
JOSEPH E. SABOL,**Petitioner,****vs.****MEMORANDUM DECISION
AND ORDER
Case No. 01CV1366****UNIVERSITY OF WISCONSIN - EAU CLAIRE,
WISCONSIN PERSONNEL COMMISSION,****Respondents.**

ADMINISTRATIVE AGENCY REVIEW

Petitioner Joseph E. Sabol seeks review of a decision by the Wisconsin Personnel Commission (the Commission) concluding there was not probable cause to believe that the University of Wisconsin - Eau Claire (UWEC) either retaliated or discriminated against Sabol when it failed to hire him for a chemistry lecturer position in 1999. Sabol claims there is no evidence of record to support the Commission's finding, that the Commission misapplied the probable cause standard to the evidence, and that the Commission incorrectly interpreted the Wisconsin Fair Employment Act (WFEA) as it relates to the facts of his case.

The Commission responds that substantial evidence of record supports its factual conclusions, that its interpretations of the WFEA are due great deference by a reviewing court, and thus must be affirmed if reasonable and not contrary to the clear meaning of the statute, and maintains it correctly applied the probable cause standard to the evidence. The Commission contends that the reason UWEC hired someone other than Sabol was that the hired person's qualifications were superior to Sabol's, and thus the reason was non-pretextual.

For the reasons set forth below, the court affirms the Commission's ruling. Accordingly, the court dismisses Sabol's petition.

FACTS AND PROCEDURAL HISTORY

In August 1997, UWEC hired Sabol as a lecturer in the Department of Chemistry (the department) to replace a faculty member on leave. The position was numbered A-129. The appointment was for the 1997-98 academic year, and the contract specified that it was not intended to be renewed. The required qualifications for A-129 were at least a master's degree in chemistry, although a Ph.D. was preferred, and the ability to clearly communicate chemical concepts, as well as to manage classroom and laboratory work. UWEC did not utilize a search committee to fill A-129.

Also in August 1997, the department began a search to fill a vacancy on its faculty created by a professor's departure. The position, numbered F-82, was a tenure-track, assistant professorship in analytical chemistry. A search committee was formed for the purpose of filling F-82. The committee considered at least eight qualified applicants, of which Sabol was ranked sixth. In April 1998, the search culminated in the hiring of Marcus McEllistrem, who had been ranked fourth on the list of eight.

In August 1998, UWEC appointed Sabol to another lecturer position, numbered A-198. Once again, the appointment was for the academic year only, and the contract specified that it was not intended to be renewed. The baseline qualifications for A-198 were a master's degree in chemistry, the ability to clearly communicate general chemistry concepts and to manage general chemistry laboratory work. Teaching experience in general chemistry was preferred.

Unlike the hiring process for A-129, the department did use a search committee to fill A-198. The committee consisted of three permanent faculty members, among whom was Scott Hartsel. The committee received four applications. Sabol was selected from a field of three finalists, apparently because he possessed the most faculty -level teaching experience. The two other finalists had only taught as graduate-level teaching assistants (TA).

On January 26, 1998, while still in his first year of teaching at UWEC, Sabol requested

an evaluation of his performance. As Sabol's contract was not intended to be renewed, he was not automatically entitled to such an evaluation. He therefore had to ask the Department Personnel Committee (DPC), chaired by Scott Hartsel, for a review. The DPC agreed to honor his request, and evaluated Sabol.

The evaluation was conducted by peer review, i.e., various faculty members were assigned to either observe Sabol in the classroom or review his class materials. The individual evaluations were generally positive. However, the faculty member reviewing Sabol's student evaluations noted that they were "disturbingly low." Sabol's students graded him particularly poorly on his ability to communicate clearly and concisely, to give clear assignments and exams, to use class time to maximum advantage, and on his overall teaching performance.

