

HAI-SHEN J. CHOU,
Complainant,

v.

**DEPARTMENT OF NATURAL
RESOURCES,**
Respondent.

**RULING ON MOTION
FOR SUMMARY
JUDGMENT**

Case No. 00-0019-PC-ER

This is a complaint of age and race discrimination relating to the denial of complainant's request for reinstatement. On November 29, 2001, respondent filed a motion for summary judgment. The parties were permitted to brief the motion but complainant declined to file a brief. The following findings of fact are based on information provided by the parties, appear to be undisputed, and are made solely for the purpose of resolving this motion.

FINDINGS OF FACT

1. Complainant was born in 1949, is Asian-American, and has been employed by respondent since 1979. From 1985-March 1999, complainant was an Air Management Supervisor in respondent's Southeast Region. Complainant has received several awards and commendations from respondent throughout his employment, including a performance recognition award in June 1998. At the time of his voluntary demotion, complainant had been supervised by Lakshmi Sridharan (Asian and born in 1942) for about 2 years. Sridharan reports to Gloria McCutcheon (Caucasian and born in 1947).

2. In August 1997, complainant received his yearly performance evaluation completed by Sridharan. She was generally complimentary about complainant's performance but noted two areas for improvement including eliminating the perception by staff and other supervisors that complainant and another supervisor did not get along and complainant's tendency to come to Sridharan for support in areas where there was a past

history of disagreement between supervisors. Complainant attached a response to his performance evaluation specifically discussing the two areas Sridharan suggested he improve.

3 Shortly after his team was relocated to Sturtevant in about December 1997, complainant met with Sridharan and McCutcheon regarding his assignment to Sturtevant and the possibility of other employment options including a voluntary demotion. The two supervisors encouraged complainant to give the new location a fair try. Complainant had an alternative work schedule of working in Milwaukee on Fridays which decreased his travel time and expense (which were aspects of complainant's concern about the Sturtevant location).

4 In June 1998, complainant received his performance evaluation completed by Sridharan. She was generally complimentary about complainant's performance but noted that one of complainant's staff had questioned his leadership and she asked that he "alleviate" this perception by his staff. Sridharan expressed concern about the three supervisors not presenting a united front to the staff. Complainant attached a response to his performance evaluation explaining that he wished to take a positive approach and not get into the allegations against him. He noted that he had been approved for a performance recognition award that year.

5 In a letter to complainant dated June 23, 1998, George E. Meyer (respondent's Secretary at the time) and McCutcheon gave complainant a performance recognition award for "providing the leadership and initiative essential to help the Southeast Region build a strong and effective central office/region air management team."

6 Complainant renewed his request for a demotion and was interviewed for a vacancy early in 1999. In a letter to complainant dated March 11, 1999, Dan Schramm (Environmental Engineer Supervisor, Caucasian and born in 1947) offered complainant a voluntary demotion to an Air Management Engineer-Advanced position in the Southeast Region effective March 14, 1999. Complainant accepted the demotion on March 11th. According to complainant, he took a demotion "due to personal reason."

7. According to complainant, within the first hour of the first day in his new position on March 15, 1999, complainant requested he be returned to his supervisory position; a request that was denied verbally by respondent.

8. On March 17, 1999, complainant and his wife met with McCutcheon at her home to discuss his request to return to his supervisory position. According to complainant, on March 19, 1999, respondent again verbally denied his request.

9. In a letter to McCutcheon dated April 7, 1999, complainant requested he be reinstated to his old position. He stated, in part:

I would like to thank you for approving my voluntary demotion to the air management engineering position. However, after a few days in my new job, I realized that I have made a mistake and am submitting this formal request that I be reinstated to my old position.

My voluntary demotion was primarily motivated by my desire to be close to my home and family.

10. In a memorandum to McCutcheon dated April 26, 1999, Sridharan offered her input on complainant's request to be reinstated to his supervisory position. Sridharan felt that complainant should not be reinstated. She believed the Southeast Region air management program supervisory team had improved slightly in his absence. Sridharan noted that during complainant's presence on the supervisory team, the team had been dysfunctional (although complainant was not at the root of this dysfunction). The team could not make consensus decisions and, as a result, the decisions were deferred to her. Sridharan further observed that complainant did not set a good example in observing work rules. She noted that improving the working relationship among the air supervisors and between the supervisors and staff within the region were the top needs of the region's air program and complainant's reinstatement would be detrimental to both those needs.

