

EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
210 MARTIN LUTHER KING, JR. BOULEVARD
MADISON, WISCONSIN

Gabriel Oviawe
212 Castille, Apt. 3
Madison, WI 53713

Complainant

vs.

Madison United Hospital Laundry Ltd.
1310 West Badger Road
Madison, WI 53713

Respondent

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND ORDER.

Case No. 20723

The Examiner issued his Recommended Decision (including the Recommended Findings of Fact, Conclusions of Law and Order) on January 25, 1989. A timely notice of appeal was filed by Respondent and the Madison Equal Opportunities Commission (MEOC) set a briefing schedule. The MEOC deliberated on the appeal on March 22, 1990.

Based upon a review of the record in its entirety, the MEOC issues the following:

FINDINGS OF FACT

1. The Complainant, Gabriel Oviawe, is an adult black male born in Nigeria.
2. The Respondent, Madison United Hospital Laundry, Ltd. (MUHL) is engaged in the business of processing soiled hospital linens. At all times relevant hereto, MUHL's place of business has been located in the City of Madison.
3. MUHL consists of two major divisions, the plant and the linen service. Each division has a manager who reports directly to MUHL's General Manager.

4. Oviawe has been employed by MUHL since September 29, 1980. He began as a part-time janitorial employee and became a full-time employee in 1982, working first in the surgical inspection department (plant division) for several weeks before transferring to the linen service division and becoming a packer. At the time of the hearing in this matter, Oviawe was still employed as a packer.

5. Throughout the period of Oviawe's employment with MUHL, job classifications and wage rates have been governed by a series of collective bargaining agreements between MUHL and Local 150, Service and Hospital Employees' International Union, AFL-CIO. Under the terms of the most recent agreement, effective April 1, 1986, there are six job classifications. For the jobs in the lowest classification, Grade I, wages range from \$5.21 to \$6.21 per hour. Jobs in Grade VI, the highest classification, pay an hourly rate of not less than \$7.93 and can pay as much as \$9.43 per hour.

6. The packer position held by Oviawe since 1982 has always been a Grade I position.

7. MUHL has designated lead workers in several departments. In the plant division, the soil sort, tumble fold, flat work and surgical inspection departments all have lead workers. The linen service departments with lead workers are the packers, pack making and mending departments.

8. Although lead workers are not supervisors per se, they do perform supervisory functions such as performing departmental quality checks, maintaining production records, making job assignments, directing workers on daily duties, and training new employees. They may not, however, hire, fire, discipline employees, or approve vacation requests. Lead worker is a Grade II position.

9. In the soil sort department, the lead worker supervises nine other employees in the department to ensure accurate and adequate workflow, posts production numbers hourly, encourages team effort to maximize workflow, and trains new employees frequently. Sorters are included in the Grade I classification.

10. In contrast, the lead worker in the packing department has little interaction with other workers since there are only two to two and one-half employees in the department, including the lead worker. Team effort is not necessary to the same degree because tasks are performed independently and training occurs only infrequently. Thus, while there is a single general lead worker job description at MUHL, lead worker traits in various departments differ considerably. All lead workers must have a high school diploma or the equivalent and must be able to read and interpret written instructions and grasp oral directions. Lead workers must also be able to explain job requirements to production workers, play a leadership role, and keep good records. In order to perform those functions, lead workers obviously need to know how to perform the general tasks of the particular department.

11. Since 1980, the collective bargaining agreement has required that all positions above Grade I be posted and that employees be permitted to bid for such positions. The agreement permits MUHL to select individuals to fill these positions on the basis of qualifications and ability, as perceived by MUHL, but requires selection of the more senior employee where the applicants are substantially equal in qualifications. Seniority is calculated from an employee's most recent date of hire.

12. In 1982, Oviawe applied for a position in the soil sort department. He was not selected. Jim Kimberly, a white male with less seniority, was selected. Oviawe claims that Greg Wilhelm, who selected Kimberly, told Oviawe that Kimberly was selected because of his seniority. Wilhelm testified that he would not have told Oviawe that Kimberly was selected on the basis of greater seniority since Kimberly was selected because of his greater experience.

13. In 1984, Oviawe applied for a position in the wash room. At the time, the position was classified in Grade V. MUHL selected a white male with less seniority than Oviawe to fill the position. However, the white male was more experienced than Oviawe, having worked in the soil sort department and as a backup in the wash room.

14. In September of 1986, the soil sort lead worker position again became available. The position was posted and Complainant, Charlotte Rindy and Scott Hatlevig applied. Rindy is a white female and Hatlevig is a white male. Both were then working in the soil sort department and Rindy had served as backup to the former lead worker, who had frequently been absent due to illness.

15. At this time, Greg Wilhelm was plant manager. Jerald Thomas was production superintendent. In that position, he directly supervised the soil sort department. Both Wilhelm and Thomas are white males.

16. Thomas, with input from Wilhelm, developed the criteria for selecting the soil sort lead worker position. He prepared a list of lead worker traits which he felt were important qualities for the soil sort lead worker based upon traits identified as desirable by lead workers during a plant meeting several years earlier. These traits included training, directing, communication, attendance, evenhandedness, accuracy, motivation, ability to get along, etc. In addition, each candidate's experience in the soil sort department and the particular position was considered. However, seniority was never considered because the applicants were not considered to be substantially equal.

17. Thomas then devised a system for assessing the candidates. The assessment consisted of three different sets of ratings of the candidates: interviews, supervisory evaluations and lead worker traits.

18. Wilhelm was not involved in devising the selection process described in paragraph 17, or in rating the candidates. He did, however, sit in on the interviews.

19. Thomas developed a set of standard interview questions which he posed to each of the candidates. He recorded their answers and assigned each an interview score on the basis of those answers. Rindy and Hatlevig each scored 4.3 and Oviawe scored 4.2. Thomas felt all three performed well at the interview but awarded Rindy a higher score than Oviawe because of her answers to two questions and her answer to the final question in particular.

20. Thomas also assigned each candidate a supervisory evaluation score on the basis of their most recent performance evaluations. For Oviawe, he used an evaluation prepared by Jane Smith in November of 1985. Thomas had evaluated Rindy in May of 1986 and used that evaluation in assigning her a supervisory evaluation score. Thomas testified that he also consulted with Smith regarding Oviawe's more recent performance, although he could not recall any specific conversations.

21. MUHL's hourly employee performance evaluation contains three evaluation sections. Section A calls for the supervisor to rate the employee in five areas: productivity; attendance; safety; working with others; and response to supervision. Each area has between five and eight components. The supervisor assigns ratings from one ("unsatisfactory") to five ("almost always exceeds minimum requirement") for each component. The overall score for each area was the average of the component scores for that area.

22. Section B of the evaluation is entitled "Potential-Promotability" and calls for ratings as well as comments on leadership, creativity, organizational loyalty, and reasoning and logic. The supervisor also rates overall potential as average, above average or excellent. Section C of the evaluation allows the supervisor to highlight areas of strength as well as areas in which the employee should attempt improvement. It also permits the supervisor to comment generally on performance since the previous evaluation.

23. The scores Thomas assigned the candidates for performance evaluations were based on Section A of the evaluations, the numerical ratings for productivity, attendance, safety, working with others, and response to supervision. Rindy's score was 3.64; Oviawe's was 3.58; and Hatlevig's was 3.14.

24. By far the greatest difference in scores between Complainant and Rindy was in the final test devised by Thomas, the lead worker trait score. Thomas identified factors he believed were indicative of the ability to perform as a lead worker and assessed the candidates with respect to each. Thomas first jotted down his comments and observations as to each candidate for each factor. He then attempted to quantify his written comments on a scale of one to five. The average score for all traits scored became the lead worker trait

score. Rindy's score was 3.9. Both Oviawe and Hatlevig received scores of 3.4.

25. Thomas's list of written comments includes two categories not accounted for on the scoring sheet. Seniority does not appear on the scoring sheet but is included in Thomas's written summary. Under the provisions of the labor contract at MUHL, seniority could not be considered unless the candidates' qualifications were found to be substantially equal. Since Rindy and Oviawe were not found to be substantially equal, there was no reason to include seniority. The scoring sheet also lists ability to get along with others and assigns scores in this area, but this is not included in the listing which contains Thomas's written comments. In addition, although the written comments list attendance from the beginning of 1986 to September as well as attendance from March, 1986 to September, only the latter is listed on the scoring sheet. Thomas testified that he used only the most recent six month period to evaluate attendance because that was the typical evaluation period and the most recent evaluation period was the most relevant in trying to assess performance.