As chair of the DPC, Scott Hartsel was the convener of that committee, for purposes of Sabol's review. Although Hartsel did not perform any of the evaluative procedures himself, he was the signatory on the DPC's formal review document summarizing the results of the other faculty members' observations. In that document, dated April 3, 1998, the DPC stated that Sabol's low student evaluations were a cause for concern. However, the DPC made some constructive suggestions on how Sabol could improve in those areas deemed most problematic, and concluded by focusing on Sabol's positive teaching attributes.

On November 13, 1998, during his second year of teaching at UWEC, Sabol e-mailed his department colleagues complaining that a bottle containing a hazardous chemical, Br₂ (bromine), had been left in an improper spot in the lab with its cap not sealed tightly. Sabol informed his colleagues he had also found many other reagent bottles with loosely capped lids. Sabol expressed his concern that his students may have been exposed to hazardous vapors unnecessarily, and asked his colleagues to make sure all reagent bottles were capped properly upon completion of any lab class.

Some time in early 1999, still during his second year of teaching, Sabol again requested

a performance review by the DPC. As was true the previous year, the nature of Sabol's 1998-99 contract did not entitle him to such a review. However, the DPC, still chaired by Hartsel, once again agreed to evaluate Sabol. This second evaluation was conducted in a manner similar to the first, i.e., by peer review. The colleague observing one of Sabol's lectures noted many positives and some negatives. In particular, the observer indicated that Sabol appeared to have difficulty maintaining some of his students' attention, and that he often answered the questions he posed to the students himself without giving them the opportunity.

In May 1999, the department commenced a search to fill a lecturer position for the academic year 1999-2000. The need for the position arose because of a faculty member's anticipated medical leave. The position, numbered A-238, was similar in nature to the positions held by Sabol the two previous years, and was for a fixed term with no intent to rehire. The qualifications listed for A-238 were a master's or Ph.D. in chemistry, the ability to clearly communicate general chemistry concepts, and to manage chemistry laboratory work. Experience in teaching organic chemistry was desirable.

The search committee for A-238 consisted of Professors Jason Halfen, who was 28 at the time, and Robert Eierman, who was 45. A review of the applicants' resumés and other materials resulted in a list of four at least minimally qualified candidates. The committee contacted one recent teaching reference for each, and selected three finalists with whom it would proceed to interviews. The committee did not include Sabol in the list of finalists. Sabol had given Scott Hartsel's name as a recent teaching reference. Hartsel, as chair of the DPC, was intimately familiar with Sabol's peer reviews, as well as with the poor results of Sabol's teaching evaluations by his students. Hartsel did not provide a favorable reference for Sabol.

On the short list of candidates was Laurel McEllistrem, wife of Marcus McEllistrem, the assistant professor hired by the department in April 1998. Laurel had had twelve semesters of teaching experience as a TA at both the University of North Carolina and the University of

Wisconsin-Madison. The committee found that Laurel "expressed the best teaching philosophy and most interest in and enthusiasm for teaching." On July 27, 1999, the department hired Laurel to fill A-238.

Needless to say, Sabol was not happy with the department's decision. On August 12, 1999, Sabol met with Ronald Satz, UWEC Provost, and Barbara Stevens, UWEC Affirmative Action Officer, to discuss his concerns about the hiring process utilized to fill A-238. Sabol also asked to be provided with copies of various documents involved in that process. On August 18, 1999, Satz sent Sabol a letter in which Satz stated he believed UWEC had acted appropriately, and had hired the best-qualified candidate for the position.

Not satisfied with the response he got from UWEC regarding his concerns, Sabol filed a discrimination complaint with the Commission on September 2, 1999. Sabol, an unmarried man in his forties, alleged that UWEC failed to hire him due to his age, gender, and single marital status. Sabol based those allegations on the facts that the person hired was a 34-yr. old woman who was married to a recently-hired faculty member. Sabol claimed that when Marcus McEllistrem was hired as a faculty member in April 1998, then department chair David Lewis promised Marcus that the department would also employ his wife Laurel.

