

HAI-SHEN J. CHOU,
Complainant,

v.

**Secretary, DEPARTMENT OF NATURAL
RESOURCES**
Respondent.

DECISION
AND ORDER

Case No. 00-0019-PC-ER

This is a complaint of discrimination based on age or race. A hearing was held on May 6 and 7, 2002, before Kelli S. Thompson, Commissioner. Kurt Stege, General Counsel, was also present. The issue at hearing was:

Whether complainant was discriminated against on the basis of age or race when respondent did not reinstate him to an Air Management Supervisor position in 1999.

FINDINGS OF FACT

1. Complainant was born in 1949, is Asian American and has been employed by respondent since 1979.
2. From 1985 to March of 1999, complainant held the position of Air Management Supervisor in respondent's Southeast Region. Complainant had been supervised by Lakshmi Sridharan, Southeast Air and Waster Manager (Asian and born in 1942) for approximately the final 3 years of that period. Ms. Sridharan reports to Gloria McCutcheon, Southeast Regional Director (Caucasian and born in 1947).
3. Respondent went through a reorganization in 1996, at which time approximately one-third of their managers were displaced. Complainant competed with a co-worker, Mike Luba, for the position of Supervisor in the Kenosha/Racine Service Center, which was later titled the Sturtevant Service Center. Complainant was the successful candidate.
4. Based on the significant reduction in the number of managers, Ms. McCutcheon wanted individuals in management positions who wanted to be in those positions.

5. On September 1, 1996, complainant was assigned to the Sturtevant Service Center. The location was not available for occupancy at the time, so complainant and his staff were temporarily stationed in Milwaukee.

6. In August 1997, complainant received his yearly performance evaluation completed by Ms. Sridharan. She was generally complimentary about complainant's performance but noted two areas for improvement. Those two areas were eliminating the perception by staff and other supervisors that complainant and another supervisor did not get along and complainant's tendency to come to Ms. 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 these two areas.

7 Shortly after his team located to Sturtevant in about December of 1997, complainant met with Ms. Sridharan and Ms. McCutcheon to discuss 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 Fridays in Milwaukee which decreased his travel time and expense (which were aspects of complainant's concern about the Sturtevant locations).

8. On June 1998, complainant received his performance evaluation completed by Ms. 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. Ms. 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.

9. In a letter to complainant dated June 23, 1998, George E. Meyer (respondent's Secretary at the time) and Ms. 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."

10. Early in 1999, respondent engaged a consultant to address internal issues that had impaired the ability of the Southeast Region Air Engineering team to work together. Among other things, the consultant conducted interviews with employees and

on April 26, 1999, the consultant issued an "Executive Summary" of his conclusions and suggestions.

11. Complainant renewed his request for a demotion and was interviewed for a vacancy. In a letter to complainant dated March 11, 1999, Dan Schramm (Environmental Engineer Supervisor) offered complainant a voluntary demotion to an Air Management Engineer-Advanced position in the Southeast Region effective March 14, 1999. Complainant accepted the offer later on March 11th. Complainant took a demotion "due to personal reasons," which included working closer to his family and home. In addition, complainant had difficulties with an employee he supervised who had filed a complaint against him.

12. The complainant began working in the Engineer-Advanced position on March 14, 1999. Shortly thereafter, complainant decided he wanted to return to his supervisory position.

13. On March 17, 1999, complainant and his wife met with Ms. McCutcheon at her home to discuss his request to return to his supervisory position.

14. In a letter to Ms. McCutcheon dated April 7, 1999, complainant requested to 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.

15. After receiving complainant's written request, Ms. McCutcheon requested input and advice from Ms. Sridharan, other management staff within the Sturtevant office, and from Human Resources staff.

16. In a memorandum to Ms. McCutcheon dated April 26, 1999, Ms. Sridharan provided her observations about complainant's request to be reinstated to his supervisory position. Ms. Sridharan felt that complainant should not be reinstated. She stated that the Southeast Region air management program supervisory team had improved slightly in his absence. Ms. 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 supervisory team could not reach a consensus decisions and as a result, the decisions were deferred to her. Ms. 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 that complainant's reinstatement would be detrimental to both those needs.

