

STATE OF ILLINOIS  
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
	)	
<b>LAURA SKIRPAN ,</b>	)	
	)	
Complainant,	)	
	)	
and	)	CHARGE NO: 2001SF0634
	)	EEOC NO: 21BA12002
	)	ALS NO: S11859
	)	
<b>OFFICE OF CHIEF JUDGE</b>	)	
<b>ASHTON C. WALLER,</b>	)	
<b>5TH JUDICIAL CIRCUIT</b>	)	
	)	
Respondent.	)	

**RECOMMENDED ORDER AND DECISION**

This matter is ready for a Recommended Order and Decision pursuant to the Illinois Human Rights Act (775 ILCS 5/1-101 et seq.). A public hearing was held before me on January 10, 2003. The parties have filed their post-hearing briefs. Accordingly, this matter is ripe for a decision.

**Contentions of the Parties**

In this Complaint, Complainant asserts that she was the victim of sex discrimination when Respondent selected a male candidate for the position of Intensive Adult Probation Services Officer, even though, according to Complainant, she was more qualified for the position. Respondent, however, submits that Complainant was passed over for the subject position for reasons unrelated to her sex. It also contends that the Commission lacks jurisdiction over this Complaint because the Complainant failed to properly name the Chief Judge of the 5<sup>th</sup> Judicial Circuit in her initial signed Charge of Discrimination.

**Findings of Fact**

Based on the record in this matter, I make the following findings of fact:

1. In September of 1991, Complainant began her employment with the Office of Chief Judge of the Fifth Judicial Circuit, and was assigned to the Vermilion County Probation and Court Services Department. At that time Complainant was given the job as an electronic monitoring officer for the juvenile division.

2. In approximately January of 1992, Complainant transferred to the position of Electronic Pre-sentence Investigative Reporting Officer and held the position for four years.

3. In 1996, Complainant transferred to the position of Intensive DUI Probation Officer, which required Complainant to maintain a caseload of 100 clients. In this position, Complainant made home visits, conducted drug tests, maintained case notes, drafted client violations and progress reports for the court, and testified in court proceedings.

4. In 1996, Complainant spoke with John Harmon, the Director of Vermilion County Probation and Court Services, about his perception that Complainant had a poor attitude and ability to get along with others in the Department.

5. On November 27, 2000, Complainant applied for the position of Intensive Adult Probation Services Officer (hereinafter referred to as the "subject position"). At all times pertinent to this case, the subject position required individuals to make personal visits with clients at least five times per week, keep written records on meetings with clients, and testify in court. Unlike like other probation officers, individuals hired into the subject position typically worked at nights and weekends, made curfew checks and handled emergency calls that occurred at all hours of the day.

6. In December of 2000, Complainant interviewed for the subject position, along with Darlene Henry, female, who was currently employed by Respondent in the position of Electronic Monitoring Officer, and Jason Dunavan, male, who was a recent college graduate who had no prior experience in the Probation Department, and who had been an intern with the Vermilion County Sheriff's Department for a period of four months.

7. The three candidates for the subject position were interviewed by Harmon, Ed Miller, the Deputy Director of Vermilion County Probation and Court Services, and Ed Miller, Complainant's current supervisor who would also be the supervisor of the successful candidate.

8. At that time of Complainant's interview, Harmon, who had been given authority by Judge Glenn, the Acting Chief Judge of the Fifth Judicial Circuit, to appoint subordinate probation officers, told Day and Miller to decide between themselves whom they believed was the best candidate and to forward the name onto him for his separate consideration.

9. During her interview Complainant stated, among other things, that she wanted the subject position only because of the increase in pay, and that she did not want to work either nights or weekends. Complainant was also asked if she would be afraid to work in particular areas in the night, and whether she could make adequate baby-sitting arrangements for her daughter during the evening hours required by the subject position.

10. During his interview, Dunavan did not indicate that he wanted the subject position only for the money or that he did not want to work either nights or weekends. However, Dunavan was asked about whether he would be afraid to work nights in particular areas of the city, but was not asked if he had suitable child-care arrangements since the interviewers were aware that he did not have any children.