26. In addition to ability to get along with others and attendance from March to September, 1986, the lead worker traits scoring sheet lists the following areas of evaluation by Thomas: leadership; communication, training, directing; evenhandedness; physical requirements; accuracy; ability to work within authority level; and ability to motivate. All of these areas are included in the list containing written comments.

27. Oviawe's attendance from January 1, 1986 to September, 1986, as reflected in Thomas's comments, was better than Rindy's. He had fewer incidents of absence and fewer total days absent. Thomas's May 5, 1986 evaluation of Rindy listed attendance as an area on which she needed to concentrate. On the other hand, for the most recent evaluation period, March to September, Thomas's comments reflect that Rindy had no absences. He awarded Rindy a rating of 4.5 in this category. For the same period, Thomas's comments reflect Oviawe was absent on three occasions, and a total of one and one-half days. He gave Oviawe a rating of 4.

28. MUHL's attendance records reflect that Oviawe was absent on three occasions between March 1 and the date Rindy was selected for the soil sort lead worker position in September. These three absences actually account for a total of two days of absence. However, one full day absence was a personal day which, according to MUHL's records, should not have counted against Oviawe. Thus, Oviawe had two countable half-day absences. MUHL's records indicate that Oviawe did have a third half-day absence later in September. However, this absence occurred after Thomas had completed the selection process and the candidates were informed that Rindy would be awarded the lead worker position. Even if Thomas had used the longer attendance periods and had not counted the personal day Oviawe took, the resulting higher attendance rating for Oviawe would not have altered the final outcome. Oviawe's scores still would not have equaled or exceeded those of Rindy.

29. Because Rindy and Hatlevig both worked in a department under his supervision, Thomas was familiar with their work and was able to assess their abilities on the basis of his own observations, including recent observations of their work.

30. Thomas had no direct supervisory responsibilities over Oviawe or the department in which he worked. Consequently, he was not as familiar with Oviawe and his work as he was with Hatlevig and Rindy. However, Thomas dealt with Oviawe on numerous occasions due to conflicts between Oviawe and employees in Thomas's department. In addition, Thomas had numerous communications with other MUHL managers, including Oviawe's supervisor of the two previous years, Jane Smith.

31. Thomas's ratings for communication were: Rindy, 4.0; Oviawe, 3.0; Hatlevig, 3.5. Thomas felt that Oviawe was sometimes difficult to understand. He also believed that Oviawe's communication difficulty was one detracting factor, although it would not have entirely prevented Oviawe from performing as lead worker in the soil sort department. Thomas felt that Rindy's communication ability was better than Oviawe's; nevertheless, Thomas would have selected Oviawe over Hatlevig if Rindy had not been a candidate due to Oviawe's superior qualifications in other areas.

32. Following the completion of his three-part assessment of the candidates, Thomas recommended that Rindy be selected in the following note to Wilhelm:

In all areas that I can compare the three candidates Charlotte scored as well or better than the others. In addition, she has had experience with being leadworker in Soil Sort, and she has done a good job at this. For these reasons I recommend that Charlotte be given the job as soil sort leadworker.

33. Wilhelm agreed with Thomas's selection of Rindy.

34. Oviawe was informed of MUHL's decision to place Rindy in the soil sort lead worker position he sought on or about September 11, 1988.

35. Rindy's greater experience was a significant factor in her selection. The results of Thomas's evaluation process indicated that no other candidate possessed superior qualifications that would have outweighed Rindy's experience. Rindy was more experienced and more qualified than Oviawe for the lead worker position in soil sort.

CONCLUSIONS OF LAW

36. The MEOC has jurisdiction over the parties to this proceeding.

37. The MEOC has jurisdiction over the subject matter of this complaint.

38. Complainant is protected by the Equal Opportunities Ordinance from discrimination in employment on the basis of race or national origin. Sec. 3.23(7), Mad. Gen. Ord.

39. Respondent has demonstrated legitimate, nondiscriminatory reasons for refusing to promote Complainant to the position of lead worker in the soil sort department.

40. Complainant has not fulfilled his burden of persuading the MEOC that Respondent's legitimate, nondiscriminatory reasons were pretextual.

41. Complainant has failed to prove intentional discrimination by Respondent on the basis of race or national origin.

FINAL ORDER

42. It is hereby ordered that the complaint is dismissed.

MEMORANDUM DECISION

Respondent appeals from a decision on the merits by the Hearing Examiner. The Examiner ruled that Respondent violated sec. 3.23(7), Mad. Gen. Ord. by discriminating against complainant on the basis of race and national origin. After reviewing the record and the briefs filed by both parties, Commissioners Johnson, King, McFarland and Ruben voted to reverse the decision of the Hearing Examiner. Commissioner Houlihan dissented and Commissioners Bruer, Fitzgerald, and Gardner abstained. The majority of the MECC rules that Complainant did not carry his burden of persuasion and therefore dismisses the complaint.

Standard of Review

The MECC has complete discretion to reverse a decision of the Examiner. See Sec. 10.2, Rules of the Madison Equal Opportunities Commission. The MECC defers to the Examiner on determinations of credibility of the witnesses since the Examiner was present for the testimony and was able to perceive the witnesses' tone of voice and facial expressions. Where, as here, the Examiner makes no specific findings as to credibility, and where, as here, determination of the question of discrimination is based primarily on written documents (evaluation forms, interview forms, etc.), the authenticity of which has not been questioned, the MECC may make its own findings of fact and issue its own ruling as to whether Complainant has met his burden of proof.

The prima facie case analysis first articulated by the U.S. Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) is applicable to disparate treatment claims arising under the Equal Opportunities Ordinance. State Medical Society of Wisconsin v. Madison Equal Opportunities Commission,

No. 82-CV-2560, Dane Co. Circ. Ct., Hon. R. Bardwell, March 2, 1983. Under the framework established by McDonnell Douglas and later rulings, the Complainant must first prove, by a preponderance of the evidence, facts which establish a prima facie case of race and national origin discrimination. If he does so, the Respondent must then rebut the prima facie case by articulating legitimate, nondiscriminatory reasons for refusing to offer Complainant the position in question. Respondent's burden in rebutting a prima facie case is not one of proof but of production. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981), Yowell v. United States Postal Service, 810 F.2d 644, 647 (7th Cir. 1987). To prevail, Complainant must then prove that the explanation offered by Respondent is a pretext for discrimination. Texas Department of Community Affairs v. Burdine, 450 U.S. at 256. The burden of persuasion rests with the Complainant. That burden then merges with the ultimate burden of proving intentional discrimination. 450 U.S. at 256. The ultimate burden of persuading the trier of fact that the Respondent intentionally discriminated remains at all times with the Complainant. 450 U.S. at 253. Where, as here, Respondent has presented explanations for its promotion decision, we need not stop to consider whether Complainant has established a prima facie case. We may simply proceed to an examination of whether Complainant has carried his burden of persuasion on the issue of whether the explanations are merely a pretext for discrimination. United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 715 (1983), Larry Gustafson v. Wisconsin Physicians Service, Case No. 20539, MECC, Ex. Dec., May 19, 1987.

Respondent's Reasons For Denying Promotion

Respondent offered three particular reasons for choosing Rindy, the employee who received the promotion for which Complainant applied, over Complainant. They were the difficulty of understanding Complainant due to his accent, Rindy's significant advantage in experience, and Rindy's better qualifications based upon a three-part evaluation of all of the candidates for the position. All three of these reasons are legitimate, nondiscriminatory reasons for promoting one candidate over another. Complainant simply has failed to carry his burden of proof as to his allegation that these reasons were merely pretexts for discrimination. Given the overwhelming advantages

Rindy had over Oviawe, it is difficult to believe that her selection was motivated by discrimination on the basis of race and national origin. There is no evidence whatsoever of racial animus on the part of MUHL. None of the discrepancies or misjudgments identified by Complainant in MUHL's evaluation procedure were significant enough to warrant the conclusion that they indicate an intention to discriminate against Oviawe. While these discrepancies may raise some concern, we find that in the final analysis Respondent's rejection of Oviawe's application was not more likely motivated in part by discriminatory reasons.

