

STATE OF WISCONSIN

PERSONNEL COMMISSION

* * * * *

NANCY SMITH, *

Complainant, *

v. *

President, UNIVERSITY OF WISCONSIN *
SYSTEM (Manitowoc County), *

Respondent. *

Case No. 93-0173-PC-ER *

* * * * *

FINAL
DECISION
AND
ORDER

INTRODUCTION

A Proposed Decision and Order was issued in the above-noted case on March 3, 1995, after which both parties submitted written arguments to the full Commission. The Commission has considered the arguments raised by the parties and has consulted with the hearing examiner. The Commission adopts the proposed decision as its own, with amendments shown herein and explained in lettered footnotes.

SUMMARY OF PRIOR PROCEEDINGS

Ms. Smith filed a charge of discrimination with the Personnel Commission on September 28, 1993, alleging that respondent had harassed her because of her age and sex, and had terminated her employment because of her age and sex in violation of the Fair Employment Act (FEA), Subch. II, Ch. 111, Wis. Stats. On April 11, 1994, an Initial Determination (ID) was issued which found no probable cause to believe discrimination occurred as alleged. Ms. Smith filed a timely appeal of the ID.

A hearing was held in the above-noted case on September 29 & 30, 1994. The parties submitted written arguments after hearing, with the last argument received by the Commission on January 27, 1995.

The parties agreed at a prehearing conference held on June 17, 1994, to a hearing on the merits (rather than a repeat of the probable cause stage) and the issues for hearing as follows:

1. Whether the respondent harassed the complainant based upon her sex and/or her age during her employment with the respondent.
2. Whether the respondent terminated the complainant's employment because of her sex and/or age.

After Ms. Smith presented her case at hearing, the examiner concluded^A she had failed to present sufficient evidence on her sex harassment and sex discrimination claims. Accordingly, respondent's case consisted of evidence regarding the claims of age harassment and age discrimination.

FINDINGS OF FACT

1. Ms. Smith initially worked for about 14 years as clerical support for the Sea Grant Program as an employe of University of Wisconsin (UW) Madison campus. She was physically located in a Sea Grant field office in Sister Bay, Wisconsin, where she was supervised by the field agent, Lynn Frederick. Ms. Smith was on a leave of absence to care for her ill husband when the field office was relocated to the UW-Manitowoc County campus (MCC).
2. Ms. Smith applied and was hired for a half-time clerical position at the the relocated Sea Grant office, which was the only support position for that office. However, she worked full time at the MCC as follows: 50% time for the Sea Grant program (20 hours per week), 25% time for the Business Office (10 hours per week) and 25% time for the Continuing Education program (10 hours per week). She started in this new position on August 17, 1992, and was required to serve a probationary period not to exceed 6 months. (Exh. R-8)
3. Ms. Smith was an employe of MCC at the new location. Ms. Frederick remained a UW-Madison campus employe.
4. Ms. Smith's position at MCC was difficult in that she was required to report to 3 supervisors, as follows: 1) to Lynn Frederick for her 50% Sea Grant position, 2) to Kathy Palmer for her 25% Continuing Education position, and 3) to Bruce Peters for her 25% Business Office position.
5. Mr. Peters was responsible to coordinate Ms. Smith's work between the 3 programs. Initially, he provided her with little guidance but later felt she was not devoting 25% time to the Business Office and she was slow to learn the Lotus computer program required in the Business Office. Accordingly, the 3 supervisors met and developed performance

^A The wording was changed to clarify that in issuing its final decision, the full Commission agreed with the examiner's conclusion.

- standards for Ms. Smith's position which were given to her during the first half of October 1992, at which time each of the supervisors reviewed her performance, pointed out perceived deficiencies and clarified expectations of improvement. Her conference with Mr. Peters occurred on October 7, 1992, followed by her conference with Ms. Frederick on October 9, 1992, and with Ms. Palmer on October 13, 1992.
6. Mr. Peters felt Ms. Smith's performance remained deficient during the 30 days after she received the written performance standards. He conferred with the personnel manager at MCC, Marge Karowsky, who advised him that the supervisors should prepare and conduct formal written performance evaluations. Each supervisor complied with the suggestion. The formal evaluation prepared by Ms. Palmer was discussed with Ms. Smith on November 19, 1992, as was the formal evaluation prepared by Mr. Peters. The formal evaluation prepared by Ms. Frederick was discussed with Ms. Smith on December 11, 1992.
 7. Ms. Frederick had supervised Ms. Smith when the Sea Grant office was located in Sister Bay, Wisconsin. The written evaluation prepared by Ms. Frederick reflected her overall feeling that Ms. Smith's performance for the Sea Grant office was "o.k.", but that Ms. Smith had difficulty moving comfortably and independently between the 3 programs and in transferring skills learned in one program to another. Ms. Smith's written reply to this evaluation (Exh. C-5) is noted below:

Tasks in Sea Grant office in this new location are basically the same as I have performed satisfactorily for the last 13 yrs. I have been in this position. In response to supervisor's comments . . . I submit the following comments: Most tasks are not similar between these 3 offices because content is not similar ie, Sea Grant's tasks consist of a technical, scientific nature; in Continuing Education office, course registration duties predominate; and Business Office duties include the handling of campus mail, compiling vehicle reports, accounting entries, etc. Skills used are similar ie, computer, typewriter, copy machine, etc. Telephone duties and subject matter of calls are different in each of the 3 offices.

Taking into consideration the fact that I am instructed to organize and seek my work daily in each of the 3 offices and the cross-over situations which occur in a working arrangement between 3 supervisors and the fact that all tasks are not repetitive on a daily basis ie, monthly or quarterly reports; I am

completing all work assigned to me and believe my performance is up to standard in this newly-created combined full-time position.

(Emphasis appears in original document.)

8. Mr. Peters noted in the evaluation he prepared (Exh. C-4) that Ms. Smith needed to increase her working speed to match the fast-paced Business Office. He also felt she needed to improve in accuracy and proficiency of the multiple tasks required of her in the Business Office. He acknowledged^B juggling 3 separate programs as part of her job was "not easy", but noted it "must be done". He specifically noted that on at least one occasion Ms. Smith appeared unable or unwilling to help a customer in the Business Office and that she was slow to learn the routine office tasks. Data entry using knowledge of Word Perfect and Lotus programs also were identified as specific problem areas in the Business Office. Ms. Smith's written reply to these criticisms was lengthy. Basically, she felt her performance at the Business Office was adequate. She explained the customer incident to Mr. Peters, felt justified in the action she took and asked him to remove the criticism from her evaluation which he declined to do. Her written reply also noted she was hired with the expectation that she did not know Lotus and that the Business Office would provide training which in Ms. Smith's opinion had been too scant and sporadic. She also stated that lack of direction from the supervisors on how she could coordinate her work between offices was responsible for a large part of the noted problems.
9. Ms. Palmer's evaluation of Ms. Smith (Exh. C-4) indicated dissatisfaction with Ms. Smith's knowledge of Word Perfect required for duties in the Continuing Education Office. Ms. Smith was hired with the understanding that she was proficient in Word Perfect which she had used at the Sea Grant Office in Sister Bay. Ms. Palmer's evaluation further noted frustration with having to re-train Ms. Smith repeatedly on performance of basic tasks. Ms. Smith's written reply to this evaluation included some of the same general comments as written in

^B The verb tense was corrected here.

reply to Ms. Palmer's^C evaluation of her work. Her comments specific to the Continuing Education portion of her position are shown below:

I believe & informed employer at time of hire 8/17/92 as a typist-1, that I do possess basic computer skills needed at start of employment. I have had courses in Word Info. Processing Theory & Word Processing App. I, Word Perfect: An Introduction & just completed course in DOS at UWC-Manitowoc at request of (Ms. Palmer). I have also, during the time this report was prepared, worked with the Merge function. I asked supervisor to take out BOLD & UNDERLINE. I cannot understand why it was put in report at all, as I have used these formats in previous employment and presently without any problem.