11. After Miller and Day discussed the candidates, both men selected Darlene Henry as their number one choice. The basis for their selection of Henry was that she was already doing the electronic monitoring aspects of the subject position and was familiar with the equipment and the clients to be monitored. While Henry would need additional firearms training, both Complainant and Dunavan would need additional training on the electronic monitoring equipment, the caseload, the classification system, firearms training and

handcuffing procedures. Dunavan would also need a 40-hour, one-week basic training course plus an additional course on use of chemical agents.

12. In discussing Complainant's qualifications for the subject position both Day and Miller viewed negatively Complainant's comment about her desire to obtain the subject position only for the money and about her desire not to work nights or weekends. Day also told Miller that, beginning in September of 2000, when he became Complainant's supervisor, Complainant's attitude towards him had changed from a friendly attitude to one in which she no longer consulted with him on her clients due to Day's new status as a member of management.

13. Miller thereafter informed Harmon that Henry was his and Day's choice for the subject position.

14. Before Harmon made the final selection for the subject position, Miller heard from others that Henry was going to file a union grievance concerning the fact that she was currently assigned to work in two separate positions. Miller thereafter confronted Henry about the situation and told her that she should have talked to him about her job assignments rather than advising the union steward about the matter.

15. After his confrontation with Henry, Miller told Day about his disappointment with Henry and told him that he no longer wanted to be a part of the decision-making process with respect to the subject position.

16. After listening to Miller express his disappointment with Henry, Day also changed his mind about recommending Henry for the position and told Harmon that he now recommended Dunavan for the subject position. Harmon thereafter offered the subject position to Dunavan.

17. On December 22, 2000, Complainant was informed that she did not receive the subject position.

18. At all times pertinent to this case, the Vermilion County had a personnel policy which stated in part that the County was “desirous” of offering promotion and transfer opportunities to its existing workforce. Specifically, the policy stated that “[e]mphasis will be placed on giving promotional opportunity to all employees identified as having qualifications for the advancement.”

19. On December 4, 2000, Harmon selected Paula Ray (female) for the position as a Juvenile Intensive Probation Officer, which had similar job duties and working hours as the subject position.

20. On June 18, 2001, Complainant sent to the Department of Human Rights a Charge of Discrimination that named Hon. Ashton C. Waller, Chief Judge of the 5<sup>th</sup> Judicial Circuit, Vermilion County Probation and Court Services Department and John Harmon as “Respondents”. The Charge listed the same address for all three individuals/entities.

21. On July 26, 2001, Complainant signed a Charge of Discrimination that had been drafted by the Department of Human Rights and had listed only the Vermilion County Probation and Court Services Department as Respondent/employer. The Office of Chief Judge Ashton C. Waller, 5<sup>th</sup> Judicial Circuit was thereafter substituted as the Respondent while the matter was still in the Department of Human Rights.

#### **Conclusions of Law**

1. Complainant is an “employee” as that term is defined under the Human Rights Act.

2. Respondent is an “employer” as that term is used under the Human Rights Act and was subject to the provisions of the Human Rights Act.

3. Complainant established a *prima facie* case of sex discrimination when Respondent failed to offer her the position of Intensive Adult Probation Services Officer.

4. Respondent articulated a legitimate, non-discriminatory reason for the instant adverse act when it stated that the reason for its decision not to offer Complainant the

position of Intensive Adult Probation Services Officer was because of her qualifications and her negative responses in her interview.

5. Complainant failed to prove by a preponderance of the evidence that Respondent's decision not to offer her the position of Intensive Adult Probation Services Officer was pretext for sex discrimination.

### **Determination**

Complainant has failed to show by a preponderance of the evidence that Respondent violated section 2-102 of the Human Rights Act (775 ILCS 5/2-102) when it failed to offer the Intensive Adult Probation Services Officer position to Complainant.

### **Discussion**

#### **Jurisdiction**

Respondent (Office of the Chief Judge Ashton C. Waller) contends that the Commission lacks jurisdiction over the instant Complaint because Complainant failed to properly name him as a respondent in her initial Charge of Discrimination. Specifically, he submits that the Commission can acquire jurisdiction over individuals only through the language set forth in the Human Rights Act, which provides for a 180-day jurisdictional period in which to file a charge of discrimination. (See, 775 ILCS 5/7A-102(A)(1).) Thus, Respondent argues that Complainant's sex discrimination claim is untimely since he was never named in an official Charge of Discrimination that was filed within 180 days from the date of the adverse act. Respondent concedes, though, that the Department named him as the Respondent at a much later date via a "technical amendment" to the original Charge. He contends, however, that any mechanism that provides for the substitution of one party for another cannot be used to acquire jurisdiction over a substituted party where, as here, the substituted party was not named in the initial sworn Charge.

