

STATE OF WISCONSIN

PERSONNEL COMMISSION

PASTORI M. BALELE,
Complainant,

v.

**Secretary, DEPARTMENT OF
TRANSPORTATION,**
Respondent.

**RULING ON CROSS
MOTIONS FOR
SUMMARY JUDGMENT**

Case No. 99-0103-PC-ER

This case is before the Commission to resolve respondent's motion for summary judgment and complainant's cross motion for summary judgment. Both parties filed written arguments. The Commission received the final argument on August 10, 2000.

The issue for hearing was proposed by the Commission at a prehearing conference on January 19, 2000, and controls here as neither party filed objections by the deadline established at the conference (see Conference Report dated 1/19/00). The statement of issues for hearing is shown below:

1. Whether complainant was subjected to disparate treatment based on color, national origin, or race, or in retaliation for engaging in protected fair employment activities, when respondent used the Option 1 career executive recruitment process to fill the position of Policy Initiatives Advisor-Passenger Rail Implementation Manager in or around March of 1999.
2. Whether respondent's use of the Option 1 career executive recruitment process to fill the position of Policy Initiatives Advisor-Passenger Rail Implementation Manager in or around March of 1999 had a disparate impact on complainant on the basis of color, national origin or race.

On November 19, 1999, the Commission issued a prior ruling in this case which granted respondent's motion to dismiss as untimely filed all appointment transactions that occurred more than 300 days prior to August 11, 1999.

The facts recited below are made solely to resolve the present cross-motions. The facts are undisputed unless specifically noted to the contrary.

FINDINGS OF FACT

1. In early 1999, DOT Deputy Secretary Terrence Mulcahy decided that implementation of the Midwest Regional Rail Initiative required a full-time coordinator. He requested that the Administrator of the Division of Transportation Infrastructure Development, Mr. James Gruendler, provide a position for this purpose. Mr. Mulcahy also asked Mr. Gruendler to review existing DOT staff to see if there was a well qualified person who could be assigned to the new position and assume immediate responsibility for the passenger rail program. The position was classified as a Policy Initiatives Advisor (PIA) and was included in the Career Executive Program.

2. It was determined that the person selected needed knowledge of federal and state railroad legislation and policies; needed to be familiar with the officials and staff of the other partners in the Midwest Rail Initiative, including the other nine states involved, the Federal Railroad Administration and Amtrak and other railroad operators; needed knowledge and experience in working with state and federal legislators on funding of projects; needed knowledge of the engineering, environmental and construction issues involved in building railroad facilities; and needed knowledge and experience in promoting community support for projects.

3. Mr. Gruendler discussed which DOT staff might possess the necessary knowledge and experience with Deputy Administrator Michael Cass and the Director of the Bureau of Rails and Harbors, Mr. Ronald Adams. The consensus reached was that Mr. Randall Wade, Chief of the Intercity Planning Section in the Division of Transportation Investment Management was the only DOT employee likely to have the needed level of knowledge and experience. Mr. Cass was directed to interview Mr. Wade to review his work experience, knowledge and skills in greater depth. At some unknown point in this process, Mr. Wade was aware from some unknown source that the position was going to be created and he indicated to Mr. Gruendler that he would be willing to be transferred to the new position.

4. Mr. Wade had worked 8 years for DOT as Chief of the Intercity Planning Section, a career executive position. One of his first assignments was to direct the preparation

of the DOT Translinks 21 Multimodal Transportation Plan which involved developing statewide system plans for freight and passenger rail, port and waterborne freight and passenger ferries, highway, intercity bus and air modes. In developing this comprehensive plan, Mr. Wade became familiar with the physical and operational characteristics of Wisconsin's rail facilities and developed relationships with the managers of Wisconsin's railroads. Mr. Wade also directed the development of a Freight Rail Policy Plan for Wisconsin and a study of a Chicago-Milwaukee high speed rail corridor. Most recently, he chaired the 9 state committee which developed a plan for a Midwest Rail Passenger System. The committee also involved Amtrak and Federal Railroad Administration officials.