Sabol also complained that UWEC, by the department, retaliated against him for his having exercised his right to report unsafe conditions when he e-mailed his colleagues about the loosely capped Br2 bottle. Sabol claimed protection under the state's occupational safety and health laws, in particular Wis. Stat. § 101.055(8)(ar), which prohibits public employers from taking adverse employment actions against employees who institute or cause to be instituted any proceeding related to allegedly unsafe or unhealthy conditions in their workplace.¹

The Commission assigned Sabol's complaint to one of its equal rights officers. On

¹Wis. Stat. § 101.055(1) states that the section is intended to provide public employees the rights and protections relating to occupational safety and health equivalent to those granted employees in the private sector under the federal occupational safety and health act (OSHA) of 1970. Thus, the court will hereinafter refer to the state law as OSHA, for ease of reference.

December 3, 1999, after an investigation into Sabol's allegations, the officer issued the Commission's Initial Determination (ID). The Commission found there was no probable cause to believe that UWEC had either retaliated against Sabol for his protected OSHA reporting activities, or discriminated against him on the bases of age, sex, or marital status when it failed to hire him for A-238. Sabol appealed the ID, and the case was set for hearing on probable cause.

On December 29, 1999, UWEC moved either to dismiss Sabol's complaint for its failure to state a claim, or for summary judgment. As grounds for its motion, UWEC invoked the reasoning stated in the ID. In addition, UWEC asserted that even if, as Sabol alleged, the department had hired Laurel McEllistrem as part of a "deal" it made with Marcus McEllistrem when hiring him the year before, such action would not amount to discrimination against Sabol on the basis of his marital status.

UWEC argued that the public policy underlying the WFEA's marital status provision, Wis. Stat. § 111.31(1), was to protect the institution of marriage by prohibiting employers from putting their employees, i.e., the protected individuals, in the position of having to choose between being married or having a job.² UWEC continued that to interpret the statute as protecting a claimant from an employer's alleged favoritism toward someone who was *not* the protected individual, because that someone is married to a particular person, would be contrary to the plain meaning of the statute.

On February 15, 2000, the Commission denied UWEC's motion either to dismiss Sabol's complaint or for summary judgment, except that it granted UWEC's motion to dismiss Sabol's claim of discrimination based on his marital status. The Commission concluded that Sabol's marital status claim amounted to one under the "spousal identity" theory, which had previously been rejected not only by the Commission, *see Olmanson v. UWGB*, 98-0057-PC-ER, 10/21/98, but also by the Wisconsin Court of Appeals in *Bammert v. LIRC*, 2000 WI App 28, 232 Wis. 2d

²UWEC cited an earlier decision by the Commission, *Ray v. Dept. of Health and Social Services*, Case No. 83-0129-PC-ER (10/10/84), to support its proposition.

365, 606 N.W.2d 620. Sabol does not challenge that conclusion in this appeal.

The Commission held a probable cause hearing in Sabol's case over five days, February 21-22, 2000, and March 8-10, 2000. The Commission's hearing examiner (HE) issued a proposed order on October 16, 2000. The HE concluded there was not probable cause to believe that UWEC had discriminated against Sabol when it selected Laurel McEllistrem rather than Sabol for A-238, either by retaliation for Sabol's OSHA reporting activity, or on the basis of his gender or age.

On January 19, 2001, following the receipt of Sabol's written objections to the proposed order, the Commission issued its Final Decision and Order (FDO). The FDO adopted the examiner's proposed order with only minor changes based on Sabol's objections. Sabol petitioned the Commission for rehearing on February 12, 2001. The Commission denied that petition on March 12, 2001. On May 22, 2001, Sabol filed the instant petition for judicial review.

Further facts will be set forth as necessary in this opinion.

STANDARD OF REVIEW

Judicial review of an administrative agency proceeding is governed by Wis. Stat. §§ 227.52-57. The court must affirm the agency, unless it finds grounds to do otherwise under § 227.57(2). Thus, review under ch. 227 is not a trial *de novo*. See *Wis. Environmental Decade v. PSC*, 79 Wis. 2d 161, 170, 255 N.W.2d 917 (1977). Rather, such review is conducted without a jury, and is limited to the record of the proceedings below generated by the agency. Wis. Stat. § 227.57(1).

