

STATE OF WISCONSIN

PERSONNEL COMMISSION

EDWARD LEDWIDGE,
Complainant,

v.

**Chancellor, UNIVERSITY OF
WISCONSIN-MADISON and
Chairperson, UNIVERSITY OF
WISCONSIN HOSPITAL AND CLINICS
BOARD¹,**
Respondents.

DECISION AND ORDER

Case No. 96-0066-PC-ER

NATURE OF THE CASE

This is a complaint of age and handicap discrimination. A hearing was conducted on April 2, 1998, by Laurie R. McCallum, Chairperson. The parties gave final argument orally at the conclusion of the hearing.

FINDINGS OF FACT

1. It is undisputed that complainant suffers from a handicap as the result of a work-related back injury. Complainant's date of birth is July 9, 1946.

2. In October of 1995, in response to his inquiries about available positions, complainant was invited to interview for a Program Assistant 1 (PA 1) position in the Purchasing Department of the University of Wisconsin Hospital and Clinics (UWHC). The position description for this position indicates that over 65% of the position incumbent's time would be devoted to data entry, electronic record review, and

¹ Effective June 28, 1996, what was known as the UW Hospital was divided into two entities; the UW Hospital and Clinics Authority (UWHCA) and the UW Hospital and Clinics Board (UWHCB). The position at the UW Hospital at issue in this case is part of the UWHCB entity and, accordingly, was added as a party to this case.

electronic release of information maintained in the Materials Management Information System (MMIS). Complainant was one of three candidates interviewed for this position. Each of these three candidates had reinstatement eligibility at the time of the interviews.

3. Complainant was advised, during the telephone conversation scheduling his interview, that this would be a job interview for a PA 1 position, that anyone with computer experience would be able to do the job, that the most important criterion would be the ability to get along with others in the workplace, and that he should bring a current resume to the interview. Complainant was not provided with a copy of the PA 1 position description until he arrived at the interview.

4. Complainant's interview occurred on October 30, 1995. The resume complainant provided to the interviewers did not indicate that he had any computer-related experience, and complainant did not refer to any such experience during his interview. Complainant was interviewed by Edwina Empereur, Purchasing Administration Supervisor, who functioned as the administrative assistant to the Purchasing Director; and William Rosko, Purchasing Director. Ms. Empereur was 53 years of age at the time of the interview and Mr. Rosko was 49. The qualifications Ms. Empereur was focusing on during the PA 1 recruitment were good computer skills, ability to make decisions, good phone skills, and good general office skills. The qualifications Mr. Rosko was focusing on were dependability and some computer experience.

5. During his interview, complainant volunteered that he had suffered a work-related back injury. At some point during complainant's interview, one of the interviewers explained that the building they would be in until the planned move to another location took place did not have an elevator and asked him whether he would have any problem walking up the stairs. Complainant indicated that he would not. Respondent had an office located on the first floor of the building in which they planned to locate any employee who was unable to walk up the stairs. After complainant's interview, he was taken on a tour of the work premises. During this tour, one of the

interviewers asked him whether he would have any trouble sitting and complainant explained that the Division of Vocational Rehabilitation would be able to provide a suitable chair.

6. On October 31, 1995, respondent interviewed candidate David Wilcox for this PA 1 position. Mr. Wilcox's resume indicated that he was familiar with a variety of computer systems and software, and had previous work experience in a Program Assistant 1 position in state service which involved both computer-related and general office duties. During his interview, Mr. Wilcox demonstrated enthusiasm not only for the PA 1 position but for computer-related work in general.

7. Mr. Wilcox was offered the PA 1 position and he accepted it. Mr. Wilcox appeared to be substantially younger than complainant. The record contains no information about Mr. Wilcox's handicap status.

8. In or around January of 1996, complainant applied for and was certified for a position in the Buildings and Grounds Superintendent 4 (BGS 4) classification. This position was located in the Division of Housing of the UW-Madison and was assigned to the Lakeshore Area. The BGS 4 classification was assigned to a pay range six levels higher than the Facilities Repair Worker 4 (FRW 4) position complainant held at the time of his separation from state service in November of 1992. Due to his work-related injury, complainant's last day of work in this FRW 4 position was January 15, 1990, and he had been on medical leave between January 16, 1990, and November 1, 1992.

