STATE OF WISCONSIN PERSONNEL COMMISSION

LEE JAMES STARCK,
Complainant,

v.

Chancellor, UNIVERSITY OF WISCONSIN SYSTEM (Oshkosh)
Respondent.

Case No. 97-0057-PC-ER

RULING ON MOTION FOR SUMMARY JUDGMENT

This matter is before the Commission on respondent's motion for summary judgment.

The initial complaint of discrimination, based on age, race and sex, referenced three civil service positions for which complainant was interviewed and not selected. Complainant subsequently withdrew two of the three claims, leaving only a 55% Financial Clerk position as a Cash Accountant at the University Bookstore of the University of Wisconsin-Oshkosh at issue.

The information in the following paragraph is undisputed.

Complainant is a white male, born in July of 1945. Complainant was one of three persons interviewed for the Cash Accountant vacancy. The successful candidate for the 55% Financial Clerk position was Walter S. Johnson, also a white male. Mr. Johnson was born on February 1, 1943. The other unsuccessful candidate interviewed for the position is a white female.

The method of analysis for respondent's motion for summary judgment was outlined in *Grams v. Boss*, 97 Wis. 2d 332, 338-39, 294 N.W.2d 473 (1980) (citations omitted:

> On summary judgment the moving party has the burden to establish the absence of a genuine, that is, disputed, issue as to any material fact. On summary judgment the court does not decide the issue of fact; it decides whether there is a genuine issue of fact. A summary judgment should not be granted unless the moving party demonstrates a right to a

> judgment with such clarity as to leave no room for controversy; some courts have said that summary judgment must be denied unless the moving party demonstrates his entitlement to it beyond a reasonable doubt. Doubts as to the existence of a genuine issue of material fact should be resolved against the party moving for summary judgment.
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> The papers filed by the moving party are carefully scrutinized. The inferences to be drawn from the underlying facts contained in the moving party's material should be viewed in the light most favorable to the party opposing the motion. If the movant's papers before the court fail to establish clearly that there is no genuine issue as to any material fact, the motion will be denied. If the material presented on the motion is subject to conflicting interpretations or reasonable people might differ as to its significance, it would be improper to grant summary judgment.

The Commission has also previously noted that in the context of a fair employment claim in which complainant appears *pro se*, "particular care must be taken in evaluating each party's showing on the motion to ensure that complainant's right to be heard is not unfairly eroded by engrafting a summary judgment process designed for judicial proceedings." *Balele v. UW-Madison*, 91-0002-PC-ER, 6/11/92.

Respondent contends it is entitled to summary judgment because the person hired for the vacancy is a 54 year old white male and is two years older than complainant who is also a white male.

Complainant offers the following arguments in opposition to respondent's motion:

> Because I lack crucial information (i.e. Mr. Johnson's resume/application, interview notes, and references) from the respondent, my case is duly handicapped. I also need the interview notes from my own interview with the respondent. These interview notes by all the parties involved will without a doubt substantiate the biased reasonings of the interviewers. . . . The U.S. Federal courts upheld a case of age discrimination when a 56 year old male employee was terminated and replaced by a 50 year old male hiree. Discrimination and biased personalities can and do manipulate circumstances to conveniently circumvent employment laws and selection choices – as clearly evident in this case.

The complainant's reference to the federal court decision relating to an age discrimination claim is presumably to the United States Supreme Court's decision in *O'Connor v. Consolidated Coin Caterers Corp.*, 116 S.Ct. 1307 [70 FEP Cases 486](1996). In *O'Connor*, the Court addressed the question of whether a plaintiff alleging age discrimination with respect to a discharge decision had to show that he was replaced by someone outside the age group protected by the Age Discrimination in Employment Act of 1967 (ADEA) in order to make out a prima facie case. The plaintiff in *O'Connor* was 56 when he was fired. His replacement was 40. The Fourth Circuit Court of Appeals had granted summary judgment because the replacement employe was not 39 or younger and, therefore, could not establish the fourth and final element under a prima facie case analysis established in *McDonnell Douglas v. Green*, 411 U.S. 792 [5 FEP Cases 965] (1973). The Supreme Court reversed. Justice Scalia wrote (70 FEP Cases 486, 489):

> The discrimination prohibited by the ADEA is discrimination "because of [an] individual's age," 29 U.S.C. Section 623(a)(1), though the prohibition is "limited to individuals who are at least 40 years of age," Section 631(a). This language does not ban discrimination against employees because they are aged 40 or older; it bans discrimination against employees because of their age, but limits the protected class to those who are 40 or older. The fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out because of his age. Or to put the point more concretely, there can be no greater inference of age discrimination (as opposed to "40 or over" discrimination) when a 40 year-old is replaced by a 39 year-old than when a 56 year-old is replaced by a 40 year-old. Because it lacks probative value, the fact that an ADEA plaintiff was replaced by someone outside the protected class is not a proper element of the McDonnell Douglas prima facie case.

The Court further explained its decision as follows:

> In the age-discrimination context, such an inference [that an employment decision was based on an illegal discriminatory criterion] can not be drawn from the replacement of one worker with another worker insignificantly younger. Because the ADEA prohibits discrimination on the

> basis of age and not class membership, *the fact that a replacement is substantially younger than the plaintiff* is a far more reliable indicator of age discrimination than is the fact that the plaintiff was replaced by someone outside the protected class. (70 FEP Cases 486, 489, emphasis added)

In the present case, the respondent not only did not hire someone substantially younger than complainant for the Cash Accountant vacancy, the successful candidate was nearly three years *older* than complainant. This fact, as well as the absence of any other evidence that would create an inference of age discrimination, means that the complainant has failed to establish a prima facie case of age discrimination under the Fair Employment Act with respect to the decision not to select him for the 55% Financial Clerk position.