11. Complainant disputes each of Sridharan's assertions listed in the prior paragraph. According to complainant, "I believe Lakshmi wanted to scapegoat me for her own problems with staff and work commitments."

12. On May 4, 1999, McCutcheon and Schramm informed complainant that his reinstatement request was denied. They presented him with a letter from McCutcheon dated April 30, 1999, to that effect.

13. In June 1991, Mike Luba (Caucasian and born in 1951), Air Management Supervisor in the Southeast Region, submitted a resignation letter. Prior to his departure, Luba was informed that his position (along with other air management supervisors) had been reallocated and included in the career executive program (retroactive to about 1 year). Luba retracted his letter of resignation and continued in his position. According to respondent, there was no reinstatement because Luba never left his position. According to complainant, Luba's supervisor did not want him to be retained, but Luba appealed directly to McCutcheon who approved his request.

OPINION

Summary Judgment Standard

The Commission may summarily decide a case when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Balele v. Wis. Pers. Comm.*, 223 Wis.2d 739, 745-748, 589 N.W.2d 418 (Ct. App. 1998). Generally speaking, the following guidelines apply. The moving party has the burden to establish the absence of any material disputed facts based on the following principles: a) disputed facts, which would not affect the final determination, are immaterial and insufficient to defeat the motion; b) 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; and c) doubts as to the existence of a genuine issue of material fact should be resolved against the party moving for summary judgment. *See Grams v. Boss*, 97 Wis.2d 332, 338-9, 294 N.W.2d 473 (1980); *Balele v. DOT*, 00-0044-PC-ER, 10/23/01. The non-moving party may not rest upon mere allegations, mere denials or speculation to dispute a fact properly supported by the moving party's submissions. *Balele, Id.*, citing *Moulas v. PBC Prod.*, 213 Wis.2d 406, 410-11, 570 N.W.2d 739 (Ct. App. 1997). If the non-moving party has the ultimate burden of

proof on the claim in question, that ultimate burden remains with that party in the context of the summary judgment motion. *Balele, Id.*, citing *Transportation Ins. Co. v. Huntziger Const. Co.*, 179 Wis.2d 281, 290-92, 507 N.W.2d 136 (Ct. App. 1993)

The Commission has determined that it is appropriate to apply the above guidelines in a flexible manner, after considering at least the following five factors (*Balele, Id.*, pp. 18-20):

1. *Whether the factual issues raised by the motion are inherently more or less susceptible to evaluation on a dispositive motion.* Subjective intent is typically difficult to resolve without a hearing whereas legal issues based on undisputed or historical facts typically could be resolved without the need for a hearing.
2. *Whether a particular petitioner could be expected to have difficulty responding to a dispositive motion.* An unrepresented petitioner unfamiliar with the process in this forum should not be expected to know the law and procedures as well as a petitioner either represented by counsel or appearing *pro se* but with extensive experience litigating in this forum.
3. *Whether the petitioner could be expected to encounter difficulty obtaining the evidence needed to oppose the motion.* An unrepresented petitioner who either has had no opportunity for discovery or who could not be expected to use the discovery process, is unable to respond effectively to any assertion by respondent for which the facts and related documents are solely in respondent's possession.
4. *Whether (in the context of a discrimination case) an investigation has been requested and completed.* A complainant's right to an investigation should not be unfairly eroded.

5. *Whether the petitioner has engaged in an extensive pattern of repetitive and/or predominately frivolous litigation.* If this situation exists it suggests that use of a summary procedure to evaluate his/her claims is warranted before requiring the expenditure of resources required for hearing.

The Commission now turns to applying the above factors to this case. Complainant appears *pro se* in this matter. Nothing in complainant's submissions indicates he is familiar with proceedings before the Commission or in other forums. There is a suggestion here that complainant has some familiarity with the legal principles or procedures relating to respondent's motion since, even though this topic was not memorialized in the prehearing conference report, it was recited in some detail in respondent's motion. Complainant's claim was investigated by the Commission and resulted in an initial determination of No Probable Cause. There is nothing in the record to suggest that complainant has conducted any discovery relating to his claim or that he is familiar with the discovery options available to him as a party to a proceeding before the Personnel Commission. Complainant does not have a history of having engaged in an extensive pattern of repetitive or predominately frivolous litigation.

Discrimination Analysis Framework

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).

Under the circumstances here, in order to demonstrate a *prima facie* case, complainant would have to show that he was a member of a protected class due to his age and/or race, that he suffered an adverse employment action, and that the circumstances

surrounding such adverse employment action give rise to an inference of age and/or race discrimination.

