

STATE OF WISCONSIN

PERSONNEL COMMISSION

* * * * *

RUBY MARKHAM,
Complainant,
v. ,
DEPARTMENT OF HEALTH AND
SOCIAL SERVICES,
Respondent.
Case No. 79-PC-ER-151
* * * * *

DECISION
AND
ORDER

NATURE OF THE CASE

This is a complaint of age discrimination with respect to 9 positions in DHSS to which complainant was not appointed following competition and certification. The complainant declined to present evidence on one of the positions to which a 54 year old person had been appointed, leaving 8 positions at issue.

FINDINGS OF FACT

1. The complainant's date of birth was May 16, 1922.
2. Early in 1979 the complainant took a multiple choice exam for Administrative Secretary 1 and 2. She received a score of 91 and was certified for a number of vacancies in DHSS. Due to a change in class titles in August 1979 as a result of the clerical survey, many of the class titles of these positions were changed to Program Assistant or other classifications.
3. At the time of her certifications the complainant was employed in DHSS, Division of Management Services, Bureau of Fiscal Services, as

a Typist 2, with primary responsibility for the production of typed copy (80%) and secondary responsibility for the provision of back-up services and assistance to the position responsible for processing Division of Health vouchers and distributing checks (15%), and the performance of miscellaneous clerical duties (5%). Her supervisor ranked her in terms of performance about at the midpoint of the typists under her supervision.

4. The complainant's other work experience included employment in a law office as a legal secretary and bookkeeper; as a librarian and secretary to the Director, Special Education Library, UW-Oshkosh, which included working with 8-12 students; and as a secretary with the State of Wisconsin Investment Board.

5. The first position in question (certification request #100.9) was classified as a Program Assistant 1 in the Division of Health, Bureau of Health Care Financing. With respect to this position:

A. The complainant ranked first on the certification list. The person appointed (B. Bastien) was 21 years of age and ranked eighth with a score of 82B.

B. The reasons for the selection of Ms. Bastien over the complainant were as follows;

1. The use of a memory typewriter was an important part of the job. Ms. Bastien was familiar with its use while the complainant was not.

2. Ms. Bastien through her prior experience was familiar

with the Division of Health and the people who would need to be contacted as a regular part of the job, while the complainant was not.

3. The position required work with a correspondence control system to keep track of and ensure timely response to MEDICAID correspondence. Ms. Bastien had had experience with this type of system while filling in as secretary for the acting Administrator of the Division of Health, while the complainant had no such experience.

C. The complainant's age was not a factor in the decision to appoint someone else and not to appoint her.

6. The second position in question (cert. req. #100-28) was an Administrative Secretary 1 (later reallocated to Program Assistant 1) in the Division of Health, Bureau of Planning. With respect to this position:

A. The complainant ranked first on the certification list. The person appointed (P. Foulker) was 22 years old and ranked third with a score of 86.

B. The reasons for the selection of Ms. Foulker over the complainant were as follows:

1. The priority requirements for this job were good typing skills, the ability to use an IBM memory typewriter, the ability to handle stress that might be induced by high priority assignments, and the ability to handle a broad range of administrative functions such as meeting and travel arrangements for a citizens' counsel.

2. Ms. Foulker ranked first and the complainant was tied for second in a typing test administered by the appointing authority. Ms. Foulker had had some experience with a (non-IBM) automatic typewriter and would require less training than the complainant, and Ms. Foulker had good references whereas one of the complainant's references, an accountant who had worked with her for a number of years, indicated when contacted by the appointing authority that in his opinion the complainant would have been unable to have handled the pressure and complexity of the position in question.

C. The complainant's age was not a factor in the decision to appoint someone else and not to appoint her.

7. The third position in question (cert. req. #200-73) was an Administrative Secretary 1 position (later reallocated to Secretary 1) with the Division of Community Services, Office of Regional Support. With respect to this position:

A. The complainant ranked first on the certification list. The person appointed (G. Freund) was 35 years old and ranked third with a score of 87.

B. The reasons for the selection of Ms. Freund over the complainant were as follows:

1. This position involved handling, keeping track of, and ensuring timely responses with respect to mail and contracts involving the state and the county, as well as serving as

secretary to the office director and being responsible for office management. Ms. Freund had had work experience with the Division of Economic Assistance which was similar in certain respects to the work in question, including a correspondence management system.

