

State of Wisconsin



Labor and Industry Review Commission

Samuel H. Alexander
Complainant

**Housing Authority of the City of
Milwaukee**
Respondent

ERD Case No. CR201103474

Fair Employment Decision

Dated and Mailed:

January 30, 2020

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The decision of the administrative law judge is **reversed** and this matter is **remanded** to the Equal Rights Division for a hearing on the merits of the complaint.

By the Commission:

/s/

Michael H. Gillick, Chairperson

/s/

David B. Falstad, Commissioner

/s/

Georgia E. Maxwell, Commissioner

Procedural Posture

This case is before the commission to consider the complainant's allegation that the respondent discriminated against him based upon his race, in violation of the Wisconsin Fair Employment Act (hereafter "Act"). An administrative law judge for the Equal Rights Division of the Department of Workforce Development held a hearing and issued a decision finding that no discrimination occurred. The complainant has filed a timely petition for commission review of that decision.

The commission has considered the petition and the positions of the parties, and it has reviewed the evidence submitted at the hearing. Based on its review, the commission makes the following:

Findings of Fact

1. The respondent, Housing Authority of the City of Milwaukee (hereinafter "respondent"), is an agency that oversees public housing in the city of Milwaukee, including more than a dozen housing developments and apartment complexes.
2. The respondent is not a subdivision of the City of Milwaukee and the respondent's employees are not part of the city's civil service system.
3. The complainant, Samuel Alexander (hereinafter "complainant"), began working for the respondent in 1985 as a Building and Grounds Laborer, an entry level position for custodial maintenance of buildings and grounds in the city's public housing developments. The complainant's race is black.
4. In 1988 the complainant was promoted to the position of Maintenance Mechanic I, and subsequently to Maintenance Mechanic II. As a maintenance mechanic, the complainant received training on repairing furnaces and boiler systems. In the role of Maintenance Mechanic II, the complainant was the emergency contact person when his supervisor, Dan Waters, the Maintenance Operations Manager, was absent. Waters' race is white.
5. In 1994 the complainant was promoted to the position of Maintenance Supervisor, a position that involved the training and direct supervision of nine custodial and maintenance employees. Additionally, the complainant was responsible for being on call as needed in emergencies, and for working with the respondent's procurement specialist to open accounts with vendors.
6. In 1997 the complainant transferred to the position of Preventative Maintenance Monitor. This position did not include supervisory duties, although the complainant directed the work of employees on the tech crew and handed out work assignments. In addition, the complainant's supervisor, Dan Waters, would ask the complainant to fill in for him when he was away from the workplace.

7. The Preventative Maintenance Monitor position was salaried, rather than hourly, and the complainant was not eligible for overtime pay. At some point the complainant learned that other similar employees were able to get overtime pay because they were paid on an hourly basis. He requested similar treatment. In 2007, the complainant's title was changed to Technical Maintenance Specialist--his duties were the same as his duties as Preventative Maintenance Monitor, but the position was an hourly one which allowed him to earn overtime pay if he worked more than 40 hours a week.

8. A few years later the complainant was promoted to a Steamfitter position, the title of which was later changed to HVAC Mechanic. (As of the date of the hearing, the complainant was still employed as an HVAC Mechanic.)

9. During his entire work history the complainant received excellent performance reviews and got along well with his supervisors, including Dan Waters. Waters repeatedly told the complainant that when he retired the complainant would get his job. A few years prior to his retirement, Waters told the complainant, "I need to get you in here, and you need to learn how to order the trucks, because I'm going to be retiring at some point and you're going to need to know how to do this." When Waters told him he expected him to take over the position, the complainant stated, "Okay."

10. Sometime after the conversation referenced above, Waters became close to another employee, James Wellman. Wellman began working for the respondent in 1992 as a Housing Maintenance Mechanic and was promoted to Lead Housing Maintenance Mechanic in 2004. Waters stopped talking to the complainant about taking over his position and instead began to groom Wellman for the job. Waters was out on a medical leave for six months in 2009, during which time Wellman handled many of his duties. Wellman's race is white.

11. In February of 2011 Waters announced he would be retiring in May. Waters told his supervisor, James Eigenberger, that he thought Wellman would be the best candidate to succeed him as Maintenance Operations Manager. Eigenberger agreed that Wellman was a good choice for the position because he and Waters had been working so closely. Eigenberger and Waters never discussed the idea of promoting anyone else. Waters wrote a letter recommending Wellman for the position and Eigenberger sent the letter on to Tony Perez, the respondent's executive director. Perez approved the recommendation, and Wellman was hired.

