

**TED L. RUPORT, SR.,**  
*Complainant,*

v.

**President, UNIVERSITY OF WISCONSIN  
SYSTEM (Superior)**  
*Respondent.*

FINAL  
DECISION  
AND ORDER

Case No. 96-0137-PC-ER

NATURE OF THE CASE

The issue in this case is whether respondent discriminated against complainant on the basis of age when complainant was not hired for one of four LTE (limited term employe) security officer positions at UW-Superior in the fall of 1996.

FINDINGS OF FACT<sup>1</sup>

1. Complainant was born on December 3, 1947.
2. Complainant started working at the University of Wisconsin-Superior in July of 1981 as a building and grounds officer and Security Officer limited term employe (LTE) and continued until he was "upgraded" as a Police Officer 1 (LTE) in 1986 and a Police Officer 2 (LTE) in 1989 after he completed Police Recruit School. The titles of complainant's positions during this period were changed in order to permit compliance with the 1044-hour employment limit for LTEs.
3. Until July of 1990, the campus Police Department was supervised by Harold Larson.
4. During the period ending in 1991, the Police Department had five full-time Police Officers and one LTE.

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<sup>1</sup> The parties stipulated at the hearing to a large part of the findings in the initial determination. This stipulation is reflected in the following findings of fact.

5. Complainant was not rehired in 1991 because he had run out of LTE hours and there was a hiring freeze.

6. From February of 1991 until November of 1995, the Police Department was under the supervision of Don Kernler.

7. During the days leading up to June 9, 1996, the campus Police Department was staffed by three full-time and 3 LTE police officers.

8. James Lund, Dean of Students, became responsible for the campus Public Safety Department in 1996. He initiated a change in the orientation of the Public Safety Department from a law enforcement body to a security role with an emphasis on counseling students rather than law enforcement. There were several program reasons for this change, including saving money (security officers were paid less than police officers). Also, he felt that the department had been functioning more like a police force than a public service unit, and he was concerned about people on campus being dealt with rudely and a resulting perception that the officers were not readily approachable. As a result of this change of focus for the department, when LTE security officers were hired to replace the LTE police officers, respondent placed an emphasis on finding candidates with good communications and interpersonal relations skills.

9. On June 9, 1996, the campus Police Department was converted to a Security Department and the Police Officers became Security Officers. Two of three full-time Police Officers voluntarily terminated their employment. To meet staffing requirements until full-time permanent Security Officers could be hired, respondent decided to hire additional LTE Security Officers.

10. In August of 1996, respondent solicited applications for four additional LTE Security Officers and complainant applied.

11. Complainant and 11 other applicants were interviewed by Joni Tazzell, Director of Residence Life and Campus Safety. Ms. Tazzell was born in September of 1957.

12. She had been employed by UW-Superior since 1983, but she had only been in charge of campus security since June 9, 1996. Before then, she had no asso-

ciation with the campus Police Department, had had little contact with complainant during his employment and knew nothing of complainant's overall work performance.

13. Each candidate was asked the same questions.

14. At the conclusion of each interview, Ms. Tazzell asked for the date of birth of each candidate. This allowed her to initiate a criminal record investigation.

15. Ms. Tazzell rated the candidates using a number scale with 1 being the least qualified and 10 being the most qualified.

16. Ms. Tazzell's scoring of complainant's interview placed him tied for 6<sup>th</sup> of the 12 candidates.

17. The successful candidates were the four persons with the highest scores as assessed by Ms. Tazzell. Those candidates, and their age at the time of the interview, are as follows:

Michael Bodin	(42 years old)
Gary Brill	(22 years old)
Bruce Edwards	(42 years old)
Josh Edwards	(20 years old)

18. At the time of the interview, complainant was 48 years old and Ms. Tazzell was 38. The ages of the other 7 unsuccessful candidates are unknown.

19. Ms. Tazzell prepared a contemporaneous document summarizing the results of the interviews. The document provides:

<u>Name</u>	<u>Score</u>	<u>Reasoning</u>
Bodin, Michael	8	Very knowledgeable about own experiences in service and life experiences. Wants position to serve campus community. Genuine, self-confident, feel very comfortable with communications.
Edwards, Bruce	8	Has worked on campus as LTE. Knowledge and respect of Law and understands role of security office. Has no problem associating with various age groups from young to old. Self-confident, communicates well.

