

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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TIMOTHY DONOVAN,

Plaintiff,

v.

KENNETH B. BLACK,

Defendant.

OPINION AND ORDER

11-cv-516-wmc

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This is the last of three employment-related lawsuits brought against defendant Kenneth Black, the former Secretary of the Department of Veteran Affairs. Plaintiff Timothy Donovan alleges that Black refused to hire him for the position of Communications Officer for the Department on the basis of Donovan's race (white) and sex (male). Black has moved for summary judgment, arguing that (1) Donovan's 42 U.S.C. § 1981 claim is foreclosed against Black as a state actor pursuant to *Jett v. Dallas Independent School District*, 490 U.S. 701 (1989); and (2) Donovan cannot demonstrate discriminatory animus on the part of Black. For the reasons that follow, the court will deny Black's motion for summary judgment.

UNDISPUTED FACTS<sup>1</sup>

The court adopts the undisputed facts which are material to Donovan's claims already set forth in *Nitschke v. Black*, No. 11-cv-215. In addition to those facts, the court further finds:

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<sup>1</sup> Except as otherwise noted, the court finds the following facts taken from the parties' proposed findings of fact to be material and undisputed.

### **A. The Plaintiff**

Plaintiff Timothy Donovan is a 59-year-old veteran of service in the United States armed forces and holds the rank of Lt. Colonel (Retired). Donovan applied for the job of Communications Officers for the Department on or about February 19, 2010, at the time Black was the Secretary of the Department

### **B. Black's Statements Regarding the Communications Officers Position**

In addition to Black's alleged statements that the Department needed greater diversity and employed too many old white men detailed in this court's *Nitschke's* opinion, Black also made alleged statements specific to Donovan's claim. At some point after defendant Black's appointment as the Department's Secretary, he told Ray Perez, the Department's Agency Liaison, that he should distance himself from General Schuster, the then-current Communications Officer and to whom Perez reported, because Black was going to make some changes and get rid of these "old white guys."<sup>2</sup> Sometime after this conversation, Black reassigned Schuster from his position as Communications Officer.

### **C. Communications Officer Position**

Sometime before February 19, 2010, the Department posted an announcement of the hiring process for a new Communications Officer, which included a description of the

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<sup>2</sup> Donovan also submits proposed facts concerning Black's alleged statements to Perez regarding Jose Leon, who at the time of the alleged statements was an applicant for the Department's Executive Assistant position. Plaintiff fails to describe, and the court cannot discern, how these allegations are relevant to Donovan's discrimination.

knowledge, skills, and abilities required for the position. While the posted job announcement and the official description for the position described certain job duties and requirements, there was no mention of a college or advanced degree requirement and no suggestion that a candidate would be advantaged by having a particular college or advanced degree of any kind. The job description also contained no reference to experience in the food service industry or with anti-smoking public relations, nor a reference to experience with new technology or social media.

#### **D. Donovan's Application**

At the time Donovan applied for the position, he had more than 38 years of service in the Wisconsin National Guard and more than 35 years of civilian and military experience in journalism, communications and public relations. Specifically, his resume listed his experience as:

- Public Affairs Officer for the 32nd Infantry Brigade Combat Team (2009-2010);
- Director of Public Affairs for the Wisconsin National Guard and Wisconsin Department of Military Affairs (1996-2009);
- Executive Director in charge of international programs of a federation of nationally-based professional associations, where he produced news releases and produced and developed an international film festival (1991-1995);
- President of his own full-service film, television and radio production company with advertising component (1989-1991);
- Senior Producer of Corporation Communications for Wausau Insurance Companies (1977-1989); and
- Reporter and managing editor for a Wausau television studio (1974-1976).

In addition to this employment history, Donovan's resume also listed his extensive military experience and his educational background -- a bachelor's degree and professional education in communications.

Donovan contends, and Black does not dispute, that through his work, military, educational and training experiences, Donovan acquired knowledge and skills directly relevant to the job duties and requirements of the Communications Officer position. Black further admits that Donovan was fully qualified for the position.

#### **E. Hiring Process**

As a first step in evaluating applications, Black worked with Steve Janisch, a Department Human Resource specialist, and Amy Franke, the Department's Human Resources Director, to develop an objective examination to assess applicants' job-related credentials and to certify an initial group deemed eligible for hire. Working primarily with Janisch, Black identified and rated the most important elements of the Communications Officer position. Based on those elements, they also developed a set of questions for the written online examination, together with criteria with which to rate and score each applicant.

