

**EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
210 MONONA AVENUE
MADISON, WISCONSIN**

<p>Gloria McCarter 4614 American Ash Drive Madison, WI 53704</p> <p style="text-align: center;">Complainant</p> <p style="text-align: center;">vs.</p> <p>Wisconsin Power & Light 222 West Washington Avenue Madison, WI 53701</p> <p style="text-align: center;">Respondent</p>	<p>RECOMMENDED DECISION</p> <p>Case No. 20471</p>
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A complaint was filed on July 22, 1985 with the Madison Equal Opportunities Commission (MEOC) alleging discrimination on the basis of race in regard to employment.

Said complaint was investigated by Mary Pierce of the MEOC staff and an Initial Determination dated November 14, 1985 was issued concluding essentially that there was probable cause to believe that discrimination had occurred as alleged.

Conciliation failed or was waived, and the case was certified to public hearing. A hearing was held commencing on August 20, 1986 before the MEOC Hearing Examiner, Allen T. Lawent. Attorney Rosemary J. Fox of **Fox, Fox, Schaefer and Gingras, S.C.** appeared for the Complainant who also appeared in person. Attorney Barbara Swan of **Brynelson, Herrick, Bucaida, Dorschel and Armstrong** appeared for the Respondent and Mary Cole acted as the Respondent's designated employee-representative. Based on the record of the hearing, including consideration of the post-hearing briefs submitted by the parties, the Examiner enters the following Recommended Decision:

RECOMMENDED FINDINGS OF FACT

1. The Complainant, Gloria McCarter, is an adult black female who resides in the State of Wisconsin.
2. The Respondent, Wisconsin Power and Light Company (hereinafter, WPL), is an employer doing business in the City of Madison, State of Wisconsin.
3. The Complainant began working for WPL in May of 1978 as a "temporary" employee in the position of Personnel Clerk III. She had recently graduated from Stillman College in Tuscaloosa, Alabama prior to taking the job.
4. While still a Personnel Clerk III, in March of 1979 she became a "special temporary" employee which entitled her to receive medical and dental benefits.
5. In December of 1979, the Complainant became a permanent employee for WPL and was promoted to a Personnel Clerk II position.
6. On October 1, 1982, the Complainant's position was reclassified and retitled Employee Relations Assistant II. At this time, her salary changed but her work duties did not. Her duties

included processing payroll authorizations, working on employee files, retiree files and EIS reports. EIS stands for Employee Information System.

7. Employees at WPL may be promoted in a variety of ways. The primary way is that an employee can apply for an open position with the company that is at a higher level than the position that the employee holds. Also, an employee can be promoted if his/her job duties and responsibilities increase significantly.
8. From 1982 up to the time of the hearing in this case, the Complainant had not applied for any open positions available at WPL. In some instances, the open position did not interest her. In other instances, she did not believe she was qualified for the open position.
9. Sometime in 1982, the Complainant indicated to her then supervisor, Brad Mains, that she was interested in additional duties and that she would like to work on some surveys. Mains complied with her request and assigned her surveys to work on. There were no other additional duties available for her at that time.
10. In August, 1983, the Complainant was evaluated formally by her then supervisor, Al Wilkening, in what WPL refers to as the "coaching" process. Wilkening's evaluation covered the Complainant's previous year of employment and was her first formal evaluation since she began working for WPL.
11. As part of the "coaching" process, Wilkening made the following comments about McCarter's oral and written communications which were included in a memo summarizing his perceptions of McCarter's job performance:

Gloria states that she, at times, has difficulty expressing herself as clearly as possible. I agree. Gloria's communication skills are in need of substantial improvement and are the most limiting factor regarding the performance of her current assignments and future advancement with the company.

The area that needs greatest improvement is oral communications skills. She has identified training and counseling programs which are designed to improve that skill in the future. We will continue to support her efforts in this regard.

Written communications skills are not a major requirement in the current job, but will receive increased emphasis in development in the next report. This skill is necessary as we require input for the development of EIS practices/procedures and related communications from personnel.