9. In the resume he submitted as part of the recruitment for this BGS 4 position, complainant summarized the duties and responsibilities of his former FRW 4 position as follows:

- Coordinate all facilities for the Department of Physical Education and Dance. Liaison for the Department Chairman including the responsibility for the operations and maintenance of Lathrop Hall for all instructional programs
- Hire and supervise (12) student security guards for all buildings occupied by the department.
- Supervise (6) full time employees.
- Responsible for full time and student hourly personnel time sheet reports.

- Train all staff State of Wisconsin safety and security procedures.
- Purchase most of the equipment for physical education classes.
- Assistant Chairman with purchase of yearly Capital purchases.
- Maintain all inventory records and purchase supplies as necessary for proper function and instructional needs.
- Perform minor equipment repairs (copiers, computer printers, etc.).
- Modify unused building space. Update blue prints as necessary.
- Provide necessary information to all State Agencies in preparation for major remodeling projects. Prepare proper documents for the State of Wisconsin Building Commission.
- Schedule Lathrop Theater for public dance concerts including stage set-up/strike, ticket sales and nightly money deposits.
- Assign and maintain records of department building keys for all faculty, staff and nightly building users.
- Provide information regarding building user fee and schedule.
- Issue Univ. of Wis. Building pass to all building occupants for after hour building use.
- Provide information to Fiscal Clerk for billing user fee for building and personnel charges.
- Allocate funds in a responsible manner and maintain accurate income and expense records.
- Responsible for collection and deposit of all special fees.
- Function in a "on call" status for all security and safety in Lathrop Hall, Schumann Shelter, and all other facilities in which the Department of Physical Education and Dance occupies.
- Coordinate transportation of all staff and students for trips to area schools and in/out of state travel to other campuses.

10. In his written answers to questions presented to each applicant as part of this BGS 4 recruitment, complainant indicated that the positions he supervised as a FRW 4 consisted of one Custodial Supervisor 4 and five Building Maintenance Helper 2 (BMH 2) positions. In his interview, complainant indicated that he had supervised 12 to 20 student security guards, 6 BMH 1 positions, and 2 Housekeeping Services Supervisor positions.

11. The position summary of the BGS 4 position for which complainant applied stated as follows:

Under the general supervision of the Assistant Director - Physical Facilities, the Manager of Physical Facilities in the Lakeshore Area supervises skilled and semi-skilled employees involved in the repair,

maintenance and operation of 21 buildings containing 762,000 square footage and 24 acres of surrounding grounds in the Lakeshore area providing housing and food service for 2700 residents (students); plans and directs the area's engineering activities; assists the Assistant Director with planning, budgeting and managing housing operations.

This position supervises 1 Housekeeping Services Supervisor 2 who supervises 36 subordinate employees, including 4 Housekeeping Services Supervisor 1's and 1 Custodial Supervisor 1; 1 Maintenance Supervisor 2 who supervises 5 Maintenance Mechanic 2's, 1 Storekeeper, and 1 Locksmith-Journey; 1 Construction Representative-Developmental who supervises 2 Painters and 1 Carpenter; 1 Program Assistant 2; and 1 Program Assistant 1. The Lakeshore area consists primarily of student residence halls, including food service operations.

12. The successful candidate for this position was Michael Kinderman. The record does not indicate Mr. Kinderman's age or handicap status. Mr. Kinderman has a Bachelor of Science degree from the University of Wisconsin-Stout in Industrial Technology/Plant Engineering, and an Associate Degree in Air Conditioning Technology. His most recent work experience had been as a Project Coordinator for the Division of Housing, Lakeshore Area, at the University of Wisconsin-Madison since 1993. Mr. Kinderman summarized his duties and responsibilities in this position in the resume he submitted as part of this BGS 4 recruitment as follows:

- Responsible for all capital budget construction and remodeling projects.
- Coordinate the hiring and scheduling of trades personnel and monitor both the quality and progress of work.
- Supervise area painters and carpenters.