Past Denials Of Promotions

Complainant argues that past incidents in which Oviawe was denied promotions should establish a discriminatory intent on the part of Respondent. Complainant cites first his application in 1982 for a soil sort lead worker promotion. Oviawe was not granted that position and testified that Greg Wilhelm, plant manager at that time, told Oviawe that the other candidate had more seniority. Wilhelm, on the other hand, testified that he could not recall what he told Oviawe. Wilhelm did not believe he told Oviawe that lack of seniority was the main reason he was denied the promotion since that was not the reason. The actual reason Oviawe was not chosen was because he had less experience than the candidate chosen. Even if Oviawe had been told mistakenly that he was not promoted because he had less seniority, that does not indicate that MUHL was racially biased against Oviawe. Furthermore, Complainant has offered no evidence to indicate that MUHL's proffered reason for denying Oviawe this position, that Oviawe was not as qualified, lacks merit.

The second position Oviawe was denied was that of washroom worker in 1984. The position was given to Marv Schoepp, a white male. Oviawe testified that his interview for that position was extremely short and argues that the supervisor who made the hiring decision, Jeff Taylor, manipulated the evaluation process. Specifically, Complainant alleges that Taylor reduced Oviawe's overall employee evaluation score by writing in the scores on the second page of Oviawe's evaluation himself. (See Complainant's exhibit R.) However, there is no evidence in the record which indicates that Taylor did indeed write those scores. Jane Smith, Oviawe's supervisor, testified that

she filled in only the scores on the first page but did not know who filled in those on the second page. Taylor himself did not testify at the hearing. Wilhelm could not recall any of the specifics regarding this hiring. The witnesses' lack of knowledge illustrates one of the policy justifications for the statute of limitations (which Complainant acknowledges bars an action over this promotion denial). This incident occurred so far in the past that the witnesses are either unavailable or unable to recall the surrounding events. Just as we could not make a finding of discrimination in this incident because of the statute of limitations, we cannot weigh too heavily the lack of explanation for the scores on the second page of the evaluation because of the stale evidence policy considerations.

We do recognize that the second page raises questions about this promotion. But MUHL's position is that Schoepp was chosen because of his greater experience. Wilhelm testified that to the best of his recollection Schoepp had indeed worked as a backup in the washroom prior to his promotion (Tr. p. 491). Jerald Thomas, production superintendent for MUHL, testified that Schoepp was working in the soil sort department before his promotion and that the soil sort department, of all MUHL's departments, best prepares a worker for the washroom (Tr. p. 278). The best evidence that could be obtained due to the length of years that had elapsed indicated that Schoepp was chosen over Oviawe because of his greater experience.

Complainant correctly points out that evidence of past discrimination is relevant to a showing of pretextuality, citing McDonnell Douglas Corp. v. Green. However, Complainant fails to acknowledge that the McDonnell Douglas case also cautions in a footnote that examples of past discrimination, "...while helpful, may not be in and of themselves controlling as to an individualized hiring decision, particularly in the presence of an otherwise justifiable reason for refusing to hire." McDonnell Douglas Corp. v. Green, 411 U.S. 792, 805 (1973). MUHL established an otherwise justifiable reason for refusing to hire in both the 1984 promotion and in the 1986 promotion (which is really at issue in this discrimination complaint). Plaintiff must do more than merely show that he was denied a promotion or treated disparately in the past; he must show that this treatment was the result of discrimination on the basis of race or national origin. Friedel v. City of Madison, 832 F.2d

965, 975 (7th Cir. 1987). Thus, we do not believe that the 1982 and 1984 promotions establish a pattern of discrimination against Oviawe.

Oviawe's Foreign Accent

The Examiner concluded that MUHL's consideration of Oviawe's accent in its employment decision amounted to national origin discrimination. We hold that Oviawe's accent was a legitimate factor which could be used by MUHL in deciding whom to promote. It is true that consideration of an individual's accent is discrimination when the accent would not interfere in the individual's performance of a particular job. Carino v. University of Oklahoma Board of Regents, 750 F.2d 815, 819 (10th Cir. 1984). However, it is equally true that there is nothing wrong with an employer making an honest assessment of a candidate's language abilities when such abilities are reasonably related to job performance. Fragante v. City and County of Honolulu, 888 F.2d 591, 596-597 (9th Cir. 1989). In the case at issue here, there is little doubt that the ability to communicate effectively is important.

The lead worker position Oviawe applied for involves much communication with the workers below. The lead worker must train new employees, promote team effort and improve the department's workflow, all of which require the ability to communicate effectively. Tr. p. 328-330. The soil sort lead worker has numerous verbal contacts with the workers every hour of the day. Tr. p. 329-330. Complainant alleges that communication abilities must not be important since a lead worker in the flat work department is deaf and unable to speak. However, testimony indicated that the soil sort department is considerably more complex than the flat work department. The tasks in the flat work department can be easily demonstrated physically without added verbal description while in the soil sort department detailed verbal descriptions are necessary in addition to demonstrations. Tr. p. 395-396. Thus, the two positions are not comparable.

The evidence indicates quite clearly that Oviawe's accent makes him difficult to understand. Testimony indicated that MUHL had received many complaints from hospitals regarding their difficulties in understanding Oviawe in telephone communications. Ex. M, Tr. p. 433-435. Witnesses also testified

as to their difficulty in understanding Oviawe, especially when he was upset. Tr. p. 315, 340-341, 434-435. Complainant's written communications display his difficulty with the English language. Ex. 34. In addition, there are numerous parts of the transcript of Oviawe's testimony in which his answer was completely or nearly completely unintelligible (e.g. Tr. p. 36-37, 50, 54, 63, 77, 78, 80-81, 93, 108, 116).

This is not to say that Oviawe could never be understood. As the Examiner pointed out, on the whole one could understand what Oviawe said even though his English was far from perfect. But the evidence noted above is sufficient to establish that Oviawe may have had some difficulty communicating in a position in which communication is important. MUHL acknowledged the fact that this was only one of the factors bearing on its choice. MUHL officers testified that they would have promoted Oviawe over the third candidate despite the fact that the third candidate did not have the communication problems that Oviawe had. But the evidence indicates that Complainant's communication difficulty was one factor that was properly considered and that it detracted from Oviawe's attractiveness as a candidate. Under the Fragante holding, as well as the implied holding of Carino, the consideration of Oviawe's foreign accent was acceptable.

Experience Versus Seniority

Respondent has indicated that Rindy's greater experience in the very position for which she applied was a significant factor in support of her promotion. Complainant argues that an inexperienced person could perform the job just as well. However, assuming this were true, just because an inexperienced person could perform the job does not mean that an employer cannot consider experience an important qualifying factor. Casillas v. U.S. Navy, 735 F.2d 338 (9th Cir. 1984). Furthermore, there is a great deal of evidence that promoting someone who was not experienced in the position would not be wise. Testimony indicated that it would take four to six weeks to train a worker unfamiliar with soil sort to become the soil sort lead worker. Tr. p. 133, 256-258, 325, 332-333, 527-528. This delay could lead to serious reductions in soil sort production which would decrease production throughout the entire plant. Tr. p. 302, 326-328. For that reason, none of the witnesses could recall an instance where an applicant was preferred over

another with successful experience in the job for which they applied. Tr. p. 184-185, 233, 318. There is no question that Rindy would be able to move into the position and perform effectively at once without any need of training. Oviawe, on the other hand, would have required a great deal of training. Experience was clearly a factor in favor of Rindy.

Complainant argues that if experience was such an important factor MUHL would not have gone through its elaborate evaluation of the qualifications of each applicant. In addition, Complainant points out that Oviawe was favored over Hatlevig who was an employee in the soil sort department (although he did not have experience as a soil sort lead worker). Complainant claims that there are only two explanations for these apparent inconsistencies: either the elaborate procedure was needed to actually determine who was better qualified and experience was not an important factor, or the procedure was simply a pretext for discrimination. Complainant apparently ignores the obvious: experience is not the only factor that is important in determining who is most qualified. Experience is but one of many factors that should be considered. MUHL's Thomas testified that he developed the elaborate leadworker trait analysis in order to give those with less experience another chance since there might be other important qualifications that might override experience. Ironically, MUHL gave Oviawe a fighting chance and Complainant attacks MUHL for doing so. Nevertheless, the fact that MUHL looked to other traits is no evidence of discrimination or pretext. It merely shows that MUHL wanted to be thorough.

There is much confusion in this case over the terms "experience" and "seniority". Several inaccurate arguments have been propounded as a result of this confusion. For instance, the Examiner questions the lead worker trait evaluation system because no numerical ratings were given for seniority even though it was included on an initial listing of lead worker traits. Given the context of the initial list, it is clear that what was meant by "seniority" was actually "experience". Seniority just means the number of years a particular employee has worked for MUHL in any department. Experience specifically refers to the amount of time an employee has spent working in the same position. It is not surprising that experience was dropped from the list of lead worker traits since it is not really a "trait" and since experience was considered so important independently.