The record, though, indicates that Complainant attempted to name the Chief Judge as her employer in her initial, unsworn statement to the Department that was tendered within

the original 180-day jurisdictional period. Moreover, the standards for a substitution of the correct party under section 5300.660(a) of the Commission's Procedural Rules (56 Ill. Admin. Code, Ch. XI. 5300.660(a) appears to have been met here, where Complainant has not changed the cause of action or alleged that the Chief Judge was not aware of her Charge within the appropriate jurisdictional period, and where there is no obvious prejudice to the Chief Judge being named as the appropriate Respondent at a later date. Indeed, the only prejudice counsel for Respondent cites to not being promptly named in the original Charge of Discrimination is the fact that Harmon died shortly before the start of the public hearing. Yet, Respondent's counsel makes no linkage between Harmon's untimely death and the failure of Complainant to list the Chief Judge in the sworn Charge of Discrimination. Thus, under these circumstances, I find that the Commission has jurisdiction over the instant Complaint.

**The merits.**

This instant case presents the Commission with an issue that was only touched upon in **Elder and Illinois Department of Public Aid**, (ALS No. S-9651, Recommended Liability Determination entered on May 18, 1999), regarding whether an employer may view an applicant with objectively less qualifications as "more qualified" than an unsuccessful applicant having more relevant job experience where the assessment is partially based on responses the unsuccessful applicant gave in her job interview. Specifically, Complainant submits that she was clearly superior in two of the three criteria (i.e., education and qualifications) allegedly used by Respondent to determine the successful candidate, and that the third alleged criteria (i.e., "attitude") was not actually considered by the Respondent in choosing Dunavan as the successful applicant. However, I find that in spite of Complainant's qualifications and experience, Respondent could properly look to her negative responses in her interview when deciding that Dunavan was more qualified than Complainant so as to take this case outside the realm of sex discrimination.

To understand how Complainant loses on her claim of sex discrimination, it is important to note that in any case alleging sex discrimination, the Commission and the courts have adopted a three-step analysis to determine whether there has been a violation under the Human Rights Act. (See, for example, **Townsell and Illinois Department of Labor**, 43 Ill. HRC Rep. 198 (1988), and **Foley v. Illinois Human Rights Commission**, 165 Ill.App.3d 594, 519 N.E.2d 129, 116 Ill.Dec. 539 (5<sup>th</sup> Dist. 1988).) Under this approach, a complainant must first establish a *prima facie* case of unlawful discrimination by a preponderance of the evidence. Then, the burden shifts to the respondent to articulate a legitimate, non-discriminatory reason for the action taken against the complainant. If the respondent is successful in his articulation, the presumption of unlawful discrimination is no longer present in the case (see, **Texas Department of Community Affairs v. Burdine**, 450 U.S. 248, 101 S.Ct. 1089 (1981)), and the complainant is required to prove by a preponderance of the evidence that the respondent's articulated non-discriminatory reason is a pretext for unlawful discrimination. This latter requirement merges with the complainant's ultimate burden of proving that the respondent discriminated unlawfully against the complainant. See, **Village of Oak Lawn v. Human Rights Commission**, 113 Ill.App.3d 221, 478 N.E.2d 1115, 88 Ill.Dec. 507 (1<sup>st</sup> Dist., 4<sup>th</sup> Div. 1985).

As with any case alleging unequal treatment based on sex, the elements of a *prima facie* case will vary according to the specific claim. Generally, in establishing a *prima facie* case of sex discrimination based on a failure to promote, a complainant must show that: (1) she belonged to a protected classification under the Act; (2) she applied for and was qualified for the job at issue; (3) despite her qualifications, she was rejected for the position; and (4) the individual selected for the position had lesser or similar qualifications and was from outside Complainant's protected classification. (See, **Henson and Board of Commissioners, etc.**, 37 Ill. HRC Rep. 56 (1988).) In this regard, I find that at least "on paper" Complainant appeared to be at least as qualified as Dunavan given her prior

experience in the Probation Department and Dunavan's status as a new graduate seeking his first full-time probation officer position.