10. At the time of the written evaluations, Ms. Smith's performance was below standards. Part of her performance problems were due to difficulties coordinating between her 3 program areas, a problem management shared the responsibility for by failing to provide adequate guidance. Ms. Smith's knowledge of Word Perfect was below expectations. Her experience working with Word Perfect at the Sister Bay office was limited in time and scope. Her 14 years at the Sister Bay office mostly involved typing on a conventional typewriter with the computer a relatively new addition. Ms. Frederick was the one who performed basic programming functions for Ms. Smith such as setting up margins and tabs, as well as use of the bold and underlining functions. Further, Ms. Smith was slow to learn the programming functions not only of Word Perfect, but of the other programs needed in the new position. She repeatedly asked for instructions on the same tasks, rather than writing down the prior instructions for her own future reference. Ms. Smith's problems learning LOTUS for the Business office duties was due, in part, to inadequate training.
11. By December 18, 1992, all three supervisors agreed that Ms. Smith was not the right person for the job due to the split between program areas. Ms. Frederick continued to feel Ms. Smith's performance in the Sea Grant Office was satisfactory. Mr. Peters and Ms. Palmer continued to note performance problems of the same nature described in the prior

^C "Mr." was changed to "Ms.", to correctly reflect Ms. Palmer's sex.

- paragraphs to such degree that her performance for the Business Office and Continuing Education program was unsatisfactory. Accordingly, Ms. Smith was terminated during her probationary period, effective January 9, 1993. She received initial notice of this decision by memo from Mr. Peters dated December 18, 1992 (Exh. R-23). A formal letter of termination was sent to Ms. Smith on December 28, 1992 (Exh. R-24).
12. MCC provided Ms. Smith with notice of her reinstatement rights to the Sea Grant program in Madison, as part of the formal termination letter. She received notice by letter dated January 5, 1993, that her restoration rights would be given effect by the Sea Grant program in Madison. Ms. Smith declined to exercise her restoration rights because she did not want to relocate to Madison. She could not have returned to the field office in Sister Bay because it no longer existed.
 13. Ms. Smith believed she was harassed and terminated because of her sex due to the circumstances described in Exh. R-21, which are briefly summarized in this paragraph. On or about December 12, 1992, Dean Roland Baldwin overheard Ms. Smith take a business call and refer to the caller as "honey". He previously had heard other staff express concern that Ms. Smith referred to business callers as "honey" and "hon". Dean Baldwin pointed out to Ms. Smith that such language could be interpreted as "sexist" and was inappropriate. Ms. Smith interpreted Dean Baldwin's correction as sex harassment or discrimination against herself. She argued that the Dean's use of the term "sexist" was offensive to her as a woman or was offensive as "name calling". Even by the time of hearing she failed to understand that she could be perceived as an alleged wrongdoer by referring to callers as "honey" or "hon". This was her sole evidence of sex harassment and sex discrimination.
 14. Ms. Smith's evidence of age discrimination was threefold. First, she felt she was performing satisfactorily, yet was terminated. Second, she felt Ms. Palmer and Mr. Peters compared her job performance unfairly to students who purportedly were faster learners and whom Ms. Smith believed to be younger than herself. Third, Ms. Smith believed she was replaced by younger students under the work-study program, who received a smaller wage. Her first contention already has been rejected.

The second and third contentions are addressed in the following paragraphs.

15. Mr. Peters and Ms. Palmer did tell Ms. Smith she caught on slower than students. Mr. Peters' reference, however, included students who were older than Ms. Smith. The pool available against which Ms. Smith's progress could be compared was students, which included students younger than Ms. Smith. It was reasonable for Mr. Peters and Ms. Palmer to use the available group as a check to see whether their expectations of Ms. Smith were reasonable. Furthermore, Ms. Palmer verbalized such comparison to Ms. Smith only once during the evaluation. Mr. Peters brought such comparison to Ms. Smith's attention at least once (Exh. R-19), but not on a daily or weekly basis.
16. Ms. Smith's 50% position with Sea Grant on the MCC was unfilled until mid-July 1994, because the Madison campus was unsatisfied with aspects of Ms. Frederick's performance and was uncertain as to the future of the program on the MCC. Ms. Frederick was terminated effective in early July 1994. The 50% position previously held by Ms. Smith was filled on a temporary basis starting at the end of July 1994, by Vernetta Stauss, who was older than Ms. Smith. At the time of hearing, the process had just begun to fill the position on a permanent basis. It was not filled initially on a permanent basis because the Sea Grant program in Madison was unsure when a replacement for Ms. Frederick would be hired. Ms. Stauss, in the meantime, performed inventory, answered calls and performed other tasks to get the office ready for Ms. Frederick's replacement.^D
17. Ms. Smith's 25% permanent position in the Continuing Education program was not continued after her termination. However, Ms. Palmer obtained clerical support utilizing a work-study student 10 hours a week. The student was younger than Ms. Smith. The wages of work-study students were paid, in part, by the federal government thereby representing a savings to MCC. No budget deficiency existed in the Continuing Education program but MCC did not wish to hire a permanent employe for only 10 hours of work per week.

