

State of Wisconsin



Labor and Industry Review Commission

Holly Swanson, Complainant

Fair Employment Decision¹

School District of Randolph, Respondent

Dated and Mailed:

ERD Case No. CR201900317
EEOC Case No. 26G201900505C

May 23, 2025
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The decision of the administrative law judge is **affirmed**. Accordingly, the complainant's complaint is dismissed with prejudice.

By the Commission:

/s/

Michael H. Gillick, Chairperson

/s/

Georgia E. Maxwell, Commissioner

/s/

Marilyn Townsend, Commissioner

¹ **Appeal Rights:** See the green enclosure for the time limit and procedures for obtaining judicial review of this decision. If you seek judicial review, you **must** name the Labor and Industry Review Commission as a respondent in the petition for judicial review. Appeal rights and answers to frequently asked questions about appealing a fair employment decision to circuit court are also available on the commission's website <http://lirc.wisconsin.gov>.

Procedural Posture

This case is before the commission to consider the complainant's allegation that the respondent discriminated against her on the basis of sex, in violation of the Wisconsin Fair Employment Act (hereinafter "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 the complainant failed to demonstrate by a preponderance of the evidence that the respondent refused to hire or employ the complainant because of sex, in violation of the Act. Accordingly, the administrative law judge dismissed the complainant's complaint with prejudice. The complainant 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 agrees with the decision of the administrative law judge, and it adopts the findings and conclusions in that decision as its own.

Memorandum Opinion

The complainant, an experienced elementary school physical education (PE) teacher for the respondent, applied and interviewed for a middle and high school PE teacher position offered by the respondent. A less experienced male teacher was hired instead. The complainant filed a complaint alleging that the respondent discriminated against her on the basis of her sex (female), between April 23, 2018 and January 25, 2019, explaining:

Despite her years of her qualifications, years of experience and documented exemplary performance, the Randolph School District passed over Mrs. Swanson for the grades 7 through 12 physical education teacher position and instead gave the position to a much less qualified male candidate who had limited experience teaching physical education or high school.

Because the complainant asserts that the respondent discriminated against her on the basis of her sex by denying her a position for which she was qualified and for which a male was hired instead, she must prove discriminatory intent. *Racine Unified Sch. Dist. v. LIRC*, 164 Wis. 2d 567, 595, 476 N.W.2d 707 (Ct. App. 1991). Wisconsin courts presume discrimination, or a discriminatory intent, when the complaining party makes out a *prima facie* case. *Puetz Motor Sales, Inc. v. LIRC*, 126 Wis. 2d 168, 172-173, 376 N.W.2d 372 (Ct. App. 1985). In general, to establish a *prima facie* case of discrimination, a complainant must show that she was a member of the protected group, and that the relevant circumstances create an inference of discrimination, *i.e.*, that others not in the protected group were treated more favorably. *Vick v. Marshfield Door System*, ERD Case No. CR200403297 (LIRC Jan. 31, 2007).

A respondent may rebut the presumption of discrimination arising from a *prima facie* case by articulating a legitimate, nondiscriminatory reason for the action taken. *Puetz Motor Sales*, 126 Wis. 2d at 173. If a respondent articulates a legitimate nondiscriminatory reason, the presumption of discrimination falls away, *Kovalic v. DEC Int'l, Inc.*, 161 Wis. 2d 863, 875, 469 N.W.2d 224 (Ct. App. 1991), and the burden of proving that the proffered reason was merely a pretext for discrimination remains with the complainant. *See, Puetz Motor Sales*, 126 Wis. 2d at 172-73. *See also, Sacred Heart Sch. Bd. v. LIRC*, 157 Wis. 2d 638, 643, 460 N.W.2d 430 (Ct. App. 1990).

However, a complainant must be given the opportunity to prove that the proffered reason is merely a pretext for discrimination. *Puetz Motor Sales*, 126 Wis. 2d at 173. In such a case,

A complainant may establish pretext either directly by showing that a discriminatory reason more likely motivated the employer or indirectly by showing the employer's proffered explanation to be unworthy of credence. That a reason is pretextual does not mean it is false; the facts asserted may in fact be true but not the actual reason for the action taken.

Puetz Motor Sales, 126 Wis. 2d at 175.

On the other hand, merely because an employer's articulated nondiscriminatory reason is pretextual does not necessarily mean the complainant *must* prevail. Rather, the evidence must persuade the commission that the pretext is a pretext for discrimination. *Kovalic v. DEC International*, 186 Wis. 2d 162, 167-68, 519 N.W.2d 351 (Ct. App. 1994); *Theusch v. Steel Craft Corporation of Hartford*, ERD Case No. 199601535 (LIRC May 22, 1998); *Trudell v. Bellin Memorial Hospital*, ERD Case No. CR201303060 (LIRC June 29, 2016). The commission may, but is not required to, reach this inference simply on the complainant's *prima facie* case and on the commission's disbelief of the articulated nondiscriminatory reason. *Kovalic*, 186 Wis. 2d at 167-68.

Here, the complainant has made a *prima facie* case. She established that she was in a protected class (female), that she was denied a position she applied for, that she was qualified for the position, and that the respondent instead hired someone not in the protected class (a male). The respondent has articulated a nondiscriminatory reason for its hiring decision: the respondent's administrator, Kevin Knudson, and its high school principal, Andrew Kohn, felt that the male candidate, Chad Kaufman, performed better during the job interview. The complainant argues that she has shown that reason is a pretext and that the record amply meets her burden of proving discriminatory intent. She notes the inherent subjectivity of the respondent's explanation for the hiring decision. She also points to her significantly

superior credentials and experience, her belief that Kohn gave Kaufman a “leg up” by notifying him of a high school special education opening which put him in place to receive favorable coaching assignments before the former middle and high school PE teacher’s departure, Knudson’s and Kohn’s “after-the-fact modification” of their interview scoring, and other instances in which she alleges that the respondent or its management favored a male over a female.