- |               |   |   |
|---------------|---|---|
| A             | 4 | Worked in nursing home. Has good communications skills and knowledge of collegiate atmosphere. When asked about anything in background, his reply was that he was let go from nursing home for borrowing equipment inappropriately. |
| B             | 4 | Knowledgeable in area of security and very familiar with campus. Does not communicate well. Observed lack of motivation. Lacks self-confidence.   |
| C             | 6 | Seems he has a lot of knowledge about the Duluth-Superior area but seems unfamiliar with campus. Didn't get a real strong feeling about communication and kind of a role officer would take on.                                     |
| D             | 5 | Seems motivated to try a new area and seems eager to learn. Seems to be very outgoing. I found weaknesses of communication skill, approach to people - appeared to want to control others by not allowing them to speak.            |
| E             | 7 | Appeared to be a good communicator. Kind [of] also felt he was just settling for this type of job with his experiences. Feel he would have difficulty being out and about and in confrontational situation.                         |
| Edwards, Josh | 9 | Has a varied knowledge of people and working with a variety of situations. Picks up quick and feel he is hard working. References indicate generally very hard working and will give much more than asked. Communicates well.       |
| Brill, Garry  | 8 | Seems to use good judgement and seemed to be up-front. Communicated well and appears to work well with others. Has had experience with security. Had very positive feeling about candidate.   |
| F             | 6 | Really didn't get a good feel for this person. He seemed not to understand the questions asked and seemed very narrow in his thinking of what a security officer would be required to do. Lacks self-confidence and direction.      |

G 5-6 During interview felt like he could be intimidated quite easily. Had a hard time seeing big picture of what a security officer does. Seemed to lack motivation and not feel real comfortable in handling situation.

Ruport, Ted 6 Although this candidate has experience in security, he came across as very overbearing and controlling. Feel that he would alienate and receive a negative response from people in situations that he would have to deal with.

20. Ms. Tauszell did not review any personnel files as part of the hiring process.

#### CONCLUSIONS OF LAW

1. This matter is appropriately before the Commission pursuant to §230.45(1)(b), Stats.

2. Complainant has the burden of proof to show by a preponderance of the evidence that respondent discriminated against him on the basis of age when it did not hire him for the positions in question.

3. Complainant did not sustain his burden of proof.

4. Respondent did not discriminate against complainant on the basis of age when it did not hire him for the positions in question.

#### 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 a hiring decision, 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. *See, e.g., Halsell v. Kimberly-Clark Corp.*, 683 F.2d 285, 29 FEP Cases 1185 (8<sup>th</sup> Cir. 1982).

Complainant was 48 years old at the time of the hiring decision in question. He had extensive experience performing somewhat similar duties for respondent during a period of approximately 10 years ending in 1991. He was one of 12 applicants for four LTE Security Officer positions. He was not selected despite his relevant work experience, and all four successful candidates were younger than complainant, including two candidates who were in their early 20s. Complainant established a prima facie case.

At this point, respondent must articulate a legitimate, nondiscriminatory reason for its decision not to hire complainant. Respondent has satisfied its burden of proceeding by explaining that in 1996 it instituted a fundamental change in the orientation of the Public Safety Department, from a police department to a security department and this change was accompanied by replacing several police officers with security officers. In hiring these security officers, respondent stressed communication and interpersonal... capabilities. According to Ms. Lund, the immediate supervisor of these positions, complainant did not have a good interview with regard to these criteria. Her notes of his interview are as follows:

Although this candidate has experience in security, he came across as very overbearing and controlling. Feel that he would alienate and receive a negative response from people in situations that he would have to deal with. Respondent's Exhibit 3.

