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TINA M. PENNYBACKER,
 Complainant,

v.

Secretary, DEPARTMENT OF
 HEALTH AND SOCIAL SERVICES,
 Respondent.

Case No. 91-0139-PC-ER

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DECISION
 AND
 ORDER

This matter is before the Commission on a complaint of sex discrimination as defined and protected against under the Wisconsin Fair Employment Act. This matter was heard before hearing examiner Donald R. Murphy. To the extent any of the discussion constitutes a finding of fact, it is adopted as such.

FINDINGS OF FACT

1. Complainant, Tina Pennybacker, began working at Southern Wisconsin Center (SWC) in 1975 through a high school co-op program.
2. In 1978, complainant obtained a permanent appointment in civil service with SWC in Housekeeping. Currently she holds the position of Residential Care Technician 2.
3. Southern Wisconsin Center is one of several facilities in respondent's Division of Care and Treatment Facilities. It is a care center for the developmentally disabled.
4. In early April 1983, complainant applied for an upholstery position announced for open competition by SWC.
5. About April 18, 1983, SWC notified all applicants for the position that it had been filled by lateral transfer of Peter Toman, a Facility Repair Worker 3.
6. Complainant was not eligible for transfer to the upholstery position and the decision to transfer Toman was made prior to any knowledge about those who had applied for the position.
7. Shortly after notification, the position was filled by lateral transfer of Toman, a male; complainant filed a sexual discrimination complaint

with SWC. This complaint was investigated internally by SWC and determined to be unfounded.

8. About August 4, 1991, Toman vacated the position and SWC's request to fill the position by lateral transfer, permissive reinstatement, or voluntary demotion was approved.

9. Complainant, who was now eligible to transfer into the position, David Doath, and James Hugenroth were interviewed for the position by George Wade, Superintendent of Grounds and Buildings, and Donald Wittrock, Grounds Supervisor.

10. Wade and Wittrock asked the candidates the same questions, took notes and afterwards came to a consensus to hire James Hugenroth and rank complainant second.

11. During the interview, Hugenroth indicated that he had completed technical courses in upholstery work, operated his own business, completed over 150 upholstery projects and thousands of objects, and had 20 years experience in upholstery. Also Hugenroth stated that he had taken welding courses in high school and technical school, and had welding experience.

12. Complainant told the interviewers that she had received a diploma in upholstery and auto trim from Gateway Technical Institute, Racine, Wisconsin, had completed a total of 50 chairs and some antiques in the last eight years, none in the last year. Complainant indicated some minor soldering, but no welding experience.

13. SWC believed that Hugenroth performed his duties as an upholsterer well, but he resigned on December 14, 1990, to take a position with a private health facility.

14. After Hugenroth resigned, SWC requested its central office to approve refilling the position by lateral transfer, voluntary demotion or permissive reinstatement.

15. Near the end of December, Hugenroth, who soon after leaving, indicated interest in his former position, told Wittrock he wanted to return.

16. On January 2, 1991, SWC requested approval from DCTF to reinstate Hugenroth and, after a delay caused by a job freeze, Hugenroth was reinstated April 15, 1991.

17. During this period, prior to Hugenroth's reinstatement, SWC personnel manager, Thomas Wall, had more than one conversation with complainant about the vacant position. On one occasion he informed

complainant of the job freeze. During these conversations, complainant did not advise Wall that she recently had received a day of welding instructions.

18. In August 1991, Hugenroth again resigned. SWC used the same prior process to fill the position, and four candidates, including complainant, were interviewed.

19. Reynaldo Reynoso was hired to the upholstery position, after the interview and recommendation by the interview panelists: Wade, Wittrock and Helen Geschke, a secretary at SWC.

20. Like complainant, Reynoso had a diploma in upholstery and auto trim from GTI, Racine, Wisconsin. In addition, Reynoso had experience in welding, had completed 500 upholstery projects, and operated his own business.

21. During the time at issue, the director of SWC was female; the director of nursing, chief psychologist and personnel manager were female; and approximately 75 percent of SWC's employees were female.