Summary Judgment Analysis

It is undisputed here that complainant is protected against discrimination because he is Asian American and in the age-protected classification (born in 1949 and therefore over 40 years old); and that he suffered an adverse term or condition of his employment when respondent refused to reinstate him to his former position as Air Management Supervisor after his voluntary demotion.

The parties have a dispute, however, regarding the final element of the prima facie case, i.e., whether the circumstances here give rise to an inference of discrimination. The question presented within the context of this motion is whether this dispute presents a genuine issue of material fact sufficient to defeat respondent's motion for summary judgment.

Respondent asserts that the undisputed facts demonstrate that complainant was not similarly situated to Luba and, as a result, no inference of discrimination arises here.

It should first be noted that it is not clear that the only way that complainant would be able to demonstrate that the circumstances here give rise to an inference of discrimination is by showing that he and Luba were similarly situated. However, even if it were the only way, the Commission is not persuaded that summary judgment would be warranted.

It is undisputed that Luba was still in his original position when he decided to stay there and withdraw the resignation he had tendered to respondent, but that complainant had worked for part of a day in another position when he asked to go back to his original position. The question of whether McCutcheon exercised any discretion regarding the Luba matter or whether Luba's retention in the position was automatic once he withdrew his resignation appears to be a matter of dispute here. Respondent contends that Luba's resignation letter was never accepted, and implies in its argument that McCutcheon did not have any choice in the matter but to retain Luba. Complainant contends that McCutcheon

did have a choice in the matter, and, despite a recommendation from Luba's supervisor that he not be retained, decided to retain him in his original position. This presents a genuine issue of material fact. Regardless of the technical differences between the two circumstances, if McCutcheon had discretion not to retain Luba in his original position, and chose to retain him despite his supervisor's recommendation to the contrary, a parallel to complainant's situation could be drawn which could in turn give rise to an inference of discrimination.

Respondent further argues that, even if complainant were successful in demonstrating a prima facie case of discrimination, complainant would not be able to show that respondent's reason for not reinstating complainant to his original position (see Finding 10, above) was pretextual. Respondent bases this argument in part on the fact that the individual upon whom McCutcheon relied in denying complainant's request for reinstatement was older in age and of the same race as complainant. This factor would, of course, tend to show that Sridharan did not rely on age or race discrimination in making her recommendation regarding complainant's reinstatement, although it is not clear that it would be dispositive. However, it is not only Sridharan's recommendation that is relevant to this inquiry but McCutcheon's decision to follow it as well. As was discussed above, a genuine issue of material fact exists as to whether McCutcheon rejected a similar recommendation in regard to the Luba situation. That factual issue is relevant at this stage of the discrimination analysis as well and is sufficient to defeat respondent's motion for summary judgment.

Respondent's other arguments in relation to the issue of pretext focus on the legitimacy of Sridharan's bases for her recommendation to McCutcheon. In view of the conclusion reached above, it is not necessary to address these arguments in order to decide this motion.

CONCLUSIONS OF LAW

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

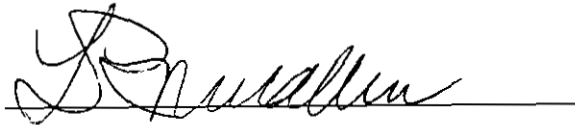
2. Respondent has the burden to show that it is entitled to summary judgment.
3. Respondent has failed to sustain this burden.

ORDER

Respondent's motion for summary judgment is denied.

Dated: January 25, 2002

STATE PERSONNEL COMMISSION

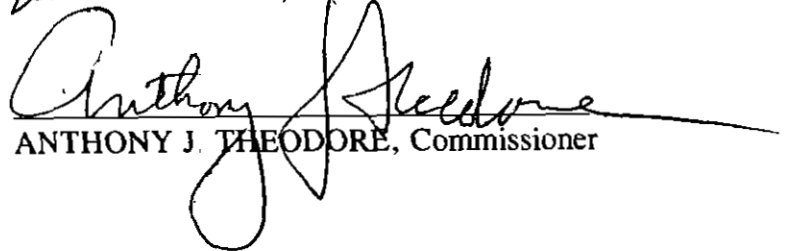


LAURIE R. McCALLUM, Chairperson

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JUDY M. ROGERS, Commissioner



ANTHONY J. THEODORE, Commissioner