

STATE OF WISCONSIN

PERSONNEL COMMISSION

BARTHEL WAYNE HUFF,
Complainant,

v.

**President, UNIVERSITY OF WISCONSIN
SYSTEM (Whitewater),**
Respondent.

DECISION
AND ORDER

Case No. 97-0111-PC-ER

NATURE OF CASE

This case involves a complaint of age discrimination under the Wisconsin Fair Employment Act (WFEA), Subchapter II, Chapter 111, Stats. The issue at hearing was:

Whether there is probable cause to believe that respondent discriminated against the complainant based on age when he was denied an interview with respondent in May of 1997.

Post-hearing briefs were filed by the parties.

FINDINGS OF FACT

1. In early 1997, complainant Barthel W. Huff applied for a tenure track position with respondent University of Wisconsin System (UWS) at the University of Wisconsin-Whitewater (UW-Whitewater) in the Department of Mathematics and Computer Science. At the time of application complainant was 61 years of age.

2. The position was advertised nationally in the Chronicle of Higher Education and sent to the American Mathematical Society and the Minority and Woman Doctoral Directory. The position announcement, in part, states:

Description: The Department of Mathematics and Computer Science of the University of Wisconsin-Whitewater anticipates one or two tenure-track positions in mathematics beginning August 1997. Responsibilities include teaching 12 undergraduate credits per semester from intermediate

algebra through calculus to advanced math. Preference will be given to candidates who demonstrate commitment to excellence in teaching as well as continued scholarship activity. An ability to integrate computers into teaching is required. Ability to teach a variety of courses in our curricula including statistics, introductory computer courses, and computer programming is a plus.

Qualifications: An earned doctorate (or ABD¹ with expectations of completion within one year) in mathematics, computer science, statistics, mathematical education, or a mathematical science is required.

The applicant was directed to send a letter of application including a reflective statement on the applicant's philosophy of teaching and scholarship, resume, unofficial undergraduate and graduate transcripts, and three letters of recommendation including at least one evaluation of teaching effectiveness to M. Heydari, Chair of the Search Committee at UW-Whitewater, by March 7, 1997.

3. The search committee for the position consisted of six faculty members from the UW-Whitewater, Department of Mathematics and Computer Science: M. Hassain Heydari (Chair), Gary Klatt, Julie Letellier, Diendonne Phanord, Richard Schauer and Krishnand Verma. With one exception, all members of the committee were over age 40. One committee member was over age 60.

4. UW-Whitewater received 111 applications for the positions including that of the complainant.

5. By letter dated May 14, 1997, from the search committee chair, complainant was advised that he no longer was being considered for the announced positions. He was not invited to be interviewed.

6. The four applicants selected to be interviewed by the search committee and the reasons for such selections were:

Dr. Cong Fan received her Ph.D. in Mathematics from Western Michigan University in 1995. She is a visiting lecturer in mathematics department in Eastern Michigan University. Her degree is in graph theory and combinatorics, two specialties that fit well with actuarial

¹ "ABD" is an acronym for "all but dissertation", meaning that all work towards a Ph.D. has been completed, except the dissertation.

mathematics and statistics. Her recommendations are enthusiastic. Her experience in teaching and scholarship is limited.

Dr. Horia Pop is an outstanding mathematician with extensive training in computer science. He received International Mathematical Olympiad prizes, while working on his undergraduate in Romania. He received his Ph.D. in Algebra, from University of Southern California in 1995, and a masters degree in computer science from University of Iowa in 1997. His recommendations are enthusiastic. He is a visiting assistant professor at the University of Iowa.

Dr. Sobitha Samaranayake received his Ph.D. in applied mathematics from Purdue University in 1996. He taught at UW-Whitewater during the Fall 1996. During that time he established himself as an outstanding teacher. His record of scholarship and publication in dynamical systems is also outstanding. He is trained in statistics and computer science and has exhibited considerable skill in computer technology through his program of research.