The resulting examination was validated by the Wisconsin Office of State Employment Relations ("OSER") to ensure that the questions and rating criteria would accurately measure each candidate's qualifications. Along with completing the online written examination, applicants were required to submit an application form and resume.

Donovan submitted an application form, his resume and completed the online written examination, indicating that he was a "veteran without disability." After all

identifying information was removed, all of the applications were then scored by a panel of Communications Officers from agencies outside the Department, according to the objective rating criteria that defendant Black had developed. These scores were then submitted to the OSER, which reviewed and approved them. Donovan received a perfect score of 100 on this examination and was the only applicant for the Communications Officer position to do so. Based on their scores, Donovan and 24 other applicants were certified as eligible to hire.

In the second stage of the hiring process, Franke and another member of the Human Resources staff, Mark Isenberg, conducted telephone interviews of all 25 applicants using interview questions developed by Black with Franke and Janisch's assistance. Franke and Isenberg conducted their telephone interviews by asking each applicant two questions. Isenberg, who interviewed Donovan, made informal notes on each applicant, indicating with symbols for positive, neutral, and negative ratings, how each performed and how well they communicated more generally. Donovan received three positive ratings. Following the telephone interviews, Franke and Isenberg selected seven candidates from the certified applicants to participate in final oral interviews, including Donovan. Of those seven, Donovan was the only veteran.

A panel composed of Franke, Black, and Black's newly-hired Executive Assistant Jose Leon conducted the interviews on March 22, 2010. Before those interviews, each panel member was given a copy of the applicant's resume and a set of standard questions taken from the remaining interview questions previously developed and approved by defendant Black. Before these interviews, Black reviewed the resumes of the seven

candidates that were given oral interviews, but did not review the examination scores of the twenty-five certified applications until after the successful candidate was selected.

Each member of the panel made notes regarding the interviewees on a copy of the standard examination questions. In her notes from Donovan's interview, Franke wrote under the first interview question:

Mil Officer - 33 yrs  
5-enlisted –  
Just this year veteran status –  
Perfect timing and fit

(Declaration of Michael R. Fox ("Fox Decl."), Ex. 8 (dkt. #25-8) 1.) In an affidavit submitted in support of Black's motion for summary judgment, Franke states that she found Donovan's demeanor during the interview to be arrogant, and that he came across to her, and other panel members, as if he were entitled to the position. (Affidavit of Amy Franke ("Franke Aff.") (dkt. #18) ¶ 14.) Franke, however, could not identify any specific examples of arrogance, nor do her notes support this concern.

In his notes from Donovan's oral interview, Leon wrote under the first interview question:

- Military officer for over 30 years. Also enlisted
- Good fit
- Good timing
- Much to offer
- Experience

(Fox Decl., Ex. 8 (dkt. #25-8) 5.)

In preparation for the interview, Donovan read the state statutes governing the Department, reviewed all available Wisconsin Board of Veterans Affairs minutes, read press releases, and familiarized himself with the Department's web site. Donovan

believed that he approached the interview with enthusiasm, was optimistic and was eager to be hired. Donovan also believed that he answered the panel's questions concisely, describing his experiences and qualifications, as well as demonstrating his knowledge of the Department and familiarity with issues confronting the Department. Donovan did not have the impression that his answers were incomplete.

Black contends that Donovan succinctly responded to the questions asked of him, but was not forthcoming with additional information or interest in the Department. In his affidavit in support of summary judgment, Black also stated that Donovan was unprepared for the interview, seemed as if the interview was just a drill for him, and failed to show enthusiasm for the position.

Donovan also contends that he was given no indication that his demeanor was deficient, nor that he was not engaged, unprepared or lacked interest or enthusiasm. Donovan was asked no questions about social media, including Facebook, Twitter or any form of "new technology." Nor was he asked any questions concerning his experience with food service or with anti-smoking public relations activities. Donovan contends that he had significant experience in all three areas. Because he had prepared himself before the interview and needed nothing clarified, Donovan acknowledges having no questions for the panelists.