As part of his attempt to show that respondent's rationale for the hiring decision was a pretext for age discrimination, complainant argues as follows:

If Ms. Tauszell thought I was over bearing and had poor communication skills and if she knew she was not going to hire me why did she ask for my birthdate? The testimony from Ms. Tauszell that I became loud and leaning over the table is a fabrication in hopes of justifying for not hiring me. A reasonable person would believe that if this statement were true

anyone else would have ended the interview, much less ask me for my birthdate. Complainant' posthearing reply brief, p. 2.

Ms. Tauszell testified that she formed her opinion of complainant on the basis of such things as body language and tone of voice. It does not follow, based on her version of complainant's interview, that a "reasonable person" would have ended the interview.

Ms. Tauszell also testified that she asked the ages of those candidates who had scored above four in her evaluation, and complainant had a score of six. While complainant did not have a good interview in comparison to the successful candidates, she also testified she would have hired complainant if she had gotten to his name during the hiring process.<sup>2</sup>

Complainant also argues that respondent made inconsistent statements during the investigation about asking applicants for their ages, and that Ms. Tauszell testified inconsistently about where she recorded their ages. However, there is no evidence to contradict her testimony that she obtained the ages of the candidates to be able to conduct a criminal record inquiry. Complainant states that respondent did not produce evidence that background checks were actually done. Since respondent produced credible evidence that this was the purpose of requesting the candidates' ages, complainant had the burden of proof to show that this did not occur.

Ms. Tauszell's written evaluations of the candidates support respondent's evidence about the change in orientation of the security unit, as the evaluations emphasize communication and interpersonal relations skills. In the context of this functional change, complainant's experience in his old job and his law enforcement background was not given the same weight by respondent as presumably would have been the case if complainant had been applying for his old job as such.

Complainant also contends that Ms. Tauszell's failure to have looked at his personnel file is an indication of age discrimination. Ms. Tauszell testified in this regard

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<sup>2</sup> For example, if some of the higher ranked candidates had elected not to accept offers of employment, respondent presumably would have made offers to lower-ranked candidates.

that she did not have this kind of background information on the other candidates, and felt it would be unfair to the other candidates to make this kind of inquiry about only complainant. This is a rational approach, and it has not been shown to have been a pretext for age discrimination.

In conclusion, the facts that complainant had experience in a similar job at UW-Superior, and that Ms. Tauszell asked candidates' ages<sup>3</sup>, create a suspicion of age discrimination. However, respondent was able to provide a rational explanation for what transpired, and complainant did not successfully rebut this showing. Also, the fact that two of the chosen candidates were over 40, and within six years of complainant's age, supports respondent's position that age was not a motivating factor in its hiring decision.

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<sup>3</sup> In the Commission's opinion, it would have been preferable to have deferred asking the candidates for their ages until after they had been ranked on the basis of their interviews and it was more apparent which of the candidates would require criminal record checks. *Cf.* I Lindemann & Grossman, *Employment Discrimination Law* 717 (Third Edition, 1996) ("Many employers need certain information . . . with respect to persons who are actually hired, such as age, sex, marital status, number of dependents, and the like. Rather than ask for such information on the application form, employers should have successful applicants fill out a second form only after they are given an offer of employment." [footnote omitted]). The Commission does not reach the question of whether respondent's action of asking the applicant's ages at their interviews violated §111.322, Stats. ("it is an act of employment discrimination . . . (3) . . . to make any inquiry in connection with prospective employment which implies or expresses any limitation, specification or discrimination because of any basis enumerated in §111.321." [emphasis added]) because this question was not part of the issue noticed for hearing.



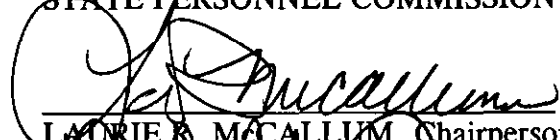
ORDER

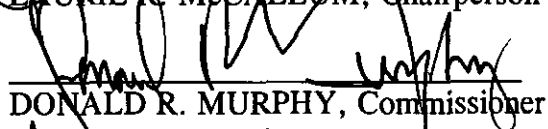
This complaint of discrimination is dismissed.

Dated: September 23, 1998.

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STATE PERSONNEL COMMISSION

  
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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 (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 peti-

tion 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