

STATE OF WISCONSIN

PERSONNEL COMMISSION

WILLIAM STAPLES,
Complainant,

v.

**State Public Defender, OFFICE OF THE
STATE PUBLIC DEFENDER,**
Respondent.

Case No. 95-0189-PC-ER

EXAMINER'S
RULING ON MOTION
TO DISMISS

NATURE OF CASE

This is a complaint of discrimination on the basis of race and arrest/conviction record with respect to the failure to hire complainant for a number of positions.

At the hearing held July 30, 1998, respondent made a motion to dismiss at the close of complainant's case in chief. The undersigned examiner then verbally advised the parties that in his opinion the motion should be granted, but that because he lacked the authority to grant the motion, §PC 5.01(2), Wis. Adm. Code, he would issue a proposed decision, §227.46(2), Wis. Stats., embodying this opinion and proposed order.¹

In the course of preparing the proposed decision, and as a result of further reflection and research, the examiner concluded that the motion should not be granted as to one facet of this case—the claim of arrest/conviction record as to the Waukesha position. Therefore, the examiner is *sua sponte* rescinding so much of his verbally stated conclusion that said aspect of this case should be dismissed, and is issuing this examiner's ruling which has the effect of returning this case to the stage of the process where the hearing was adjourned.

The following findings are based on the record to date and are subject to revision and addition.

¹ The hearing then was adjourned.

TENTATIVE FINDINGS OF FACT

1. Complainant is a member of the black race.
2. Complainant was convicted of attempted murder in 1976.
3. Complainant has experience working in a paralegal capacity as a pro se litigant and by helping others to resolve legal problems.
4. Complainant applied for a paralegal job with respondent.
5. Complainant was qualified for said employment.
6. Respondent did not hire complainant for any of its vacant positions.
7. The parties stipulated, and it is found that complainant's felony conviction record was a causative factor with respect to the failure to hire complainant in one position (Waukesha).

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §230.45(1)(b), Stats.
2. Complainant has the overall burden of proving that he was discriminated against on the basis of race and/or arrest/conviction in connection with respondent's failure to hire him for any of the vacant positions in questions.
3. Complainant failed to establish a prima facie case as to his charges of race discrimination as to all the positions in question, and his charges of arrest/conviction record as to all positions except the Waukesha position.
4. Complainant established a prima facie case as to his claim of arrest/conviction discrimination with respect to the Waukesha position.
5. Respondent has the burden of proof to establish the §111.335(1)(c), Wis. Stats., exception to arrest/conviction discrimination with respect to the Waukesha position.
6. It cannot be concluded as a matter of law that complainant's arrest/conviction record was substantially related to the Waukesha position, pursuant to §111.335(1)(c), Wis. Stats.

OPINION

In order to establish a prima facie case of discrimination in hiring the complainant must show 1) he is a member of a protected group; 2) he applied for a vacancy which the employer was trying to fill; 3) he was qualified for the position in question; 4) he was rejected under circumstances which give rise to an inference of discrimination. *See, e.g., Halsell v. Kimberly-Clark Corp.*, 683 F. 2d 285, 29 FEP Cases 1185 (8th Cir. 1982)

Complainant is in protected groups on the basis of race and arrest/conviction record. He applied and was not hired for vacant positions for which he was qualified. Thus he has satisfied the first three elements of a prima facie case. The question then is whether he has satisfied the fourth step—i.e., rejection under circumstances which give rise to an inference of discrimination.

With regard to race, complainant has failed to establish the fourth step in a prima facie case because there is nothing in the record which creates an inference that he was not hired because of race. While complainant presented some evidence of his own qualifications for these positions, there is no evidence that he was as well qualified, or better qualified, than any of the candidates who were hired. There is no other evidence that suggests he was discriminated against on the basis of race.

With respect to arrest/conviction record, there is no evidence (with the exception of the Waukesha position) that respondent's agents who were responsible for the hiring knew about complainant's conviction record. Thus complainant has failed to establish the fourth element of a prima facie case of arrest/conviction record discrimination as to the non-Waukesha positions.

