

**MICAH ORIEDO,**  
*Complainant,*

v.

**Secretary, DEPARTMENT OF  
CORRECTIONS,**  
*Respondent.*

**RULING ON  
RESPONDENT'S  
OBJECTION TO  
COMPLAINANT'S  
PROPOSED SUB-ISSUE**

Case No. 00-0001-PC-ER

This case involves a charge of discrimination on the bases of race, color, national origin, and WFEA retaliation, with regard to failure to hire. At a prehearing conference held March 23, 2000, the parties agreed to the following statement of issue for hearing: "Whether respondent discriminated against complainant on the bases of race, color, national origin or WFEA retaliation in connection with its failure to hire him for the position of Correctional Services Manager-Director Office of Education, in December 1999." Complainant proposed the following sub-issue: "Whether any post-certification actions or decisions of respondent had a disparate impact on complainant because of his race, color or national origin." Respondent objected to consideration of this sub-issue, and the parties have filed briefs."

According to the complaint, complainant applied, was examined, was certified, and was interviewed for a career executive position in DOC, but was not hired. The complaint also alleges that "interviews and post certification practices or decisions had disparate impact on complainant because of his black race and national origin."

In support of its objection to the sub-issue, respondent argues as follows:

[G]iven the factual basis for the complaint, there is no basis for a disparate impact theory. Disparate impact cases are grounded in statistical comparisons comparing generally the success rate of protected group members against the success rates of the remaining group. Since there was only one hire, there is no conceivable theory that the single hire of a[n] applicant, not a member of a protected class, impacted more heavily on the complainant's protected class. Or that the single decision "

has a significant exclusionary impact on the (complainant's) class.” *Balele v. DOC*, 97-0012-PC-ER, (October 9, 1998, p. 15) Respondent's letter dated April 4, 2000, p. 2.

The Court of Appeals has characterized the adverse impact theory as a means “to attack facially neutral policies which, although applied evenly, impact more heavily on a protected group.” *Racine Unified School District v. Labor and Industry Review Commission*, 164 Wis. 2d 567, 595, 476 N. W. 2d 707 (Ct. App. 1991) (citation omitted). There is nothing in *Balele*, or elsewhere, that requires that there must be more than one hire involved in a case to give rise to an adverse impact. In *Balele*, there was only one position and hiring decision in question. The adverse impact claim in that case arose from complainant's contention that “the use of an achievement history questionnaire (AHQ) and resume screen as part of the selection process for *this* position had an illegal adverse impact on racial minorities.” *Balele*, p. 15 (emphasis added) *See also, e. g., Caviale v. State of Wisconsin*, 744 Wis. 2d 1289, 35 FEP Cases 1642 (7<sup>th</sup> Cir 1984). *Caviale* was an adverse impact case won by the plaintiff which involved the filling of one position. In that case, the adverse impact arose from the employer's decision to utilize the Career Executive Program to fill the position, at a point when there were no females in that program.

ORDER


Respondent's objection to complainant's proposed sub-issue is overruled.<sup>1</sup>

Dated: July 19, 2000

AJT:000001Cru12

STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

  
JUDY M. ROGERS, Commissioner

(Commissioner Murphy did not participate in the deliberation or decision of this case.)

---

<sup>1</sup> In a March 28, 2000, email, complainant requested an amendment to the main (stipulated) issue ("Whether respondent discriminated against complainant on the bases of race, color, national origin or WFEA retaliation in connection with its decision not to hire him .), by changing the word "or" to "and on." Since either variation of the issue allows complainant to prevail on any or all of the bases of discrimination, there is no need to make the recommended change, and complainant's request is denied.