Dr. Sebastian Schreiber received his Ph.D. in mathematics from the University of California, Berkeley in 1995, where he has been a postdoctoral fellow since. His strength is outstanding research record and publication. His teaching abilities are unknown except for favorable comments in one of his recommendation letters. (Respondent's Exhibit 3).

Dr. Cong Fan was expecting to receive a Masters Degree in Computer Science from Western Michigan University in April, 1997. (Respondent's Exhibit 4).

7. The search committee's stated reason for not selecting complainant for an interview was that his application materials did not show he met the required qualifications of an "ability to integrate computers in teaching and teaching experience/potential."

8. The search committee declined to interview forty-nine applicants because their application materials did not evidence an ability to integrate computers into teaching; twenty-four applicants for failure to show necessary teaching/potential in the areas assigned to the position; twenty-four applicants for incomplete files; and the remainder for failure to show certain other position qualification requirements.

9. All UW-Whitewater faculty searches are subject to approval and review by the college Dean, the Provost and the Office of Affirmative Action. In the search at issue the procedure was as follows:

(1) The college Dean and university Provost approved the mathematics and computer science department's request to fill a position in its department.

(2) The Office of Affirmative Action (AA) Director reviewed and approved the search plan, position announcement (including advertised qualifications for position) and recruitment sources.

(3) The AA Director met with the search committee to discuss their responsibilities in accordance with the university search and screen guidelines, and review their obligations under state and federal employment law.

(4) During the search the AA Director was available to answer any questions of the search chair.

(5) The AA Director reviewed and approved the search committee's reasons for recommending interviews for Fan, Pop, Samaranayake and Schreiber.

(6) The Dean of the College of Letters and Science (L & S) reviewed and approved the applicants to be interviewed by the search committee.

(7) After the interviews were completed, the search committee submitted its recommendation for the position to the L & S Dean.

(8) On approval the department chair, AA Director and L & S Dean, the recommendation was forwarded first to the UW-Whitewater Provost and then its chancellor for decision.

10. UW-Whitewater hired Cong Fan to fill the announced vacant position.

CONCLUSIONS OF LAW

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

2. Complainant has the burden of proof to establish there is probable cause to believe respondent discriminated against complainant on the basis of age when he was denied an interview for a teaching position in May of 1997.

3. Complainant has failed to satisfy his burden of proof.

4. There is no probable cause to believe respondent discriminated against complainant on the basis of age in May 1997, as charged.

OPINION

Under the Wisconsin Fair Employment Act (FEA), the initial burden of proof is on the complainant to show a prima facie case of discrimination. If complainant meets this burden, the employer then has the burden of articulating a non-discriminatory reason for the actions taken which the complainant may, in turn, attempt to show was a pretext for discrimination. *McDonnell-Douglas v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 5 FEP Cases 965 (1973), *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 25 FEP Cases 113 (1981).

In the context of a hiring decision, a complainant would establish a prima facie case for age discrimination by showing that he (1) is a member of a class protected by the Fair Employment Act; (2) applied for and was qualified for an available position; (3) that, despite his qualifications he was rejected; and (4) that an applicant not in the protected age category was hired. *Trimble v. UW-Madison*, 92-0160-PC-ER, 11/29/93.

This claim of age discrimination is before the Commission on the inquiry of probable cause. Section PC 1.02 (16) Wis. Adm. Code defines "probable cause" as "a reasonable ground for belief, supported by facts and circumstances strong enough in themselves to warrant a prudent person to believe that a violation probably has been or is being committed" as alleged by complainant.