Complainant's claims of race and sex discrimination also fail to withstand respondent's motion. In *Simens v. Reno*, 960 F.Supp. 6, 73 FEP Cases 878 (DC DC, 1997), the effect of *O'Connor* on the prima facie case analysis of a sex discrimination claim was discussed at length. The complainant in *Simens* was a female FBI agent who claimed, *inter alia*, sex discrimination with respect to the decision not to select her for a supervisory position, even though another woman, a woman Simens claimed was less qualified, was chosen instead. The court granted respondent's motion for judgment on the pleadings with respect to the sex discrimination claim.

> Under the familiar prima facie test for failure to promote in violation of Title VII, a plaintiff must show (1) she belongs to a protected group; () she was qualified and applied for a promotion; (3) she was considered for and denied the promotion; (4) other employees not members of the protected group were promoted at the time plaintiff's request for a promotion was denied. . . .
>
> But Simens says take one giant step backwards. She believes that the fourth prong of the prima facie case no longer exists. According to Simens, the United States Supreme Court, in a brief, unanimous opinion written by Justice Scalia in *O'Connor v. Consolidated Coin Caterers Corp.*, 116 S.Ct. 1307 (1996), has completely eradicated the prima facie

requirement that a member of a non-protected class be promoted instead of the plaintiff. . . .

Plaintiff directs the court to *Carson v. Bethlehem Steel Corp.*, 82 F.3d 157, 158 (7th Cir. 1996) where that court found *O'Connor* applicable in the Title VII context, finding that a white employee, replaced by another white employee, should not be prevented from meeting her prima facie case for that reason alone. "The question instead is whether the plaintiff has established a logical reason to believe that the decision rests on a legally forbidden ground. That one's replacement is of another race, sex, or age may help to raise an inference of discrimination, but it is neither a sufficient nor a necessary condition." *Carson*, 82 F.3d at 159. Defendant responds that this might be true for the discharge and subsequent hiring of a replacement employee who is in the same class, but certainly not in the case where two people simultaneously apply for the position, both of whom are members of a protected class, where one is hired and the other is not. There, defendant argues, no prima facie case can be made.

The problem with using class membership in the prima facie equation in *O'Connor* was simply that it was not probative of whether there was discrimination on the basis of age. And, in fact, lower courts interpreting *O'Connor* in the ADEA context have altered the fourth prong of the prima facie case in failure to promote or termination cases to require that the person promoted or hired in his stead be "a substantially younger person" as opposed to simply outside the protected class. Age difference is what is probative, not class membership in the ADEA context. In Title VII, however, class membership itself is probative.

To reduce the prima facie requirements to merely (1) membership in a protected class, (2) that plaintiff was qualified for the position or promotion, and (3) subsequent termination or failure to promote, would give complete weightlessness to an already light plaintiff's [prima facie case] burden. But, in effect, Simens wants the court to infer gender discrimination without having to show even the most basic factors which would allow the court to make such an inference.

It is true that the *McDonnell Douglas* framework was never intended to be "rigid, mechanized, or ritualistic," but instead to be a way of evaluating circumstantial evidence and the way it comes to bear on "the critical question of discrimination." However, this court cannot imagine that in a Title VII disparate treatment case, a plaintiff can meet her prima facie burden without circumstantial evidence of disparate treatment.

> Though there may be some imaginable circumstance where a woman can make a prima facie showing of gender discrimination in a case such as this without showing that someone outside her protected class received the promotion or replaced her, it goes without saying that some other facts of a commensurately forceful nature must be put forth to create the same inference of discrimination that would arise had the job or the promotion been given to a man. Such facts are not present in this case. (73 FEP Cases 878, 880-81, citations omitted, footnotes omitted)

In a footnote to its decision, the court offered a further explanation of the role of a prima facie case analysis:

> It is important to remember why courts use the prima facie case in the first place. Because a plaintiff often lacks direct evidence of discriminatory intent, the plaintiff must create a circumstantial case. In *McDonnell Douglas*, the Supreme Court created a framework for inferring discrimination; a plaintiff must allege very elemental facts which allow a supposition of discrimination. The burden then shifts to the defendant to provide a non-discriminatory reason for the actions taken. If that is done, the plaintiff has the final burden of proving, by a preponderance of the evidence, that the employer's reason is pretextual. 411 U.S. at 802 -04. But without the prima facie case, there is nothing from which to infer discrimination. In *Bundy v. Jackson*, our Circuit stated that a prima facie case "constitutes proof of actions taken by the employer from which we can reasonably infer a discriminatory animus. . . ." 641 F.2d at 951. A plaintiff cannot just shoot into a barrel of fish--that would invariably open the door to the filing of frivolous and vexatious Title VII complaints. And in these times, when a defendant is the target of a discrimination complaint, there are significant, wide-reaching consequences for that defendant's reputation and resources. At the very least, when a plaintiff has no direct evidence of discriminatory intent, she must provide the court with at least something reasonable on which to rest a claim. This is the function performed by the prima facie case. (73 FEP Cases 878, 880 n.4)

In the present case, there is nothing reasonable serving as the basis for complainant's claims. Because the successful candidate was the same race, same sex and several years older than complainant and in the absence of other facts, disputed or otherwise, relative to complainant's claims, complainant has failed to present any evidence

that his age, race or sex were motivating factors in the decision not to select him for the Cash Accountant position and he has not raised a genuine issue of material fact sufficient to withstand summary judgment.

ORDER

Respondent's motion for summary judgment as to complainant's claims of race, sex and age discrimination relating to the decision not to select him for the 55% Financial Clerk position is granted. Complainant has withdrawn his other allegations. Therefore, this case is dismissed.

Dated: November 7, 1997 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

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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 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.)