

STATE OF WISCONSIN

PERSONNEL COMMISSION

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EARL ANDREWS,  
                                Complainant,

v.

UNIVERSITY OF WISCONSIN-  
MADISON,  
                                Respondent.

Case No. 80-PC-ER-14

\* \* \* \* \*

DECISION  
AND  
ORDER

NATURE OF THE CASE

Earl C. Andrews filed a charge of discrimination with the Wisconsin State Personnel Commission on February 4, 1980, alleging he was denied employment as a carpenter by the respondent, University of Wisconsin-Madison, because of his age. Following an investigation, the equal rights officer issued an Initial Determination dated August 29, 1980, concluding that there was no probable cause to believe complainant had been discriminated against by respondent. Complainant filed an appeal of the Initial Determination on October 2, 1980. Pursuant to Ch. PC 4.03(3), Wisconsin Administrative Code (WAC), the matter was set for hearing on the following issue:

Is there probable cause to believe that the complainant was denied employment by the respondent as a journeyman carpenter because of his age, in violation of Section 111.32(5)(b) and Section 111.325, Wisconsin Statutes?

At the outset of the hearing on the issue of probable cause, respondent objected to the Commission's jurisdiction on the grounds that the appeal was not timely filed. The hearing examiner overruled the objection.

FINDINGS OF FACTS

Jurisdictional Issue

1. It is undisputed that the ID was dated August 29, 1980; that the respondent was served personally with the ID on September 2, 1980; and that the Commission received the appeal on October 2, 1980.

2. Chapter PERS 1.09 WAC provides:

"PC 1.09 TIME. Unless otherwise provided by these rules, orders of the commission setting forth time periods shall be expressed in terms of working days, which include every day except Saturdays, Sundays, and statewide legal holidays provided in §230.35 (4) (a), Stats. The day the order is made or entered shall not count as one of the prescribed days. Any questions about time computations for procedural matters before the commission shall be resolved by reference to §801.15(1), Stats."

3. Section 801.15(1), Stats., provides in part:

"801.15 TIME. (1) Notwithstanding §§985.09 and 990.001(4), in computing any period of time prescribed or allowed by chs. 801 to 847, by any other statute governing actions and special proceedings, or by order of court, the day of the act, event or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday or a legal holiday."

4. The petition for the hearing on the issue of probable cause was received by the Commission within 30 calendar days after the date of service, pursuant to Ch. PC 4.03(3).

Probable Cause Issue

1. Complainant, a journeyman carpenter, was hired as an LTE carpenter by the University of Wisconsin-Madison, in 1979, having been referred by the local carpenters' union. He was 55 years of age at that time.

2. Robert Wildeck, the "number two" carpenter supervisor, under whom

Andrews worked for a time, encouraged Andrews to take the civil service exam for a permanent position in respondent's carpenter shop.

3. The civil service exam measures knowledge of carpentry; handymen and persons working in construction could pass the test.

4. Andrews achieved the highest test score of all the applicants. He and ten other candidates, including one with reinstatement rights, were interviewed by Clarence Hamre, supervisor of respondent's Carpenter Shop for the past nine years, and Wildeck.

5. Andrews was interviewed on or about January 28, 1980; the interview was perfunctory, about five minutes in length, because Andrews was familiar with the operation and known to the supervisors.

6. Hamre's three criteria in rating were: Is the candidate a journeyman carpenter? Is the candidate currently working at the trade? Candidate's ability, based on past experience and previous employment.

7. At the time of interview, Hamre considered Andrews currently working at the trade. It was undisputed that Andrews was a journeyman carpenter.

8. Following the interviews, Hamre solicited recommendations from previous employers of the candidates. He contacted Joe Daniels Construction Co., for whom Andrews had worked for approximately eight years. Daniels said he would not hire Andrews again because of his lack of initiative. Fritz Lutze, under whom Andrews had worked his last month as an LTE, repairing university housing, was very satisfied with the work of several LTE's and was interested in having them back. When Hamre asked

Lutze specifically whether he would like Andrews back, Lutze said he would prefer not, that he preferred others, and that Andrew's workmanship was just average.