Respondent does not dispute that complainant is a member of an age category protected under the WFEA, that complainant met the minimum qualification for the position on the basis of his Ph.D. in mathematics, that he was rejected, or that an

applicant not in the protected age category was hired. Respondent's explanation for rejecting complainant on the basis of his application is as follows:

The search committee rejected Complainant's application because his application materials failed to show evidence of an ability to integrate computers into teaching – a required qualification for the position used by the search committee to screen candidates for the interview pool (Respondent Exhibit 3, p. 4). In addition, the search committee determined, based on a review of Complainant's application materials, that Complainant lacked current teaching experience – having not taught at a college or university on a full-time basis since 1991 – and that his past teaching experience in the area of statistics and mathematics reflected a lack of ability/potential to teach all of the courses that would be assigned to the successful candidate – statistics, introductory computer courses and computer programming.

This explanation by respondent for excluding complainant from further consideration as a candidate for the position at issue, together with evidence presented regarding same, has satisfied its burden of articulation a legitimate, non-discriminatory rationale for its decision not to interview complainant.

Complainant makes several arguments that respondent's explanation for not hiring him was pretextual. Citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S. Ct. 849, 28 L. Ed. 2d. 158, 3 FEP Cases 175 (1971), complainant argues that, once he established a prima facie case of discrimination, respondent is required to prove that its employment criteria "had a manifest and vital relationship to the employment in question." However, this is a misstatement of the law in *Griggs*. As applicable to this case, the rule of law in *Griggs* is that job qualifications "must measure the person for the job and not the person in abstract." 401 U.S. 485; and contrary to complainant's argument, he, instead of respondent, must establish that the subject candidate selection criteria discriminated against persons in the protected age category. See *Dothard v. Rawlinson*, 433 U.S. 321, 329, 53 L. Ed. 2d 786, 804, 97 S. Ct. 2270 (1977).

Complainant argues, "It is not very subtle discrimination to imply that 30-year old transcripts are some how more significant (than) subsequent accomplishments and activities. Such a claim would be analogous to a Physics Department claiming that it

did not hire Albert Einstein for a position because his transcript showed no courses in relativity theory.”

While respondent verified certain qualifications of the candidates by examining their transcripts, contrary to the essence of this argument, candidates were requested by complainant to provide additional information, such as resumes and reference letters, for review by its search committee. These requested materials provided candidates liberty to present information regarding post-doctorate achievements and accomplishments, and complainant failed to offer any evidence to substantiate his contention that persons in the protected age category were discriminated against by reason of undergraduate and graduate transcripts.

Complainant makes several arguments concerning comparable qualifications:

My letter of application stated that I had directed student teams working on computer intensive industrial and modeling projects, had been involved with the programming languages APL, Basic, Pascal, Fortran, had used statistical packages, programmable calculators, etc. in the classroom. These activities were not restricted to a single year. My interests as noted in letter of application and curriculum vitae extend far beyond pure statistics or actuarial science. The statement that I worked as a non-tenured visiting professor at the Claremont Graduate School is disingenuous (I was on leave from a tenured Associate Professorship at Queen's University to examine a technically oriented program in applied mathematics) and irrelevant. Moreover, none of the finalists selected by Respondent had ever held a tenure track position. The claim that there is no mention of my experience in the Math Clinics in my curriculum vitae ignores the specific mention of such activities in my letter of application, Rick Vitale's letter of recommendation and entry (7) under Miscellaneous specifically notes the Final Report to General Dynamics on one such project.

Complainant entered into evidence Exhibit C-15, purported to be a copy of the letter of application, and Exhibit C-22, the letter by Vitale. Exhibit C-15 (letter of application) lacks credibility. This letter had no heading, date, inside address of recipient, salutation or signature—standard parts of a letter. The heading and salutation is replaced by a series of xx's. The Vitale reference letter shows no specific recipient (“Dear Colleague:”) and is dated March 17, 1994. Even so, these documents do not

indicate that complainant had taught courses integrating computers or taught introductory computer courses.

