STATE OF WISCONSIN PERSONNEL COMMISSION

LEONARD CONKLIN,

Complainant,

v.

Secretary, DEPARTMENT OF NATURAL RESOURCES,

Respondent.

Case No. 82-PC-ER-29

DECISION AND ORDER

This matter is before the Commission after an initial determination of probable cause to believe that the respondent discriminated against the complainant on the basis of age, with respect to a decision not to send him to law enforcement school.

FINDINGS OF FACT

1. The complainant, born on November 21, 1933, worked for the respondent DNR as a limited term employe (LTE) for a number of years.

2. For all times relevant to this proceeding, the complainant's supervisor was Jack Pickert, Forest Ranger and Park Superintendent for the Big Bay State Park on Madeline Island.

3. During 1979, while employed as an LTE, the complainant was sent to law enforcement school for one week in June. Attending the school allowed the complainant to have the authority to issue citations and to otherwise restrict the freedom of Big Bay State Park visitors.

4. The law enforcement school lasted a total of approximately seven weeks. In the summer of 1980, the complainant was again sent to the school so that he could take the second week in the course. One other LTE was

also sent to the school from the Park for 1979 and 1980.

5. In 1981, the Park budget indicated that the Park would operate at a deficit.

6. During April of 1981, Lanny Peickert, another LTE at the park, was sent to law enforcement school for a week. Mr. Peickert was approximately 32 years of age.

7. On or about May 29, 1982, the complainant, who was scheduled to begin working at the park on June 1, 1981 was advised by Mr. Pickert that he would not be sent to law enforcement school for the following three reasons: 1) the park's budget was limited, 2) the complainant had failed to issue any citations during the prior two years, and 3) the complainant was too old and only had a few years left to work as a DNR employe after completing the school.

8. The complainant's age was a factor in respondent's decision not to send the complainant to law enforcement school.

9. As a consequence of not attending the law enforcement school, the complainant did not suffer any reduction in base pay or fringe benefits. However, the complainant would have been entitled to a day of overtime pay that he would have received for travelling to and from the school.

CONCLUSIONS OF LAW

1. The Personnel Commission has jurisdiction over this discrimination complaint pursuant to §§230.45(1)(b) and 111.33(2), Wis. Stats.

2. The respondent is an employer within the meaning of §111.32 (3), Wis. Stats.

3. The complainant has a burden of proving by a preponderance of the evidence that, with respect to the decision not to send him to law enforcement school, the respondent discriminated against him on the basis of age.

4. The complainant has met his burden.

OPINION

In reviewing complaints of discrimination, the Commission will apply the analytical framework established in McDonnell Douglas Corp v. Green, 411 U.S. 792 (1973) and Texas Dept. of Community Affairs v. Burdine, 540 U.S. 248 (1981). The complainant has the initial burden of establishing a prima facie case of discrimination. In the present case, the complainant has shown that he was in a protected age group, that he was not permitted to attend law enforcement school and that Lanny Peickert, whose age was approximately 32, went to the school. The complainant also established that he was qualified to attend the school as indicated by his attendance during 1979 and 1980.

Once a prima facie case is established, the burden shifts to the respondent to show a legitimate, nondiscriminatory basis for its actions. The respondent argued that it had a legitimate basis for sending Peickert to the school and not sending the complainant. Complainant's supervisor, Mr. Pickert, who actually decided who would go to the school, stated that budget restrictions dictated, or strongly suggested, that only one LTE be sent to the school in 1981. Pickert chose to send Peickert to the school. Pickert stated that he made his decision because Peickert got along with everyone at the park and the complainant did not. Pickert stated that Peickert's ability to get along with other people made him a better person to have law enforcement authority.

Because the respondent's evidence "raised a genuine issue of fact as to whether it discriminated" against the complainant, Burdine, 450 U.S. 248, 254, the employe is given an opportunity to demonstrate that the reason proffered by the respondent is pretextual. In this case, the complainant has testified that his supervisor, Mr. Pickert, specifically stated that the complainant's age was one of three factors in not sending him to the law enforcement school. Mr. Pickert stated that the only reason he told complainant that he was too old to go to school was to "cushion the blow" which complainant must have felt when he realized that Pieckert had been chosen to go to the school and he had not. Pickert testified that age was an excuse given to the complainant for the decision, because the complainant was unlikely to accept the conclusion that Peickert, a relatively new employe, would deserve the training more. One problem with Mr. Pickert's theory is that respondent offered very little evidence to support his allegation that, as of early 1981, Mr. Pieckert got along with park visitors and other employes while the complainant did not. The complainant also testified that on two different occasions, Mr. Pickert's supervisor (Mr. Clark) stated that age was one of the three reasons for the decision not to send the complainant to the school. None of this testimony was refuted by the respondent.