17. Complainant believed Ms. Sridharan used him as a scapegoat for her own supervisory problems with staff and work commitments.

18. On May 4, 1999, complainant was informed that his reinstatement request was denied. He was presented with a letter from Ms. McCutcheon dated April 30, 1999, to that effect. In the letter, Ms. McCutcheon referenced the deliberation that had gone into complainant's decision to demote, both for him personally and for respondent's management employees.

19. In June of 1991, Mike Luba (Caucasian and born in 1951), Air Management Supervisor in the Southeast Region, discussed with his staff the possibility of resigning to take a job in the private sector. In a letter dated June 12, 1991, Mr Luba was informed that his position (along with other air management supervisors) had been reallocated and included in the career executive program and that this reallocation was retroactive to about one year. Mr Luba decided not to resign and continued in his position.

20. Mr Luba did not submit a formal letter of resignation.

CONCLUSIONS OF LAW

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

2. Complainant has the burden to establish that respondent discriminated against him on the basis of age and/or race when he was denied reinstatement to the Air Management Supervisor position in 1999.

3. Complainant has failed to satisfy his burden of proof.

OPINION

In complainant's post-hearing brief, he attempted to provide additional exhibits that were not admitted in the record during the hearing. These exhibits may not be considered in the Commission's decision because they are extra-record.

Race Discrimination

Complainant, who is Asian, resigned from his position as Air Management Supervisor for “personal reasons” and due to difficulties with subordinate staff and he voluntarily demoted to an Air Management Engineer-Advanced position. He changed his mind shortly after starting his new position and asked to be returned to his former position as a supervisor. Respondent declined and complainant claims discrimination.

In a discrimination case of this nature, the initial burden of the complainant is to show a prima facie case--i.e., facts which if unrebutted, have a tendency to show that discrimination has occurred. Respondent then must articulate a nondiscriminatory rationale for its action which complainant then must try to prove constitutes a pretext for unlawful discrimination. Since the case has been fully heard on the merits, the Commission will not dwell on whether complainant established a prima facie case,¹ but will proceed directly to the question of whether respondent’s explanation for its decision not to reinstate complainant to his former position as a supervisor was actually a pretext for race discrimination. See *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 715, 75 L. Ed. 2d 403, 410, 103 S. Ct. 1478 (1983).

In a letter dated April 26, 1999, complainant’s supervisor during his time as Air Management Supervisor, Lakshmi Sridharan, recommended that complainant not be reinstated to his former position. Ms. Sridharan explained that throughout the time complainant had served in a management capacity for the SER Air Management Program, the supervisory team had been dysfunctional. She went on to state that complainant was not likely the root cause of the problem, but he was still a member of the team and that since complainant’s departure, Ms. Sridharan had observed a slight improvement in the working relationship between supervisors. In previous performance evaluations, Ms. Sridharan had noted areas complainant could improve as a supervisor. In her testimony, Ms. Sridharan explained that she did not always perceive that complainant was providing a positive example for the individuals he supervised. Ms. Sridharan testified that complainant did not always follow rules, gave the impression that he had a contentious relationship with another supervisor, and relied

¹ An exception to this approach is where the missing element of a prima facie case which is also an essential element for establishing liability. For example, if a person has not established that he is at least 40 years old and thus covered by the WFEA age discrimination provision §111.33(1), Stats., it is not possible for that person to establish an age discrimination claim even if the employer’s proffered reason for its action were pretextual, and there normally would be no rationale for analyzing the question of pretext.

on Ms. Sridharan, as his supervisor, for assistance instead of working towards a solution with his team or trying to come to some consensus, which he had been counseled to do by Sridihan on previous occasions.