12. Part of the criticism of the Complainant's oral communication pertained to her failure to ask the proper questions to obtain necessary information from persons she had to deal with.
13. Also in August of 1983, but before the coaching session with Wilkening, the Complainant had spoken to Glen Kielley, WPL's Director of Personnel, and indicated to him that she was interested in doing more work on the EIS computer. In particular, she was interested in learning how to write programs and retrieve programs. Prior to this time, she had no regular duties that involved the use of the computer and she only knew how to "log on" to the computer (i.e., turn on the computer and type in the password).
14. After his conversation with the Complainant, Kielley wrote a memo to Wilkening (the Complainant's then supervisor) outlining the Complainant's request and asking Wilkening to look into the possibility of the Complainant being given the opportunity for training and work on the computer. At the time, some reorganization was taking place within WPL's Personnel Department which resulted in Mary Cole becoming the Complainant's supervisor. Cole began working on September 1, 1983 and sometime thereafter Wilkening reviewed with Cole the contents of Kielley's memo about the Complainant.

15. During the fall of 1983, Cole was learning her new job. She was primarily occupied with the personnel budgeting process and had little time to work with the Complainant. Cole did, however, spend some time with McCarter during October of 1983 to set up a job activity matrix for McCarter's position in order to gain an understanding of just what job duties McCarter was performing and how much time she spent on them. The Complainant also began to work on the Easytrieve system. Easytrieve was a computer program for obtaining employee information. It was used with different environments, first VSPC and then ROSCOE. Also during the fall of 1983, Cole gave McCarter some requests for computer reports to work on. Beginning in 1984, McCarter began learning how to write programs and prepare reports herself.
16. Cole evaluated the Complainant's performance sometime in 1984. On the "coaching" form, Cole commented about the Complainant's communication skills in the following manner:

Communication skills - Need for experience and skill base seminars.

Human Relation Skills - Need for extra experience within job to elevate interpersonal skills.

Cole also rated the Complainant less than effective in the "initiative" category as part of the 1984 coaching process.

Cole also wrote in regard to the Complainant:

Have perceived a positive change (since April, 1984) in the following areas: participation with peers, initiative and imagination with work activities, confidence in use of communication skills with groups and individuals, time scheduling and work organization.

17. McCarter's proficiency in writing Easytrieve programs increased during the remainder of 1984 and into 1985, and she began creating more programs on her own.
18. Throughout 1984 and approximately the first half of 1985, Cole had ultimate responsibility for all of the computer reports. Requests for reports came to Cole who made the initial assessment as to who should prepare the reports. Preparation of the reports was split fairly evenly between Cole and McCarter.
19. McCarter went on maternity leave some time in March of 1985. Just before McCarter went on maternity leave, Val Parish joined the department to assume the position of Employee Relations Information Analyst, the position formerly held by Cole. Cole became Employee Benefits Supervisor.
20. Upon her return from maternity leave in the latter part of May, 1985, the Complainant was informed by Cole that various employees had been promoted. The promoted employees included two white employees in the Personnel Department where McCarter worked. The two white employees were Debby Ramharter and Ginny Bowar who each held the position of Employee Relations Assistant I and were promoted to positions as Employee Relations Specialists.
21. Ramharter's and Bowar's promotions came about because the responsibilities of their positions had increased in amount and complexity from sometime in 1983 until their promotions in May of 1985. The increase in amount and complexity of their work responsibility was related to federal legislation which became effective during 1983-84 involving compensation and benefits (including what are colloquially referred to as TEFRA, DEFRA and REACT).
22. McCarter, Loretta Alderson and Debby Kolberg were the Employee Relations Assistant II's in WPL's Personnel Department in May of 1985. Neither McCarter, Alderson or Kolberg were