9. Prior to this Hamre had heard nothing unsatisfactory about Andrew's work as an LTE. Andrews had also worked under Hamre, who considered him an average carpenter, of average initiative.

10. Primarily on the basis of the recommendations, Andrews was ranked number five among the 11 candidates. The four higher candidates had superior recommendations, and all were subsequently hired.

11. On January 30, 1980 Andrews received his notification of non-hire.

12. Andrews filed a charge of discrimination based on age on February 4, 1980. He was a member of the protected group at this time.

13. Jim Lehr the top-rated candidate, was almost 54 years of age at the time of hire. He began work on February 11, 1980.

14. Arden Vick, the second-ranked candidate, had also been working at the University as an LTE carpenter. He was 35 years of age when he was hired for one of the carpenter openings, beginning January 31, 1980.

15. Denis Drinkwater, the third-ranked candidate, was hired beginning March 24, 1980. He was 30 at the time. The fourth ranked candidate who was hired on June 2, 1980, was approximately 35 at that time.

16. Of the 41 carpenters in the University's employ during 1980, 20 were over 40 at the time of hire. One of the 21 under 40 at the time of hire was originally employed as an apprentice. Thirty-five were hired

after July 4, 1959, the effective date of Ch. 149, Laws of 1959, which amended the Wisconsin Fair Employment Practices law to include discrimination based on age; 19 were over 40 at the time of hire and 16 were under 40.

#### CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to §230.45(1)(b), Stats.
2. The burden of proof is on the complainant to establish that there was probable cause to believe he was discriminated against by the respondent in denying him employment as a carpenter because of his age. (See Ch. PC 4.03(3), WAC.) Probable cause means proof within a reasonable probability that a full hearing will establish the fact to a reasonable certainty by a preponderance of the evidence. Marshall v. Industrial Commission of Wisconsin, Circuit Court, Dane County, 120-078, February 23, 1967, IEPD ¶19772.)
3. The complainant has failed to sustain his burden.
4. There is not probable cause to believe that complainant was discriminated against by the respondent on the basis of age.

#### OPINION

The sole question before the Commission at this time is whether complainant has adduced sufficient evidence to show probable cause that the respondent discriminated against him on the basis of age. That evidence must demonstrate within a reasonable probability that a full hearing on the merits will establish the fact of discriminatory action to a reasonable

certainty by the preponderance of credible evidence.

To succeed in carrying his burden, the complainant's evidence must be credible as it relates to his allegations. Complainant has established that he was in the protected age group at the time he was denied employment; however he has failed to adduce any credible evidence that age was a factor in respondent's decision. The highest ranked candidate for the position was himself a member of the protected group (age 54). The limited statistical evidence available does not indicate a likelihood that a hearing on the merits would support a finding of a pattern or practice of age discrimination. (See finding #16).

The fact that Andrews ranked first on the written test is not sufficient to establish probable cause. Once the top-ranked applicants have been certified, the appointing authority has considerable discretion as to whom to appoint and is not required to appoint the person at the top of the list. State ex rel Buell v. Frear, 146 Wis. 291, 302-303 (1911). (See also Christensen v. DHSS and Division of Personnel, 77-62, p. 15 decided by the Personnel Commission on September 13, 1980).

Andrews also testified that he was encouraged to take the test for the permanent carpenter position by one of his supervisors while he was working as an LTE. Since Andrews was 55 at the time, this evidence tends to demonstrate non-discriminatory animus rather than support a finding of probable cause.

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ORDER

The Commission having determined that there is no probable cause to believe the respondent discriminated against complainant on the basis of age, and the complaint of discrimination is dismissed.

Dated: Oct. 21, 1981.

STATE PERSONNEL COMMISSION

Charlotte M. Higbee  
Charlotte M. Higbee  
Commissioner *ers*

CMH:jmg

PARTIES

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Commissioner Murphy abstained from voting in this decision due to his employment with the University of Wisconsin at the time this appeal was filed.