Furthermore, MUHL's collective bargaining agreement precluded consideration of seniority until after qualifications were determined. Nevertheless, Complainant believes that seniority should have been considered. The bargaining agreement provided that promotions would be determined based on qualifications and abilities as perceived by the management. Seniority could be considered only if applicants were substantially equal in qualifications. Ex. C. Complainant claims that he and Rindy were substantially equivalent in qualifications and therefore he should have been offered the job because of his greater seniority. It should be noted that even if a court might conclude that an employer misjudged the qualifications of the applicants, that in itself does not establish discrimination. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 259 (1981). But again, there is little evidence here that MUHL misjudged the qualifications of the applicants. Not only did Rindy score significantly higher on the lead worker traits evaluation, but she also had far more experience than Oviawe. It is clear that Rindy and Oviawe were not substantially equal in qualifications. For that reason, we conclude that not only was consideration of seniority in the promotion decision unnecessary, but it also would have been illegal under the bargaining agreement.

Finally, Oviawe complains that he was misled by MUHL regarding the role of seniority. He testified that, after he was denied his first application for soil sort lead worker in 1982, Wilhelm told him that the reason Oviawe did not get the promotion was because of lack of seniority. Wilhelm testified that he could not recall making those comments but doubts that he did since it was untrue. The problem most likely stems from confusion over the difference between experience and seniority. Wilhelm could easily have used the wrong word or Oviawe could have misinterpreted the word so that Oviawe thought that lack of seniority was the problem when it was really lack of experience. In any case, the fact that Oviawe was misled also does not establish discrimination or pretext. Misleading Oviawe demonstrated poor business judgment on the part of MUHL since it set him up for disappointment later. But evidence that questions an employer's business judgment does not make the employer liable for discrimination. Williams v. Williams Electronics, Inc., 856 F.2d 920, 924 (7th Cir. 1988). In conclusion, we find no evidence of discrimination because of MUHL's use or lack of use of seniority in making its

employment decision. Rather we find that experience was a major factor which was appropriately considered as one of several important qualifications.

Lead Worker Traits Analysis

In addition to using experience as a measure for comparing the three candidates for the soil sort lead worker position, MUHL devised a three pronged evaluation to determine the qualifications of each of the candidates. First, each candidate was given scores for his or her answers to the same interview questions. Second, the candidate's performance evaluations were compared. Finally, each candidate was given a score based on a lead worker traits analysis. Complainant attacked these evaluations because of their subjective quality and alleged that the use of subjective criteria raises the suspicion that the criteria are being used as a pretext to discriminate. In support of this position, Complainant cited Royal v. Missouri Highway & Transportation Commission, 655 F.2d 159, 164 (8th Cir. 1981). Royal held that, although not illegal per se, subjective promotion procedures should be given close scrutiny because of their susceptibility to abuse. The Royal Court did not rule that the subjective promotion procedures at issue in that case were a pretext for discrimination. Rather, it simply remanded the case to the lower court so that the lower court could give the procedures close scrutiny. Moreover, Royal does not say that courts must find discrimination whenever subjective criteria are used, nor that a plaintiff's burden of persuasion is lowered by the existence of subjective criteria.

The Examiner cites several other cases for the same proposition that the use of subjective criteria has been recognized as a pretext for discrimination. These cases can be distinguished. In Stewart v. General Motors, the Court recognized that some subjectivity is inevitable in filling jobs of a supervisory nature, but held that the "total lack of objective standards" in the promotion procedures indicated that they were a pretext for discrimination. Stewart v. General Motors Corp., 542 F.2d 445, 450 (7th Cir. 1976), cert. denied, 433 U.S. 919 (1977). In the present case, we do not find that there was a "total lack of objective standards" and we agree that some subjectivity is inevitable.

Colon v. Sorensen, which the Examiner cites as similar to the present case, is also readily distinguished. In Colon the candidate interviews alone determined the promotion decision. Colon v. Sorensen, 668 F. Supp. 1319, 1328 (D. Neb. 1987). Obviously in the instant case, the interviews were not the sole deciding measure of qualifications. In Colon the interview notes were missing (668 F. Supp. at 1328), while interview notes were available and introduced in this case as exhibits in the hearing before the Examiner. See Ex. 12, 13, and 14. Finally, the Colon Court found that the interview scoring was standardless, determined that there was a total lack of objective standards, and noted that the plaintiff scored the highest on the objective application screening scores but was denied the position on the basis of his interview score. 668 F. Supp. at 1328. Given that, it is not surprising that the Court ruled that the subjective criteria were a pretext for discrimination. In the present case, the interview scoring was not standardless. Each correct answer to the interview questions was given a particular score and the total reflected the number of correct answers. In addition, the interview score was only one of three scores used to compare the candidates. The other two scores were more objective like the application screening scores in Colon. We believe that the facts of this case are significantly different from those of Colon.

Another case cited by the Examiner, Shaw v. State of Nebraska, et al., follows the Royal holding that subjective standards for promotion must be closely scrutinized. The Shaw Court found that the subjective standards involved were a pretext for discrimination. However, Shaw differs from the instant case in a rather remarkable way. In Shaw, which was a sex discrimination case, there was strong evidence that the defendant state employees harbored blatantly sexist attitudes. One of the defendants addressed female employees as "dear" and "honey" and asked one of them why she did not marry and settle down. The other referred to female employees as "girls" and suggested to the plaintiff that she should get married and let her husband take care of her. Shaw v. State of Nebraska, et al., 666 F. Supp. 1330, 1334 (D. Neb. 1987). In the face of such overwhelming evidence of sexist attitudes on the part of the defendants, it is not surprising that the Shaw Court held that the subjective promotion process, which it found was nonuniform, was a pretext for discrimination. 666 F. Supp. at 1336. In our

case, there is not a shred of evidence that any of the MUHL employees involved in the promotion decision harbored any racist attitudes. In fact, the testimony indicates that MUHL management made a genuine attempt to improve Oviawe's chances at a future promotion when he complained to them about their refusal to promote him in 1986. Tr. 241-243. Given the record, we find that the Shaw case is not applicable to these facts.

Several courts have found that the use of subjective criteria is acceptable and is not a pretext for discrimination. The Ninth Circuit has held that the use of subjective criteria is reasonable when it enables the decision maker to consider each person's abilities vis-a-vis the job requirements. Casillas v. United States Navy, 735 F.2d 338, 345 (9th Cir. 1984). The Court noted that:

We have explicitly rejected the idea that an employer's use of subjective criteria has a talismanic significance: "Even assuming subjectivity was involved here, it has never been held that subjective evaluation by an employer is per se prohibited by Title VII, or alone shifts to the defendant the burden of proving absence of intentional...bias..." Ward, 651 F.2d at 1270. Title VII is the law's promise that employment decisions will not be based on non-permissible discriminatory criteria, not that subjective criteria will be eliminated. Casillas cannot render sound business judgment illegal by labeling it "subjective."

735 F.2d at 345. In Casillas, the plaintiff applied for a promotion and was subjected to a three-step promotion procedure. The first step involved a ratings panel which designated applicants as highly qualified, qualified or unqualified. Only those ranked highly qualified could move on to the next step in the procedure. Casillas was first ranked only as "qualified" so he applied for a rerating. The ratings panel, with one member replaced, found him "highly qualified" the second time. The second step involved an advisory panel which interviewed the highly qualified candidates and then deliberated over their evaluations of the interviews and applications until they could come to a consensus on which were the best three candidates. These three names were then given to a selecting official to make the final choice; Casillas was not among those three. Despite the suspicions raised by Casillas's first rating of qualified and the subsequent change in that rating, and despite the nearly complete subjectivity of the standards used by the advisory panel, the Casillas Court held that the subjective standards were not a pretext for discrimination. 735 F.2d at 345.

The Seventh Circuit followed the Casillas decision in EEOC v. Sears, Roebuck & Company, 839 F.2d 302 (7th Cir. 1988). "We agree with the Ninth Circuit that a court must consider 'an employer's use of subjective criteria...with the other facts and circumstances of the case.' Casillas v. United States Navy, 735 F.2d 338, 345 (9th Cir. 1984)." 839 F.2d at 332. In the EEOC case, Sears based its employment decisions purely on interviews and its interviewers worked without any formal training or written instructions regarding qualities they should look for in commission sales applicants. 839 F.2d at 332. Despite this extreme subjectivity, the Court ruled that Sears had not engaged in a discriminatory practice. 839 F.2d at 332. In the present case, the standards used were not nearly as subjective as those in Casillas and EEOC. Even in the interviews, the questions were written out and the correct answers were identified ahead of time. The employee evaluations and the lead worker traits evaluations also were generally uniformly applied because they were written out before the candidates were actually evaluated. Where the facts indicate that the standards were even more objective than in EEOC, we cannot rule contrary to that Seventh Circuit decision. Therefore we hold that the promotion procedures were not so subjective as to make them a pretext for discrimination.

