

STATE OF WISCONSIN

PERSONNEL COMMISSION

JOSEPH E. SABOL,
Complainant,

v.

**President, UNIVERSITY OF WISCONSIN
SYSTEM (Eau Claire),**
Respondent.

**RULING ON
RESPONDENT'S
MOTION FOR
SUMMARY JUDGMENT**

Case Nos. 02-0020-PC-ER, 02-0024-PC-ER

NATURE OF THE CASE

This case is before the Commission on respondent's motion for summary judgment filed on March 15, 2002. Both parties have filed briefs and supporting documents. The following findings are made solely for the purpose of resolving this motion.

FINDINGS OF FACT

1. This case involves a complaint of discrimination on the bases of age and retaliation for having engaged in protected activities under the WFEA (Wisconsin Fair Employment Act; Subchapter II, Chapter 111, Wis. Stats.) and the state OSHA law (§101.055, Wis. Stats., Public Employee Safety and Health Law).

2. This complaint alleges, inter alia, that complainant applied for a position at UWEC (University of Wisconsin-Eau Claire) denominated as 2002-2003 tenure track assistant professor (inorganic/analytical chemistry) faculty vacancy F-263.

3. The complaint further alleges that he was over the age of 40 and that he had engaged in protected activity under the WFEA and the state OSHA law, and that respondent was aware of that activity.

4. The complaint further alleges that notwithstanding that complainant filed a timely and complete set of application materials, including a curriculum vitae (CV), and that he was qualified for the position, respondent notified him on or about January 15, 2002, that he had not been hired for the position.

5. In its materials in support of its motion for summary judgment, respondent asserts that complainant's application materials were postmarked on the very last day for constituting a timely application, but that the materials were not complete because he had failed to include the required CV

6. Respondent further asserts that Patricia Jenneman, the department's program assistant, consistent with standard practice in the chemistry department, opened all of the submitted packets of application materials for this position, and she discovered on opening and examining complainant's application materials that complainant had not submitted a CV. She asserts that neither Jason Halfen, the chair of the search committee, nor Jack Pladziewicz, chemistry department chair, had a role in opening complainant's application materials, nor did either of them direct her to remove a CV from complainant's application materials.

7. Respondent further asserts that the search committee for this position first considered the group of applications that were both complete and had been submitted in a timely manner (the "priority" applications). There were 18 applicants, including complainant, that had not submitted applications that were both complete and timely. The search committee did not consider these because they identified a sufficient group of qualified applicants from the priority applications. This process was administered in accordance with the standard practice in the chemistry department, which was to consider the applicants that had not submitted timely and complete applications only if the search committee did not identify sufficient qualified applicants from among the priority applications.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction in this case pursuant to §230.45(1)(b) and (g), Stats.
2. On the basis of the record before it, there are relevant facts in dispute.

OPINION

Balele v. WPC, 223 Wis. 2d 739, 589 N.W.2d 418 (Ct. App. 1998) provides the governing authority for the Commission to decide cases using a process similar to summary judgment procedures under §802.08, Stats. In *Balele v. DOT*, 00-0044-PC-ER, 10/23/01, the Commission discussed the methodology for analyzing summary judgment motions in this forum.

"[S]ummary judgment is appropriate when no *genuine* issue of material fact exists and the moving party is entitled to judgment as a matter of law." 2 BARBARA LINDEMAN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, Ch. 33, p. 1464 (emphasis added); §802.08(2), Stats. ("The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no *genuine* issue as to any material fact and that the moving party is entitled to judgment as a matter of law" [emphasis added].) The requirement of a *genuine* issue of material fact means that it is not sufficient for the nonmoving party to raise *any* dispute of fact. The court looks at the conflicting evidence and decides whether, after consideration of both parties' affidavits or other showing, a reasonable jury or other fact-finder could make the finding in question in favor of the nonmoving party. See *Baxter v. DNR*, 165 Wis. 2d 298, 312,477 N. W 2d 648 (Ct. App. 1991).