As to the position in Waukesha, the parties stipulated that complainant's conviction record was a factor in the decision not to hire complainant there. However, §111.335(1)(c), Wis. Stats., provides an exception to the proscription of arrest/conviction discrimination. As complainant indicated in his testimony, his credibility in court proceedings could be impeached by questioning on cross-

examination about his felony conviction. *See, e.g., State v. Kuntz*, 160 Wis. 2d 722, 753, 467 N. W.2d 531(1991) (“Wisconsin law presumes that all criminal convictions have some probative value regarding truthfulness.”).

Complainant apparently contends that the negative impact of such a line of questioning would be limited, because if he answered truthfully, the questioning could not go beyond the bare fact that he had been convicted of one or more crimes.² Notwithstanding this, the susceptibility of being impeached in this manner has been recognized as a significant problem for someone who has to testify in court. *See Law Enforcement Stds. Bd. v. Lyndon Station*, 101 Wis. 2d 472, 492-93, 305 N.W.2d 89 (1981). However, the party whose witness is impeached in this manner on cross-examination has the right on redirect to attempt to rehabilitate the witness by showing, for example, that the crime was not related to veracity. *See State v. Bailey*, 54 Wis. 2d 679, 689-90, 196 N.W.2d 664 (1972). In this regard, complainant’s only conviction was in 1976 for attempted first degree murder. Respondent has the burden of proof to establish the §111.335(1)(c), Wis. Stats., exception to arrest/conviction record discrimination. *See Gibson v. Transp. Comm.*, 106 Wis. 2d 22, 29, 31 N.W.2d 346 (1982). Respondent did not present any evidence on this issue beyond the cross-examination of complainant. In order to grant respondent’s motion to dismiss at the close of complainant’s case, it essentially would be necessary to conclude as a matter of law that the circumstances of complainant’s criminal record relate substantially to the circumstances of the job in question, pursuant to §111.335(1)(c), Stats. Given the age of complainant’s conviction and that the conviction did not appear to be one involving credibility, the aforesaid relationship can not be concluded as a matter of law. In *Law Enforcement Stds. Bd. v. Lyndon Station*, *supra*, the Court did conclude as a matter of law that there was a substantial relationship between the circumstances of the criminal record and the duties of the position in question: “common sense dictates that a conviction of the felony of misconduct in public office for falsifying traffic tickets

² *See e.g., Voith v. Buser*, 83 Wis. 2d 540, 541, 266 N. W.2d 304 (1978).

certainly bears a substantial relationship to the duties of a police officer who is called on to issue traffic citations . . .” 101 Wis. 2d at 492. In the instant case, the record reflects neither how often the investigator would be called on to testify in court, nor what kind of testimony he or she would be giving on those occasions. While there may be a substantial relationship between complainant’s 1974 attempted first degree murder conviction and the investigator’s duties, the relationship is not so ineluctable that it can be concluded to be present as a matter of law. Therefore, it would be inappropriate to grant respondent’s motion to dismiss the part of this case that involves the claim of arrest/conviction record discrimination as to the Waukesha position.

ORDER

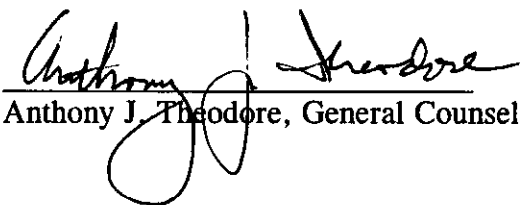
The examiner’s verbal decision to dismiss this complaint rendered at the July 30, 1998, hearing is rescinded to the extent said decision encompassed the arrest/conviction discrimination claim concerning the Waukesha position. However, the remainder of the decision stands, and the examiner will recommend in his ultimate proposed decision that complainant’s race discrimination claims as to all positions, and his arrest/conviction claims as to all positions except Waukesha, be dismissed.

The hearing will be reconvened at the point it was adjourned—i.e., at the close of complainant’s case in chief.

Dated: August 11, 1998.

AJT:rjb:950189Cru12

STATE PERSONNEL COMMISSION


Anthony J. Theodore, General Counsel