Indeed, Respondent does not essentially quarrel with the notion that Complainant satisfied all of the requirements of a *prima facie* case of sex discrimination, but has focused instead on his explanation that Complainant was not selected for the subject position because the selection committee believed that Dunavan was the better candidate given his attitude, education and qualifications, as well as Complainant's negative responses in her job interview.<sup>1</sup> On its face, these explanations provide me with neutral, non-discriminatory reasons for the failure of Respondent to offer Complainant the subject position, and I would note that Complainant does not seriously contend that these explanations, if believable, would not be sufficient to satisfy his articulation burden under **Burdine**.

Therefore, the real issue in this case is whether Complainant has satisfied her burden of showing that Respondent's articulations are a pretext for sex discrimination. To that end, a complainant may establish pretext for unlawful discrimination either directly, by offering evidence that a discriminatory reason more likely motivated the employer's actions, or indirectly, by showing that the employer's explanation is not worthy of belief. (See, for example, **Burnham City Hospital v. Human Rights Commission**, 126 Ill.App.3d 999, 467 N.E.2d 635, 81 Ill.Dec. 764 (4<sup>th</sup> Dist. 1984).) Moreover, a complainant may discredit an employer's justification for its actions by demonstrating either that: (1) the proffered reason had no basis in fact; (2) the proffered reason did not actually motivate the decision; or (3) the proffered reason was insufficient to motivate the decision. See, for example, **Grohs v. Gold Bond Products**, 859 F.2d 1283 (7<sup>th</sup> Cir. 1988).

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<sup>1</sup> Day also asserted as a factor in the selection process a statement he overheard Complainant make to her daughter regarding Complainant's desire to shoot herself with a gun because of her daughter's misbehavior. However, I doubt whether this conversation actually influenced Day's decision not to recommend Complainant for the subject position in view of Day's subsequent testimony that he was unaware that Day even possessed a gun.

Complainant initially argues that Dunavan's qualifications for the subject position could not have been the real reason for his selection since her education and experience within the Department were clearly more extensive than Dunavan's given the fact that he had no prior experience within Respondent's probation department, or for that matter the probation department of any other County. However, as Respondent points out, the disparity in qualifications between Dunavan and Complainant was not that great since Complainant would have required additional training in many of the areas that Dunavan needed when he started the subject position. Moreover, while courts have hinted that there could be a situation where a complainant was so overwhelmingly better qualified than the successful candidate that the disparity in background and experience alone could permit a trier-of-fact to find an intent to discriminate (see, for example, **Sanchez v. Philip Morris Inc.**, 992 F.2d 244 (10<sup>th</sup> Cir. 1993) and **Tebrugge and Springfield Department of Public Utilities**, \_\_\_ Ill. HRC Rep. \_\_\_ (1991SF0092, October 3, 1995), I find that the instant disparity was not so great so as to make such an inference given Complainant's similar need for additional training.

Moreover, Complainant's focus on her background and experience essentially misses the mark since both Day and Miller testified that "attitude" played a factor in their decision in not recommending Complainant. Here, Complainant provided no evidence to counter Day's observation that she had suddenly become uncommunicative towards him once he became her supervisor in September of 2000, or Miller's observation that individuals in the probation unit by necessity had to work closely with one another and communicate with their supervisor on a daily basis. More telling to both Day and Miller, though, was Complainant's response in her interview that she was only seeking the subject position because of the additional pay that it would provide, and that she did not want to work nights or weekends. However, as Miller explained, the subject position was "primarily" a night-time position, and Day noted that the typical schedule for the subject position required work on both Saturdays and Sundays. Thus, even if Complainant had a more extensive background in the probation field than

Dunavan, I cannot ascribe a discriminatory intent in Respondent's selection of Dunavan where: (1) Complainant essentially stated in her interview that she not want to perform the duties of the subject position at the time she would have been required to do them; and (2) Dunavan did not express a similar sentiment in his interview.