#### **F. Selection of Sara Stinski**

Following the completion of the seven oral interviews, Black alone made the final decision regarding which of the seven candidates to hire as Communications Officer, selecting Sara Stinski, a Caucasian female. However, it was also the unanimous

consensus of the panel that Stinski was the most qualified for the position. Stinski's resume indicated that she had 13 years of experience in marketing and public relations for private organizations, but no experience with military or veteran's affairs, nor with the public affairs activities of a governmental agency.

Although the panel did not rank the candidates, Black and Franke now contend that they would have ranked Stinski first and Donovan near the bottom of the seven candidates. While Black believed that Donovan had more extensive experience serving the Department's veteran constituency than Stinski, he contends that Stinski was the best qualified applicant for the position overall because she impressed him at the in-person interview more than any of the other final candidates. Black found her to be engaging, confident, and forthcoming with information. Black believed that she had done her homework in researching the Department and preparing herself for the interview. As further support for his decision to hire her, Black also points to Stinski's master degree in journalism, her food service industry experience, anti-smoking public relations experience, and her knowledge and experience with technology, including social media and networking. In a March 23, 2010 memo to a Human Resources staff member justifying the decision to hire Stinski, Black stated generally that the Department's marketing and communications would require "new media as well as old" and referred to Stinski having undergraduate and master degrees in public relations.

Donovan contends that Stinski was substantially less qualified than he. In the scoring system performed by the outside panel in the first stage of the hiring process, Stinski scored an 82, ranking her 16 among the 25 certified candidates, and well below Donovan's score of 100. Defendant contends that these scores were irrelevant after the

first round, because all seven of the individuals selected for final interviews were qualified for the position. In his interview notes from the telephone interview, Isenberg gave Stinski two positive ratings and one neutral one. Stinski was also not a veteran, and Black was aware of this before hiring her. The panelists' interview notes gave no indication that Stinski was "engaging, confident and forthcoming with interview," as Black now contends.

Wisconsin Statute § 45.03(4)(a) provides that "[a]ll persons appointed by the department, shall, if possible be veterans[.]"<sup>3</sup> Black testified at this deposition that he believed that the statute directed him to hire a veteran, if possible. Black further acknowledged the benefits of hiring veterans to the modern workplace, and that hiring of veterans was consistent with the Department's mission to encourage both public and private employers to hire veterans. During the hiring process, Black was aware that Donovan was a veteran. Black admitted that it was possible to hire Donovan, but, in his opinion, Donovan was not the best person for the position.

### **G. Appeal and ERD Complaint**

On March 31, 2010, Donovan was notified that another candidate had been hired as Communications Officer. On April 29th -- after discovering Stinski's sex and that, in Donovan's opinion, she was substantially less qualified -- Donovan appealed Black's decision to not hire him to the Wisconsin Employment Relations Commission ("WERC"). During a deposition taken as part of that process, Black asserted for the first

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<sup>3</sup> Donovan's military service qualified him as a "veteran" within the meaning of this hiring preference.

time that Stinski was hired because of her experience with “food issues” and “smoking issues.” Black also indicated that Stinski’s “level of education” was important to him.

In January 2011, a two-day administrative hearing on Donovan’s appeal to WERC was conducted before an administrative law judge. When asked in what specific qualities, knowledge, skills or abilities Stinski exceeded Donovan, Black noted Stinski’s master degree, that she had more knowledge about the Department, and that she “brought a lot to the table in terms of communication.” (Pl.’s PFOFs (dkt. #23) ¶ 207.) For the first time during this same deposition, Black also articulated subjective reasons, based on his favorable impression of Stinski as compared to Donovan. At that time, Black said nothing about Stinski’s experience with food services or smoking issues. During the second day of the hearing, when asked to elaborate, Black stated that he relied on (1) Stinski’s experience in the “food industry” and “restaurant industry,” (2) experience developing a smoking policy, (3) her remarks about “Facebook” and “Twitter,” and (4) her having “started her own business.” (*Id.* at ¶ 211.)

On November 8, 2010, Donovan filed a timely administrative complaint with the Wisconsin Equal Rights Division (“ERD”), alleging that he was denied the Communications Officer position based on his race and sex. On March 1st, the ERD issued an initial determination on Donovan’s complaint, finding that there was probable cause to believe that race, sex and age discrimination he alleged had occurred. The ERD’s initial determination concluded that “the Respondent has not provided any substantive, legitimate, non-discriminatory reason for the hiring decision that was eventually made.” (Pl.’s PFOFs (dkt. #23) ¶ 203.)

