

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 25, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 01-1753
STATE OF WISCONSIN**

Cir. Ct. No. 00-CV-2876

**IN COURT OF APPEALS
DISTRICT IV**

PASTORI M. BALELE,

PETITIONER-APPELLANT,

v.

**WISCONSIN PERSONNEL COMMISSION AND DEPARTMENT
OF ADMINISTRATION,**

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County:
ROBERT DeCHAMBEAU, Judge. *Affirmed.*

Before Dykman, Roggensack and Deininger, JJ.

¶1 PER CURIAM. Pastori Balele appeals an order affirming the Wisconsin Personnel Commission's decision on his employment discrimination complaint. The Commission granted summary judgment on undisputed facts, deciding that George Lightbourn, the secretary of the Department of

Administration (DOA), did not discriminate against Balele by hiring someone else for a vacant administrator's position within DOA.¹ The circuit court affirmed. We directly review the Commission's decision, *Zignego Co. v. DOR*, 211 Wis. 2d 819, 824, 565 N.W.2d 590 (Ct. App. 1997), and affirm.

¶2 The facts are not in dispute. In late 1999, the position of Administrator, Division of State Agency Services within DOA became vacant. The position is described as follows:

The Administrator, Division of State Agency Services, reports directly to the Secretary, Department of Administration, and is responsible for the direction and administration of programs within the Division. Responsibilities include: plan for, develop, implement, monitor and evaluate divisional programs, ensure the establishment of operational policies and divisional goals and meet objectives.

Agencies under the administrator's supervision include the Bureau of Transportation, Bureau of Document Service, Bureau of Procurement and the Bureau of State Risk Management. These agencies have a combined budget of approximately \$35 million, and approximately 159 full-time employees. The administrator is also required to serve on various Boards and Commissions as DOA representative. The position is unclassified.

¶3 Lightbourn knew Robert Cramer, a white male, from Cramer's seven-years of employment with DOA. Lightbourn thought highly of Cramer's

¹ The stipulation of the issue before the Commission states: "[w]hether complainant was discriminated against on the basis of race, national origin or ancestry, or color, or retaliated against for engaging in protected fair employment activities when he was not selected for the position of Administrator, Division of State Agency Services. Complainant has indicated that he intends to prove this discrimination/retaliation using both a disparate treatment and a disparate impact analysis."

abilities. When Cramer left the Department in early 1999, he received Lightbourn's open-ended invitation to return. In the fall of 1999, Cramer expressed an interest in returning and submitted a resume.

¶4 A few weeks later, Lightbourn contacted Cramer and offered him the administrator position. At about the same time, Balele, who is of African descent, applied for the job by e-mail, with a resume attached. Lightbourn never responded to Balele's e-mail. Cramer accepted Lightbourn's offer and was appointed to the position on March 31, 2000. Lightbourn did not seek applicants for the opening and never considered anyone but Cramer for it.

¶5 Cramer's work experience includes four years as an executive policy and budget analyst in DOA, three years as an information technology management consultant for the Department, and one year as government services manager for the Wisconsin office of the Arthur Anderson accounting firm. His education includes a bachelor's degree and two master's degrees. Lightbourn considered him an excellent upper echelon employee for DOA during his seven years there.

¶6 Balele had worked for DOA eighteen years, most recently as a contractual services management assistant in the Bureau of Procurement. The Commission determined that his resume described numerous duties and accomplishments in his DOA career, but listed no significant supervisory or administrative duties. His other work experience consisted of five years during the 1970's as a manager, supervisor, accountant or administrative officer for local government or quasi-government agencies in his homeland of Tanzania. Balele has a bachelor's degree and a master's degree from the University of Wisconsin-Platteville.