Complainant, though, challenges Day's observation that she displayed a bad attitude in the workplace by noting that she received a favorable job performance review one month prior to her interview for the subject position. Indeed, a review of the evaluation indicates that both Day and Harmon signed off on a statement that Complainant was an "outstanding officer...[who] maintain[ed] an excellent contact with her other officers concerning clients and [kept] everyone informed as to client status." But the period reflected on the job evaluation covered from December 1999 through November of 2000, and Day consistently testified that he did not notice a change in Complainant's attitude towards him until sometime after September of 2000 when he first became her supervisor. Moreover, Complainant's reliance on her evaluation scores to establish pretext is somewhat tenuous since: (1) Day testified that the department had a practice of periodically awarding merit raises to all probation officers; and (2) pursuant to the practice, he was instructed by Harmon to give Complainant sufficiently high scores on her evaluation because it was Complainant's "turn" to receive a merit raise.

Interestingly, Respondent cites to the fact that both Day and Miller initially wanted Henry (a female) to take the subject position since she possessed the most relevant prior experience, and presumably would have required the least amount of training. However, as Complainant notes, the initial selection of Henry does little to advance Respondent's defense in this sex discrimination case where Henry was ultimately not selected as the successful candidate. But I am not sure how far Henry's circumstances can take Complainant in her contention that she would have received the subject position "but for" Respondent's sex discrimination where Henry was arguably the best candidate in the same areas (i.e.

background and experience in electronic monitoring and servicing the existing clientele) that Complainant claims that she was better than Dunavan. In any event, Respondent provided a non-discriminatory reason for not selecting Henry, and Complainant did not show that Miller was not actually concerned over a conversation he had with Henry regarding Henry's complaint to a union steward over her current job duties, or that Day and Miller had similar "anti-union" concerns with Dunavan.

Additionally, Complainant submits that Harmon displayed evidence of sex discrimination when he asked her and Henry whether they would be able to make arrangements for the care for their children should they obtain the subject position and failed to pose a similar question to Dunavan. However, Complainant's argument presupposes that only females (as opposed males) are responsible for the care and upbringing of their children, and of course, Complainant provides no evidentiary support for such a notion. Moreover, the record indicates that the interviewing panel knew that Dunavan did not have any children, and thus understandably would not have asked the question. Thus, in this regard, Complainant has cited no case law that requires employers to pose pointless questions to applicants in order to insulate them from claims of sex discrimination. The fact that Harmon hired a female (Paula Ray) in a position similar to the subject position near the same time as Complainant's interview only reinforces Respondent's argument that inquiries with respect to child-care were only based on concerns that the successful applicant be actually able to perform the essential functions of the subject position.

Similarly, I did not find as evidence of sex discrimination Miller's question posed to the applicants regarding whether he or she would be intimidated by working at night in "bad areas" of the city. While Complainant submits that Miller's inquiry was patronizing because both she and Henry had worked on occasion in bad areas in their current positions, the record showed that Miller also asked Dunavan the same question, thereby dissipating any gender bias with respect to the question. More important, though, I found Miller to be

genuine in his observation that the subject position, with its primary focus on night-time job duties in bad neighborhoods, was a different type of position from what Complainant had experienced in her day-time job at the time of her interview. Indeed, Complainant tacitly recognized the difference in positions during her job interview when she indicated that she did not want to work evenings or weekends.

Finally, Complainant contends that Dunavan's selection for the subject position ran contrary to the County's policy, which placed an emphasis on giving promotional opportunities to existing County employees and demonstrated an anti-female bias where Harmon selected the least qualified male applicant over two more qualified female County employees. However, because the Chief Judge of the Circuit Court is the technical "employer" in this case and by statute (730 ILCS 110/13) has authority to appoint subordinate probation officers, the record is unclear as to whether Respondent was ever bound by any County policy when making employment decisions. In any event, the text of the policy does not mandate that Respondent select an existing probation officer over an applicant from outside the probation department. Here, it is enough to say that Complainant was not selected for the subject position because she indicated that she did not want to work the hours and schedule required of the subject position.

**Recommendation**

For all of the above reasons, I recommend that the instant Complaint and the underlying Charge of Discrimination of Laura Skirpan be dismissed with prejudice.

HUMAN RIGHTS COMMISSION



BY: \_\_\_\_\_  
MICHAEL R. ROBINSON  
Administrative Law Judge  
Administrative Law Section

ENTERED THE 20TH DAY OF OCTOBER, 2003