

STATE OF WISCONSIN

PERSONNEL COMMISSION

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 *
 JOHN R. SPRENGER, *
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 Complainant, *
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 v. *
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 President, UNIVERSITY OF *
 WISCONSIN SYSTEM (Green Bay) *
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 Respondent. *
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 Case No. 85-0089-PC-ER *
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DECISION
 AND
 ORDER

NATURE OF THE CASE

On June 14, 1985, complainant filed a complaint with the Commission charging occupational safety and health retaliation and age discrimination in regard to respondent's decision to lay him off and respondent's failure to recall him at a later date. Respondent filed motions to dismiss such charges based, inter alia, on the ground that the charges had not been filed on a timely basis. In an Interim Decision dated September 13, 1985, the Commission granted the motion to dismiss the charge of occupational safety and health retaliation on the ground that it was not filed on a timely basis. In an Interim Decision dated January 24, 1986, the Commission vacated and rescinded the Interim Decision of September 13, 1985. In an Interim Decision dated June 18, 1986, the Commission granted the respondent's motion to dismiss the charge of occupational safety and health retaliation on the ground that it was not filed on a timely basis but denied the respondent's motion to dismiss the charge of age discrimination. Subsequently, the parties agreed to waive an investigation of the complaint

and a hearing on the issue of probable cause. A hearing on the merits was conducted by Laurie R. McCallum, Commissioner, on September 11, 1986, and the briefing schedule was completed on October 31, 1986.

FINDINGS OF FACT

1. Complainant was born in 1932 and has a B.A. in psychology.
2. In 1974, complainant was appointed to the classified position of Theater Maintenance Coordinator in the Office of Lectures and Performances at the University of Wisconsin-Green Bay (UW-GB). This was a full-time position, i.e., 40 hours a week, 12 months a year. The duties and responsibilities of such position primarily included the preparation, operation and maintenance of the theater/stage area for visiting, not in-house, productions. Complainant was not assigned set construction or scenic or lighting design duties.
3. In 1982, Tom Birmingham, Director of the Office of Lectures and Performances, discussed with complainant a proposal to reduce complainant's position to an academic year position, i.e., nine months a year instead of 12 months. The reason offered to justify such a proposal was that budget cutbacks needed to be made. This proposal was never implemented.
4. During the 1982-83 academic year, Gene Bowers was an assistant professor in the Communication and the Arts concentration (department) responsible for teaching theater classes and serving as the technical director for the theater with responsibility for preparation, operation, and maintenance of the theater for in-house theater productions. Mr. Bowers' contract was not renewed for the 1983-84 academic year and he was advised of such non-renewal in the spring of 1982.
5. During the 1982-83 academic year, Tom Birmingham was the director of the Office of Lectures and Performances which was not part of a

concentration but was supervised by an associate vice chancellor. Mr. Birmingham resigned in the spring of 1983.

6. During the 1982-83 academic year, the Office of Lectures and Performances included, besides complainant's position and the Birmingham position, a secretarial position and a ticket office manager position occupied by Linda Erwin. The Birmingham and Erwin positions were academic staff positions.

7. During the 1982-83 academic year, Michael Thron, the Associate Vice Chancellor for Academic Affairs who was assigned budget and personnel duties, among others, and Bob Bauer, the chairman of the Communication and the Arts concentration, discussed various options regarding restructuring the Office of Lectures and Performances and the theater discipline within the Communication and the Arts concentration. Several factors and concerns precipitated such discussions:

a. Vacancies in the Birmingham and Bowers positions for the 1983-84 academic year provided a good opportunity to review and restructure the programs to which these positions had been assigned.

b. Budget cutbacks mandated by the UW-System administration required campuses to make their operations as efficient as possible and to continue only those programs or services considered essential.

c. Problems had been encountered coordinating the activities of the Office of Lectures and Performances and the activities of the theater discipline within the Communication and the Arts concentration.

8. The following decisions were reached as a result of these discussions:

a. To assign the duties of complainant's position and the duties of the Bowers position to a single academic staff level 3 technical director/scenic and lighting designer/teacher position within the Communication and the Arts concentration. This action was taken to reduce salary costs, to better coordinate the use of the theater for visiting productions with the use of the theater for in-house productions, to better coordinate the technical and academic aspects of the theater, and to facilitate the theater discipline's use of the promotional skills and experience of the Lectures and Performances staff.

b. To designate the Office of Lectures and Performances as the Office of Arts and Performances, to reassign supervision of the Office of Arts and Performances from an Associate Vice Chancellor to the Vice Chancellor's office which also supervised the Communication and the Arts concentration, to assign the curator of arts position to such office, and to consolidate secretarial support for these functions.