- promoted in May of 1985. McCarter had been a permanent employee for WPL since December of 1979, Alderson had been a permanent employee since May of 1980 and Kolberg had been a permanent employee since June of 1980.
23. The Complainant, upon being informed by Cole of the promotions of Bowar and Ramharter in her department and three persons in another department, asked Cole if she (McCarter) was going to be promoted. Cole told McCarter that, ". . . your job duties haven't changed and you're not doing that good of a job at the job you have now." The Complainant was also told that she probably would not get promoted until late 1987 when it was anticipated that a new computer system would be installed to replace the EIS system.
 24. On or about June 14, 1985, the Complainant wrote a memo expressing disappointment that she had not been promoted to an Employee Relations Assistant I position. After Cole received the memo, she asked the Complainant to discuss it paragraph by paragraph to clarify the information that had been included. The Complainant submitted a written response to Cole.
 25. Subsequently, the Complainant had a meeting with Cole at which both of the Complainant's memos were discussed as well as Cole's response to them. The coaching forms from 1983 and 1984 were also discussed at the meeting, each having been marked to indicate grammatical errors.
 26. During the meeting and discussion of the Complainant's writings, Cole also indicated to the Complainant that the Complainant had problems with pronunciation, enunciation, grammar, diction and verb tenses. The Complainant informed Cole that she (McCarter) could not change the way she spoke. She (McCarter) had previously taken courses in an attempt to improve her oral communications skills.
 27. The Complainant subsequently consulted with Dr. Gail Dreyfuss, a linguistics professor at the University of Wisconsin-Madison, in regard to complaints about her speech. Dreyfuss concluded that the Complainant's form of speech had some of the phonological characteristics of Black English and that there was nothing wrong with the way McCarter spoke. Dreyfuss did believe the Complainant had problems with her writing, however.
 28. As a result of the change in her position to Employee Benefits Supervisor early in 1985, Cole had less and less time available to spend preparing reports on the computer. In addition, a change was made in August of 1985 in the operating environment of the EIS computer from VSPC to ROSCOE. Because Cole was unable to take the necessary training to learn ROSCOE, Cole was unable to operate the computer at all after August of 1985.
 29. McCarter and Parish both took the ROSCOE training and both were responsible for preparing computer reports through the summer of 1985. In the fall of 1985, Parish's duties with regard to budget preparation became so heavy that she had no time to spend working on computer reports. McCarter thus became responsible for preparing almost all of the computer reports for the personnel department. In addition, McCarter became responsible for preparing more "tailor-made" reports (special requests).
 30. In late 1985 and early 1986, Parish was also involved in a pre-study for a new human resources system. During this period Parish also had very little time to spend on the computer and McCarter was responsible for the bulk of the computer work.
 31. The changes in Parish's workload and McCarter's workload were noted by Kielley during the fall and early winter of 1985. As a result of the workload changes and the increased reliance which WPL's Personnel Department was placing on McCarter to prepare the necessary computer reports, McCarter was promoted from an Employee Relations Assistant II to the position of Employee Relations Information Assistant in March of 1986. As an Employee Relations Information Assistant, her job was equivalent in status and salary to an Employee Relations Assistant I.

32. The Complainant's (McCarter's) race was not a factor in the Respondent's (WPL's) failure to promote her in May of 1985.

RECOMMENDED CONCLUSIONS OF LAW

1. The Complainant, Gloria McCarter, is a member of the protected class of race within the meaning of Sec. 3.23, Madison General Ordinances.
2. The Respondent, Wisconsin Power and Light Company, is an employer within the meaning of Sec. 3.23, Madison General Ordinances.
3. The Respondent did not unlawfully discriminate, within the meaning of Sec. 3.23 of the Madison General Ordinances, against the Complainant on the basis of race in regard to promotion.

RECOMMENDED ORDER

That this case be and hereby is dismissed.

MEMORANDUM OPINION

In order to prevail in this case, the Complainant must prove by a preponderance of the evidence¹ that race was a motivating factor in the Respondent's failure or refusal to promote her in May of 1985 when two other white employees in her department were promoted (the Complainant was promoted in March of 1986). The Complainant need not show that race was the sole motivating factor relied on by the employer; the Complainant may prevail even if there were also legitimate motivating factors as well as the unlawful factor.²

In a case where the hearing has been completed, the focus is on whether the Complainant has met her ultimate burden of proving discrimination (as opposed to her interim burden of establishing a prima facie case).³

The Complainant, who is black, presented evidence that she was not promoted in May of 1985 when white employees Debby Ramharter and Ginny Bowar were. Ramharter and Bowar were Employee Relations Assistant I's in WPL's Personnel Department. McCarter was an Employee Relations Assistant II and was not promoted until March of 1986. Loretta Alderson and Debby Kolberg were also Employee Relations Assistant II's. Alderson and Kolberg, both white, were also not promoted in 1985.

McCarter's job duties differed from Alderson's and Kolberg's even though all three persons had the same job title. McCarter's job duties also differed from Ramharter's and Bowar's.

The Complainant contends essentially that the employer's criticism of her oral communications was racially motivated and delayed her promotion, and that any deficiencies the Complainant had in written communications were not job-related.

The employer essentially argues that the Complainant was not promoted in 1985 primarily because her job duties and responsibilities had not changed sufficiently to warrant a promotion at that time, but that her duties and responsibilities had sufficiently changed to warrant a promotion in 1986.