13. Complainant and Mr. Kinderman were interviewed for this BGS 4 position by Paul Evans, Assistant Director, Physical Facilities, Lakeshore Area; Joe Cooper, Housekeeping Services Supervisor 2, Lakeshore Area; and Mark Engbring, Maintenance Supervisor 2, Lakeshore Area. At the time of these interviews, Mr. Evans was 41 years of age, Mr. Cooper was 44, and Mr. Engbring was 43. The

interview scores (adjusted for the fact that question 7 was not supposed to be scored) were as follows:

	Edward Ledwidge	Michael Kinderman
Paul Evans	10	18
Joe Cooper	8	14+
Mark Engbring	9	18

14. During the course of his interview, complainant indicated that he had been out of work for two years due to a work-related injury.

15. Mr. Kinderman's interview performance and relevant qualifications were superior to complainant's for this BGS 4 position.

16. Mr. Kinderman was reassigned some time after he was hired for the BGS 4 position and, as a result, this BGS 4 position became vacant again. Complainant's name remained on the register so he was contacted by respondent some time in April of 1996 and asked whether he wanted to be considered for this vacancy and, if so, whether he wanted a second interview. Complainant indicated that he did want to be considered and that he did want a second interview.

17. The resume that complainant submitted as part of this second BGS 4 recruitment added certain language to his description of the duties and responsibilities he had been assigned in his former FRW 4 position. This language, as relevant here, is that which occurs in italics in the following list:

- Coordinator of all facilities for the Dept. of Physical Education and Dance including the responsibility for operations and maintenance of all *Phy Ed facilities, grounds and instructional equipment.*
- Hire* and supervise six to ten full time employees.
- Hire and supervise ten to 20 student security positions for all facilities occupied by the department.
- Discipline and terminate employees when necessary.*
- Evaluate each employees performance yearly.*
- Assist Dept. Chairman with yearly capital purchases *and major remodeling plans.*

Responsible for all building maintenance including preventive maintenance. Developed card file and computer maintenance program for HVAC, electrical, plumbing etc. in all facilities. Schedule maintenance and housekeeping during break periods. Supervise all grounds work on outdoor fields used by the dept. Set fee [building user fee] and approve nondepartmental building users. Deposit and keep record of all locker rental and towel fees. Budget and allocate funds in a responsible manner and maintain accurate accounting records. Budget and coordinate transportation for all staff and students daily trips to area schools and in/out of state travel to other campuses.

18. In a written summary of his qualifications included as part of the information he provided for this recruitment for the second BGS 4 vacancy, complainant indicated that, in his former FRW 4 position, he had supervised journey craft workers in all building trades as well as technical and semi-skilled employees; and had been responsible for the budgeting and scheduling of several major remodeling projects. In response to an interview question, complainant clarified that he had not directly supervised craft/trade workers or maintenance mechanics but that Physical Plant employees had been assigned to the projects with which he had been involved, and that he had directly supervised a Custodial Supervisor 1 who had supervised subordinate Building Maintenance Helpers.

19. The successful candidate for this position was Daniel Lewillin. The record does not indicate Mr. Lewillin's age or handicap status. Mr. Lewillin was employed at the time of this recruitment as a Superintendent of Buildings and Grounds 3 with the Department of Administration (DOA), supervising a steamfitter, plumber, 2 electricians, 3 Maintenance Mechanic 3's, 3 Maintenance Mechanic 2's, and 2 Facility Repair Workers, and co-supervising a carpenter, a mason, and a painter; had been previously employed as a Maintenance Supervisor 2 in the HVAC Department at the UW-Madison, supervising 5 Maintenance Mechanic 3's, 17 Maintenance Mechanic 2's, lead workers, and students; and had been employed before that as a Maintenance Supervisor 2 in the Lakeshore Area, supervising 5 Maintenance Mechanic 2's, a painter, and student employees. Mr. Lewillin's resume indicated that, as a BGS 3 for

DOA, he was responsible for the operation, repair and maintenance of 780,000 square feet of office space in four buildings occupied by 6 different state agencies with more than 3500 employees; that, as a Maintenance Supervisor 2 for the UW-Madison, he was responsible for all mechanical maintenance to the heating, ventilation and air conditioning systems for 156 office, classroom, and research buildings; and that, as a Maintenance Supervisor 2 for the Lakeshore Area, he was responsible for the remodeling, maintenance, and repair of the mechanical and structural components of 18 dormitory buildings which included 3 food service/dining facilities.