9. The following actions were taken to implement these decisions:

a. A new academic staff level 3 position was created with the following qualifications and responsibilities:

Qualifications: Terminal degree (M.F.A. or Ph.D.) or professional equivalent in technical theatre. Capable of scenic design and lighting design. Capable of teaching theatre courses including stagecraft, lighting and scenic design. Capable of scene shop management. Technical director experience required, based upon diverse theatre offerings, including dance as well as all the other Performing Arts.

Responsibilities: Normal technical director duties for University Theater and Music productions, utilizing both paid and unpaid assistance. Design sets for main stage shows. Supervise all set building and painting. Design lights for all shows. Supervise all uses of theatre spaces: main stage and house, experimental theatre, scene shop. Assist stage managers of booked shows for Lectures and Performances, utilizing paid student crews. Supervise safety and security measures for theatre spaces. Supervise equipment maintenance and inventory. Teach technical theatre courses as needed.

b. Complainant's position was eliminated. Mr. Birmingham advised complainant in January of 1983 that his position would be eliminated as of June 30, 1983, and he would be laid off as a result. Complainant received written notice to such effect in a letter dated May 6, 1983. This letter also summarized complainant's transfer, bumping, voluntary demotion, recall, and reinstatement rights under the applicable collective bargaining agreement based upon complainant's current classification (Theatre Maintenance Coordinator), current pay range (PR6-10), and seniority date (November 25, 1974). At the time of complainant's layoff, there was no vacant position into which complainant had a right to transfer; there were no other Theatre Maintenance Coordinator positions at the UW-GB so complainant had no bumping rights in the applicable employing unit; and there were no vacant permanent Technical Unit positions in a pay range lower than PR6-10 into which complainant could demote. In addition, at no time

after complainant's layoff did a vacancy occur in a permanent Theater Maintenance Coordinator classified position at the UW-GB to which complainant could have been recalled. In fact, there was no permanent Theater Maintenance Coordinator position at the UW-GB after complainant's layoff.

c. The new academic staff level 3 position referenced in a. above was posted and filled by Terry Burton effective in the late summer of 1983. Complainant did not apply for such position and did not have the qualifications required for the position, i.e., did not have an M.F.A. or Ph. D. degree; did not have significant scenic design, lighting design, or set construction experience or training; and did not have stagecraft or design teaching experience or training.

d. Ms. Erwin was appointed to the position of coordinator of the new Office of Arts and Performances effective July 1, 1983. The position Ms. Erwin had previously occupied, i.e., ticket office manager, was posted and filled by Carl Shakal. Complainant did not apply for such position, was not generally familiar with the duties of such position, and had no right to transfer into or be recalled to such position because it was an academic staff position, not a classified position.

10. Mr. Burton's contract was not renewed for the 1984-85 academic year due to poor performance. During the 1983-84 academic year, a dance instructor in the Communication and the Arts concentration resigned. The concentration faculty was of the opinion that, although it was desirable to continue to utilize the theater for community entertainment purposes, it was also desirable to establish the theater as an academic area and, in order to accomplish this, the concentration needed a position to teach more

upper level theater courses. The concentration faculty was also of the opinion that the Burton position already was assigned too numerous and too diverse duties and could not be assigned these additional teaching duties. The concentration faculty recommended, as a result, that the position vacated by the dance instructor be assigned upper level theater courses teaching duties as well as scenic and lighting design duties and be designated as an assistant professor position in the theater discipline within the Communication and the Arts concentration. In addition, the concentration faculty recommended that the Burton position continue to be assigned the technical director duties as well as basic theater courses teaching duties. Dr. Thron accepted and implemented these recommendations. Dr. Thron decided that the position formerly occupied by Mr. Burton would be designated as an academic staff level 2, not level 3, position since the position would not be assigned the scenic and lighting design duties which had been assigned to the Burton position. Michael Mills was appointed to the academic staff level 2 position and Jeff Entwistle to the assistant professor position. Complainant did not apply for either of these positions and was not qualified for either of these positions for the same reasons he was not qualified for the Burton position (See Finding of Fact 9.c.).

11. The qualifications and responsibilities of the Mills position include:

Qualifications: Terminal degree (M.A. or M.F.A.) or professional equivalent. Capable of teaching courses in basic stagecraft, stage management and theatre management. Experience in technical direction and scene shop management required based upon

diverse theatre offerings, including dance as well as all other Performing Arts.

Responsibilities: Teach and supervise basic stagecraft labs and one course per semester. Normal technical director duties for University Theatre, Arts and Performances, and music events, utilizing both paid and unpaid assistance. Organize and supervise all set construction and painting. Supervise all uses of theatre spaces: mainstage and house, experimental theatre, scene shop. Assist stage managers of professional shows for Arts and Performances, utilizing paid student crews. Supervise all safety and security measures for theatre spaces. Supervise equipment maintenance and inventory. Familiarity with the use and maintenance of sophisticated computerized lighting equipment.