22. In 1990 SWC hired its first permanent female in the grounds department. Prior to that time, the grounds department had employed a number of females as limited term employees or interns.

CONCLUSIONS OF LAW

1. This matter is before the Commission pursuant to §230.45(1)(b), Stats.
2. Complainant has the burden to prove that she was discriminated against on the basis of sex in regard to respondent's decision to reinstate James Hugenroth in April 1991.
3. Complainant has failed to sustain this burden of proof.
4. Complainant has failed to prove respondent discriminated against her as alleged.

OPINION

The question before the Commission is whether respondent discriminated against complainant on the basis of sex when they reinstated James Hugenroth to the upholstery position in April 1991.

Under the Wisconsin Fair Employment Act (WFEA), §§111.321-111.37, Wis. Stats., it is unlawful to refuse to employ an individual on several prohibited bases of discrimination, including sex. As with the courts of this

state, the Commission uses the analytic framework designated in McDonnell-Douglas v. Green, 411 U.S. 792, 93 S. Ct. 1817, 5 FEP Cases 965 (1973), and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 25 FEP Cases 113 (1981), as a means for viewing discrimination cases.

The evidence presented clearly establishes the first element of a prima facie case of sex discrimination. Complainant as a female is protected by WFEA against employment discrimination based on gender. It is less clear that complainant satisfied the second element by being qualified for the vacant upholsterer position. Approximately 10 percent of the duties of this position involve welding. When Hugenroth was initially hired instead of complainant, complainant had no welding experience. Later, during the period prior to Hugenroth's reinstatement, complainant obtained one day of welding instruction from a friend, who was by profession a truck driver. If it can be determined that complainant satisfied the second element of a prima facie case of sex discrimination, then the evidence present is sufficient to establish the third element of being rejected and having the position filled by someone not in her protected group.

In rebuttal, respondent argues: [I]t is not at all clear that the complainant was qualified for an available position. [I]t is unclear whether there was an "available position" under the circumstances of Mr. Hugenroth's resignation and subsequent reinstatement. [T]he complainant has failed to establish that the circumstances surrounding SWC's reinstatement of Mr. Hugenroth give rise to an inference of unlawful discrimination.

In support of her claim and response to respondent's rebuttal, complainant points to evidence of record regarding SWC's female managers, the number of women employees in the grounds unit, the availability of restroom facilities for women in the grounds building, and reasons for complaints prior and subsequent failure to be hired for the upholsterer position.

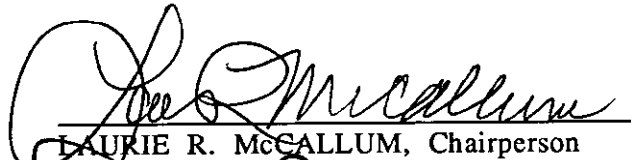
It is the Commission's belief that complainant has failed to establish general underutilization of women as employees at SWC or specific underutilization of same in the grounds unit. In this particular case, there is only one upholsterer position, rendering statistical analysis of gender bias meaningless. Also the Commission believes the evidence shows that if complainant was qualified for the upholsterer position, she was less qualified than the person appointed to the position in April 1991, or in any of the other

hires reflected in the record. Finally, the Commission believes the evidence establishes that SWC followed its normal practice of reinstating employees when Hugenroth was reinstated. Therefore, the Commission can find no unlawful discrimination as alleged by complainant.

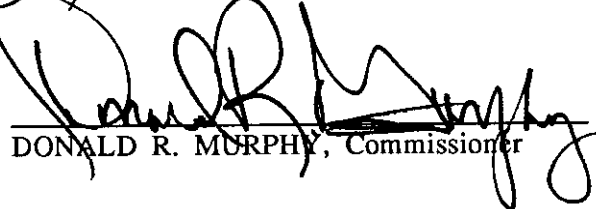
ORDER

In accordance with the Findings of Fact, Conclusions of Law, and Opinion set out above, the complaint in Case No. 91-0139-PC-ER is dismissed.

Dated: July 7, 1994 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

DRM:rcr


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

Parties:

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NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.)