20. Complainant and Mr. Lewillin were interviewed for this second BGS 4 position by Mr. Evans and Mr. Cooper. Both candidates were asked the same questions and their answers to the interview questions were scored. Their interview scores (adjusted again for the fact that question 7 was not supposed to be scored) were as follows:

	Edward Ledwidge	Daniel Lewillin
Paul Evans	12	17+
Joe Cooper	9+	17

21. Complainant indicated during his interview that he had been out of work for two years due to a work-related injury.

22. Mr. Lewillin's relevant qualifications and interview performance were superior to complainant's for this second BGS 4 position.

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §230.45(1)(b), Stats.
2. Complainant has the burden to show that he was discriminated against as alleged.
3. Complainant has failed to sustain this burden.

OPINION

Under the Wisconsin Fair Employment Act (FEA), the initial burden of proof is on the complainant to show a prima facie case of discrimination. If complainant meets this burden, the employer then has the burden of articulating a non-discriminatory reason for the actions taken which the complainant may, in turn, attempt to show was a pretext for discrimination. *McDonnell-Douglas v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 5 FEP Cases 965 (1973), *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 25 FEP Cases 113 (1981).

In the context of this complaint, in order to show a prima facie case, complainant would have to show that he is a member of a protected class, that he was qualified for the positions under consideration and, despite his qualifications, he was rejected under circumstances which lead to an inference of discrimination.

Program Assistant 1 Position

It is undisputed that complainant is a member of a protected class based on his age at the time of the recruitment for this position, i.e., 49, and on his handicap. Since he was interviewed for the position, it will be presumed that he was qualified for it. Since it was apparent to the interviewers that complainant was substantially older than the successful candidate, it is concluded that the circumstances present here lead to an inference of age discrimination, and that complainant has made out a prima facie case of age discrimination. However, since the handicap status of the successful candidate is not contained in the record, it is concluded that the circumstances do not create an inference of handicap discrimination, and that complainant has failed to make out a prima facie case of handicap discrimination. However, for purposes of analysis, the handicap issue will be fully discussed below as if complainant had made out such a prima facie case.

Respondent has indicated that Mr. Wilcox was hired for this position due to his superior qualifications and interview performance. These reasons are legitimate and non-discriminatory on their face.

The burden then shifts to complainant to demonstrate pretext. Complainant argues in this regard that computer skills were emphasized more strongly in respondent's justification of the hiring decision than they were during the recruitment. However, the position description for this PA 1 position places a heavy emphasis on computer duties and responsibilities. As found above (see Finding of Fact 2), over 65% of the position incumbent's time would be devoted to computer-related work. In addition, in complainant's own post-interview notes, he indicates that he was told during the phone conversation setting up the interview that, "anyone with computer experience would be able to do the job." The record here shows that the resume complainant submitted as part of this recruitment does not mention computer skills or knowledge. Although complainant testified that he mentioned his computer skills and knowledge during the interview, this is not credible both because the interview notes in the record are devoid of any reference to complainant's computer skills or knowledge and because complainant's testimony was marked by inconsistencies and misstatements. In contrast, the successful candidate's resume places a strong emphasis on his computer skills and knowledge, and the notes of his interview indicate that this was a focus of discussion during his interview. Complainant has failed to demonstrate pretext in this regard.

Complainant also argues that pretext is demonstrated by the fact that he was misled during the phone conversation setting up the interview into believing that it would not be an actual job interview, that he was the only candidate for the position, and that the only hiring criterion would be his ability to get along with others in the work unit. However, complainant's own post-interview notes classify the meeting as a "job interview." In addition, these notes reference both the ability to get along with others and computer experience as hiring criteria. Finally, it is not clear how complainant got the impression that he would be the only candidate, although it appears

from his testimony that he assumed, since he was eligible to reinstate, that he would get the job if he had the minimal qualifications. However, the record shows that eligibility for reinstatement does not mean that an individual is entitled to a job. Again, pretext has not been demonstrated.