5. After interviewing Mr. Wade, both Mr. Cass and Mr. Gruendler concluded that Mr. Wade was uniquely well qualified for the position due to his background in environmental quality and economic development, his experience in the legislative process and with community groups and organizations, his knowledge and experience in Wisconsin rail system planning and policy development, and his experience as chair of the inter-state committee which developed the Midwest Rail Initiative plan. Mr. Gruendler also concluded it was unlikely that a person outside of DOT or in the private sector would have comparable knowledge or experience. For these reasons, Mr. Gruendler recommended to Mr. Mulcahy that the PIA position be filled by transfer of Mr. Wade. Mr. Mulcahy approved the recommendation. The position was offered to and accepted by Mr. Wade, as confirmed by letter dated March 31, 1999. He was transferred into the PIA position under §§ER-MRS 30.07 and 30.08, Wis. Admin. Code.

6. The PIA career executive position was included in state job group 001, Administrators-Senior Executives, for affirmative action purposes. At the time of Mr. Wade's transfer to the PIA position, there were 143 filled positions in the Department of Transportation (DOT) which were career executive positions. Nine of these 143 employees (6.3%) were racial minorities. At this same time, the availability of qualified minorities in the relevant labor pool (state job group 001) was 7.5%, as determined by the Department of Employment Relations (DER), Office of Affirmative Action. At this same time, the DER had determined state job group 001 was underutilized for minorities statewide.

7 Mr. Wade's prior career executive position was filled by open competition. (Complainant did not apply.) The successful candidate was a black woman who had not held a career executive position previously. After this appointment, DOT had 144 filled career executive positions. Ten incumbents (6.9%) were racial minorities.

8. An opening for a DOT Manager, Director of the Bureau of Rails and Harbors, was announced in the August 17, 1998 Current Opportunities Bulletin. This position reported to the Director of the Bureau of Rails and Harbors. Complainant applied for this position and was found ineligible based on a resume screen. As a result, complainant's name was not placed on the certification list as eligible for further consideration.

9. Complainant applied for the career executive position of Highway Program Manager with respondent. He was certified for the position in April 1997, and was interviewed but not hired. Unlike the contested hire, this position was not responsible for any rail systems. The position summary portion of the position description (PD) for this position is shown below. (See Exh. C1a attached to complainant's 7/18/00 brief.)

The Director, Bureau of Transit & Local Roads is responsible for the development, administration, financing, monitoring and reporting of state and federal programs for the maintenance and improvement of local roads and bridges, transit systems and local transportation operations support. Duties encompass managing programs that direct the financing of local improvements projects and transit systems and that provide financial and technical assistance for general transportation development, operations and maintenance programs with annual budgets totaling \$345,000,000. Programs include the federal local rural roads and urban street programs, the local bridge program, the Local Roads Improvement Program, federal and state urban mass transit aids, elderly and disabled transportation aids, federal rural public transportation aids, general local transportation assistance and a variety of other categorical programs. The incumbent is responsible for conducting high level policy analysis to direct program and fiscal management of the local highway, transit and transportation aids programs funded by state and federal resources. In addition, the incumbent is responsible for coordinating and interpreting the department's local cost sharing and jurisdictional transfer policies.

10. Complainant applied for the career executive position of Administrative Manager - Chief of Environmental Services with respondent. He was certified for the position

in March 1999, and was interviewed but not hired. Unlike the contested hire, this position was not responsible for any rail systems. The position summary portion of the position description (PD) for this position is shown below, followed by a more detailed description used for the job announcement. (See Exh. C-5 attached to complainant's 7/18/00 brief.)

PD: Manages the Environmental Services Section, assists the Bureau Director in the administration and management of the Bureau, acts on behalf of and with the full authority of the Director during their absence, and acts for the Director in specific functions as may be delegated.