Knudson and Kohn explained that they scored Kaufman more highly than the complainant during the interview process in part because the complainant gave them the impression that she believed she was entitled to or “owed” the position by virtue of her years of experience and service in the respondent’s school district. They also felt that the complainant emphasized her own experience and qualifications, as opposed to her commitment to the students and the job during the interview. Kohn in particular noted the complainant’s comment that she saw the position middle and high school PE teacher as something that would help her with her post-retirement goal of becoming an instructor at the college level. Kohn and Knudson felt that Kaufman’s responses, by contrast, better emphasized a flexible and adaptable approach to dealing with high school students, explained the importance of developing relationships and rapport with the students, and demonstrated his commitment to the job and the school community.

The commission concludes that Knudson’s and Kohn’s view of the responses given by the complainant and Kaufman during the interview, though subjective, was not pretextual. On this issue, the commission does not re-examine the respondent’s business decision; its concern is whether the respondent honestly believed its articulated reasons, even if mistaken or ill-considered. *Thobaben v. County of Waupaca Sheriff’s Department*, ERD Case No. CR200602483 (LIRC Dec. 23, 2011). In this case, Knudson reasonably observed that experience as an elementary school teacher did not necessarily mean one would be a good high school teacher; different skills in dealing with children of different ages are involved. Further, in selecting a job candidate through an interviewing process, credentials and experience may reasonably be weighed against responses demonstrating commitment to, and enthusiasm for, the job at issue. In other words, the fact that the more credentialed, more experienced individual is not hired does not automatically prove a pretext for unlawful employment discrimination. As the complainant points out, the Seventh Circuit has held that “evidence of the applicants’ competing qualifications does not constitute evidence of pretext unless those differences are so favorable to the plaintiff that there can be no dispute among reasonable persons of impartial judgment that the plaintiff was clearly better qualified for the position at issue.” *David v. Caterpillar, Inc.*, 324 F.3d 851, 861–62 (7th Cir. 2003) (emphasis added). The commission has followed this approach. *Delgadillo v. Kenosha Unified School Dist.*, ERD Case No. CR201101545 (LIRC Nov. 30, 2018).

In this case, the complainant's experience, credentials, and accomplishments during her teaching career are notable and impressive. However, they do not compel the conclusion that, regardless of Kohn's and Knudson's reasons for viewing Kaufman's interview responses more favorably, the complainant was undeniably the better qualified candidate for the position of middle and high school PE teacher. Further, while Knudson and Kohn adjusted their interview scores during the interviewing process, the commission does not view that as suspicious or unusual, nor does it appear that the complainant would have had the higher interview score had the scoring changes not been made.

The commission also gave careful consideration to the testimony offered by the complainant that she contended demonstrated a pattern of favorable treatment of males generally by the respondent or its management. However, neither administrator Knudson's tendency to socialize with men more than women nor the complainant's and Ms. Alvin's feelings that he did not respect their opinions regarding gym equipment placement (Ms. Alvin operated a local fitness center) demonstrate discriminatory intent with respect to the terms or conditions of their employment. Nor does the fact that a male teacher was chosen instead of the complainant to teach a middle and high school fitness and weight class demonstrate discriminatory intent. High school principal Kohn and elementary school principal Christy Fay both testified that they attempted to slot the complainant into the fitness and weight class, but could not make it work because of the difference between the length of elementary school classes or periods compared to those of the middle and high school.

The complainant also elicited testimony suggesting disparate treatment of male high school principal Kohn and female elementary school principal Fay in terms of pay in the early years of their employment with the respondent. However, Fay herself explained that the initial difference in pay seemed reasonable because Kohn had prior relevant administrative experience—he had been a principal at another school—while Fay did not. Despite that difference in experience, the respondent later gave Fay a pay raise to a level that exceeded Kohn's when she demonstrated to the respondent's school board the value she brought to the job. Indeed, Fay felt that administrator Knudson supported her in that effort. In short, the initial difference in the pay offered to Fay and Kohn provides no basis for finding discriminatory intent against the complainant on the basis of sex in her unsuccessful pursuit of the middle and high school PE teacher job.

If there is any reason for questioning the validity of the respondent's articulated reason for hiring Kaufman instead of the complainant, it is the testimony of both Kohn and Kaufman that they were old friends who had roomed together in college and attended each other's wedding. However, that evidence does not establish that the respondent's articulated reason is a pretext for discrimination based on sex, as required under *Kovalic v. DEC International*, 186 Wis. 2d at 167. As the

administrative law judge observed, the commission has previously held that favoritism toward an old friend, while unfair, is not among the conduct prohibited by the Act. *Krueger v. County of Waupaca*, ERD Case Nos. CR20100816 and CR201400425 (LIRC Aug. 22, 2018). *See also, Nadeau v. Felician Senior Living Community and HDS*, ERD Case No. 200401598 (LIRC Nov. 18, 2005) (favoritism on the part of a supervisor is not prohibited under the Act). Stated another way, even if it had been established that Kohn's favoritism toward an old friend played a role in the respondent's hiring decision in this case, that would not establish discrimination based on sex.

In sum, after carefully considering the record and the arguments made by the parties on review, the commission affirms the administrative law judge's conclusion that the complainant failed to meet her burden of proving an illegal discriminatory intent under the Act.

cc: Attorney Christina Ripley
Attorney Douglas Witte