Finally, complainant points to the references to climbing stairs and to sitting as evidence that he was rejected for the position due to his handicap. However, it should first be noted that complainant himself introduced the topic into the interview by volunteering that he had been out of work for two years due to a work-related back injury. Once that information was volunteered, inquiries as to possible accommodations do not constitute evidence, without more, that complainant was discriminated against based on his handicap.

Complainant has failed to show here that he was a better qualified candidate for the PA 1 position than Mr. Wilcox. Given the ages of Ms. Empereur and Mr. Rosko at the time of the hiring decision, i.e., 53 and 49, respectively, it is highly unlikely that they would have discriminated against complainant based on his age. Not only did complainant fail to make out a prima facie case of handicap discrimination, the record does not establish a causal connection between complainant's handicap and the subject hiring decision. Complainant has failed to show that he was discriminated against based on his age or handicap in regard to the PA 1 position.

Building and Grounds Superintendent 4 Positions

Here, complainant has failed to demonstrate a prima facie case since he has failed to make a part of the record the ages or handicap status of Mr. Kinderman or Mr. Lewillin. However, consistent with the approach taken above, the analysis of the discrimination issues will be completed in regard to these two hiring decisions as well.

Respondent has indicated that complainant's qualifications and interview performances were inferior to those of the successful candidates. These reasons are legitimate and non-discriminatory on their face.

Complainant argues first that, since his previous FRW 4 position was virtually identical to these BGS 4 positions, he was the best qualified candidate for these positions. However, the record does not support this contention. First of all, it is unlikely that the level of responsibility of a position would be closely comparable to that of a position in a classification 6 pay ranges lower. Second, it is apparent from comparing the number and types of positions supervised; the numbers, sizes, and functions of the buildings in the respective areas of responsibility; the level and scope of decision-making; and the extent of the technical expertise required, that these two positions were not closely comparable. Complainant has failed to demonstrate pretext in this regard.

Complainant also appears to be arguing that he was not seriously considered for the second vacancy since he was given a “summary” interview. However, this contention is not borne out by the evidence in the record, i.e., the notes of complainant’s second interview contain entries for each interview question which are as detailed as those for complainant’s first interview and as those for the successful candidate.

Complainant also appears to be arguing that the fact that individuals who had previously been employed by the Division of Housing in the Lakeshore area were the successful candidates for these two positions demonstrates pretext. This argument, however, seems inconsistent with complainant’s contention that he was discriminated against on the basis of his age or handicap, i.e., complainant seems to be arguing in this regard that he was discriminated against based on his failure to have worked in this unit before. In addition, it would lead to an absurd result if it were concluded that hiring current or former employees of a particular unit was a discriminatory practice. Often, current or former employees have the most relevant experience and it is not *per se* improper to consider this experience in making a hiring decision.

The record here shows that the qualifications of the two successful candidates were clearly superior to complainant’s. As concluded above, it is highly unlikely, given the ages of interviewers Evans, Cooper, and Engbring at the time, i.e., 41, 44,

and 43, respectively, that they would have discriminated against complainant on the basis of his age. Moreover, complainant has failed to make out a prima face case of age or handicap discrimination through his failure to introduce into the record evidence of the age or handicap status of the successful candidates. Complainant has failed to sustain his burden to show that he was discriminated against on the basis of age or handicap in regard to either of the BGS 4 hiring decisions.

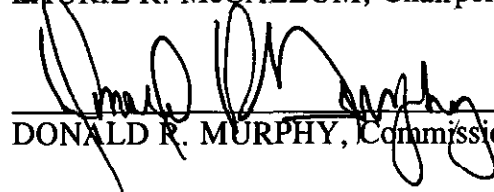
ORDER

This complaint is dismissed.

Dated: May 20, 1998

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

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OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

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