Job Announcement: This position manages the Environmental Services Section. Duties include assisting the Director in developing goals and objectives; preparation of the annual budget; developing policies and rules to implement environmental laws and regulations; directing the operation of the wetland mitigation banking system, the archeology program, and the contaminated sites program; providing for training and professional development of the staff; acting as intra- and inter-agency liaison; negotiating funding agreements; recommending hiring, terminating, promoting and other personnel actions for employees in the section.

11. Complainant applied for the career executive position of Administrative Officer 3 - Legislative & Business Community Liaison with respondent. He was certified for the position in September 1992, and was interviewed but not hired. Unlike the contested hire, this position was not responsible for any rail systems. (See Exh. C1b attached to complainant's 7/18/00 brief.)

12. Complainant earned a Bachelor of Science degree in Agricultural Business Administration in 1979 and a Master of Science degree in Agricultural Industries in 1981. The University of Wisconsin Platteville campus conferred both degrees.

OPINION

I. Standard for Summary Judgment Analysis

The use of summary judgment procedures in this administrative forum has been affirmed by the Court of Appeals, *Balele v. Wis. Personnel Comm., DER, DMRS, DOT & DHSS*, 223 Wis.2d 739, 589 N.W.2d 418 (Ct. App. 1998).

The Commission reviews motions for summary judgment using the following standard (*Balele v. DNR*, 98-0046-PC-ER, 1/25/00):

On summary judgment the moving party has the burden to establish the absence of a genuine, that is, disputed, issue as to any material fact. On summary judgment the court does not decide the issue of fact; it decides whether there is a genuine issue of fact. A summary judgment should not be granted unless the moving party demonstrates a right to a judgment with such clarity as to leave no room for controversy; some courts have said that summary judgment must be denied unless the moving party demonstrates his entitlement to it beyond a reasonable doubt. Doubts as to the existence of a genuine issue of material fact should be resolved against the party moving for summary judgment.

The papers filed by the moving party are carefully scrutinized. The inferences to be drawn from the underlying facts contained in the moving party's material should be viewed in the light most favorable to the party opposing the motion. If the movant's papers before the court fail to establish clearly that there is no genuine issue as to any material fact, the motion will be denied. If the material presented on the motion is subject to conflicting interpretations or reasonable people might differ as to its significance, it would be improper to grant summary judgment.

Certain factors must be kept in mind in evaluating such a motion in a case of this nature. First, this case involves a claim under the Fair Employment Act with respect to which complainant has the burden of proving that a hiring decision, which typically has a multi-faceted decisional basis, was motivated by an unlawfully discriminatory intent. Second, complainant is unrepresented by counsel who presumably would be versed in the sometimes intricate procedural or evidentiary matters that can arise on such a motion. Third, this type of administrative proceeding involves a less rigorous procedural framework than a judicial proceeding. Therefore particular care must be taken in evaluating each party's showing on the motion to ensure that complainant's right to be heard is not unfairly eroded by engrafting a summary judgment process designed for a judicial proceeding.

II. Disparate Treatment

Mr Balele alleged that he was not hired for the PIA position because of his color, national origin, or race, or in retaliation for engaging in protected fair employment activities.

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).

The elements of a prima facie case of discrimination in the context of hiring decision are that the complainant 1) is a member of a class protected by the Fair Employment Act, 2) was qualified for the position, and 3) was rejected under circumstances which give rise to an inference of unlawful discrimination. The prima facie case typically also includes the requirement that the complainant applied for the position. Complainant need not show that he applied for the position in this case because he had no opportunity to apply due to the facts that the vacancy was unannounced and was filled by transferring a current DOT employee with career executive status.