## OPINION

Donovan claims that Black intentionally discriminated based on his race and sex in failing to hire him for the Communications Officer position in violation of 28 U.S.C. § 1981 (race) and 42 U.S.C. § 1983 (race and sex). The court adopts its discussion of the applicable § 1981 and § 1983 law set forth in *Nitschke*.

### I. § 1981 Claim

For the reasons stated in the court's earlier opinion in *Nitschke*, the court similarly rejects defendant's argument that plaintiff's § 1981 claim for racial discrimination must be dismissed as a matter of law because § 1983 provides the exclusive federal remedy against state actors.

### II. Discrimination Claims

Black moves for summary judgment on Donovan's claims of discrimination, contending that no reasonable jury could find discriminatory animus on the part of Black on the facts here. Alternatively, Black contends that Donovan has only put forth evidence to support his gender discrimination claim and, therefore, his race discrimination claim necessarily fails. Donovan proceeds under both the direct or indirect method, or a combination of the two. Like *Nitschke*, Donovan also argues that the direct/indirect framework has run its course and the court should abandon it for a more flexible approach. The court again declines this invitation, but as in *Nitschke*, will consider whether Donovan has put forth sufficient circumstantial evidence from which a

jury could infer discriminatory animus.<sup>4</sup> See *Sattar v. Motorola, Inc.*, 138 F.3d 1164, (7th Cir. 1998) (“[A] plaintiff should be free to meet his or her initial burden with this kind of evidence as well, whether we describe it as ‘mosaic’ evidence or something else.” (internal citation omitted).)

### A. Viability of Hybrid or Intersectional Claim

As an initial issue, the court must determine whether Donovan can claim discrimination based on his race, given that Black hired another white person to fill the position. As the court understands plaintiff’s theory, if he had been either a woman or not white, he would have been hired for the Communications Officer position. In other words, because Black was seeking a diverse candidate -- either based on race or sex -- Donovan’s status as a white male rendered him an undesirable applicant. As such, Donovan’s claim turns on the combination of his race and sex.

While other circuits have considered this issue and allowed plaintiffs to proceed as to a “hybrid” or “intersectional” claim (*i.e.*, “sex-plus” or “race-plus” some other characteristic)<sup>5</sup> the Seventh Circuit has yet to weigh in. See *Coffman v. Indianapolis Fire Dep’t*, 578 F.3d 559, 563-64 (7th Cir. 2009) (“[w]e have not yet decided in this circuit

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<sup>4</sup> Unlike Nitschke, Donovan has developed an argument under the indirect method. Still, the court need not analyze his claim under that method, finding sufficient evidence for a jury to infer discriminatory animus under the direct method of proof. *Diaz v. Kraft Foods Global, Inc.*, 653 F.3d 582, 589 (7th Cir. 2011) (declining to address the indirect method where court concluded that plaintiffs’ “failure-to-hire claims survive summary judgment when evaluated under the direct method of proof”).

<sup>5</sup> See *Jefferies v. Harris Cnty. Cmty. Action Ass’n*, 615 F.2d 1025, 1032 (5th Cir. 1980) (holding that “discrimination against black females can exist even in the absence of discrimination against black men or white women”).

whether we recognize a ‘sex-plus’ theory of discrimination” and declining to decide this issue given the plaintiff’s showing) (citing *Logan v. Kautex Textron No. Am.*, 259 F.3d 635, 638 n.2 (7th Cir. 2001)). The Seventh Circuit, however, has analyzed a discrimination claim based on two characteristics, even if not labeling it as “hybrid” or “sex-plus” or “race-plus” claim. See *Goodwin v. Bd. of Trustees of Univ. of Ill.*, 442 F.3d 611, 619 (7th Cir. 2006) (describing the plaintiff as a “black female” and analyzing her claim as such). Finally, at least one district court in the circuit has recognized a hybrid claim brought by an African-American male, after reviewing case law, EEOC guidelines on “intersectional discrimination” and scholarship on this issue. *Kimble v. Wis. Dep’t of Workforce Dev.*, 690 F. Supp. 2d 765, 769-71 (E.D. Wis. 2010) (holding that plaintiff may bring a claim of discrimination based on “combination of race and gender”).

