukee and Southern Wisconsin District Council of Carpenters, received a telephone call from Jerry Studnicka, respondent's Physical Plant, requesting need for two carpenters on June 23, 1992.
5. The next day, June 23rd, Weaver, as directed by Weiss, went to respondent's Physical Plant office to apply for work as a temporary carpenter (LTE). Weiss had also given Terry Pribbenow, a white carpenter, the same instructions.
6. At the Physical Plant office, Weaver requested an application and filled out some forms. While Weaver was waiting to be interviewed, another

person unknown to him, came in, filled out forms and was seen first by the interviewer, Robert Wildeck. Weaver overheard Wildeck tell this person his office was not currently hiring, but would do so in one or two weeks.

7. When Weaver was interviewed by Wildeck, he was told there were no jobs, and as Weaver left, he observed Wildeck disposing his forms in the wastepaper basket.

8. As Wildeck was interviewing Weaver, he recognized Weaver and was aware that he had been involved in Weaver's prior employment with his office and in Weaver's prior complaint against them resulting in a settlement.

9. Just outside the office door, Weaver met and briefly spoke with Michael O'Neil, a white carpenter, as O'Neil was going into the office. O'Neil began working for respondent as an LTE carpenter on June 29, 1992.

10. Terry Pribbenow, who had also gone to the Physical Plant office on June 23, 1992, seeking employment as an LTE carpenter, was hired by Robert Wildeck on June 29, 1992.

11. Two other white carpenters, Tony Reisen and John Zingible, were hired by respondent's Physical Plant on June 29, 1992.

12. Respondent's Physical Plant has no African-American carpenters on its permanent staff or holding LTE positions.

13. The district carpenters' union has received no requests from respondent's Physical Plant for a minority group member or female carpenter.

14. Aside from Weaver, there are at least 5 or 6 other African-American general carpenters listed with the district carpenters' union.

#### CONCLUSIONS OF LAW

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

2. Complainant has the burden to prove he was discriminated against by respondent on the basis of race or color, and retaliated against for fair employment activities in violation of the Wisconsin Fair Employment Act, §§111.321 et seq.

3. Complainant has failed to sustain this burden of proof.

4. Complainant has failed to prove respondent discriminated against him as alleged.

### OPINION

The issue in this case is whether complainant William G. Weaver was discriminated against by the respondent, University of Wisconsin - Madison because of his race/color and retaliated against for fair employment activities when he was not hired as a limited term employe for a carpentry position in June 1992, in violation of the Wisconsin Fair Employment Act. In summary, Subchapter II of the WFEA, §§111.321 et seq., inter alia, prohibits an employer from refusing to hire a person on the basis of race or color, or for opposing any discriminatory practices as described under it. Accordingly, the three-part test for evaluating disparate treatment discrimination claims set out in McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 5 FEP Cases 965 (1973) is utilized here.

It is undisputed that complainant William Weaver is an African-American. It is also undisputed that Weaver is a general (journeyman) carpenter. In addition, the clear evidence shows that on June 22, 1992, James Weiss of the Carpenters Union received a telephone call from Jerry Studnicka, UW-Madison, Physical Plant, requesting two all-around carpenters were needed June 23, 1992, and that Weaver, acting on Weiss' instruction, reported to the Physical Plant office at 8:00 a.m. on June 23, 1992, and was told by Robert Wildeck that no LTE carpenter positions were available. The clear evidence shows that on June 29, 1992, Robert Wildeck hired four LTE carpenters.

Respondent's Physical Plant carpenter shop supervisor Robert Wildeck testified that in June 1992, an increase in the workload caused him to request authorization to hire some LTE carpenters. He testified the request was made orally to John Harrod, the Director of the Physical Plant about June 22, 1992, and that he had not received a response when Weaver applied for work, but that permission was granted orally by June 26 when he went to the union hall to obtain a list of carpenters for LTE positions.

Complainant argues that he has made a prima facie case of race discrimination and we agree. Wildeck testified that since no authorization had been given to hire LTE carpenters prior to June 26, 1992, Jerry Studnicka of his office could not have called the union on June 22, 1992, requesting two carpenters. However, James Weiss of the Carpenters Union testified he personally took the call from Studnicka requesting two carpenters. This testimony was verified by an Employer Work Order (Appellant's Exhibit 1) executed by Weiss, which was entered into the record. Regardless, the

evidence clearly shows that complainant, an African-American, applied for an LTE carpenter position for which he was qualified, was rejected by respondent, who six days later hired four comparably qualified white LTE carpenters, thus satisfying McDonnell-Douglas' prima facie case tests.

Complainant argues that respondent's assertion by Wildeck that he did not hire Weaver on June 23rd because he had not yet received any authorization to hire any LTE carpenters is pretextual. Pointing to Wildeck's testimony, complainant argues that his statements concerning what he told Weaver and Pribbenow, and how he subsequently hired Pribbenow are incredible, leading only to the conclusion of racial discrimination and retaliation.