12. The respondent has no rules requiring it to post open positions. The Maintenance Operations Manager job was never posted and the complainant was never given an opportunity to apply.

13. The complainant did not receive any advance notice that Waters was going to retire; Waters was already retired and Wellman in the job when the complainant received the news.

14. Wellman was told that he would have to resign as a City of Milwaukee employee and become the respondent's employee. Wellman did so--he resigned from his job at the City and applied for a job with the respondent. Wellman was hired into an interim position entitled Assistant Maintenance Support Manager, worked in that job for about a month, and then was moved into the position of Maintenance Support Manager.¹

15. The position of Maintenance Support Manager included supervisory responsibilities. Wellman had no prior supervisory experience.

16. The complainant had prior supervisory experience, as detailed in paragraphs 5 and 6 above.

17. The job description for the position of Maintenance Support Manager states that the job requires a low pressure boiler's license, a valid Wisconsin Driver's license, and a State of Wisconsin HVAC license or the ability to obtain one within 6 months of hire. Wellman had a driver's license, but he did not have the boiler license or HVAC license.

18. The complainant had all of the licenses required, as well as an EPA certification that allowed him to work with refrigerant and air conditioners.

Conclusions of Law

1. There is probable cause to believe that the respondent denied the complainant a promotion based upon his race, in violation of the Wisconsin Fair Employment Act.

Memorandum Opinion

This case is before the commission on probable cause. The burden of proof at a probable cause hearing has been described as "low." It is somewhere between a preponderance and a "suspicion" that discrimination has occurred. *See, Buska v. Central Building Management, LTD*, ERD Case No. 9200725 (LIRC Sept. 28, 1995). The commission believes sufficient evidence was presented in this case to warrant a finding of probable cause.

¹ The titles "Maintenance Support Manager" and "Maintenance Operations Manager" are interchangeable.

To establish a *prima facie* case of discrimination, a complainant must show that he was a member of the protected group and suffered the adverse action alleged, and that the relevant circumstances create an inference of discrimination, *i.e.*, typically, that others not in the protected group were treated more favorably. *Gabrielson v. Wauwatosa School District*, ERD Case No. CR201502807 (LIRC April 5, 2019), citing *Keene v. Menard, Inc.*, ERD Case No. CR200501282 (LIRC May 8, 2008). The respondent has argued that the complainant cannot satisfy his *prima facie* burden since he did not apply for a promotion. However, the *prima facie* case requirement is meant to be a flexible one, and there is no absolute requirement that the complainant have applied for a promotion. Nor would such a requirement be reasonable in this case, since the complainant was never provided an opportunity to do so. Where, as here, the complainant established that he is black, that he had been told he would be promoted, that he was qualified for a promotion, and that--without the complainant having been given a chance to apply--the respondent instead offered the job to a white employee who lacked some of the position qualifications that the complainant possessed, there is little question but that the *prima facie* case requirement has been met.

Once a *prima facie* case has been established, the burden shifts to the respondent to articulate a legitimate, nondiscriminatory reason for its actions. The respondent's burden is one of production, not of persuasion. *Lowe v. City of Appleton*, ERD Case No. 9203351 (LIRC Jan. 11, 1995). "The requirement of "articulation" is rather minimal: the employer need not initially prove the articulated reason was the actual reason for the discharge. Rather, the employer need only raise a genuine issue of fact as to whether it discriminated against the employee. To do this, though, the employer at least "must clearly set forth, through the introduction of admissible evidence, the reasons for the [employee's] rejection.'" *Kalsto v. Village of Somerset*, ERD Case No. 199802509 (LIRC Oct. 3, 2000), citing *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 25 FEP Cases 113, 116 (1981). If the respondent carries its burden of production, the complainant then must show that the respondent's asserted reasons were in fact a pretext for retaliatory conduct. *Monroe v. Birds Eye Foods Inc.*, ERD Case No. CR200304303 (LIRC March 31, 2010).