An administrative review requires the court to evaluate and treat separately issues of agency procedure, the agency's interpretations of law, and its findings of fact. Wis. Stat. § 227.57(3). However, the court is not bound by the agency's characterization of any of its determinations as either a finding of fact or a conclusion of law. *Madison Teachers, Inc. v.*

WERC, 218 Wis. 2d 75, 84, 580 N.W.2d 375 (Ct. App. 1998). Here, Sabol does not claim any procedural error on the part of the Commission. Thus, the standard of review depends upon whether the issues presented involve questions of law or fact. Sabol alleges both.

A reviewing court must sustain the agency's findings of fact if they are supported by substantial evidence in the record. Wis. Stat. § 227.57(6). *Hamilton v. DILHR*, 94 Wis. 2d 611, 617-18, 288 N.W.2d 857 (1980). Substantial evidence does not mean a preponderance of the evidence. *Id.*, at 617. Rather, substantial evidence is defined as relevant evidence that a reasonable person could accept as adequate to support the determination at issue. *Id.* Where the evidence is such that two conflicting conclusions may reasonably be drawn, it is for the agency to determine which view of the evidence it accepts. *Id.*

When reviewing questions of law, the court is not bound by an agency's conclusions. *Sauk County v. WERC*, 165 Wis. 2d 406, 413, 477 N.W.2d 267 (1991). Nonetheless, the general rule in Wisconsin is to afford a presumption of validity to the agency. *Id.* Varying levels of deference apply, depending upon the "comparative institutional capabilities and qualifications" between the court and the administrative agency. *Jarrett v. LIRC*, 2000 WI App 46, ¶9, 233 Wis. 2d 174, 607 N.W.2d 326.

The three levels of deference afforded an agency's interpretations of law are: great weight, due weight, and no weight. *Sauk County*, 165 Wis. 2d at 413-14. The "great weight" standard is appropriate when the court finds that the agency is charged with administering the law in question, the agency has specialized knowledge or expertise in interpreting the law, and the agency's interpretation provides uniformity of application of the law. *Knight v. LIRC*, 220 Wis. 2d 137, 148, 582 N.W.2d 448 (1998). Under great weight deference, the court must uphold the agency so long as its interpretation is at least reasonable and not contrary to the clear meaning of the law, even if another interpretation may be more reasonable. *UFE v. LIRC*, 201 Wis. 2d 274, 286-87, 548 N.W.2d 57 (1996).

The requirements for great weight deference have been met in this case. The Commission is charged by the legislature with hearing and deciding discrimination complaints under both the WFEA and the state's OSHA law. Wis. Stat. §§§ 111.375(2), 101.055(8)(b), 230.45(1)(b) and (1)(g). *See also, Phillips v. Wisconsin Personnel Comm'n*, 167 Wis. 2d 205, 216, 482 N.W.2d 121, 125 (Ct. App. 1992). Further, the Commission has developed considerable expertise at interpreting and applying those provisions, given its performance of those functions over the last few decades. *See History*, Wis. Stat. § 230.45.

Next, the Commission uses its specialized knowledge of the state's civil service system in forming its interpretations of the laws it is charged with administering. *Balele v. Wisconsin Personnel Commission*, 223 Wis. 2d 739, 744, 589 N.W.2d 418 (Ct. App. 1998). Finally, the Commission's interpretations will provide uniformity in processing discrimination complaints involving state agencies. *Id.* Thus, the court is bound to uphold the Commission's interpretation if it is reasonable, even if another is equally reasonable. *Phillips*, 167 Wis. 2d at 216.

ISSUES FOR REVIEW

1. Could the Commission reasonably find there was not probable cause to believe that UWEC discriminated against Sabol because he engaged in protected OSHA reporting activity when it failed to hire Sabol for chemistry lecturer position A-238 in 1999?
2. Could the Commission reasonably find there was not probable cause to believe that UWEC discriminated against Sabol because of his age, i.e., 45, when it failed to hire him for A-238?
3. Could the Commission reasonably find there was not probable cause to believe that UWEC discriminate against Sabol because he is male when it failed to hire him for A-238?

