

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**November 24, 2004**

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. 04-0034  
STATE OF WISCONSIN**

**Cir. Ct. No. 02CV001826**

**IN COURT OF APPEALS  
DISTRICT II**

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**JOSEPH E. SABOL,**

**PETITIONER-APPELLANT,**

**v.**

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

**RESPONDENTS-RESPONDENTS.**

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APPEAL from an order of the circuit court for Racine County:  
CHARLES H. CONSTANTINE, Judge. *Affirmed.*

Before Anderson, P.J., Brown and Snyder, JJ.

¶1 PER CURIAM. Joseph E. Sabol appeals from an order affirming a decision of the Wisconsin Personnel Commission that the University of Wisconsin-Eau Claire (UWEC) did not unlawfully discriminate or retaliate when it failed to hire Sabol for a 2002-2003 faculty position. He claims there were

procedural irregularities and improper evidentiary restrictions in the hearing before the commission and that UWEC's reasons for not hiring him were pretextual. We affirm the order of the circuit court.

¶2 Sabol was hired by UWEC's chemistry department to fill a one-year faculty vacancy for the 1997-1998 school year and again for the 1998-1999 school year. In November 1998, Sabol sent an email to several of his colleagues reporting that he had found unsafe chemical storage in a teaching laboratory and asking them to double-check that reagent bottles were tightly sealed when lab sections were finished. Sabol was not hired for a 1999-2000 faculty position for which he applied. He filed a complaint with the commission alleging age and sex discrimination and retaliation for protected OSHA (Occupational Safety and Health Act) reporting activity (the November 1998 email). His complaint was dismissed and the decision affirmed on appeal. *See Sabol v. State Pers. Comm'n*, No. 02-1190, unpublished slip op. (WI App May 1, 2003), *review denied* (WI July 9, 2003). In 2001, Sabol pursued three other complaints before the commission when he was not hired for other positions in the UWEC chemistry department.

¶3 In August 2001, UWEC began recruitment to fill a vacancy for a tenure track assistant professor of inorganic or analytical chemistry. For priority consideration, completed applications were to be postmarked no later than October 19, 2001. Sabol's application materials were postmarked October 19, 2001. However, he had not included his curriculum vitae (CV), and the application was deemed incomplete. Sabol was not considered for the position.

¶4 In February 2002, Sabol filed a complaint with the commission alleging that UWEC had discriminated against him because of age, retaliated

against him for having engaged in protected activities under the Wisconsin Fair Employment Act (WFEA), and retaliated against him for having engaged in activities protected by state OSHA laws. The commission found that a prima facie case was established because two individuals outside the age-protected classification had been offered the position and Sabol's rejection occurred within some proximity to his protected activities. UWEC explained that Sabol was not considered because his application was not timely completed. The commission found this to be a legitimate, nondiscriminatory explanation for the hiring decision. Sabol argued that the reason was pretextual and that the handling of his application had been manipulated by department chair, Jack Pladziewicz, or chair of the search committee, Jason Halfen, for reasons of personal animus relating back to the November 1998 OSHA report. The commission concluded that there was not sufficient evidence of pretext and dismissed Sabol's complaint.

¶5 We review the commission's decision and not that of the circuit court. *Board of Regents v. State Pers. Comm'n*, 2002 WI 79, ¶25, 254 Wis. 2d 148, 646 N.W.2d 759. The determination of the employer's motivation is a finding of ultimate fact. *St. Joseph's Hosp. v. Wisconsin Employment Relations Bd.*, 264 Wis. 396, 400-01, 59 N.W.2d 448 (1953). The commission's findings of fact are conclusive if supported by substantial evidence in the record. *Sieger v. Wisconsin Pers. Comm'n*, 181 Wis. 2d 845, 855, 512 N.W.2d 220 (Ct. App. 1994). "Substantial evidence, for the purpose of reviewing an administrative decision, is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Mews v. DOC*, 2004 WI App 24, ¶11, 269 Wis. 2d 641, 676 N.W.2d 160. The commission determines the weight of the evidence and the credibility of the witnesses. *Id. v. LIRC*, 224 Wis. 2d 159, 165, 589 N.W.2d 363 (1999).

¶6 The commission found that Sabol did not send his CV with his application postmarked on the due date, and therefore, his application was not complete by the deadline for priority consideration. Substantial evidence supports this finding. Patricia Jenneman, the staff person responsible for processing applications, testified about her regular practice of determining whether applications were complete. She could not find Sabol's CV with his application. She looked on her desk and later double-checked all materials she had handled that day to be sure the CV had not been misplaced or slipped out unnoticed. She asked Halfen to look at Sabol's submitted materials to determine if she was mistaken about the missing CV. Halfen confirmed that no CV was included. Halfen directed Jenneman to send Sabol a letter indicating that his CV was missing from the application. Halfen's testimony confirmed that the CV was not included and Jenneman made a thorough search for it. Another chemistry faculty and search committee member testified that he came into the office when Jenneman was looking for the CV and determined that Sabol's application was incomplete. The commission believed this testimony despite Sabol's insistence that he had included his CV. Indeed, the commission noted that Jenneman had no animus against Sabol.