Complainant and the Examiner pointed to a number of discrepancies in the evaluation process as evidence that it was pretextual. None of these discrepancies are significant enough to meet Complainant's burden of persuasion on the issue of pretext and discriminatory intent. The first problem cited was that the person making the evaluations, Jerald Thomas, was more familiar with Rindy than with Oviawe since he was Rindy's supervisor. However, the Seventh Circuit has specifically held that a supervisor's lack of opportunity to observe an applicant's work does not warrant a finding of discrimination. The Court recognized that this might question the employer's business judgment. But it held that this failure did not raise sufficient doubt about the genuineness of an employer's claim that he made an employment decision based on the relative merits of the employees. Williams v. Williams Electronics, Inc., et al., 856 F.2d 920, 924 (7th Cir. 1988). In addition, the advantage of one who has personally worked with the supervisor making the hiring decision is obvious, but that does not make it improper. Russell v.

Baker, 47 F.E.P. 934, 936 (D.D.C. 1988). Finally, there is ample evidence in the record that Thomas was sufficiently familiar with Oviawe's performance, both through firsthand experience and through discussions with Oviawe's supervisor, that he could make a reasonable evaluation of Oviawe. We hold that Thomas's relative lack of familiarity with Oviawe's performance does not establish by a preponderance of evidence that the evaluation process was pretextual.

Next, Complainant argues that Thomas's failure to obtain updated information regarding Oviawe's performance indicated that the evaluation process was pretextual. We do not feel that this argument is any different than the last regarding lack of familiarity. We agree with the Seventh Circuit that this failure may question MUHL's business judgment, but it does not establish discrimination. Furthermore, Thomas testified that he purposely used the most recent evaluation form for each applicant (instead of having new ones done at the time) because he knew Rindy had improved significantly since her last evaluation and he did not want to prejudice Oviawe's chances. Tr. p. 292, 401. Thomas used the latest evaluations available for each applicant so that he could be free of any charge of rigging newer evaluations once the application process had begun. The fact that Complainant's evaluation was older is merely the result of his supervisor filling out evaluations less frequently. We cannot find that this discrepancy demonstrates that there was discrimination when Oviawe would have been hurt more by the use of more recent employee evaluations.

The Examiner cites discrepancies in Thomas's scoring of the lead worker traits evaluations. First, he correctly notes that Thomas used incorrect records to determine Oviawe's attendance. He also attacks Thomas's use of a six-month period of attendance for evaluation purposes rather than a previous nine-month period. But Thomas testified that he used the most recent six-month period because it is the typical evaluation period. Tr. p. 306. In addition, using the most recent period makes sense. Using an outdated attendance record would be much more questionable. As for Thomas's use of the wrong attendance records and thus judging Oviawe to have a poorer attendance record than Rindy, the fact that a court might think that an employer misjudged the qualifications of applicants does not in itself expose the

employer to liability for discrimination. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 259 (1981). In any case, use of the correct attendance records, or even use of the nine-month period rather than the six-month period for comparison, would not have changed the result and given Oviawe a higher score for lead worker traits. Again, it makes no sense to find that a discrepancy which would not have changed the final result could be evidence of discrimination.

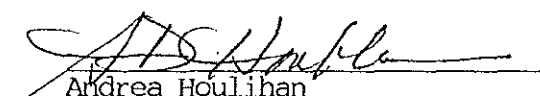
The Examiner also found fault with Thomas's rating of the candidates for accuracy. The Examiner claims that Thomas based Rindy's accuracy score on her most recent performance but based Oviawe's accuracy score on an evaluation that was a year old. The Examiner similarly attacked Thomas's scores for leadership ability. Again, just because we might find that the employer misjudged Oviawe's accuracy or that the employer was not as familiar with one candidate as he was with another does not mean discrimination occurred. While Thomas did testify that he based his accuracy rating for Oviawe on the older evaluation, there was evidence that Thomas obtained updated and firsthand information about Oviawe's leadership ability. Thomas could not remember a specific conversation he had with Oviawe's supervisor regarding this subject but it would have been unnecessary since he had personally observed Oviawe interacting with others and had been informed about additional problems. Thomas and others testified that Oviawe had difficulty dealing with coworkers. Tr. p. 159, 315-316. Thomas had to become involved to stop conflicts between Oviawe and workers in Thomas's department and at times he found Oviawe to be uncooperative and incommunicative. Tr. p. 315, 340-342, 441-442. Employees complained that Oviawe was intentionally bumping into him and that he harassed them. Tr. p. 198-200, 565. Finally, testimony indicated that Oviawe could not take criticism and blamed his errors on others. Tr. p. 340-341, 440-442. Given all of this knowledge that Thomas had, it is not difficult to conclude that he had ample indication of Oviawe's leadership ability and that his rating was not questionable in the least. We also note that even if Oviawe's scores on both accuracy and leadership ability had been higher, Rindy would still have considerably outscored Oviawe on the overall lead worker traits evaluation. We cannot see that these discrepancies show that the evaluation system was a pretext for discrimination.

Conclusion

There is no doubt that Rindy had more experience than Oviawe. In addition, a legitimate evaluation process indicated that Rindy was more qualified than Oviawe. If an employer selects the most qualified applicant for a position, an argument of pretext will ordinarily fail. Clark v. Huntsville Board of Education, 717 F.2d 525, 527 (11th Cir. 1983). The promotion of a better qualified applicant is a legitimate and nondiscriminatory reason for choosing the successful applicant over a plaintiff. Jefferies v. Harris County Community Action Association, 693 F.2d 589 (5th Cir. 1982). We hold that Complainant has failed to meet his burden of persuasion on the issue of pretext. The discrepancies in the evaluation process cited by the Complainant are not significant enough either to have changed the result or to raise a suspicion of pretextual discrimination. In our view, Rindy appeared to be the most experienced and most qualified applicant for the position. Choosing the most qualified and experienced candidate simply is not discrimination. It is just good business sense.

Dated at Madison, Wisconsin this 3 day of ^{August} ~~July~~, 1990.

EQUAL OPPORTUNITIES COMMISSION


Andrea Houlihan
EOC President

**EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
210 MARTIN LUTHER KING, JR. BOULEVARD
MADISON, WISCONSIN**

<p>Gabriel Oviawe 212 Castille, Apt. 3 Madison, WI 53713</p> <p style="text-align: center;">Complainant</p> <p style="text-align: center;">vs.</p> <p>Madison United Hospital Laundry Ltd. 1310 West Badger Road Madison, WI 53713</p> <p style="text-align: center;">Respondent</p>	<p style="text-align: center;">RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER</p> <p style="text-align: center;">Case No. 20723</p>
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In a complaint filed with the Equal Opportunities Commission on December 26, 1986, Gabriel Oviawe charged the Respondent, Madison United Hospital Laundry, with discrimination in employment on the basis of race and national origin. Complainant alleged discrimination in Respondent's failure to promote him and also alleged that he had been harassed by co-workers. The complaint was investigated and on October 28, 1987, an initial determination of no probable cause was issued. Complainant timely appealed the initial determination, and on January 8, 1988, the hearing examiner issued a decision and order entering a finding of probable cause to believe discrimination occurred with respect to Respondent's failure to promote Complainant and affirming the no probable cause determination with respect to harassment. Conciliation was unsuccessful and the case was certified to hearing.

The hearing was held on July 12, 13 and 14, 1988. Complainant appeared in person and by his attorney, Carol Rubin, of Kelly & Haus. Respondent appeared by its attorney, Lauri D. Morris of Stroud, Stroud, Willink, Thompson & Howard.

Based on the evidence presented at the hearing, I now make the following Recommended Findings of Fact, Conclusions of Law and Order:

RECOMMENDED FINDINGS OF FACT

1. The Complainant, Gabriel Oviawe, is an adult black male born in Nigeria.
2. The Respondent, Madison United Hospital Laundry, Ltd. (MUHL) is engaged in the business of processing soiled hospital linens. At all times relevant hereto, MUHL's plant has been located in the City of Madison.
3. MUHL consists of two major divisions, the plant and the linen service. Each division has a manager who reports directly to MUHL's General Manager.
4. Oviawe has been employed by MUHL since September 29, 1980. He began as a part-time janitorial employee and became a full-time employee in 1982, working first in the surgical inspection department (plant division) for several weeks before transferring to the linen service division and becoming a packer. At the time of the hearing in this matter, Oviawe was still employed as a packer.