12. The responsibilities of the Entwistle position included scenic and lighting design and the teaching of at least two theater classes per semester.

13. The duties and responsibilities of neither the Burton, Mills, nor Entwistle positions were comparable to those of complainant's position. Messrs. Burton, Mills, and Entwistle were all under the age of forty when appointed to the subject positions.

14. Complainant became aware some time in 1984 that someone had been appointed to the position formerly held by Mr. Burton. However, it was not until he saw the 1984-85 UW-GB faculty-staff-student directory on or

around June 10, 1985, and read there that the Office of Arts and Performances contained a position designated as a Theater Tech that he formed a belief that a position with duties and responsibilities equivalent to those of his former position had been created. Complainant filed his charge of discrimination with the Commission on June 14, 1985.

15. Age did not play a part in respondent's decision to lay off complainant or in respondent's decision not to recall complainant at a later date.

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §§230.45(1)(b) and 111.33(2), Stats.

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

3. The complainant has the burden of proving that, with respect to the subject layoff decision and to the subject failure of respondent to recall complainant at a later date, the respondent discriminated against complainant on the basis of his age.

4. The complainant has not satisfied his burden of proof.

OPINION

Jurisdictional Issue

At the hearing, respondent made a motion to dismiss the instant complaint on the basis that it was not filed on a timely basis. Specifically, respondent alleged that:

"Since the evidence is clear that the university has not reinstated Mr. Sprenger's former classified position and that, therefore, no recall was required under the collective bargaining agreement, the date of alleged discrimination must revert to the date when Mr. Sprenger was notified of his impending layoff, May 6, 1983, or at the very latest when his layoff became effective June 30, 1983.

"The Personnel Commission in its earlier decisions in this matter held that the appropriate standard as to whether a charge of discrimination has been brought in a timely fashion is when 'the complainant knew---or a reasonable prudent person would have known---facts to support a charge of discrimination.' Mr. Sprenger knew on May 6, 1983, that his position was being eliminated and that an academic staff position had been established to handle the duties he previously performed. Therefore, the complaint of discrimination was brought almost two years after Mr. Sprenger was aware of the alleged discrimination and the complaint should be dismissed on this basis" (See Respondent's post-hearing brief, page 2).

However, as the record clearly indicates, complainant filed his charge of discrimination because he believed that the Mills position, not the Burton position, was a recreation of complainant's position. Complainant formed this belief on or around June 10, 1985, when he read the entry for the Mills position in the 1984-85 UW-GB faculty-staff-student directory (See Finding of Fact 14). There is no evidence in the record from which it is possible to conclude that complainant had formed this belief or should have formed this belief earlier than June 10, 1985. On this basis, the Commission concludes that complainant filed his charge of discrimination on a timely basis, i.e., within 300 days of the date when complainant knew or should have known of the existence of, and the Theater Tech designation of, the Mills position.

Merits

In McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 5 FEP Cases 965 (1973), the Supreme Court established the basic allocation of burdens and order of presentation of proof in cases alleging discriminatory treatment. The complainant must carry the initial burden of establishing a prima facie case by a preponderance of the evidence. In a case alleging age discrimination, this may be accomplished by showing: 1) that complainant was within the age group protected by the Wisconsin Fair Employment Act; 2) that complainant was adversely affected by the employer's action which is

the subject of the complaint; and 3) there is evidence age was not treated neutrally in the employer's decision. If the complainant succeeds in establishing a prima facie case, the burden of production then shifts to the defendant employer to articulate some legitimate, nondiscriminatory reason for the employer's action. Once this is accomplished, the complainant must then be given a fair opportunity to show by a preponderance of the evidence that the employer's stated reasons for the action were in fact a pretext for a discriminatory decision. The ultimate burden of persuading the trier of fact that the respondent employer intentionally discriminated against the complainant remains at all times with the complainant, Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 25 FEP Cases 113 (1981).

In the instant case, complainant did establish a prima facie case of age discrimination. As a person who was over the age of 40 at all times relevant to this proceeding, complainant is within the age group protected by the Wisconsin Fair Employment Act; complainant was adversely affected by respondent's decision to lay him off and by respondent's failure to recall him at a later date; and, since younger persons were hired to perform the duties previously performed by complainant, an inference of discrimination on the basis of age could be drawn.