¶7 In his discrimination complaint, Balele alleged that his failure to obtain the administrator position was attributable to discrimination based on race, color, national origin and retaliation for prior discrimination complaints he has filed against DOA. Dismissing his complaint on summary judgment, the Commission held, among other things, that Balele failed to show: (1) that he was qualified for the position, (2) that Balele failed to present any evidence of pretext, (3) that hiring Cramer discriminated under a disparate impact theory and (4) that Lightbourn hired Cramer in retaliation against Balele.

¶8 Wisconsin prohibits employment discrimination because of race, color and national origin. WIS. STAT. § 111.321 (1999-2000).² Refusing to hire someone on that basis is a prohibited discriminatory act. WIS. STAT. § 111.322(1). The same is true if the act is done in retaliation for engaging in protected employee activity. Section 111.322(3).

¶9 One may prove employment discrimination by showing disparate treatment or disparate impact. *Racine Unified Sch. Dist. v. LIRC*, 164 Wis. 2d 567, 594, 476 N.W.2d 707 (Ct. App. 1991). The first depends on discriminatory intent. *Id.* at 595. Absent direct proof of that intent, a complainant must establish a *prima facie* case for discrimination that includes proof that he or she is qualified for the job in question. *Puetz Motor Sales, Inc. v. LIRC*, 126 Wis. 2d 168, 172-73, 376 N.W.2d 372 (Ct. App. 1985). Disparate impact discrimination depends on the impact a policy has on a protected group, regardless of the intent behind it. *Racine*, 164 Wis. 2d at 595.

² All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

¶10 When an agency has particular competence or expertise on an issue, we will sustain its legal conclusions if they are reasonable. *Nelson Bros. Furniture Corp. v. DOR*, 152 Wis. 2d 746, 753, 449 N.W.2d 328 (Ct. App. 1989). We also accord special deference to the agency's decision if it involves value and policy determinations. *Id.* at 753.

¶11 Addressing Balele's disparate treatment claim, the Commission determined that even if Balele established a *prima facie* case of employment discrimination,³ the employer provided a legitimate, non-discriminatory reason for its decision and Balele failed to make any showing that the employer's reason was pretextual. *See Puetz*, 126 Wis. 2d at 172-73 (describing the burden shifting analysis applicable to disparate treatment claims when there is no direct evidence of intent to discriminate). DOA's explanation for its decision to hire Cramer rather than Balele was that the agency never sought or considered applicants for the opening. Rather, Lightbourn and Cramer had been in an ongoing dialogue concerning Cramer's return to DOA prior to the opening of the unclassified administrator position, and Lightbourn considered no one other than Cramer once the position opened because he felt that Cramer was highly qualified and because he knew Cramer was interested in returning. Balele's evidence of pretext amounts to little more than a suggestion that Lightbourn should have established a more formal, competitive hiring process and abandoned his informal discussions with Cramer upon receiving Balele's unsolicited e-mail expressing interest in the position. The Commission's conclusion that this showing was insufficient to survive summary judgment is reasonable.

³ We do not address the Commission's conclusion that Balele failed to establish a *prima case* of employment discrimination.

¶12 The Commission also properly determined that DOA's appointment process for unclassified positions did not have a disparate impact on any protected group. Balele's allegation of disparate impact was conclusory only, with no evidence presented to support it. In contrast, DOA presented evidence that a higher percentage of DOA unclassified positions were occupied by racial or ethnic minorities than were represented in the available labor pool.

¶13 Additionally, the Commission properly dismissed Balele's claim of discrimination by retaliation. Balele presented no evidence that Lightbourn failed to hire him in retaliation for engaging in protected employee activity. Without such evidence, Balele failed to satisfy his burden of proof. *See Acharya v. Carroll*, 152 Wis. 2d 330, 340, 448 N.W.2d 275 (Ct. App. 1989) (employee bears initial burden of showing connection between the adverse employment decision and his or her prior protected activity).

¶14 Our decision makes it unnecessary to address issues regarding the alternative grounds the Commission presented for its decision.

By the Court.—Order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5.