Given this trend and Donovan’s arguable showing that he was turned down for being “non-diverse,” he will be allowed to proceed on summary judgment on a hybrid claim that he was discriminated against as a white male, but not on a claim of race discrimination alone. In addition, the court expressly reserves on whether Donovan has presented sufficient evidence that he lost the Communications Officer position because of a combination of his race and sex to get to a jury on this question.

## **B. Evidence of Discriminatory Intent**

To prove a failure-to-hire claim under the direct method, Donovan must put forth “either direct or circumstantial evidence that would permit a jury to infer that discrimination motivated” Black’s decision not to hire him. *Diaz v. Kraft Foods Global, Inc.*, 653 F.3d 582, 587 (7th Cir. 2011); see also *Good v. Univ. of Chi. Med. Ctr.*, 673 F.3d

670, 676 (7th Cir. 2012) (holding that under the direct method, the plaintiff must put forth “evidence leading *directly* to the conclusion that an employer was illegally motivated, without reliance on speculation” (emphasis in original)).

Donovan points to the following “bits and pieces” of circumstantial evidence in opposition to defendant’s motion for summary judgment:

- Black’s alleged statements in and around March 2010 that the Department had too many old white men.
- Black’s statement in early 2010 to Perez that he should distance himself from General Schuster, the Communications Officer at that time, because Black was going to make some changes and get rid of these “old white guys.” (Notably, Black does not dispute this statement. (Def.’s Resp. to Pl.’s PFOFs (dkt. #46) ¶ 19.)
- Black’s decision to remove Schuster from the position.
- Black’s treatment of other white male employees, including Nitschke, Wistrom, and Kloster.
- Black’s other contemporaneous non-white male hirings, including Jose Leon, Wanda Daylin Hurr and James Bond.
- Black’s decision to hire Stinski, a white female instead of Donovan.

In light of the timing of Black’s statements with respect to Donovan’s application, Black’s degree of influence as the hiring decision maker of the Communications Officers position, and the content of his statements -- particularly comments about the need for Perez to distance himself from “old white guys” like Schuster -- the court finds that a reasonable jury *could* infer that Black was motivated, at least in part, but discriminatory intent. *Ellis v. United Parcel Serv., Inc.*, 523 F.3d 823, 829 (7th Cir. 2008) (“Derogatory remarks based on an employee’s race can be direct evidence of discrimination if they are made by the decisionmaker (or by a person who influences the decisionmaker), near the time of the decision to fire the employee, and in relation to the employee’s discharge.”).

Specifically, the court agrees with plaintiff that a reasonable jury could infer that Black's alleged discriminatory purpose motivating his removal of Schuster was also at work in Black's hiring decision for a new person as Communications Officer. Black's treatment of other white men, so-called "me too" evidence may also support this inference. *See Hasan v. Foley & Lardner LLP*, 552 F.3d 520, 529 (7th Cir. 2009).

In moving for summary judgment, defendant would focus on Stinski's performance in the final, in-person interview, as compared to Donovan's performance, as well as the skills and experiences Black believed were unique to Stinski. This evidence is certainly relevant to the indirect method: (1) whether defendant has rebutted the discrimination presumption by putting for a legitimate reason for the decision not to hire Donovan; and (2) whether Donovan has raised an issue of material fact as to whether that reason is pretext. At this stage, however, Donovan is not required to rebut a defendant's non-discriminatory reason for the adverse employment action, as they must under the indirect method." *See Diaz*, 653 F.3d at 588.

At trial, Black "may, of course, present its rationale to a jury to defeat the plaintiff[s] discrimination claim, but it is insufficient to quash it at summary judgment." *Id.* Indeed, a jury may well find credible Black's testimony that he relied on certain intangible, subjective determinations based on the final round of interviews to make his hiring decision. *See Blise v. Antaramian*, 409 F.3d 861, 868 (7th Cir. 2005) ("[T]here is no doubt that an interview also allows an interviewer to get a sense of the applicant's personality, poise, and manners. These are all traits that are in the eye of the beholder and all traits that any employer would surely like to have a sense of before making a hiring decision. It is difficult to see how such traits could be measured by any objective

criteria.”). But that is a question for the jury, not for this court on summary judgment. Accordingly, the court will deny defendant’s motion.

ORDER

IT IS ORDERED that defendant Kenneth B. Black’s motion for summary judgment (dkt. #14) is DENIED.

Entered this 28th day of August, 2012.

BY THE COURT:

/s/

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WILLIAM M. CONLEY  
District Judge