Wildeck testified that prior to requesting authorization to hire LTE carpenters, near June 22, 1992, he called the union about the availability of carpenters, but did not ask that any carpenters be sent because he had no approval. Further, he testified that when he interviewed Weaver on June 23rd he told Weaver that they did not have any work, based on the fact he did not have clearance to hire anybody. Wildeck testified that he also directed the remarks to Jerry Studnicka. Also Wildeck testified that he recognized Weaver after a couple of minutes because of his leather jacket. Wildeck did not recall talking to the other applicant at the office when Weaver was there. Weaver testified he heard Wildeck tell this applicant that they were not hiring at the present, but they would be putting people on in about two weeks. Weaver testified that when he was interviewed by Wildeck, he was told that they could not use him and Wildeck did not say there would be any work in the near future. Weaver also testified that Wildeck could not have recognized him because of his leather jacket, because he had only recently received it as a birthday gift, and Wildeck had no occasion to see him subsequently.

Wildeck testified that on or about Friday, June 26, 1992, after he was given oral authorization to hire LTE carpenters, he went to the union hall, talked with a female union staff person named Barb, went through the list of available carpenters and the fourth person he selected was Terry Pribbenow. According to Wildeck, O'Neil, Reison, Zingible and Pribbenow were advised of their selection for hire as soon thereafter as he was able to contact them. About Weaver, Wildeck testified that he specifically inquired about whether he was listed and was told he was employed.



Regarding the hire of Terry Pribbenow, in contrast to Wildeck's testimony, the record shows that, although Pribbenow told Weiss on June 23rd he was not hired by the Physical Plant, his name was not on the out-of-work list reviewed by Wildeck as Wildeck testified.

Respondent's witness, Terry Pribbenow, testified that he had been told by the union there was an opening at the Physical Plant, and when he went there about June 23, 1992, Wildeck told him only that they were not hiring. In explaining how he was hired, Pribbenow testified:

I talked with Jim Weiss, and I thought that I might check back at a later date because it was mid-summer, and I figured or heard -- in a round about way -- or might of talk to Weiss as far as checking back.

But on cross examination, Pribbenow was not positive anymore whether he checked at the union hall about jobs or the union called him and said there was a job at the Physical Plant. Pribbenow testified that he checked back about ten days after he first went to the Physical Plant, was hired by Wildeck, and started work that day or the next day. Pribbenow testified that he started work on June 30, 1992, and worked for six months.

In rebuttal, respondent argues that Weaver was mistakenly sent to its Physical Plant office when there were no job openings for LTE carpenters, that Wildeck gave all applicants the same information which should let them know to check back and that when the LTE positions became open Weaver was employed elsewhere. More particularly, respondent argues that Weaver's testimony quoting Wildeck's comments about no work and his testimony regarding the presence of another applicant on June 23rd, varied from his account of these events in his complaint. Respondent concludes that Weaver did not have an accurate memory of the events of that day. During cross examination Weaver took exception to this view, stating that in both instances his quotes of Wildeck's comments were accurate, as was his testimony regarding the other applicant. Respondent also relied heavily on the testimony of Wildeck in support of its conclusion that this claim was ill founded.

The nub of this case is whether respondent's claim that there were no LTE carpenter jobs when Weaver sought same on June 23, 1992, was pretextual. The evidence shows that on June 22, 1992, Jerry Studnicka, who shares responsibility of hiring LTE's in respondent's Physical Plant with shop

supervisor Robert Wildeck, made a request by telephone for two carpenters to begin work on June 23, 1992. In response, the union sent the complainant, an African-American, and Terry Pribbenow, a white American. Neither was hired by respondent on June 23rd, and both reported back to the union that day. Wildeck testified that while work was available, no authority had been given to hire and he imparted that information to all applicants. Wildeck testified that six days later, after receiving authorization to hire LTE carpenters, he contacted and hired four white carpenters, including Terry Pribbenow. Pribbenow testified that Wildeck gave him no explanation for not hiring him when he first applied, but Pribbenow just returned to the office a week later, on his own, and was hired by Wildeck.

The Commission believes the evidence presented is insufficient to support complainant's assertion that, during the June 23rd job interview, Wildeck told Weaver and Pribbenow there was no work, but gave Pribbenow additional information causing Pribbenow to return to respondent's office for hire on June 29, 1992. Pribbenow's testimony on this point corroborated neither Weaver's nor Wildeck's testimony, but provided a third perspective of his interview. Although Wildeck's testimony was proven to be inconsistent in other critical areas, the same can be said of Weaver's. Accordingly, we cannot conclude respondent discriminated against complainant as charged when he applied for a carpentry position in June 1992.

Turning to the question of retaliation, the Commission finds there was none. Clearly Wildeck was aware of complainant's prior charge against them of discrimination, when he recognized complainant at the interview, for he was one of the main principles in that controversy, which was later settled. However, as previously concluded, the evidence presented is insufficient to establish that Wildeck on June 23, 1992, had authority to hire two LTE carpenters, but after recognizing Weaver during the interview, postponed hiring anyone, then gave Weaver different information from Terry Pribbenow, causing Pribbenow to return for a position a week later and Weaver to believe no job would be available in the near future. Consequently, complainant failed to establish a causal connection between his WFEA protected discrimination claim against respondent and respondent's refusal to hire him, the third element in a claim of retaliation.

ORDER

In accordance with the Findings of Fact, Conclusions of Law, and Opinion set out above, complainant's charges of race or color discrimination and retaliation in Case No. 93-0022-PC-ER are dismissed.

Dated: \_\_\_\_\_, 1994      STATE PERSONNEL COMMISSION

\_\_\_\_\_  
LAURIE R. McCALLUM, Chairperson

DRM:rcr

\_\_\_\_\_  
DONALD R. MURPHY, Commissioner

\_\_\_\_\_  
JUDY M. ROGERS, Commissioner

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