5. Throughout the period of Oviawe's employment with MUHL, job classifications and wage rates have been governed by a series of collective bargaining agreements between MUHL and Local 150, Service and Hospital Employees' International Union, AFL-CIO. Under the terms of the most recent agreement, effective April 1, 1986, there are six job classifications. For the jobs in the lowest classification, Grade I, wages range from \$5.21 to \$6.21 per hour. Jobs in Grade VI, the highest classification, pay an hourly rate of not less than \$7.93 and can pay as much as \$9.43 per hour.
6. The packer position held by Oviawe since 1982 has always been a Grade I position.
7. MUHL has designated lead workers in several departments. In the plant division, the soil sort, tumble fold, flat work and surgical inspection departments all have lead workers. The linen service departments with lead workers are the packers, pack making and mending departments.
8. Lead workers are not supervisory employees. They may not hire, fire or discipline employees, or even approve vacation requests. They do not evaluate employees. Lead worker is a Grade II position.
9. The role of the lead worker is limited to distributing work within the department and monitoring productivity. In the soil sort department the lead worker posts production scores hourly, calls for sorters to shift from task to task at regular intervals, and performs the work performed by sorters as well. Sorters are included in the Grade I classification.
10. MUHL has a single lead worker job description, which makes no distinction by department with respect to the duties of lead workers or the minimum qualifications needed to hold the position of lead worker. Lead workers must have a high school diploma or the equivalent and must be able to read and interpret written instructions and grasp oral directions. Lead workers must also be able to explain job requirements to production workers, play a leadership role, and keep good records. No special skills or experience are required for the position.
11. Since 1980, the collective bargaining agreement has required that all positions above Grade I be posted and that employees be permitted to bid for such positions. The agreement permits MUHL to select individuals to fill these positions on the basis of qualifications and ability, as perceived by MUHL, but requires selection of the more senior employee where the applicants are substantially equal in qualifications. Seniority is calculated from an employee's most recent date of hire.
12. In 1982, Oviawe applied for the lead worker position in the soil sort department. He was not selected. Jim Kimberley, a white male with less seniority, was selected. Greg Wilhelm, who selected Kimberley, told Oviawe Kimberley was selected because of his seniority.
13. In 1984, Oviawe applied for a position in the wash room. At the time, the position was classified in Grade V. MUHL selected a white male with less seniority than Oviawe to fill the position.
14. In September of 1986, the soil sort lead worker position again became available. The position was posted and Complainant, Charlotte Rindy and Scott Hatlevig applied. Rindy is a white female and Hatlevig is a white male. Both were then working in the soil sort department and Rindy had served as back-up to the former lead worker, who had been absent frequently due to illness.
15. At this time, Greg Wilhelm was the plant manager. Jerald Thomas was production superintendent. In that position, he directly supervised the soil sort department. Both Wilhelm and Thomas are white males.
16. Wilhelm and Thomas discussed filling the soil sort lead worker position and agreed on the criteria by which the candidates would be judged: "seniority"; "leadership record"; "attendance"; "communication skills - train, direct others"; "even-handedness"; "physical requirements"; "accuracy with computations"; "ability to work within authority level"; "able to motivate others to good performance"; "get along"; and "response to their need to improve".

17. Thomas then devised a system for assessing the candidates. The assessment consisted of three different sets of ratings of the candidates: interviews, supervisory evaluations and lead worker traits.
18. Wilhelm was not involved in devising the selection process described in paragraph 17, or in rating the candidates. He did, however, sit in on the interviews.
19. Thomas developed a set of standard interview questions which he posed to each of the candidates. He recorded their answers and assigned each an interview score on the basis of those answers. Rindy and Hatlevig each scored 4.3 and Oviawe scored 4.2. Thomas felt all three performed well at the interview but awarded Rindy a higher score than Oviawe because of her answers to two questions and her answer to the final question in particular.
20. Thomas also assigned each candidate a supervisory evaluation score on the basis of their most recent performance evaluations. For Oviawe, he used an evaluation prepared by Jane Smith in November of 1985. Thomas had evaluated Rindy in May of 1986 and used that evaluation in assigning her a supervisory evaluation score.
21. MUHL's hourly employee performance evaluation contains three evaluation sections. Section A calls for the supervisor to rate the employee in five areas - productivity; attendance; safety; working with others; and response to supervision. Each area has between five and eight components. The supervisor assigns ratings from one ("unsatisfactory") to five ("almost always exceeds minimum requirement") for each component. The overall score for each area is the average of the component scores for that area.
22. Section B of the evaluation is entitled "Potential - Promotability" and calls for ratings as well as comments on leadership, creativity, organizational loyalty, and reasoning and logic. The supervisor also rates overall potential as average, above average or excellent. Section C of the evaluation allows the supervisor to highlight areas of strength as well as areas in which the employee should attempt improvement. It also permits the supervisor to comment generally on performance since the previous evaluation.
23. The scores Thomas assigned the candidates for performance evaluations were based on Section A of the evaluations, the numerical ratings for productivity, attendance, safety, working with others, and response to supervision. Rindy's score was 3.64; Oviawe's was 3.58; and Hatlevig's score was 3.14.
24. By far the greatest difference in scores between Complainant and Rindy is in the final test devised by Thomas, the lead worker trait score. Thomas identified factors he believed were indicative of the ability to perform as a lead worker and assessed the candidates with respect to each. Thomas first jotted down his comments and observations as to each candidate for each factor. He then attempted to quantify his written comments on a scale of one to five. The average score for all traits scored became the lead worker trait score. Rindy's score was 3.9. Both Oviawe and Hatlevig received scores of 3.4.
25. Thomas's list of written comments includes two categories not accounted for on the scoring sheet. Seniority does not appear on the scoring sheet but is included in Thomas's written summary. In addition, although the written comments lists attendance from the beginning of 1986 to September as well as attendance from March, 1986 to September, only the latter is listed on the scoring sheet. The scoring sheet also lists ability to get along with others and assigns scores in this area, but this is not included in the listing which contains Thomas' written comments.
26. In addition to ability to get along with others and attendance from March to September, 1986, the lead worker traits scoring sheet lists the following areas of evaluation by Thomas: leadership; communication, training, directing; even-handedness; physical requirements; accuracy; able to work within authority level; able to motivate. All of these areas are included in the list containing written comments.

27. Oviawe had more seniority than Rindy.
28. Oviawe's attendance from January 1, 1986 to September, as reflected in Thomas' comments, was better than Rindy's. He had fewer incidents of absence and fewer total days absent. Thomas' May 5, 1986 evaluation of Rindy listed attendance as an area on which she needed to concentrate. For the March to September period, Thomas' comments reflect that Rindy had no absences. He awarded Rindy a rating of 4.5 in this category. For the same period, Thomas's comments reflect Oviawe was absent on three occasions, and a total of one and one-half days. He gave Oviawe a rating of 4.
29. MUHL's attendance records reflect that Oviawe was absent on three occasions between March 1 and the date Rindy was selected for the soil sort lead worker position in September. These three absences actually account for a total of two days of absence. However, one full day absence was a personal day which, according to MUHL's records, should not have counted against Oviawe. Thus, Oviawe had two countable half-day absences. MUHL's records indicate that Oviawe did have a third half-day absence later in September. However, this absence occurred after Thomas had completed the selection process and the candidates were informed that Rindy would be awarded the lead worker position.
30. Because Rindy and Hatlevig both worked in a department under his supervision, Thomas was familiar with their work and was able to assess their abilities on the basis of his own observations, including recent observations of their work.
31. Thomas had no supervisory responsibilities over Oviawe or the department in which he worked. Consequently, he was not as familiar with Oviawe and his work as he was with Hatlevig and Rindy. Oviawe's supervisor for at least two years had been Jane Smith, the linen service manager.
32. In the area of leadership, Thomas gave Rindy a rating of 4; he gave Oviawe a score of 3. Although Thomas had a copy of Smith's November, 1985 evaluation of Oviawe, which gave Oviawe high marks in the area of leadership and potential promotability, he did not consider that portion of the evaluation which addressed potential and promotability in assigning Oviawe a leadership lead worker trait rating of 3. Thomas also failed to consult with Smith on this point to determine whether Oviawe had leadership experience, how he performed, or whether she had anything to add to her evaluation based on Oviawe's performance in the ten months which had passed since she had written it.
33. In the area of accuracy, Thomas gave Rindy a 4. In his May 1986 performance evaluation of Rindy, Thomas gave her a rating of 3. Thomas based his lead worker trait score for accuracy on Rindy's more recent, improved performance, which he had observed.
34. Oviawe's lead worker trait score for accuracy was 3. Thomas based this on the rating Oviawe received from Smith in November, 1985, as well as a contemporaneous notation in Section C of the evaluation that "clearer record keeping" was an area on which Oviawe needed to concentrate. Thomas did not consult with Smith to determine whether she had noted any changes in Oviawe's record keeping since then.
35. Thomas's ratings for communication were: Rindy, 4.0; Oviawe, 3.0; Hatlevig, 3.5. Thomas felt that Oviawe was sometimes difficult to understand. He was also of the opinion that Oviawe did not have a communication difficulty which would have prevented him from performing as lead worker in the soil sort department, but merely felt Rindy's communication ability was better than Oviawe's: Thomas would have selected Oviawe over Hatlevig if Rindy had not been a candidate.
36. Following the completion of his three-part assessment of the candidates, Thomas recommended that Rindy be selected in the following note to Wilhelm:

In all areas that I can compare the three candidates Charlotte scored as well or better than the others. In addition she has had experience with being leadworker in Soil Sort, and she has done a good job at this. For these reasons I recommend that Charlotte be given the job as soil sort leadworker.

37. Wilhelm agreed with Thomas's selection of Rindy.
38. Oviawe was informed of MUHL's decision to place Rindy in the soil sort lead worker position he sought on or about September 11, 1986.
39. Although Rindy's experience was a factor considered in selecting her and may have influenced some of the ratings she received for lead worker traits, her selection resulted from the fact that she emerged from Thomas's evaluation process with slightly higher scores for two of the tests - interview and evaluations - and a significantly higher score for lead worker traits.
40. Thomas failed to assess all the candidates in the same manner in rating them.
41. Oviawe's race and national origin were contributing factors in MUHL's decision not to award him the soil sort lead worker position in September of 1986.
42. The union contract establishes an hourly wage differential of sixty-four cents (\$0.64) between the Grade I position held by Oviawe and the wage he would have received had he been promoted to soil sort lead worker, a Grade II position. This differential existed from September, 1986 to July, 1988, when the hearing in this proceeding was held. The contract also establishes a normal work week of forty (40) hours.
43. The parties have stipulated that Oviawe's physical ability to perform as a lead worker beyond the final date of the hearing in this matter, July 14, 1988, is to be determined in a supplemental hearing.

RECOMMENDED CONCLUSIONS OF LAW

44. The Commission has jurisdiction over the parties to this proceeding.
45. The Commission has jurisdiction over the subject matter of this complaint.
46. Complainant is protected by the Equal Opportunities Ordinance from discrimination with respect to selection for, or the terms, conditions or privileges of employment on the basis of his race or national origin. sec. 3.23(7), Mad. Gen. Ord.
47. In failing to select Complainant for the position of soil sort lead worker, MUHL discriminated against him on the basis of his race and national origin, in violation of sec. 3.23(7), Mad. Gen. Ord.
48. Complainant is entitled to such relief as will redress the injury done to him as a result of Respondent's violation of the Equal Opportunities Ordinance. sec. 3.23(9)(c)2.b., Mad. Gen. Ord.
49. The Commission is constrained by the stipulation of the parties from making any factual findings with respect to Complainant's physical ability to perform in any lead worker position beyond July 14, 1988 and therefore cannot now award Complainant relief beyond that date.

RECOMMENDED ORDER

50. The Respondent, MUHL, shall cease and desist from applying promotion selection criteria in a discriminatory manner.
51. The Respondent shall pay Complainant back wages in the amount of sixty-four cents (\$0.64) per hour, on the basis of a forty hour work week, for the period beginning September 11, 1986 and ending July 14, 1988.
52. Respondent shall pay Complainant pre-judgment interest at the annual rate of seven percent (7%) on all back wages awarded Complainant in paragraph fifty-one (51) of this order.

53. Complainant is awarded costs and reasonable attorneys fees, to be paid by Respondent, for the proceedings had to date in this matter. Complainant shall have thirty (30) days from the date of this order to file a petition for costs and attorneys fees and to serve the same on Respondent. Respondent shall then have fifteen (15) days to file and serve a response and Complainant shall have fifteen (15) days thereafter to file and serve a reply.
54. A further evidentiary hearing shall be held for the purpose of determining whether Complainant is entitled to further relief. The sole factual issue to be addressed at the hearing shall be the Complainant's ability to physically perform lead worker duties after July 14, 1988.
55. A pre-hearing conference will be held on March 7, 1989 at 10:30 a.m. at the MEOC Office, Room 500, City-County Building, 210 Martin Luther King, Jr. Boulevard, in Madison.

MEMORANDUM DECISION

The prima facie case analysis first articulated by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) is applicable to disparate treatment claims arising under the Equal Opportunities Ordinance. State Medical Society of Wisconsin v. Madison Equal Opportunities Commission, No. 82-CV-2560, Dane Co. Circ. Ct., Hon. R. Bardwell, Mar. 2, 1983. Under the framework established by McDonnell Douglas and its progeny, the Complainant must first prove, by a preponderance of the evidence, facts which establish a prima facie case of race and national origin discrimination.¹ If he does so, the Respondent must then rebut the prima facie case by articulating legitimate, non-discriminatory reasons for having failed to award Complainant the soil sort lead worker position.² To prevail, Complainant must then prove that the explanation offered by Respondent is a pretext for discrimination. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981). Pretext is shown by proving the explanation is unworthy of belief, or that a discriminatory reason more likely motivated the Respondent. id. A showing that Respondent's explanation for how it reached its decision lacks merit is sufficient to show pretext. Shaw v. State of Nebraska, 666 F.Supp. 1330, 1335 (D. Neb. 1987). This is so because once the legitimate reasons for Respondent's rejection of Complainant are eliminated, the only explanation remaining is that Respondent based its decision on an impermissible consideration (such as Complainant's race or national origin). Furnco, 438 U.S. at 577. Where, as here, the Respondent has presented evidence to explain its decision and the hearing has progressed to its completion, we need not pause to determine whether Complainant has made out a prima facie case but may move directly to the ultimate question of discrimination. United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 715 (1983); Larry Gustafson v. Wisconsin Physicians Service, Case No. 20539, MEOC, Ex. Dec., May 19, 1987.

Complainant has succeeded in discrediting MUHL's legitimate, non-discriminatory explanations for rejecting him in favor of Charlotte Rindy, a white female, and has therefore proven that his rejection was motivated, at least in part,³ by discriminatory reasons. Although both Greg Wilhelm, the plant manager, and Gerald Thomas, the production superintendent, testified that Rindy's experience in the soil sort department and as back-up to the previous soil sort lead worker was the one determinative factor in her selection, the evidence clearly establishes that this was not in fact true. In addition, the evidence establishes that Thomas applied the "lead worker traits" analysis in a non-uniform and biased manner which worked to Oviawe's disadvantage. Finally, there is evidence that MUHL improperly considered Oviawe's foreign accent in the selection process.

As production superintendent, Thomas oversaw the operations of the soil sort department and observed and was familiar with both Rindy's and Hatlevig's work. It was Thomas who prepared Rindy's performance evaluations. Oviawe worked in the packing department under the supervision of

Jane Smith, manager of the linen service. Thomas had no supervisory responsibilities over Oviawe and seldom observed his work. In short, Thomas was fairly familiar with Rindy and Hatlevig and in a position to assess their respective performance and capabilities, but was not in a position to do so with respect to Oviawe. At the hearing, Thomas testified that, although he was familiar with Rindy and knew she had filled in for the soil sort lead worker during his many absences, he was unprepared to elevate Rindy to lead worker on that basis alone. He also testified at length about the three-part test he devised to select a lead worker. Thomas knew who the applicants for the position were when he devised the selection process. In fact, he testified that in devising the process he was sensitive to the fact that two of the candidates were protected class members, and that he wanted to avoid any hint of bias or unfairness in the selection of a new lead worker. In view of such evidence, it is impossible to accept MUHL's contention that experience alone led to Rindy's selection. Although her experience was undoubtedly a factor, it was but one of many considered by MUHL in deciding who would be promoted.