Respondent did offer legitimate, non-discriminatory reasons for (1) complainant's layoff: to reduce salary costs without reducing course offerings; to better coordinate the use of the theater for visiting productions with the use of the theater for in-house productions; and to better coordinate the technical and academic aspects of the theater (See Findings of Fact 7 and 8); and (2) respondent's failure to recall complainant at a later date: at no time after complainant's layoff did a vacancy occur in a

permanent Theater Maintenance Coordinator position at the UW-GB to which complainant could have been recalled; the relevant collective bargaining agreement required the recall of complainant only if such a vacancy existed; complainant was not recalled to fill any of the vacant academic staff positions, i.e., the ticket officer manager position, the Burton position, or the Mills position, because complainant's recall rights extended only to classified, not academic staff, positions, and affirmative action and recruitment procedures which the UW-GB was required to follow provided that a vacant academic staff position must be posted and a person must apply for a vacant position in order to be considered for such position; complainant did not have the requisite educational background or work experience to carry out the duties of any of such academic staff positions or the Entwistle faculty position even if the UW-GB could have recalled him to such positions (See Findings of Fact 9c, 9d, 10); and the duties and responsibilities of neither the Burton, Mills, nor Entwistle positions were equivalent to those of complainant's position (See Finding of Fact 13).

The remaining question then is whether the reasons stated by respondent for complainant's layoff and for respondent's failure to recall complainant at a later date were in fact a pretext for discriminatory actions by respondent.

Complainant alleges that the financial reasons offered to explain the elimination of complainant's position are a "sham" because complainant, who was paid approximately \$19,000 per year at the time of his layoff, was "in essence replaced by Michael Mills" who was paid approximately \$22,000 per year. However, as the Findings of Fact above indicate, what had been three positions in the 1982-83 academic year (complainant's position, the Bowers position, and the dance instructor position) ultimately were reduced to two

positions (the Mills position and the Entwistle position) in the 1984-85 academic year for a net savings of one position. Although the record fails to specify the salaries for each of these positions, those salaries which are specified are in the \$19,000-\$25,000 range and, as a result, it is more likely than not that the salaries of the remaining positions are in this range and that, as a result, the net reduction of one position resulted in a dollar savings to respondent.

One of the rationales offered by respondent for consolidating the duties and responsibilities of complainant's position with those of the Bowers position was that such consolidation would facilitate the theater discipline's use of the promotional expertise of the Lectures and Performances staff. Complainant alleges that such rationale was pretextual because such expertise was vested only in complainant and Mr. Birmingham and, as a result of Mr. Birmingham's resignation and complainant's layoff, no such expertise remained in the Office of Lectures and Performances. However, complainant has lost sight of the fact that respondent considered it desirable to establish a sharing of expertise between the Office of Lectures and Performances and the theater discipline by assigning duties relating to both to a single position regardless of who the position incumbent was. In other words, the sharing was a function of the duties of the positions, not the qualities of the persons appointed to the positions. Complainant has failed to establish pretext in this regard.

Complainant argues that respondent's failure to recall complainant to the Mills position which is essentially a recreation of complainant's position demonstrates pretext. However, it is clear from the record that the Mills position is not a recreation of complainant's position (See Finding of Fact 13) primarily because the Mills position includes teaching

and set construction duties while complainant's position did not. In addition, the Mills position is an academic staff position and complainant could be appointed to such a position only if he had applied and successfully competed for it, i.e., as a classified employee, complainant had no recall rights to an academic staff position. Complainant further argues in this regard that respondent had a duty to advise complainant of the vacancy in the position ultimately filled by Mr. Mills but offers no authority for his assertion that respondent's obligation extended beyond that of posting the vacancy in accordance with applicable affirmative action and recruitment requirements and no rationale for complainant's failure to apply for such position in response to such posting. Complainant has failed to establish pretext in this regard.

Complainant further alleges that he should have been recalled to the ticket office manager position vacated by Ms. Erwin. However, this position was an academic staff position for which complainant had no recall rights as a classified employee, there was no convincing showing that complainant was qualified for such position, and, again, complainant cites no authority for his assertion that respondent's obligation extended beyond that of posting the vacancy in accordance with applicable affirmative action and recruitment requirements and no rationale for complainant's failure to apply for such position in response to such posting. Complainant has failed to establish pretext in this regard.

Finally, complainant argues that, since complainant is qualified to perform all of the duties of the Mills position except the teaching duties, the failure of respondent to assign such teaching duties to the Entwistle position and the technical duties of the Entwistle position which complainant is qualified to perform to the Mills position, demonstrates pretext.

However, complainant is not qualified to perform all of the non-teaching duties of the Mills position. Specifically, complainant is not qualified to perform the set construction duties of the Mills position. Moreover, complainant is not qualified to perform the technical duties of the Entwistle position. These technical duties involve scenic and lighting design duties which complainant is clearly not qualified to perform. Complainant has failed to demonstrate pretext in this regard.


Respondent's decision to lay complainant off was based on budget and program considerations, not on complainant's age. Respondent's failure to recall complainant was based on the unavailability of a vacant position in the proper classification, not on complainant's age.

ORDER

This complaint is dismissed.

Dated: December 30, 1986 STATE PERSONNEL COMMISSION


DENNIS P. MCGILLIGAN, Chairperson


DONALD R. MURPHY, Commissioner


LAURIE R. MCCALLUM, Commissioner

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