In a letter dated April 30, 1999, Gloria McCutcheon, Regional Director for respondent, denied complainant's request to reinstate to his former position. Ms. McCutcheon had discussed the reinstatement request with complainant and then met with Ms. Sridharan. She also requested and received input from other management employees in the Sturtevant office. Ms. McCutcheon took three weeks to come to her final decision so she could weigh all of the factors involved. Ms. McCutcheon had spoken to complainant on two separate occasions prior to complainant's voluntary demotion about his personal reasons for wanting to make such a career move. Complainant was distraught about driving to the Sturtevant office for work and felt a lot of pressure. Ms. McCutcheon and Ms. Sridharan counseled complainant about his concerns and suggested he give his supervisory position more of a chance. In addition, to help alleviate complainant's concerns, Ms. McCutcheon suggested he work out of respondent's Milwaukee office on Fridays, and consider a flex schedule or car-pooling. Complainant did try the suggestions for a time, but came to Ms. McCutcheon a second time and stated that he wished to leave his supervisory role and go back to an Engineering position. Ms. McCutcheon agreed because complainant was aggressive in his pursuit of an Engineering position and because she only wanted individuals to serve in management positions if they wanted to be in those positions.

Ms. McCutcheon weighed all available information before making her final decision.

Complainant is now given the opportunity to show pretext. An employer's erroneous decision-making is not sufficient to establish pretext. *Richter v. Hook-SupeRx, Inc.*, 142 F. 3d 1024, 1031-32 (7th Cir. 1998)

The complainant alleges that a co-worker, Mike Luba, was given preferential treatment in 1991, when he was allowed to rescind his resignation letter and continue in his current position.

The hearing record shows that in June of 1991, Mr. Luba expressed his interest in leaving his position in state service for a position in the private sector. Mr. Luba shared this information with co-workers, including complainant, as well as Ms. McCutcheon. On June 12, 1991, Mr. Luba received a letter from the Department of Employment Relations stating that his position had been placed in the Career Executive Program effective June 17, 1990. After receiving this information, Mr. Luba made the

decision not to resign from state service and to remain in his position. He verbally informed Ms. McCutcheon of his decision. Mr. Luba never submitted a formal resignation letter. Mr. Luba never left his position with respondent.

In contrast, the record shows that complainant thoroughly considered his options before he formally accepted a voluntary demotion, started in the new position, and *then* changed his mind. Complainant met with Ms. McCutcheon and Ms. Sridharan to discuss his situation at Sturtevant and the possibility of a voluntary demotion. Complainant was encouraged by Ms. McCutcheon and Ms. Sridharan to give the new location a try, and they made suggestions, such as an alternative work schedule and car pooling, to alleviate some of complainant's concerns regarding the driving and the distance to the Sturtevant office. Sometime later, complainant renewed his request for a voluntary demotion, citing personal reasons for his decision. Ms. McCutcheon agreed to his request because he had spoken with her about his reasons on two separate occasions and because he had given the new location a chance and had tried the suggestions recommended to him. In addition, respondent had reduced its management positions by one-third and Ms. McCutcheon felt it was necessary to have supervisors who really wanted to be in those positions. Complainant interviewed and was offered the position of Air Management Engineer-Advanced. Complainant accepted the demotion on March 11, 1999, and started work there on March 14th. On March 17, 1999, complainant and his wife met with Ms. McCutcheon at her home to request a reinstatement to complainant's former position as a supervisor. In a letter dated April 7, 1999, complainant renewed his request for reinstatement. Ms. McCutcheon requested and received information from Ms. Sridharan and a variety of other persons, regarding complainant's request. Ms. McCutcheon deliberated over her decision for approximately three weeks before denying complainant's request for reinstatement.

The Commission does not find the situation of Mr. Luba to be evidence of pre-text for discriminating against complainant. There was an eight-year gap between the two situations. Ms. McCutcheon was involved in both situations, though there was no evidence presented that Ms. Sridharan was involved in Mr. Luba's situation. The circumstances surrounding the two situations were different. Complainant verbally requested a demotion based on personal reasons. He was counseled by his supervisor as well as Ms. McCutcheon to take time to thoroughly think through his decision. Complainant requested the voluntary demotion a second time and subsequently interviewed for the Engineering position and then signed the appointment letter. Although complainant alleges Mr. Luba submitted a resignation letter, Mr. Luba and

Ms. McCutcheon have no recollection of such a letter. Complainant did not submit the letter as part of the hearing record. Mr. Luba and Ms. McCutcheon both testified they had conversations about Mr. Luba leaving to take a job in the private sector, however, he never left his position with respondent and made the decision not to leave after receiving information regarding his career executive status. In addition, though the relevance is minimal, Mr. Luba and Ms. McCutcheon testified that during reorganization in 1996 he was displaced and applied for several jobs, including one for the Sturtevant (known in 1996 as the Kenosha/Racine) Service Center. Complainant was appointed to the position rather than Mr. Luba. (R Exh. 8)