Ramharter's and Bowar's jobs had each begun changing during 1983, presumably sometime in January when at least some TEFRA provisions had begun to take effect.⁴ They were promoted approximately twenty-eight months later in May of 1985.

McCarter's job began changing after August of 1983 when she started to learn how to use the computer. Further, some of the main changes in her computer work responsibility occurred after she returned (in May of 1985) from maternity leave; specifically, Cole no longer was able to work on the computer and Parish's time became occupied with other duties. Consequently, McCarter became primarily responsible for the computer reports and she also became responsible for generating more "tailor-made" reports (special requests).

Perhaps the crux of this discrimination charge involves the meeting between Cole and McCarter after McCarter returned from maternity leave (in May, 1985) and had found out that other (white) employees had been promoted, including two who worked in the same department as McCarter. While Cole's manner of handling this meeting can be characterized as lacking in sensitivity and diplomacy, the issue here is whether there is anything that occurred at the meeting that supports the Complainant's position that her failure to be promoted was motivated by race bias.

At the meeting, Cole criticized McCarter's writing as well as her pronunciation, enunciation, grammar, diction and verb tenses. Even McCarter's own expert witness concedes McCarter had problems with her writing. However, it should also be noted that written communications were not a major requirement of her job as an Employee Relations Assistant II.

As for oral communications, the Complainant had been previously criticized by the employer on this point. One aspect of the criticism was the Complainant's failure to ask the proper questions to obtain necessary information from persons she had to deal with.

Even if the Complainant used perfect pronunciation, enunciation, grammar, diction and verb tense, she could still have had problems obtaining needed information from persons and she has failed to show that this part of the criticism of her oral communications was racially motivated.

At the same time, while there had been some valid criticism of the Complainant's oral communications, some of Cole's criticism was also invalid. The Complainant's speech exhibited characteristics of a variant of English called "Black English"⁵ ("Standard English" is also a variant of English), but her speech did not exhibit what her expert witness referred to as stigmatized forms of that variant. Also, the Complainant had taken special instruction to improve her oral communications (and this Examiner had no problems understanding her testimony at the hearing).

Nevertheless, the Complainant's burden in this case is to show, by a preponderance of the evidence, that her race was a factor in the failure to promote her in March of 1985. Even if one accepts the Complainant's view that some of Cole's criticism of the Complainant's speech was racial in nature, the Complainant has not established, under the heavy burden which the law requires and in view of the totality of the circumstances, that her race was a factor in the failure to promote her in May of 1985.

Essentially, in May of 1985 the changes in the Complainant's job had not been present for as long as the changes in Ramharter's and Bowar's jobs. Also, some of the important changes in responsibility regarding the Complainant's job did not occur until after her return from maternity leave (in May, 1985); i.e., increased reliance on the Complainant for computer reports as a result of Cole's no longer being involved in computer work and Parish's becoming preoccupied with the budget and other duties.

Consequently, even if racial bias is found in some of Cole's criticisms of the Complainant's oral communications skills, there is not sufficient evidence in this case to also warrant a finding that McCarter's race was a factor in her failure to be promoted in May of 1985. And the promotion issue is the only issue I have been called on to enter a specific finding in this case.

Signed and dated this 29th day of December, 1986.

EQUAL OPPORTUNITIES COMMISSION

Allen T. Lawent
Hearing Examiner

¹Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089 (1981).

²State v. W.E.R.C., 122 Wis. 2d 132 (1985); Muskego-Norway C.S.J.S.D. No. 9 v. W.E.R.B., 35 Wis. 2d 540, 151 N.W. 2d 617 (1967); see also Wisconsin Dept. of Agriculture, V. LIRC, 17 EPD 8607 (1978) applying the Muskego-Norway tests to an employment discrimination case under the Wisconsin Fair Employment Act (sec. 111.31 et seq., Wis. stats.) and Federated Rural Electric Insurance Company v. MEOC, et al, No. 84-552 (Wisconsin Court of Appeals IV/III, 9/10/85), rev'd on other grounds by the Wisconsin Supreme Court without reaching the "in-part" test issue, 131 Wis. 2d 189 (1986).

³U. S. Postal Service Board of Governors v. Aikens, 103 S.Ct. 1478, 31 EPD par. 33, 477 (1983).

⁴TEFRA presumably refers to the federal Tax Equity and Fiscal Responsibility Act of 1982.

⁵Not all blacks speak "Black English" nor are all persons who speak "Black English" necessarily black.