

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**May 1, 2003**

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. 02-1190  
STATE OF WISCONSIN**

**Cir. Ct. No. 01-CV-1366**

**IN COURT OF APPEALS  
DISTRICT IV**

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**JOSEPH E. SABOL,**

**PETITIONER-APPELLANT,**

**v.**

**STATE OF WISCONSIN PERSONNEL COMMISSION AND  
UNIVERSITY OF WISCONSIN-EAU CLAIRE,**

**RESPONDENTS-RESPONDENTS.**

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

Before Vergeront, P.J., Roggensack and Deininger, JJ.

¶1 PER CURIAM. Joseph Sabol appeals a circuit court order that affirmed the Wisconsin Personnel Commission's dismissal of his employment discrimination complaint. We affirm for the reasons discussed below.

## BACKGROUND

¶2 The commission found that the University of Wisconsin at Eau Claire hired Sabol as a lecturer in 1997 to fill a one-year vacancy in its Chemistry Department caused by a faculty member's leave of absence. At the time, Sabol had a PhD and ten years of teaching experience. In 1998, the University hired Sabol to fill another one-year vacancy caused by the sabbatical of another faculty member. The hiring letters designated each position offered to Sabol as "fixed term, no intent to renew."

¶3 During his employment, Sabol sent an email to several of his colleagues asking them to double check that all caps were replaced on reagent bottles of solvents and acids after he discovered some loose caps following lab sessions led by other faculty.

¶4 In 1999, the Chemistry Department recruited for a lecturer to fill another one-year vacancy to replace a faculty member on medical leave. Sabol applied and listed Scott Hartsel, chairperson of the University departmental personnel commission and Chemistry 101 coordinator as one of his references. Hartsel told the recruitment committee that he considered Sabol's teaching to be below the average of his peers, based on observations by other faculty members and low student evaluations. The other three candidates, who also had PhDs, all received above average recommendations.

¶5 The recruitment committee did not interview Sabol, and the University ultimately hired a thirty-four-year-old woman with fewer years of teaching experience than Sabol, whose husband had accepted a tenure track faculty position at University the year before.

## STANDARD OF REVIEW

¶6 We review the administrative agency's decision rather than that of the circuit court. *Stafford Trucking, Inc. v. DILHR*, 102 Wis. 2d 256, 260, 306 N.W.2d 79 (Ct. App. 1981). Judicial review of administrative proceedings pursuant to WIS. STAT. § 227.57 (2001-02)<sup>1</sup> is confined to the administrative record, with the exception of alleged procedural irregularities for which evidence may be presented in the circuit court. Section 227.57(1). A court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact, so long as the fact is supported by substantial evidence in the record. Section 227.57(6); *Advance Die Casting Co. v. LIRC*, 154 Wis. 2d 239, 249, 453 N.W.2d 487 (Ct. App. 1989); *Princess House, Inc. v. DILHR*, 111 Wis. 2d 46, 54-55, 330 N.W.2d 169 (1983).

¶7 A court shall reverse only if it determines that the agency acted outside of the discretion accorded to it by law or otherwise acted contrary to a constitutional or statutory provision or the agency's own rules or practice. WIS. STAT. § 227.57(8). We are not bound by an agency's conclusions of law in the same manner as we are by its factual findings. *Begel v. LIRC*, 2001 WI App 134, ¶6, 246 Wis. 2d 345, 631 N.W.2d 220. However, we may nonetheless defer to its legal determinations. An agency's interpretation or application of a statute may be accorded great weight deference, due weight deference or *de novo* review, depending on the circumstances. See *UFE, Inc. v. LIRC*, 201 Wis. 2d 274, 284, 548 N.W.2d 57 (1996).

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

¶8 Great weight deference is appropriate when: (1) the agency is charged by the legislature with the duty of administering the statute in question; (2) the agency's interpretation of the statute is one of long-standing; (3) the agency employed its expertise or specialized knowledge in interpreting the statute; and (4) the agency's interpretation will provide uniformity and consistency in the application of the statute. *Harnischfeger Corp. v. LIRC*, 196 Wis. 2d 650, 660, 539 N.W.2d 98 (1995). We are satisfied that the commission meets the criteria for great weight deference in this case, having been charged by the legislature with hearing and deciding discrimination complaints and having developed considerable expertise over the years doing so. *See* WIS. STAT. § 111.375(2); *Phillips v. WPC*, 167 Wis. 2d 205, 216, 482 N.W.2d 121 (Ct. App. 1992). Therefore, we will affirm the commission's decision so long as it was reasonable, even if an alternate decision might have been more reasonable. *Harnischfeger*, 196 Wis. 2d at 661.

## DISCUSSION

¶9 There is a three-step framework for evaluating discrimination claims under the Wisconsin Fair Employment Act. First, the plaintiff must demonstrate a *prima facie* case of discrimination, in that he or she was a member of a protected class who was qualified for the job, and that someone outside of the protected class was hired instead. Second, if the plaintiff succeeds in establishing a *prima facie* case, the defendant must articulate some legitimate, nondiscriminatory reason for the employee's rejection to create a factual dispute. Third, should the defendant carry his or her burden of production, the plaintiff carries the ultimate burden of persuasion to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a

pretext for discrimination. *Currie v. DILHR*, 210 Wis. 2d 380, 390, 565 N.W.2d 253 (Ct. App. 1997).

¶10 At the probable cause stage of evaluating a WFEA complaint, the commission must determine whether there is “a reasonable ground for belief, supported by facts and circumstances strong enough in themselves to warrant a prudent person to believe that a violation probably has been or is being committed as alleged in the complaint.” WIS. ADMIN. CODE § PC 1.02(16). In making its probable cause determination, the commission may make credibility determinations based on the testimony and should adopt the viewpoint of a prudent person contemplating the ordinary, everyday concepts of cause and effect, given all of the available evidence. *Boldt v. LIRC*, 173 Wis. 2d 469, 475-76, 496 N.W.2d 676 (Ct. App. 1992).

¶11 Here, the commission determined that Sabol had established *prima facie* cases for discrimination based on age, gender, and retaliation for protected OSHA reporting activities. It further determined that the University had proffered a valid reason for hiring another person—namely, its view that the other candidate was better qualified based on Sabol’s poor recommendations from his reference and student evaluations. The commission concluded, however, that there was no probable cause to believe that the University’s proffered reasons for its hiring decision were pretextual.

¶12 We are satisfied that the commission’s conclusion was reasonable. The commission noted that there was virtually no evidence that the University’s hiring decision had been motivated by Sabol’s email, age or gender. The commission was persuaded that “the real bone of contention” was Sabol’s initial claim that the position was filled as part of a deal made when the successful

candidate's husband was hired the preceding year. Sabol's claim of discrimination based on marital status or spousal identity was abandoned, however, following this court's decision in *Bammert v. LIRC*, 2000 WI App 28, 232 Wis. 2d 365, 606 N.W.2d 620.

*By the Court.*—Order affirmed.

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

