

STATE OF WISCONSIN

PERSONNEL COMMISSION

* * * * *

LEE OZANNE,

Complainant

v.

Secretary,

DEPARTMENT OF TRANSPORTATION

Respondent

Case No. 87-107-PC-ER

* * * * *

DECISION
AND
ORDER

Nature of the Case

This is a complaint of discrimination in hiring on the basis of sex and age. On April 6, 1988, one of the Commission's equal rights investigators issued an initial determination finding no probable cause to believe that complainant had been discriminated against as alleged. Complainant appealed such no probable cause determination. A hearing was held before Laurie R. McCallum, Commissioner, on October 11, 1988. The briefing schedule was completed on December 8, 1988.

Findings of Fact

1. Complainant is a male and his date of birth is August 29, 1941.
2. The relevant time period for purposes of this case is October 21, 1986, through August 17, 1987. During this relevant time period, complainant applied three times with respondent for employment as a limited term employee (LTE). He applied twice in person with respondent's Bureau of Personnel Management at the Hill Farms State Office Building in Madison,

Wisconsin, and once by mail with respondent's Transportation District One Office at 2101 Wright Street in Madison, Wisconsin.

3. When he applied in person, complainant filed a completed application form with an attached resume. The application was a copy of an application originally completed by complainant in 1985 which indicated that complainant's date of availability was October, 1985; that complainant's most recent employment ended in August of 1985; that complainant was applying for clerical or clerk/typist positions; that complainant had work experience as a laboratory technician, a clerk, an engineering aide, a typist, a tutor, and a job counselor; and that complainant had a B.A. in physics and had completed graduate work in history. The attached resume indicated that complainant had worked as a painter/drywaller in 1986-87 and also had work experience as a laboratory technician, prison guard, secretary/receptionist, clerk, engineering aide, tutor, job coach, surveyor's aide, teacher, and grader. When complainant applied in person, he advised the person who accepted his application that his application was outdated but was told by this person that the attached resume would be considered part of the application. The application mailed by complainant to respondent's Transportation District One Office included only the above-described application form, i.e., the resume was not attached.

4. Respondent's Bureau of Personnel Management receives approximately 800 LTE applications every year and removes an LTE application from their files once it is six months old, i.e., once six months has passed from the date of availability on the application form. Respondent's Transportation District One Office receives approximately 400 LTE applications every year and removes an LTE application from their files once it is one year old, i.e., once

one year has passed from the date of availability on the application form. Respondent receives approximately 2500 to 3500 applications for LTE employment each year.

5. Respondent sent a letter to complainant on April 25, 1986, which complainant received within a few days, which stated as follows, in pertinent part:

Thank you for your interest in Limited Term Employment possibilities with the Wisconsin Department of Transportation. Each of our department's employing units hire limited term employees directly as the need for temporary help arises. Applications for limited term employment should be made directly to those employing units where you would like to work. Instructions for student engineers are published in an announcement issued each February.

Limited term employment by our DOT employing units is carried out under department practices which have been centrally established. These practices include (1) preference to former DOT employees, especially to those to whom we are paying unemployment compensation benefits, (2) preference to students enrolled, and in good standing, in college or technical school curriculum, for engineering support positions which constitute a substantial portion of our temporary summer help needs, and (3) positive efforts to balance our workforce with ethnic minorities, handicapped persons, and females in historically non-traditional jobs where imbalances exist. Our practices effectively meet our needs, but we do recognize they limit the number of new employees hired. Be aware, however, that opportunities for limited term employment are very limited.

Attached for your information is a current list of our department's employing units where the possibility for limited term work may exist. Apply directly to those units of interest to you, and send one application to our Transportation Personnel Office (address listed on application). Enclosed please find the LTE application form.

6. During the relevant time period, only one clerical position was filled from the LTE applications on file with respondent's Bureau of Personnel Management. The person hired for this part-time position which required work processing skills was a person then employed by respondent in another position. The person hired is a female but the record does not show what this person's age is. The Bureau of Personnel Management gives a hiring

preference to those with current applications, i.e., those whose applications indicate a date of availability no more than six months earlier than the date of consideration for hire.

7. During the relevant time period, no clerical positions were filled from the LTE applications on file with respondent's Transportation District One Office. Also during this period, engineering aide/technician positions were filled from the LTE applications on file with District One. The record does not indicate the age or sex of the individuals hired to fill such positions but does indicate that a hiring preference was given to those with current applications, i.e., those whose applications indicate a date of availability no more than one year earlier than the date of consideration for hire.

8. The record includes the following statistical information:

I. Ages of LTEs--District 1

<u>Year</u>	<u>Total number</u>	<u>% Under 40</u>	<u>% Over 40</u>
1985	66	88%	12%
1986	96	92%	8%
1987	103	89%	11%
1988	125	86%	14%

II. Sex of LTEs--Statewide--Clerical

<u>Year</u>	<u>Total number</u>	<u>% Female</u>	<u>% Male</u>
1985	33	91%	9%
1986	27	74%	26%
1987	48	83%	17%
1988	53	87%	13%

III. Sex of LTEs--Statewide--Engineering Aides/Technicians

<u>Year</u>	<u>Total number</u>	<u>%Female</u>	<u>%Male</u>
1985	409	25%	75%
1986	482	23%	77%
1987	469	24%	76%
1988	525	22%	78%

9. Complainant was not hired for an LTE position by respondent during the relevant time period.

Conclusions of Law

1. This matter is properly before the Commission pursuant to s. 230.45 (1)(b), Stats.
2. Complainant has the burden to show that there is probable cause to believe that he was discriminated against on the basis of age and sex as alleged.
3. Complainant has failed to sustain this burden.