Mr. Balele failed to establish a prima facie case because he has not shown that he was qualified for the PIA position. Specifically, he did not have the required experience and knowledge required for the position as noted in ¶2 of the Findings of Fact (FOF). The fact that he previously had been certified for other DOT positions as noted in ¶¶9-11, FOF, is insufficient to show that he was qualified for the PIA position because the other positions did not include responsibility for rail systems. In fact, he was not certified for the one position he applied for which did relate to rail systems, as noted in ¶8, FOF.

The Commission now turns to Mr. Balele's claim of FEA retaliation. The elements of a prima facie case of retaliation are that 1) the complainant participated in a protected activity and the alleged retaliation was aware of that participation, 2) there was an adverse employment action, and 3) there is a causal connection between the first two elements. A "causal connection" is shown if there is evidence that a retaliatory motive played a part in the adverse employment action.

Mr. Balele failed to establish a prima facie case of FEA retaliation. The parties do not dispute that he filed prior discrimination cases against respondent. Mr. Balele, however, has not shown and has not even alleged in his motion or supporting documents that Mr. Gruendler, Mr. Cass or Mr. Adams, the individuals who recommended Mr. Wade for hire, were aware of his prior discrimination cases.

Mr. Balele presented multiple arguments in an attempt to establish pretext. Those arguments are not addressed here because he did not establish a prima facie case of discrimination or retaliation.

III. Disparate Impact

Mr. Balele contends that discrimination occurred under a disparate impact theory. The contested practice is filling a vacancy by transfer of a current DOT employee who has career executive status (Option 1 recruitment¹). The standard for analyzing this claim was discussed in *Oriedo v. DOC*, 98-0124-PC-ER, 2/11/00, as noted below (footnotes omitted):

The standard for a finding of disparate impact, as articulated in *Caviale*² and *Dothard*³, *supra*, and as applicable here, is that the policy have a significantly disproportionate effect on the opportunity for racial minorities to compete for the subject position. Unlike the record in *Caviale*, the record here shows that, during the relevant time period, 7.1% of the employees in respondent's career executive positions were racial minorities and, as a result, eligible to compete for the subject position pursuant to the policy at issue here, i.e., career executive reassignment within an employing agency. The record also shows that the availability of racial minorities for administrator/senior executive positions in the relevant labor pool was 7.5%. The difference between these two statistics does not meet the standard of "significantly disproportionate" as set forth in *Caviale* and *Dothard*, *supra*. Moreover, the record here is also distinct from that in *Caviale* in that respondents here undertook an examination

¹ There are four "options" available for staffing a vacant career executive position. Option 1 is limited to the movement of a career executive within the employing agency. Option 2 involves the movement of a career executive between different agencies. Option 3 involves certification from the register of career executives who are classified civil service employees, and Option 4 is open competition. *Balele v. DOC, DER & DMRS*, 97-0012-PC-ER, 10/9/98.

² *Caviale v. State of Wisconsin, Dept. of Health and Social Services*, 744 F.2d 1289, 35 FEP cases 1642 (7th Cir. 1984)

³ *Dothard v. Rawlinson*, 433 U.S. 321, 15 FEP Cases 10 (1977)

of the reassignment candidate's qualifications for the position and demonstrated at hearing that the candidate's qualifications were unusually well tailored for this position.

During the time period relevant in Mr. Balele's present case, 6.3% of the employees in respondent's career executive positions were racial minorities and were eligible to compete for the position. The availability of qualified racial minorities in the relevant labor pool was 7.5%. (See ¶6 of the Findings of Fact.) The difference between these statistics does not meet the standard of "significantly disproportionate" as set forth in the *Caviale* and *Dothard* cases.