However, a finding in the complainant's favor will result when the *prima facie* case of discrimination is not rebutted by the articulation of a non-discriminatory reason. *Zunker v. RTS Distributors*, ERD Case No. CR201004089 (LIRC June 16, 2014); *Foust v. City of Oshkosh Police Department*, ERD Case No. 9200216 (LIRC April 9, 1998); *Ray v. Ramada Inn-Sands West*, ERD Case No. 8651937 (LIRC March 5, 1991). That is the situation here. The respondent did not bring the decision-maker,

Dan Waters, to the hearing,² and the only evidence regarding the reasons for the respondent's decision to promote Wellman and not the complainant comes from the deposition of James Eigenberger, Waters' supervisor.³ In his deposition, Eigenberger testified that Waters told him he was recommending Wellman for the position because he was the best person for the job. Eigenberger stated that Waters did not elaborate and was vague during their conversation, although Eigenberger expressed his personal opinion that Wellman knew more about the respondent's buildings than any other person on staff, and that there was no better choice than Wellman.⁴ Eigenberger mentioned that Wellman had been groomed for the position and that prior to retirement Waters took him on as his protégé. He stated that he did not know why the complainant was not considered, and indicated that he did not know if the complainant would even have accepted the position since he had turned down a supervisory position on a prior occasion.

This evidence did not satisfy the respondent's burden to "clearly set forth the reasons for the employee's rejection," as contemplated in *Burdine, supra*. While the respondent presented an explanation as to why Wellman was selected--that he was groomed for the job and that Waters indicated he was best--it did not explain why the complainant, who was arguably better qualified for the job,⁵ was not selected or even considered. Eigenberger speculated that the complainant might not have wanted the job based upon a decision to decline a prior promotion, but did not actually assert that Waters passed over the complainant for that reason, nor does the evidence support such a theory. The complainant testified that when Waters told him he would be getting the position the complainant responded affirmatively, and there is no other evidence to suggest that the complainant indicated he did not want the job.

In her decision the administrative law judge stated that it does not appear race was a factor because Waters thought highly of the complainant's skills and abilities as

² A footnote in the administrative law judge's decision indicates that Waters has retired and moved up north. There is nothing to explain whether the respondent made any effort to obtain his testimony.

³ The deposition came into the record under Wis. Stat. § 804.07(b), which allows depositions of an officer or director to be used by an adverse party.

⁴ After their meeting, Waters sent Eigenberger a letter stating that Wellman had extensive knowledge in all the mechanical aspects of the buildings and that housing managers "have come to know him as the one person they can call if they need a mechanical or technical problem resolved in their building." (Eigenberger Deposition, Ex. 20).

⁵ The complainant testified that, with the exception of ordering trucks, there was no part of Dan Waters' job that he had not done and, further, that he had never observed or learned that Wellman performed duties he could not. In addition, the complainant had supervisory experience and all of the licenses required for the job, which Wellman lacked.

evidenced by his excellent performance reviews and the fact that Waters had offered him previous promotions. However, rather than shedding light on the decision, the fact that Waters acknowledged the complainant was an excellent performer raises questions as to why he decided not to promote the complainant and focused on the white employee instead. Nor does the fact that the complainant received previous promotions necessarily demonstrate a lack of racial animus; Waters' willingness to promote the complainant to other, lower level positions does not require a conclusion that race was not a factor in his decision to offer the Manager position to a white employee. The commission notes that at the hearing the complainant presented evidence indicating that there was a cultural divide in the work place between white and black employees, and the individual who received the promotion instead of the complainant, James Wellman, supported this general characterization and stated that he and Waters were "the same breed." Absent any explanation for the decision to offer the promotion to a white employee without even considering the complainant for the job, it cannot be presumed that race was not a factor in the decision.

To summarize the evidence, the complainant showed that 1) he is black, 2) he was well qualified for the position of Maintenance Support Manager and had been previously told by his supervisor that he would be receiving the position after the supervisor retired, 3) the respondent never gave him an opportunity to apply for the position and apparently never considered him for the position, and 4) the respondent handpicked a white individual who had similar or fewer qualifications, waiving license requirements (that the complainant met) so that person could be found eligible for the job. This evidence easily satisfies the complainant's burden to establish a *prima facie* case and shifts the burden to the respondent to explain why it made the choice it did. However, the respondent did not provide a legitimate nondiscriminatory reason for its actions. Waters was not at the hearing, and the respondent's only live witness, the individual who was selected instead of the complainant, had no information as to why the complainant was not chosen. While Eigenberger's deposition was also included in the hearing record, Eigenberger could not explain why the complainant was not considered and could only speculate as to the decision-maker's motives. Absent any explanation for the decision to offer the job to Wellman without considering the complainant, it cannot be presumed that race was not a factor. The evidence presented by the complainant at hearing is sufficient to raise a suspicion that discrimination may have occurred, and the commission believes that the complainant should be given an opportunity to prove his case on the merits.

cc: Nola J. Hitchcock Cross
Agatha K. Raynor