C. The complainant's age was not a factor in the decision to appoint someone else and not to appoint her.

8. The fourth position in question (cert. req. #200-162) was an Administrative Secretary 2 position in the Bureau of Alternative Care. With respect to this position:

A. The complainant ranked second on the certification list. The person appointed (G. Buss) was 25 years old and not ranked inasmuch as she was appointed on a transfer basis and had not been examined.

B. The reasons for the selection of Ms. Buss over the complainant were as follows:

1. The office in question was relatively new. The duties and responsibilities of the position in question included office management and supervising the other clericals in the office, developing policies and procedures for the functioning of the office, coordinating paperwork regarding the regulatory matters with which the office deals, and handling confidential records and responding to requests for access thereto.

2. Ms. Buss had been at the Administrative Secretary 2 level since November 1977 and had had direct involvement in establishing office policies and procedures, supervising 5 staff members, developing budget estimates and ordering capital equipment. The complainant lacked this type of comparable experience.

C. The complainant's age was not a factor in the decision to appoint someone else and not to appoint her.

9. The fifth position in question (cert. req. #200-224) was an Administrative Secretary 1 position in the Office of Program Support, Division of Community Services. With respect to this position:

A. The complainant ranked first on the certification list. The person appointed (S. Jaskiewitz) was 31 years of age and ranked second with a score of 89.

B. The reasons for the selection of Ms. Jaskiewitz over the complainant were as follows:

1. This position had the responsibility to establish complete office procedures, including payroll and personnel administration functions, for a relatively new office, as well as providing clerical support to the director and deputy director, and supervising three additional clerical positions which it was anticipated would be staffed in the future.

2. Ms. Jaskiewitz had extensive related experience, including the initiation and overhaul of office procedures

and working for a large number of professional staff. The complainant had not worked for large numbers of professional staff and had limited experience outside an established office.

C. The complainant's age was not a factor in the decision to appoint someone else and not to appoint her.

10. The sixth position in question (cert. req. #200-237) was an Administrative Secretary 1 (later reallocated to Program Assistant 1) position in the Office of Operations and Management, Division of Community Services. With respect to this position:

A. The complainant ranked first on the certification list. The person appointed (P. Voigt) was 29 years of age and was not ranked inasmuch as she was appointed on a transfer basis and had not been examined.

B. The reasons for the appointment of Ms. Voigt over the complainant were as follows:

1. It was important that the person hired have the ability to operate a "mag card" typewriter. The duties and responsibilities of the position also included the supervision of two other clericals, one of whom was very difficult to supervise due to erratic behavior, and certain administrative duties, including scheduling and coordinating meetings.

2. Ms. Voigt had had experience with a mag card typewriter, had some familiarity with the division from prior experience, and was felt by the appointing authority based on interviews to be more likely to be able to handle the problem employee than the complainant.

C. The complainant's age was not a factor in the decision to appoint someone else and not to appoint her.

11. The seventh position in question (cert. req. #820-3) was an Administrative Secretary 2 position in the Bureau of Personnel and Employment Relations, Division of Management Services, which was re-allocated to Clerical Supervisor 2 subsequent to the appointment of Ms. Parrino. With respect to this position:

A. The complainant was ranked first on the certification list. The person hired (J. Parrino) was not ranked as she was appointed on a transfer position and she did not take the examination. Her transfer was from a position in the Department of Justice directly to this position.

B. The reasons for the appointment of Ms. Parrino over the complainant were as follows:

1. This position supervised 6 typists in a clerical pool, and accordingly supervisory or strong lead work abilities were desirable. The ability to implement new policies and procedures also was important.

2. Ms. Parrino had been an Administrative Secretary 2 in the Department of Justice for several years where she functioned as a lead worker as to other clericals and coordinated the work of others. Her experience was stronger than the complainant's.

C. The complainant's age was not a factor in the decision to appoint someone else and not to appoint her.

12. The eighth position in question (cert. req. #840-33) was an Administrative Secretary 1 position in the Bureau of Planning, Division of Policy and Budget. With respect to this position:

A. The complainant ranked second on the certification list. The person appointed (J. Butler) was ranked eleventh with a score of 83.