The decision goes on to discuss the evidentiary burdens as follows:

Another significant aspect of summary judgment practice is that if the non-moving party has the ultimate burden of proof on the claim in question, that ultimate burden remains with that party in the context of the summary judgment motion. See, e. g., *Transportation Ins. Co. v. Huntziger Const. Co.*, 179 Wis. 2d 281, 290-92, 507 N W 2d 136 (Ct. App. 1993):

Just as a defendant moving for dismissal at the close of the plaintiff's case must demonstrate that the evidence is insufficient to sustain the plaintiff's burden on one or more elements of the plaintiff's proof, a party seeking summary judgment must "establish a record sufficient to demonstrate that there is no triable issue of material fact on any issue presented." The ultimate burden, however, of demonstrating that there is sufficient evidence to either continue with the trial (in the case of a motion to dismiss at the end of the plaintiff's case) or to go to trial at all (in the case of a motion for summary judgment) is on the party that has the burden of proof on the issue that is the object of the motion.

[I]n the context of summary judgment, once the moving party demonstrates that the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law," Rule 802.08(2), Stats., the opposing party may avoid summary judgment only by setting forth specific facts showing that there is a genuine issue for trial," Rule 802.08(3), Stats.

Often, a party moving for summary judgment is able to submit evidentiary material that specifically negates an essential aspect of the adverse party's proof. Under the rules, the adverse party must then counter with evidentiary material showing a triable issue of fact. . . Other times, however, a party moving for summary judgment can only demonstrate that there are no facts of record that support an element on which the opposing party has the burden of proof, but cannot submit specific evidentiary material proving the negative. . . once sufficient time for discovery has passed, it is the burden of the party asserting a claim on which it bears the burden of proof at trial "to make a showing sufficient to establish the existence of an element essential to that party's case." The party moving for summary judgment need only explain the basis for its motion and identify those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," that it believes demonstrate the absence of a genuine issue of material fact; the moving party need not support its motion with affidavits that specifically negate the opponent's claim. (citations omitted)

See also Moulas v. PBC Prod., 213 Wis. 2d 406, 410-11, 570 N. W. 2d 739 (Ct. App. 1997) ("[O]nce the motion is made and demonstrates the support required by the statute, the opponent does not have the luxury of resting upon its mere allegation or denials of the pleadings, but must advance specific facts showing the presence of a genuine issue for trial.")

The Commission then discussed special factors involved in summary judgment practice before this agency when a party is not represented by counsel. The Commission will not go into these special factors, because it believes, in any event, that summary judgment must be denied under the authority cited above.

At the crux of this case is the question of whether complainant's application materials included his CV at the time it was received at UWEC. If they did not, this would be quite detrimental for complainant's case, because respondent apparently treated his application the same as it treated 17 other applications which were not complete and timely filed—i.e., they were not considered by the search committee. The obverse is that if the materials did include his CV, this would be quite favorable for complainant's case, because this would mean that respondent's asserted rationale for not considering complainant for hiring for this position would be considerably undermined.

The primary evidence on this point are the affidavits of complainant, which states that his CV *was* included with the other application materials he mailed to UWEC, and the affidavit of department's program assistant, Ms. Jenneman, which avers that she alone opened the application materials, and complainant's CV was *not* included. The resolution of this key fact turns largely on an evaluation of these witnesses' credibility.¹ It is not the case, as respondent asserts in its reply brief, that complainant is relying solely on his "unsupported suspicions that Patricia Jenneman, a rank and file department secretary with no stake whatsoever in this proceeding, perjured herself in her affidavit." Respondent's reply brief, p. 1. Complainant is relying on his own sworn statement that when he mailed his application materials, they contained his CV. This is sufficient to create a material issue of fact and require that the motion be denied. *See* 73 Am Jur 2d SUMMARY JUDGMENT, §36 (It is not the function of the adjudicative body on a motion for summary judgment to determine the credibility of the witnesses where the parties' affidavits are diametrically opposed); *cf. Young v. DP*, 81-0007-PC, 6/3/81 (Notwithstanding that the Commission staff date stamped an appeal on January 8th, the Commission found that the appellant actually hand delivered the appeal, and it actually was filed, on January 7th, where it was impressed by the appellant's credibility, and noted that the process it used to date stamp documents, like any such process, was not infallible.)

¹ This is not to say there could not be other relevant evidence in addition to the testimony of these two individuals.

ORDER

Respondent's motion for summary judgment is denied.


Dated: April 19, 2002.

STATE PERSONNEL COMMISSION

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KELLI THOMPSON, Commissioner



ANTHONY J. THEODORE, Commissioner