Decision

In McDonnell-Douglas Corp. V. Green, 411 U.W. 792, 93 S. Ct. 1817, 5 FEP Cases 965 (1973), the U. S. Supreme Court provided a framework for analysis of discrimination complaints. Under this framework, the burden of proof remains with the complainant but the burden of proceeding shifts. Initially, the burden is on the complainant to show a prima facie case of discrimination. The burden then shifts to the respondent to offer a legitimate, nondiscriminatory reason for the actions it has taken. Finally, the burden shifts back to the complainant to show that the reasons offered by the respondent are pretextual. In the context of a hiring decision such as the one before us here, the elements of a prima facie case are that the complainant (1) is a member of a class protected by the Fair Employment Act, (2) applied for and was qualified for an available position, and (3) was rejected under circumstances which give rise to an inference of unlawful discrimination. Since the issue is one of probable cause, the standard is less rigorous than in a decision on the merits.

Complainant has established that he is protected by the FEA on the basis of his age and his sex during the relevant time period. Complainant has also

shown that he applied for LTE positions during the relevant time period and that he had certain training and work experience which could qualify him for certain clerical or engineering aide\technician positions. Complainant has also shown that there was one available clerical position for which the LTE applications on file at the Bureau of Personnel Management were consulted and several available engineering aide/technician positions filled from the LTE applications on file at District One. Complainant has also shown that an inference of sex discrimination could be drawn from the fact that a female candidate was hired for the subject clerical position. Complainant has failed to show that an inference of age discrimination could be drawn from this hire since the age of the successful candidate is not indicated in the record.

Complainant has also failed to show that an inference of discrimination could be drawn from the fact that complainant was not selected for the subject engineering aide/technician positions since neither the age nor sex of the successful candidates for these positions is indicated in the record. Thus, complainant has established a prima facie case only as to his allegation of discrimination on the basis of sex in regard to the subject clerical position.

If complainant had established a prima facie case of discrimination as to each of the subject hires, respondent then has the burden of offering a legitimate, non-discriminatory reason for its hiring decisions. In regard to the subject clerical position, respondent offered the explanation that the successful candidate had word processing experience and that such experience was necessary for the position and that a preference was given to those applications which indicate a date of availability no more than six months earlier than the date of consideration for hire. There is nothing in the record from which to conclude that this explanation was not legitimate and it is

clearly non-discriminatory on its face. In regard to the subject engineering aide/technician positions, a hiring preference was given to civil engineering students, candidates with surveying experience, and applications which indicate a date of availability no more than one year from the date of consideration for hire. Again, there is nothing in the record from which to conclude that this explanation was not legitimate and it is clearly non-discriminatory on its face.

The burden then shifts back to the complainant to demonstrate pretext. Complainant argues in this regard that his resume indicates that he has training and work experience in a variety of areas and he should have been considered for non-clerical positions despite the fact that his application indicated that he was seeking clerical or clerk/typist positions. Not only has complainant failed to show that other positions for which he was arguably qualified were available during the relevant time period and were filled with younger or female candidates but also that respondent's failure to review complainant's resume whenever an LTE position became available or to consider his application as a timely one because it had an October, 1985, availability date on it deviated from the procedure followed in relation to applications filed by other individuals, i.e., complainant has failed to show a relationship between respondent's actions and complainant's age or sex. Complainant has failed to demonstrate pretext.

The above analysis applies to cases where disparate treatment is alleged. Complainant has also proffered a disparate impact theory in this case and has offered statistical information in support of his theory (See Finding of Fact 8 above). This statistical information indicates that the representation of men in clerical LTE positions at DOT is less than the representation of men in the

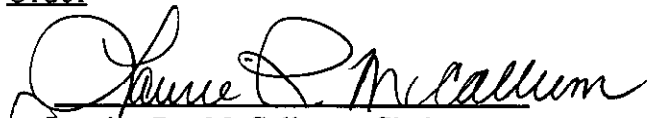
population as a whole and that the representation of men in engineering aide/technician LTE positions at DOT is more than in the population as a whole. This statistical information also indicates that District One employs more LTEs under the age of 40 than over the age of 40. In the absence of information indicating, for example, the age and sex of individuals who were considered for these positions, it is not possible to draw any conclusions regarding the hiring practices of respondent from this raw data.

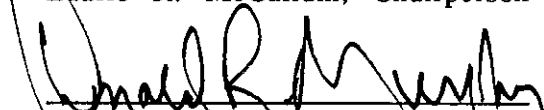
Complainant has failed to show probable cause that he was discriminated against as alleged on the basis of both the disparate treatment and disparate impact theories offered by complainant.

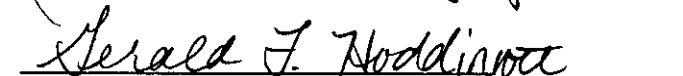
This complaint is dismissed.

January 31, 1989
Date

Order


Laurie R. McCallum, Chairperson


Donald R. Murphy, Commissioner


Gerald F. Hoddinott, Commissioner *erm*

LRM/lrm

Parties:

Lee Ozanne
2612 Granada Way, Apt. 4
Madison, WI 53713

Ronald Fiedler
Secretary, DOT
P.O. Box 7910
Madison, WI 53707-7910