Complainant also argues “It is not very subtle discrimination to emphasize “recent” accomplishments while ignoring the achievements of a long career. This is especially true when it is noted that Respondent was willing to consider new graduates whose only achievements would consist of routine schoolwork, writing a thesis under the close direction of a faculty member, and serving as a Teaching Assistant with limited responsibility.” Contrary to complainant’s assertion, this question was addressed in *Chandler v. UW-La Crosse*, 87-0124-PC-ER & 88-0009-PC-ER, 8/24/89 where the Commission, at p. 11 (“The fact some candidates were selected without their Ph.D’s in hand does not show any illegal treatment of complainant.”), found this argument to be unavailing. This facially neutral parameter might have been suggestive of discrimination if complainant had presented evidence showing that it selected applicants in a significantly discriminatory pattern against persons 40 or more in age, but complainant failed to make this showing.

At the beginning of this proceeding, complainant made a “motion for summary finding of probable cause.” Complainant stated “[t]he reasons for this are two-fold. One, respondent has destroyed relevant and admissible information that is protected by federal law. Secondly, respondent abused the discovery process and is in contempt of the Commission’s motion to compel production of the relevant and admissible information.” The examiner advised complainant that he had no authority to decide this motion (§ PC 5.01(2), Wis. Adm. Code, “. . . no hearing examiner shall decide any motion which would require final disposition of any case . . .”)

This motion is predicated on a September 9, 1998, Ruling on Motions by the Commission, where respondent was directed to respond to complainant’s discovery request #2² by “provid[ing] so much of this information as is available no later than

² 2) Resumes of current faculty in the Department of Mathematics at UW-Whitewater. The resumes should contain the following information: date of birth; Ph.D.: date hired by UW-Whitewater; legitimate publications in refereed journals including date and place of publication and covered by Math Review.

September 18, 1998.” The Commission also directed respondent to submit “copies of position announcements and letters sent to other schools inviting applications” that it possessed to complainant within nine days of the date of this order, and advised respondent of its continuing responsibility to provide complainant newly found documents sought in his June 30, 1998 discovery request.

As directed in the Commission’s September 9, 1998, ruling, respondent answered complainant’s June 30, 1998, discovery request by letter dated September 15, 1998. In this letter respondent enclosed a written list of the dates of birth and hire for UW-Whitewater’s current faculty and the written summary prepared by the search committee in support of its recommendation to interview the applicants that were subsequently interviewed. Respondent also informed complainant that it did not possess any documents listing publications by its faculty, as requested, did not maintain any records that list or summarize the Ph.D. completion dates for its faculty members and did not possess any other copies of position announcements and letters sent to other schools.

Specifically, complainant contends that respondent destroyed “relevant/admissible information” protected by Federal law in violation of the Age Discrimination in Employment Act [ADEA], abused the discovery process and is in contempt of the Commission’s September 9, 1998, ruling. According to complainant’s statement during his presentation, this motion is the same as previously presented by him and decided by the Commission in its September 9, 1998, ruling. As that ruling concerns complainant’s contention that respondent destroyed certain documents in violation of the ADEA, the Commission found it lacked authority to consider this question:

The Commission lacks the authority to enforce federal laws. However, whether complainant’s contention in this regard might have some relevance to the instant motions will not be addressed until after the hearing provides an opportunity for the parties to develop an evidentiary record concerning the circumstances surrounding non-retention of the applications.

Contrary to his claim, complainant was given an opportunity to make an evidentiary record in support of this motion. Only two witnesses, complainant and the UW-Whitewater Affirmative Action (AA) Director, testified during the hearing. The AA Director is not the custodian of the documents in issue, and no evidence was elicited concerning the respondent's non-retention of the requested information at issue. The same is true with regard to complainant's other two contentions. No evidence was proffered showing that respondent "abuse[d] discovery" or committed any act in "contempt" of the Commission's orders. Based on the evidence presented, this motion is denied.

ORDER

Having determined there is no probable cause to believe complainant was discriminated against on the basis of age when he was declined an interview with respondent in May 1997, this charge of discrimination is dismissed.

Dated: August 31, 1999.

DRM:rjb:970111Cdec1

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


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 (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) 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.)

2/3/95