ANALYSIS AND DECISION

I. RETALIATION BASED ON PROTECTED OSHA ACTIVITY

The Commission found that Sabol established a *prima facie* case of retaliatory discrimination because of his protected OSHA reporting activity. Sabol showed that 1) he engaged in a covered activity; 2) the alleged retaliator(s) were aware of that activity; 3) there was

an adverse employment action; and 4) there were circumstances giving rise to an inference of unlawful motivation.

As to the first element, the Commission found that Sabol's November 13, 1998 e-mail qualified, albeit nominally, as an OSHA report. The Commission considered the incident borderline given that both sides presented evidence on whether Sabol's discovery of loosely capped bottles of bromine and other reagents in one of the laboratories posed a significant enough safety or health risk to bring it within the parameters of OSHA reporting activity. Ultimately however, the Commission determined that as OSHA statutes are remedial in nature, *see Butzlaff v. Wisconsin Personnel Commission*, 166 Wis. 2d 1028, 1033, 480 Wis. 2d 559 (Ct. App. 1992), they must be construed liberally, and thus, that there was enough evidence of a possible hazard from the situation that it warranted OSHA coverage.

There were no disputes as to whether Sabol had fulfilled the second and third elements of a *prima facie* case. Sabol sent the e-mail to eleven faculty members, including the members of the search committee for A-238, Halfen and Eierman, as well as Hartsel, who later provided the damning reference for Sabol, and both the then and future departmental chairs, David Lewis, and Jack Pladziewicz. Each of the named individuals were either directly or indirectly involved in the recruitment process for A-238, resulting in the failure to hire Sabol.

With regard to circumstances giving rise to an inference of unlawful motivation, the Commission considered Sabol's numerous allegations of instances of procedural irregularities by the department culminating in its failure to hire him for A-238. Those allegations all stem from UWEC's articulated reason for hiring Laurel McEllistrem and not Sabol: the department found McEllistrem more qualified than Sabol in the particular area the department deemed most important to a lecturer's position, i.e., the ability to clearly communicate chemical concepts to students. Sabol vehemently contends that reason is pretextual, and has done his best to cast doubt on many aspects of the recruitment.

The department based its reason for hiring McEllistrem both on the positive attributes it saw in her and the negatives it saw in Sabol. McEllistrem's recent teaching reference considered her "definitely above average" by comparison to her peers, and stated he would definitely hire her to teach general chemistry and perhaps organic chemistry lab at his institution, UW-Madison. Furthermore, the search committee was impressed by the level of enthusiasm for teaching McEllistrem displayed in her interview. Finally, the committee felt McEllistrem expressed the best teaching philosophy of all four qualified applicants.

In contrast, Scott Hartsel, one of the individuals Sabol named as a recent teaching reference for himself, informed the committee about Sabol's teaching abilities based on his knowledge of Sabol's performance reviews generated by the DPC for the two years Sabol had taught in the department. Sabol's reviews had revealed that he had difficulties maintaining his students' attention and/or managing classes. More importantly, Sabol's student evaluations were some of the lowest ever seen by the faculty reviewing them. Hartsel noted that there wasn't much improvement from one year to the next.

Much of Sabol's case for pretext revolves around his belief that he was the most qualified candidate for A-238, primarily because of the extent and nature of his teaching experience compared to the others, and in particular to McEllistrem. Sabol's position seems to be that since he was, at least in his mind, the most qualified, any reason given for not hiring him could only be pretextual. Sabol is simply unwilling or unable to accept the notion that sheer quantity of experience might not be the most important factor in a hiring decision. As the Commission noted, Sabol's two years of experience at UWEC may have worked against him given his poor student evaluations. Indeed, the A-238 search committee may have wondered why someone with as much teaching experience as Sabol had had before coming to UWEC would still receive such low marks from students.