On the basis of both Mr. Pickert's and Mr. Clark's statements on May 29th, August 26th and October 14th, the Commission concludes that age was one of the factors in making the decision in question and that the non-discriminatory reason articulated by the respondent was pretextual.

The Commission has previously ruled that in "mixed-motive" cases, the complainant does not have to show that "but for" the discrimination, the personnel action would not have been taken:

> In the McDonnel-Douglas framework, a complainant succeeds in proving discrimination if he or she shows that the employer acted out of mixed motives. The complainant does not have to show that discriminatory motives were the sole reasons for the adverse employment action; the employer may have had some otherwise legitimate reasons for the employment action, but if the illegal reasons played a part in the decision, the employer has violated the prohibition against discrimination in employment. Smith v. UW, Case No. 79-PC-ER-95 (6/25/82) (citation omitted).

In the present case, the complainant has established that his age played a part in the respondent's decision not to send him to law enforcement school and that the respondent's action was therefore discriminatory.

Even if the respondent were able to show that the standard announced by the Commission in Smith is somehow inapplicable to the present proceedings, discriminatory intent would be established by a "direct evidence" analysis. As outlined in Perryman v. Johnson Products Co., 31 FEP Cases 93 (11th Cir, 1983), special rules are to be applied where, as here, the appellant has established by direct evidence the existence of discriminatory intent:

> Of course, some plaintiffs are able to prove the existence of discriminatory intent by direct evidence; in these rare cases, the plaintiff is not required to rely on the inference of discrimination created by the prima facie case of McDonnell Douglas. If the factfinder believes the direct evidence presented by the plaintiff, a presumption is created that the adverse employment action taken against the plaintiff was a product of that discriminatory intent. At this point, just as with a successful showing by the plaintiff of discriminatory intent based on circumstantial evidence, the burden shifts to the defendant to prove by a preponderance of the evidence that the adverse action would have been taken even in the absence of a discriminatory motive. *(citations omitted)*

In the present case, the respondent has failed to justify the personnel transaction for non-discriminatory reasons. Mr. Pickert admitted that the budget limitations made it very difficult but not impossible to send more than one LTE to law enforcement school and that the failure to issue any citations was not a determining consideration in reaching his decision. Mr. Pickert was unable to identify specific instances which led him to conclude that Mr. Peickert had a better relationship than the appellant with park patrons and staff. Mr. Pickert also stated that it was Mr. Conklin who raised appellant's age as a consideration. However, this statement was not corroborated by Mr. Conklin, nor was it placed in time as having occurred after Mr. Pickert had made his final decision with respect to the appellant.

Based upon the evidence cited above, the respondent has failed to overcome the presumption established by the direct evidence of the discriminatory intent pursuant to the Perryman analysis.

Remedy

The complainant testified that if he had attended the week long session of the law enforcement school in 1981, he would have received a total of an additional day's pay for the travel time to and from the school. He also would have received some educational benefits from the training. The record shows that the complainant is no longer employed by the DNR, that the Big Bay Park is now operated by the town of La Pointe and that the DNR now has no control over hiring employes at the park. For these reasons, there does not appear to be a sufficient basis for now ordering the respondent to provide a week of law enforcement training to

the complainant. The complainant's remedy is appropriately limited to recovering the monetary loss suffered by not attending the school. Because the complainant was paid his regular salary for working in the park during the week that he would have attended the school, he is only entitled to recover the one day of additional pay that he would have received had he attended the school.

ORDER

It is ordered that the respondent pay the complainant one day's salary at an hourly rate equal to the complainant's rate of pay on June 1, 1981.

Dated: May 21, 1983 STATE PERSONNEL COMMISSION

DONALD R. MURPHY, Chairperson

KMS:lmr

LAURIE R. McCALLUM, Commissioner

DENNIS P. McGILLIGAN, Commissioner

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