The Commission finds the respondent did not reinstate complainant to his former position as supervisor for reasons other than racial discrimination. Ms. McCutcheon testified very credibly about the factors that were the basis for her final decision in not reinstating complainant to a supervisory position. Complainant obviously disagreed with the decision but he has offered no evidence to suggest that Ms. McCutcheon did not honestly believe in the correctness of her decision and that she was motivated by complainant's race.

As noted by the witnesses that testified at the hearing, the decision not to reinstate complainant turned on factors other than training and experience. These other factors included complainant's work rule violations, the discord among management in the Sturtevant office, (which according to Ms. Sridharan had slightly improved since complainant's departure) and complainant's personal reasons for his decision to voluntarily demote. These issues were all relevant to the position of supervisor and were valid considerations. They are not indicative of pretext.

During the hearing, complainant provided favorable letters from employees who complainant had previously supervised. These letters stated the individuals' opinions of complainant's supervisory skills. The submission of materials from a co-worker indicating that an employee's performance was satisfactory provides little evidence of pretext in this context.² The fact that two individuals complainant supervised thought his work was satisfactory cannot establish that management's explanation was a fabrication. There is no evidence to indicate that management was lying about what they *perceived* to be complainant's shortcomings as a manager. The two individuals who wrote letters on behalf of complainant were not in supervisory roles and did not have the benefit of taking part in the discussions with supervisory personnel,

² The case cite has been removed and the language modified from the Proposed Decision to more accurately describe the Commission's analysis.

discussions between complainant and Ms. Sridharan, and management's review of complainant's work rule violations. The testimony of the individuals supervised by complainant is insufficient to overcome management's rationale that complainant had difficulties during his time as supervisor.³

Complainant argues his performance awards and pay raises are evidence that he was a good supervisor and deserved to be reinstated to his former position. Respondent did not dispute that complainant was knowledgeable in his position as supervisor and brought good qualities to the position. But respondent believed complainant's shortcomings, including his inability to come to a consensus on decisions with his team, his continued reliance on Ms. Sridihan in areas that complainant should have been comfortable handling, complainant's contentious relationship with another supervisor, management's perception that complainant did not always provide a good role model for staff, and the overall dysfunction of the entire management team, overshadowed complainant's positive qualities as a supervisor.

Age Discrimination

Testimony during the hearing established that both Ms. Sridharan and Ms. McCutcheon are older than complainant. Complainant has not identified any other individuals that he believes discriminated against him on the basis of age. Complainant has not provided any evidence to show age discrimination. Complainant's arguments amount to disagreement with Ms. Sridharan over management of the supervisory team, his belief she was using him as a scapegoat, and complainant's disagreements with management's perception of his problems as a supervisor. These arguments are not evidence of age discrimination.

Respondent's decision not to reinstate complainant to his former position as a supervisor was based on careful deliberation by Ms. McCutcheon after receiving input from complainant's former direct supervisor as well as other management staff. Ms. McCutcheon took into account complainant's reasons for leaving, his problems with management staff, and the needs of the department before making her final decision.

³ The case cite has been removed and language modified from the Proposed Decision to more accurately describe the Commission's analysis.

The Commission finds complainant has not proffered any evidence to show respondent's decision was motivated by complainant's age.


ORDER

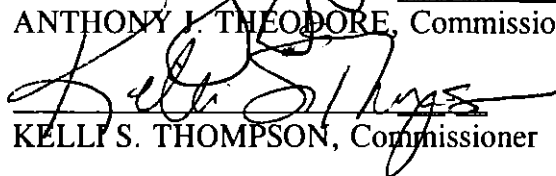
This case is dismissed.

Dated: Dec 17, 2002.

KST- 000019Cdec1

STATE PERSONNEL COMMISSION



ANTHONY J. THEODORE, Commissioner


KELLY S. THOMPSON, 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.)

2/3/95