Sabol attacked the department's use of the type of appointment he received the first two

years, i.e., a fixed term, no intent to renew position. He pointed to the University of Wisconsin System's (UWS) Administrative Code, which states that academic staff appointments may be simply fixed term, probationary, or indefinite. Sabol contends there is no such officially sanctioned appointment type as fixed term, no intent to renew. Sabol claims the department's use of that type is evidence of its attempt to manipulate the rules in its favor.

However, as the Commission stated in its FDO, even if it were true that there was no officially sanctioned appointment type as fixed-term, no intent to renew, the fact that the department designated both of Sabol's 1997-98 and 1998-99 appointments as such, as well as the 1999-2000 position to which Laurel McEllistrem was appointed, demonstrates a lack of pretext by the department in that such appointments were routinely used. The Commission supported that position with evidence of record, including Sabol's appointment letters for the two years he taught, and UWEC's Personnel Action Request Form (PARF) used for Sabol's first appointment. The court finds that the Commission's position on this point is amply supported in the record, and further, is eminently reasonable.

Sabol's attack on the department's use of the fixed term, no intent to renew appointment type stems in part from the fact that according to UWS' Faculty and Academic Staff Handbook, individuals employed in fixed term positions are to be evaluated in the same manner as probationary faculty. Probationary faculty receive automatic performance reviews. The reviews are to be conducted in accordance with the Chemistry Department Evaluation Plan (EP). The EP is a 14-page document that includes a 4-page section on the procedures for evaluating probationary faculty. Such reviews include many more criteria besides teaching effectiveness, which Sabol contends would have resulted in a much better evaluation of him.

Further, Sabol argues that a fixed term appointment requires the department chair to forward his or her recommendation as to the reappointment of the incumbent to the department dean by a date certain so as to provide ample notice if the decision is not to reappoint. Sabol

claims that then department chair David Lewis failed to perform that obligation during the spring semester of 1999 in an attempt to deny Sabol of what he considered his right to reappointment. Once again though, the Commission concluded that the department's failure to follow that procedure in the years both before and after Sabol's OSHA reporting activity evidenced a lack of pretext in that the department was consistent from one year to the next.

In his reply brief to this court, Sabol claims that "no records of a search process for filling the 1998-99 position [i.e., A-198] exist." However, one of Sabol's own exhibits belies that contention. His exhibit #41 is a letter authored by faculty member Cheryl Muller on behalf of the faculty search committee for the 1998-99 academic staff position. The letter is addressed to Dean Carl Haywood, and contains information about the three candidates the committee considered best qualified for the post. The letter notes that Sabol had the most faculty-level teaching experience, which apparently in that particular instance turned out to be the deciding factor, as Sabol received the appointment.

Ultimately, the Commission concluded that while certain of Sabol's allegations of pretext had some merit, none of them were sufficiently meritorious to overcome the legitimacy of UWEC's articulated reasons for appointing Laurel McEllistrem to A-238 rather than Sabol. Thus, the Commission found that Sabol had failed to carry his burden to establish probable cause to believe UWEC, by the department, retaliated against him for his protected OSHA reporting activity. However, Sabol attacks the Commission's interpretation of the probable cause standard, contending that the Commission improperly viewed the evidence most favorably to UWEC. However, Sabol does not cite any authority to support his claim that the Commission should have viewed the evidence in a light most favorable to him.

On the other hand, the Commission correctly states the law on the probable cause standard employed in administrative agency proceedings. See *Boldt v. LIRC*, 173 Wis. 2d 469, 474-77, 496 N.W.2d 676 (Ct. App. 1992). That standard, while not as high as a preponderance of the

evidence, *id.*, at 476, is not as low as that employed in civil or criminal hearings. *Id.*, at 475. The standard applicable in (Personnel) Commission proceedings is defined as follows:

...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 in the complaint.