B. The reasons why Ms. Butler was hired over the complainant were as follows:

1. It was important that the person hired for this job be able to work independently in a newly-formed bureau without a standard organization and to develop office procedures, a filing system, etc., to independently set up a log and control system for controlled correspondence, to independently provide clerical support to various citizens' advisory committees, and to respond to a diverse professional staff's needs for clerical services under high-pressure circumstances.

2. Ms. Butler had worked at the YMCA where she had worked with the YMCA board and had revised the filing system. She had worked in a law firm handling sometimes conflicting demands from professionals. Her experience for this job was superior to the complainant's.

C. The complainant's age was not a factor in the decision to appoint someone else and not her.

13. The effective decision on hiring with respect to each of the positions in question was lodged with a different individual.

CONCLUSIONS OF LAW

1. The respondent is an employer within the meaning of §111.32(3), stats.

2. This matter is properly before the Commission pursuant to §230.45(1)(b), stats.

3. The burden of proof is on the complainant to establish that the respondent discriminated against her on account of her age by failing to appoint her to any of the positions in question.

4. The complainant has not satisfied that burden.

5. The respondent did not discriminate against the complainant on the basis of her age in failing to appoint her to any of the positions in question.

OPINION

In a case involving a claim of age discrimination, a complainant establishes a prima facie case by making the following showing:

1. That she is a member of a protected class;
2. That she applied and was qualified for a job for which the employer was seeking applicants;
3. That despite her qualifications, she was rejected;
4. That, after her rejection, the position remained open and the employer continued to consider applicants from persons of her qualifications. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

While the ultimate burden of persuasion always remains with the complainant, the establishment of the foregoing prima facie case shifts the burden of proceeding or going forward to the respondent, who then must "articulate some legitimate, nondiscriminatory reason" for its action. See Board of Trustees v. Sweeney, 439 U.S. 24 (1978), Texas Dept.

of Community Affairs v. Burdine, 25 FEP Cases 113 (1981).

If the respondent satisfies this burden, the appellant then has an opportunity to show that the articulated nondiscriminatory reason for the action is actually a pretext for a discriminatory reason. McDonnell Douglas, supra.

Finally, it should be noted that:

"McDonnell Douglas is to a large extent an analytical framework enunciated post hoc, in light of a given set of facts, to give judges a method of organizing evidence and assigning the burdens of production and persuasion in a discrimination case." Loeb v. Textron, Inc., 20 FEP Cases 29, 38, 600 F. 2d 1003 (1 St. Cir. 1979).

It is not necessary that the proof be ordered in accordance with the shifting burdens set forth in McDonnell Douglas and subsequent cases. See Sime v. Trustees of Cal State University and Colleges, 526 F. 2d 1112 (9th Cir. 1975).

In this case, it is clear that the complainant established a prima facie case. It also is clear that the respondent satisfied its burden of proceeding by articulating some "legitimate, nondiscriminatory" reasons for its decisions with respect to the ~~appointments~~. The complainant, however, did not satisfy her burden of proving that the reasons were pretextual.

Agency employees responsible for each of the hiring decisions testified, as well as the complainant and a number of other witnesses. In each case, there was a legitimate and nondiscriminatory reason advanced for preferring another person over the complainant. There was an opportunity to evaluate the demeanor of each of these witnesses. While the complainant had a good score on the exam and ranked at or near the top

of each certification list, the exam was a general one and each position had its own, to some extent unique, requirements. The statistical argument inherent in being passed over for eight positions is somewhat mitigated by the fact that although there is only one agency-respondent, there were actually 8 separate and independent hiring decisions made by 8 different people.

ORDER

The Commission having determined that the respondent did not engage in discrimination as alleged in the complaint, this complaint is dismissed.

Dated: Aug 9, 1982 STATE PERSONNEL COMMISSION

AJT:jmf


DONALD R. MURPHY, Chairperson


LAURIE R. McCALLUM, Commissioner


JAMES W. PHILLIPS, Commissioner

Parties:

Ruby M. Markham
101 E. Mifflin Street
Apt. 502
Madison, WI 53703

Donald R. Percy, Secretary
DHSS
Rm. 663, 1 W. Wilson St.
Madison, WI 53702