^D The spelling of Ms. Stauss' name was corrected.

18. Ms. Smith's 25% permanent position in the Business Office was not continued after her termination. Nor were additional students hired to replace her. Instead, existing staff absorbed the duties Ms. Smith had been expected to perform previously.
19. James Anhalt, Comptroller for UW-Systems, noticed in February or March 1993, that the MCC budget for the Business Office was overdrawn due to the permanent 25% position previously held by Ms. Smith. The budget problem existed because a revenue source was used to fund Ms. Smith's salary which generally is reserved for indirect costs and not for salaries. Mr. Peters had been aware that the salary line of his budget appeared deficient prior to February 1993, but had believed the deficiency already covered by other budget items. He was unaware of the reason for the deficiency until after Mr. Anhalt explained it in February or March 1993.
20. Ms. Frederick and Ms. Smith worked together a long time and had become friends. At the time of hearing, Ms. Frederick had a harassment claim pending against UW-Madison in regard to her own termination. Ms. Frederick did not believe Ms. Smith was harassed due to her age or sex, or that Ms. Smith was terminated due to her age or sex. Ms. Frederick did not hear any comments to that effect either before or after Ms. Smith was terminated.

CONCLUSIONS OF LAW

1. This case is properly before the Commission pursuant to s. 230.45(1)(b), Stats.
2. Ms. Smith is eligible for potential protection under the FEA by virtue of her sex and age.
3. It was Ms. Smith's burden to prove by a preponderance of the evidence that she was harassed and/or discriminated against on the basis of her age and/or sex, as alleged in her Complaint; a burden she failed to meet.
4. Respondent did not discriminate against or harass Ms. Smith on the basis of her age or sex.

DISCUSSION

Analytical Framework

The analytical framework for discrimination cases was laid out in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973). This

framework provides that the burden is first on the complainant to show a prima facie case; that this burden then shifts to respondent to rebut the prima facie case by articulating a legitimate, non-discriminatory reason for its action; and that the burden then shifts back to complainant to show that respondent's reason is a pretext for discrimination.

Sex Harassment:^E The term "Sexual harassment" is defined in s. 111.32(13), Stats., as shown below:

"Sexual harassment" means unwelcome sexual advances, unwelcome physical contact of a sexual nature or unwelcome verbal or physical conduct of a sexual nature. "Unwelcome verbal or physical conduct of a sexual nature" includes but is not limited to the deliberate, repeated making of unsolicited gestures or comments, or the deliberate, repeated display of offensive sexually graphic materials which is not necessary for business purposes.

Sex harassment is prohibited under s. 111.36, Stats., as shown below in pertinent part.

(1) Employment discrimination because of sex includes, but is not limited to, any of the following actions by any employer . . . or other person:

* * *

(b) Engaging in sexual harassment; or implicitly or explicitly making or permitting acquiescence in or submission to sexual harassment a term or condition of employment or the basis or any part of the basis for any employment decision affecting an employe; or permitting sexual harassment to substantially interfere with an employe's work performance or to create an intimidating, hostile or offensive work environment. . . .

Age Harassment: The prima facie case for a claim of harassment requires the record to show: 1) complainant is a member of a class protected by the FEA, 2) she was subjected to unwelcome verbal or physical conduct of a nature based on the protected class, 3) but for complainant's protected class, she would not have been subjected to such conduct, 4) the conduct complained of was sufficiently severe or pervasive that it unreasonably interfered with

^E The legal analysis for sex harassment was changed to conform with statutory language. No statutory definition exists for age harassment and, accordingly, that portion of the discussion was unchanged.

her work performance or created an intimidating, hostile or offensive work environment and 5) (where complainant seeks to hold respondent liable for a hostile working environment created by a supervisor), complainant must show that the respondent knew or should have known of the harassment yet failed to take prompt, remedial action. Carlson v. The Three Star, Inc., (LIRC 8/27/86).

Discriminatory Discharge: The prima facie case for a claim of *discrimination in relation to termination*, requires the record to show: 1) complainant is a member of a class protected under the FEA, 2) complainant performed the job satisfactorily, 3) complainant was discharged, and 4) after the discharge, complainant was replaced by an individual not in complainant's protected class. Hatcher v. Greater Cleveland Reg. Transit Auth., 746 FSupp 679, 684 (ND Ohio, 1989).