Ironically, the selection process devised by Thomas in order to fairly select a lead worker on the basis of merit became a vehicle for discrimination. The lead worker trait analysis consisted primarily of subjective, undefined criteria. While not unlawful per se, the use of subjective criteria in filling low level blue collar jobs has been recognized as a ready mechanism for discrimination. See, Grano v. Dept. of Development, 699 F.2d 836, 837 (6th Cir. 1983) (per curiam); Royal v. Missouri Highway & Transportation Comm'n., 655 F.2d 159, 164 (8th Cir. 1981); Stewart v. General Motors Corp., 542 F.2d 445, 450-51 (7th Cir. 1976), cert. denied, 433 U.S. 919 (1977). Where they are employed, "subjective promotion procedures are to be closely scrutinized because of their susceptibility to discriminatory abuse", Royal, supra, 655 F.2d at 164, especially where the evaluators themselves are not members of the protected minority. id. Here, as in Colon v. Sorenson, 668 F.Supp. 1319 (D. Neb. 1987), Complainant has shown that the promotion process did not ensure equality of opportunity and that the reasons advanced by MUHL for selecting Rindy are pretextual. First, although he knew little about Oviawe's leadership ability, Thomas rated him in this category without having considered the written comments in the "potential-promotability" portion of Smith's evaluation or consulting with Smith to determine Oviawe's capabilities. Thomas rated Rindy on the basis of his many opportunities to observe her at work. He awarded Rindy a score of 4 and Oviawe a 3. Thomas acted in the same manner in rating the candidates in the category of accuracy. Although Thomas had given Rindy a score of 3 for accuracy in a performance evaluation he prepared just a few months earlier, he now gave her a score of 4 and explained that this higher score was based on Rindy's recent performance. In giving Oviawe a score of 3 for accuracy, Thomas relied on an evaluation which was almost a year old. He made no attempt to determine whether Oviawe's accuracy had improved, worsened or remained constant in the intervening period. His actions "strongly suggest a disinterest [by Thomas] in challenging [his] impressions and gathering a uniform set of information about each candidate." Colon v. Sorenson, 668 F.Supp. at 1328. Thomas has offered no reasonable explanation for having failed to avail himself of pertinent information which would have enabled him to fairly and uniformly assess the candidates' lead worker traits.

Thomas was also inconsistent in converting his written comments on lead worker traits to numerical ratings.⁴ Although he and Wilhelm both agreed that seniority was one of the factors that would be considered and Thomas included seniority in his initial listing of lead worker traits, he did not give the candidates numerical ratings for seniority. Oviawe was more senior than Rindy and Hatlevig. Thomas' handling of the attendance rating is also troubling. Initially, he considered two periods of attendance. The first began January 1, 1986 and ended in September, at about the time the lead worker ratings were prepared. The second ended at the same time, but only extended back to March 1, 1986. Under either test, Oviawe was absent the same number of days. For the first and longer period identified,

Rindy's attendance record was not as good as Oviawe's. However, if consideration of attendance was limited to the shorter period, Rindy compared favorably to Oviawe: she had no absences and Oviawe had no more than two. Thomas chose to rate the candidates' attendance on the basis of the later, shorter period only. As with his failure to assign numerical ratings for seniority, he offered no explanation for having done this. This evidence further supports the inference that MUHL illegally discriminated against Oviawe.

Finally, it is apparent that Oviawe has a foreign accent. His testimony at the hearing however, was understandable, and Thomas testified that Oviawe was qualified for the soil sort lead worker position and that if Rindy had not been in the running for the position, Oviawe would have been selected over Hatlevig. I therefore conclude that Oviawe's foreign accent would not have interfered with his ability to perform soil sort lead worker duties. Despite this, Thomas considered Oviawe's accent by including communication in the leadworker trait category and rating him the lowest of the three candidates in that category. Thomas' consideration of Oviawe's accent, which would not have interfered with his ability to do the work in question, amounted to national origin discrimination. See, Carino v. University of Oklahoma Board of Regents, 750 F.2d 815, 819 (10th Cir. 1984).

Where, as here, the explanations offered by MUHL for how Rindy came to be selected are shown to be untrue (as with the contention that Rindy was selected solely on the basis of experience) and lacking in merit (as with the subjective, unfairly applied lead worker trait analysis), and the evidence shows that MUHL improperly relied on Complainant's accent in rating him, Complainant has met his burden of proving that discrimination has occurred. See, Burdine, supra; Furnco, supra; Shaw, supra.

Victims of employment discrimination are entitled to such relief as will redress the injury done by the discrimination, including back wages. Sec. 3.23(9)(c)2.b. In addition, the Commission is authorized, where a violation is found to have occurred, to order such action as will bring the Respondent into compliance with the ordinance and generally effectuate its purposes. id. By ordering Respondent to cease and desist from discriminating on the basis of race and national origin in its promotion process, Respondent is brought into compliance and the objectives of ensuring equal opportunities in employment without regard to race and national origin are furthered.

MUHL's rejection of Oviawe had the immediate and lasting effect of depriving him of the higher lead worker wage. The wage differential between Oviawe's position and the lead worker salary is, sixty-four cents (\$0.64) per hour. Oviawe is entitled to back wages from September 11, 1986, the date MUHL rejected him and selected Rindy to fill the lead worker position, through July 14, 1988, the date on which the hearing was concluded. However, because the parties stipulated that the question of Oviawe's physical ability to perform lead worker duties beyond July 14, 1988 should be addressed at a later evidentiary hearing, I am unable to make any factual findings which would support an award of lost wages beyond that date. An award of pre-judgment interest is also necessary to effectuate the objective of making Complainant whole for his loss. Hilgers v. Laboratory Consulting, Inc., Nos. 86-CV-6488 and 86-CV-6733, Dane Co. Circ. Ct., Hon. A. Bartell, Aug. 24, 1987, Mem. Dec. at 12. Since the parties have articulated no factual or legal criteria for determining the appropriate rate of interest, I have elected to follow the lead of the Supreme Court in Anderson v. Labor and Industry Review Commission, 111 Wis. 2d 245, 330 N.W.2d 594 (1983) and order that Respondent pay pre-judgment interest at an annual rate of seven percent (7%) on the back pay awarded Complainant.

Complainant is also entitled to recover his costs and attorneys fees. See, Adam Vance v. Eastex Packaging, Case No. 20107, MEOC, Aug. 29, 1985; Felix Ossia v. Mariann Rush, Case No. 1377, MEOC, Ex. Dec., Jun. 7, 1988. Accordingly, the above order affords him an opportunity to file a petition for costs and attorneys fees and also affords MUHL an opportunity to respond to that petition.

Whether further relief is appropriate will be determined following a supplementary hearing, also provided for in the above order.

Dated at Madison this 25th day of January, 1989.

EQUAL OPPORTUNITIES COMMISSION

Harold Menendez
Hearing Examiner

¹The facts necessary to establish a prima facie case of discrimination will necessarily vary with each case. McDonnell Douglas Corp. v. Green, 411 U.S. at 802, n.13. What is required is a showing of facts which, if unexplained, would support an inference of discrimination. Furnco Construction Corp. v. Waters, 438 U.S. 567, 576 (1978). Thus, in Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), a prima facie case was made out by a female who showed she was qualified for the position she sought, and that the position remained open for a lengthy period before she was rejected in favor of a male who had been under her supervision. 450 U.S. at 253, n.6. A prima facie case was also established by a plaintiff who demonstrated membership in a protected class, similarity to individuals not within that class, and differential treatment. See, Collins v. State of Illinois, 830 F.2d 692, 698 (7th Cir. 1987).

²Respondent's burden in rebutting the prima facie case is not one of proof but of production. MUHL need only set forth, through the introduction of admissible evidence, an explanation for rejecting Complainant which is legally sufficient to justify judgment for Respondent. 450 U.S. at 254.

³The Commission adheres to the "in-part" test of 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, Billy Sanders v. U-Haul Co. of Western Wisconsin, Case No. 20288, MEOC, Ex. Dec., May 22, 1985; Gloria McCarter v. Wisconsin Power & Light, Case No. 20471, MEOC, Ex. Dec., Dec. 29, 1986; aff'd., MEOC, Mar. 26, 1987.

⁴As Thomas explained it, he first listed lead worker traits on a sheet of paper and recorded information, comments and observations for each candidate. See, Exh. R-11. He then converted his written comments to numerical ratings. See, Exh. R-10. The numerical ratings constituted the third component of the three-part test Thomas used to evaluate the candidates.