Wis. Adm. Code § PC 1.02(16).³

While that standard is relatively low, the Commission was under no obligation to view the evidence most favorably to Sabol. *See Boldt*, at 476. UWEC was not required to prove the absence of probable cause. *Id.* On the contrary, the burden to show probable cause was always on Sabol. *Id.* Moreover, in contrast to a civil or criminal probable cause hearing, the HE at Sabol's hearing was entitled to make credibility judgments. *Id.*, at 475. Thus, even if some credible evidence existed that pointed to probable cause, the HE could still determine on the basis of all the evidence presented, it was not probable that retaliation or discrimination occurred. *Id.*

In summary, while Sabol did produce some evidence that the Commission could have interpreted as showing pretext by UWEC, none of it rose to the level of probable cause when all the evidence on both sides was considered. The court finds the Commission's conclusion reasonable and amply supported in the record.

II. AGE DISCRIMINATION

The Commission found that Sabol had established a *prima facie* case of age discrimination by showing he is in a member of a protected group, i.e., persons aged 40 or older, he applied and was qualified for A-238, he was not selected, and a person not in the protected group was hired. However, first the Commission found UWEC's reason for hiring McEllistrem for A-238 instead of Sabol non-pretextual based on most of the same considerations as those outlined in the above

³The definition of probable cause referenced in *Boldt*, i.e., Wis. Admin. Code § Ind. 88.01(8), is for all intents and purposes the same as that employed by the Commission in this case:

"Probable cause" means a reasonable ground for belief, supported by facts and circumstances strong enough in themselves to warrant a prudent person in the belief, that discrimination ... probably has been or is being committed.

section on retaliation for OSHA reporting activity. Thus, the Commission found a lack of probable cause on Sabol's age discrimination theory.

The Commission further noted that several circumstances relevant to an age discrimination claim actually pointed to a lack of discrimination, rather than supporting Sabol's case. Some of those circumstances include the facts that the A-238 search committee consisted of one 28-yr. old professor and one the same age as Sabol was at the time, i.e., 45, and that the department chair, Jack Pladziewicz, was older than Sabol, as was the alleged primary conspirator, former chair David Lewis. In addition, Dean Lund, who made the ultimate decision on the appointment of Laurel McEllistrem, was 54.

Again, the court finds the Commission's conclusions to be reasonable and amply supported in the record.

III. SEX DISCRIMINATION

As with his age discrimination claim, the Commission found that Sabol did establish a *prima facie* case of sex discrimination, in that he is a member of a protected class, i.e., males, he applied and was qualified for A-238, he was not selected, and a person not in the protected class was hired. Once again, however, all the same reasons for why the Commission accepted UWEC's reason for hiring McEllistrem instead of Sabol as non-pretextual still applied, and thus the Commission found no probable cause on that claim as well.

Furthermore, the Commission again noted that the circumstances relevant to a sex discrimination claim were not in Sabol's favor. All of the personnel involved in the recruitment leading to McEllistrem's hiring were male. Relying on its own precedent, the Commission acknowledged that while the fact the appointing authority and Sabol were of the same gender did not necessarily preclude finding probable cause to believe that gender-based discrimination occurred, it was probative of the absence of such discrimination.⁴

⁴The Commission there cited to its case, *Bloedow v. DHSS*, 87-0014-PC, 8/24/89.

Finally, the Commission observed that Sabol had not raised a "reverse discrimination" claim, i.e., where a female candidate receives preference in order to fulfill affirmative action objectives. And in any event, as the Commission stated, the record shows that A-238 had not been designated as underutilized for women by UWEC's affirmative action authority. That fact would be inconsistent with any claim of reverse gender discrimination, had Sabol so alleged.

As with the Commission's determinations on both the OSHA and age discrimination claims, the court finds that the Commission's conclusions as to Sabol's sex discrimination claim are reasonable and well supported by evidence in the record.

CONCLUSION

For all of the reasons set forth herein, the court AFFIRMS the Commission's Final Decision and Order in its entirety. Accordingly, the court DISMISSES Sabol's petition.

IT IS SO ORDERED.

Dated this 18 day of March, 2002.

BY THE COURT:


The Honorable Robert A. DeChambeau
Dane County Circuit Court Judge - Branch 1