Ms. Smith's Harassment Claim

Based on sex:^F Ms. Smith was not the victim of sexual harassment. Rather, Dean Baldwin took reasonable steps in an attempt to correct Ms. Smith's telephone behaviors which others found offensive or demeaning. The credible evidence in the record leads the Commission to conclude that Dean Baldwin would have been concerned if any employe referred to business callers over the phone as "hon" or "honey", whether the employe was male or female. His concerns about potential claims of discrimination resulting from such continued behavior would have existed even if Ms. Smith had been a male.

Based on age: Ms. Smith has met the first element of her prima facie case showing potential FEA protection on the basis of her age. Arguably, the second element of her case was established due to the comparisons made by Mr. Peters and Ms. Palmer to her learning rate as compared to the learning rate of student workers in similar positions, comments which she did not like to hear. She failed to establish the next two elements of her prima facie case, as discussed in the following paragraph.

The credible evidence in the record leads the Commission to conclude that the comparisons made by Mr. Peters and Ms. Palmer would have been

^F Same text as prior footnote.

made to a new employe in a new position having performance problems even if the new employe were younger than Ms. Smith because the group available for comparison included students, some of whom were older than Ms. Smith yet performed successfully. Furthermore, such comparisons were not discussed so frequently with Ms. Smith as to justify a conclusion that such comments created an intimidating, hostile or offensive work environment.¹

Ms. Smith's Discharge Claim

Based on sex: The credible record evidence does not establish a prima facie case of sex discrimination in regard to Ms. Smith's discharge. The first element of the prima-facie case was established because sex is a protected basis under the FEA. Ms. Smith, however, failed to show that she performed her job duties satisfactorily. Furthermore, she was not replaced in the Business Office and while she was replaced in the Continuing Education program and, later, in the Sea Grant program, the replacements were women.

Based on age: The credible record evidence does not establish a prima facie case of age discrimination in regard to Ms. Smith's discharge. The first element of the prima-facie case was established because of her age. However, as noted above she failed to show that she performed her job duties satisfactorily. Further, she was replaced in the Sea Grant Office^G by an older person. Respondent's failure to replace her in the Business Office was due to budget problems unrelated to her age, as evidenced by the fact that the budget deficiency was not discovered until after Ms. Smith was terminated.

¹ In reaching this conclusion, the hearing examiner notes she found Ms. Smith's contrary testimony unreliable. Ms. Smith indicated she was compared to students on a daily basis. Her perceptions in general, however, were out of proportion with her experiences at MCC. Further, Ms. Palmer credibly testified she only discussed such comparison with Ms. Smith during the November 1992 evaluation. The record shows at least one occasion when Mr. Peters compared Ms. Smith to student employes (Exh. R-19) It is unlikely such comments were made daily by Mr. Peters because Ms. Smith only worked for him 10 hours per week. Ms. Smith did not allege that such comparisons were made by Ms. Frederick.

^G The name of the office referred to was corrected.

ADDITIONAL COMMENTS^H

Some of the arguments raised in Ms. Smith's most recent brief address matters which go beyond the scope of hearing. She continues to assert that respondent holds some responsibility for performance problems she might have experienced on the job, for example, by providing her with inadequate training. The proposed decision and order contains findings which support her viewpoint. The hearing issue, however, was not whether respondent engaged in poor managerial practices.

The ultimate issue was whether discrimination occurred. Discrimination was not shown by the hearing record, for reasons already explained in the proposed decision and order.

ORDER

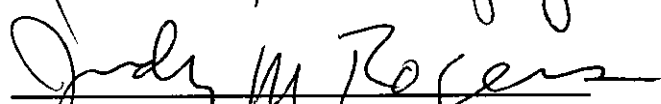
That Ms. Smith's Complaint be dismissed.

Dated April 17, 1995.

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

Parties:

Nancy Smith
11727 Juice Mill Lane
Ellison Bay, WI 54210

Katharine Lyall
President, UW System
1700 Van Hise Hall
1220 Linden Drive
Madison, WI 53706

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

^H This section was added to address the main legal arguments which Ms. Smith submitted to the full Commission after the proposed decision was issued.

Petition for Rehearing. Any person aggrieved by a final order (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) 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.)

2/3/95