Mr. Balele is aware of the applicable legal analysis noted above because he functioned as Mr. Oriedo's representative in the above-noted case. Furthermore, the same legal analysis was used in *Balele v. DATCP, DER & DMRS*, 98-0199-PC-ER, 4/19/00, which also contested the use of Option 1 to fill a vacant position. He attempts to avoid the conclusion reached in the prior paragraph by saying that he does not intend to rely on statistics to establish the disparate impact claim. The following excerpt is from p. 15 of complainant's brief dated July 18, 2000 (emphasis appears in the original document):

[I]f the Commission has held that statistics are the only means for establishing a prima facie case of race discrimination under the disparate impact theory, then the commission decisions erred and they should be reversed. *Hill v. Ross*, 183 F.3d 586 (7th Cir 1999). The present law states that a complainant only must identify and demonstrate practices or acts of commission (sic) that injured him as an **individual** for his protected status (Title 42 2000e-2. (k)(1)(A), emphasis added). Title VII makes it unlawful for an employer "to limit, segregate, . . . applicants for employment in any way which would deprive or tend to deprive **any individual** of employment opportunities . . . because of such individual's race, national origin . . ." 42 U.S.C. sec. 2000e-2(a)(2) (emphasis added on some words); see *Connecticut v. Teal*, 457 U.S. 440, 448 (1982). In fact DOT's brief does not dispute that it limited and segregated applicant (sic) for this particular position which deprived Balele equal consideration because of his race and national origin. *Id.* The Supreme Court holds that the principal focus of the statute is on the **protection of the individual applicant or employee, rather than the protection of the minority group as a whole.**" (emphasis added on some words). *Connecticut v. Teal*, 457 U.S. 440, 448 (1982). As a whole statistics have been regarded as "statistical nonsense" in defending or prosecuting discrimination cases under disparate impact theory (sic). *Hill v. Ross*, 183 F.3d 587 (7th Cir 1999).

Therefore DOT (sic) proposition that Balele would advance statistics as his means to prove or defend his case is a misstatement of facts and in fact has no merit.

The Commission rejects the above-noted argument because it eviscerates the distinction between the disparate treatment and disparate impact theories of proving discrimination and because it is based upon incorrect summaries of the cited federal laws and related cases.

Disparate treatment claims focus on a complainant as an individual whereas disparate impact claims focus on a complainant as a member of a group.

The essence of disparate treatment is intentional discrimination. By contrast, the adverse impact theory of liability holds that an employer's facially neutral policy or practice may be unlawful—even absent a showing of discriminatory intent—because it has a significant adverse impact upon a protected group. In other words, disparate treatment focuses on discriminatory *intent*, while adverse impact focuses on discriminatory *results*.

Barbara Lindemann & Paul Grossman, *Employment Discrimination Law 3rd Ed.* Ch.4 §1, at 81 (1976) (emphasis in original).

Disparate treatment is the intentional use of race, gender, religion, or national origin to make employment decisions [D]isparate impact discrimination is the use of "employment policies that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity."

Charles Sullivan, Michael Zimmer, Richard Richards, *Employment Discrimination 2nd Ed.*, §2.3 at 39 and §2.4 at 43 (1988).

The proof required in a disparate impact claim involves the use of statistical evidence regarding the protected group of which complainant is a member, as compared to the remaining individuals.

The plaintiff proves a disparate impact case by establishing that the employer's facially neutral hiring requirements operate to disqualify minorities at a substantially higher rate than white applicants. The employee may establish the prima facie case by statistics alone, or by a combination of statistical and nonstatistical proof.

45A Am. Jur 2d *Establishing a prima facie case* §587 at 544 (1993)

Mr. Balele's contention that a claim of disparate impact could be established by citing to him as the sole adversely-affected individual is incorrect and contrary to the basic concept that such claims look at the impact on a protected group. His contention that a disparate impact claim can be established without any statistical proof also is incorrect.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction in this matter pursuant to §230.45(1)(b), Stats.
2. Respondent has the burden to establish entitlement to summary judgment and has sustained its burden.
3. Complainant has the burden to establish entitlement to his cross motion for summary judgment and failed to sustain his burden.

ORDER

Respondent's motion for summary judgment is granted and this case is dismissed.

Dated: November 15, 2000.

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

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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