¶7 The finding that Sabol's application was in fact incomplete by the priority deadline is conclusive. The record further establishes by substantial evidence that the UWEC search committee did not consider applications not complete by the priority deadline. Jenneman explained that only the applications complete by the priority date were turned over to the search committee. The committee did not ask to see the incomplete applications. Thus, there was a legitimate and nondiscriminatory reason for not considering Sabol's application.

¶8 Sabol attempted to show pretext by the fact that other applicants submitting incomplete applications were allowed to correct omissions or were more timely notified that the application was incomplete. However, Jenneman's records indicate that even though the transcripts of one applicant were not stamped with the date they were received, the application submitted was marked as complete before the priority deadline. Another applicant was sent a letter well before the deadline indicating his application was incomplete and the applicant responded by email asking that he be informed if additional materials were not received by the end of the week. His application was made complete before the deadline. Thus, the incompleteness of Sabol's application was handled the same as others' incompleteness. Since Sabol's application was postmarked on the last day and not received until after the deadline, he could not make it complete within the deadline.

¶9 Sabol's argument that the search committee failed to keep records of its review meetings and failed to meet with the affirmative action officer misses the mark. His application was not complete by the priority deadline and was not submitted for consideration to the committee. There is no connection between Sabol not being considered for the position and the failure to exactly follow procedures, if any, subsequent to submission of completed applications.

¶10 Sabol also contends that UWEC's reliance upon the missing CV was pretextual because it was only a technical omission that could have been disregarded. He explains that information included on a CV could be found in other parts of his application materials, that he had a CV on file with UWEC by virtue of prior employment, and that his qualifications were well known to the chemistry department. The department chair, Pladziewicz, testified that it would not be a good practice to take a previously submitted CV and add it to an

application missing a CV because applicants write a CV specific to a job. He indicated it would be a disservice to the applicant. He further explained that it would not be proper for the search committee to rely on personal knowledge of an applicant's qualifications since there was a process to follow and fairness required that all applications be reviewed with the same minimal requirements. Halfen also indicated it would not be appropriate to use a previously submitted CV on a new application since information can change and that is why a new CV is required. He confirmed that reliance on personal knowledge of an applicant's qualifications in the absence of a CV would violate the procedures set up to review applications. In light of these concerns, Sabol's application could not be made complete by reliance on other sources for the missing CV. The failure to do so was not pretextual. The commission's conclusion that UWEC did not engage in discriminatory or retaliatory conduct in not hiring Sabol must be affirmed.

¶11 Sabol contends that he was denied a full and fair opportunity to present critical evidence by the hearing examiner's narrow view of what was relevant evidence. Sabol wanted to offer evidence regarding events that occurred immediately after his November 1998 OSHA report such as UWEC's failure to hire him for a 1999-2000 position and the department chair's failure to support Sabol's research proposal. With respect to the exclusion of an affidavit of a retired member of the chemistry department, Sabol was not prejudiced by the ruling because the affiant testified at the hearing. With respect to the other evidentiary exclusions, we conclude Sabol was not prejudiced since he was afforded a complete and fair hearing on the controlling factual finding—whether his CV was included in his application. The other evidentiary materials were not relevant in light of the finding that Sabol's application was not completed before the priority consideration deadline.

¶12 We reject Sabol's remaining claim that a procedural error occurred because the commission made its decision on the merits and did not employ the probable cause standard with respect to his age and WFEA retaliation claims. Just two weeks before the hearing date, Sabol filed an appeal from the initial determination of no probable cause with respect to those claims. He claims that at the hearing he only had the burden to demonstrate probable cause on those claims. However, it was anticipated that the age and WFEA claims would go to hearing on the merits. The hearing on the OSHA part of Sabol's complaint was set within a required expedited deadline. At a prehearing conference, the matters were consolidated in the interest of judicial economy. It was discussed whether the hearing would proceed on the merits of the age and WFEA claims or with regard to the pending probable cause determination. Sabol did not object to the statement of the issue being whether he had been discriminated against on the basis of age, retaliation under WFEA, or retaliation for OSHA activity. Sabol knew the age and WFEA claims would be heard on the merits. Although Sabol filed his appeal from the no probable cause determination before the hearing, he did not object to the statement of the issue. Neither at the commencement of the hearing nor in his opening statement did Sabol indicate that only probable cause was at issue on those claims. He waived the claim that only probable cause was to be addressed.

¶13 Moreover, because Sabol had a full evidentiary hearing, the failure to explicitly address whether probable cause existed was not prejudicial and of no consequence. Sabol had a hearing on the merits. There is no suggestion of any evidence he was holding back because he believed he needed only to establish probable cause.

*By the Court.*—Order affirmed.

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



