

STATE OF WISCONSIN

PERSONNEL COMMISSION

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LARRY VESPERMAN,
 Appellant/Complainant,

v.
 President, UNIVERSITY OF
 WISCONSIN-MADISON

↔ Respondent.

Case Nos. 81-232-PC and
 81-PC-ER-66

* * * * *

DECISION
 AND
 ORDER

NATURE OF THE CASE

This matter involves the consolidation of an appeal of a hiring decision and a complaint of discrimination on the basis of handicap and age.

FINDINGS OF FACT

1. In 1981, as a result of the lifting of a hiring freeze, the University of Wisconsin Hospital and Clinics proceeded to fill sixteen vacant Building Maintenance Helper 2 (hereinafter BMH2) positions.
2. Appellant/complainant applied for and was one of the thirty-two applicants certified for these positions.
3. Each of the certified applicants who was still interested in the positions and who reported at the designated time was interviewed by Mike Mayer, a custodial supervisor at the University of Wisconsin Hospital and Clinics.
4. Mr. Mayer asked all interviewees the same questions; evaluated each on the basis of the following selection criteria: appearance, extent and nature of janitorial experience, previous work record including attendance, attitude and knowledge of pertinent cleaning procedures; and

wrote a short summary of the information obtained from each written application and during each interview and his impression and assessment of each interviewee.

5. During the previous four and one-half years, appellant/complainant had been employed in six different positions. Although one of the terminations was due to an acknowledged lack of the requisite skills and training, two the fact that the positions had been designed to last only a short period of time, and one to a labor dispute now in arbitration, one of the terminations resulted from the fact that appellant/complainant initiated an angry verbal attack on a nun at St. Catherine's school who was escorting a group of children and who walked on a floor he had just waxed and one termination resulted from an acknowledged personality conflict with a supervisor at the U.S. Department of Housing and Urban Development.

6. Appellant/complainant's written application indicated that he had one year of general janitorial experience and appellant/complainant did not advise respondent of any additional janitorial experience even when Mr. Mayer specifically gave him the opportunity to do so during his interview.

7. Appellant/complainant acknowledged in his interview that he had had attendance problems in previous employment.

8. Mr. Mayer was of the opinion that appellant/complainant's responses to interview questions did not evidence satisfactory knowledge of cleaning procedures or satisfactory estimates of time needed to complete certain cleaning jobs.

9. Respondent, in applying its selection criteria to the information obtained from the written applications of and interviews with appellant/complainant and the applicants who were ultimately hired for the positions, concluded that each successful applicant had a better recent work record

than appellant/complainant, a better attendance record in previous employment, and a better knowledge of pertinent cleaning procedures. Respondent also concluded that the few successful applicants who did not have more extensive general janitorial experience than appellant/complainant either had specialized janitorial experience applicable to a hospital setting or outstanding work records in responsible positions in other related fields.

10. Respondent's decision not to hire appellant/complainant was based upon its conclusion that appellant/complainant was not as well qualified as those applicants ultimately hired for the positions. Respondent reached this conclusion through the uniform application of its selection criteria, these criteria were a reasonable means of assessing probable future work performance in the BMH2 positions, and respondent's evaluation of the relative qualifications of the applicants was reasonable in view of the information available to respondent at the time.

11. Three of the eight handicapped applicants certified for the positions were hired by respondent.

12. The record does not indicate the ages of those applicants certified for the positions or the ages of those hired. The record does, however, indicate that 34% of BMH 2s employed at the University of Wisconsin Hospital and Clinics as of October, 1981, were over the age of 40 when hired.

13. At all times relevant to this matter, appellant/complainant was over the age of 40 and physically handicapped.

14. Respondent's decision not to hire appellant/complainant for the subject BMH2 positions was neither illegal nor an abuse of discretion and was not discriminatory on the basis of handicap or age.

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §§230.45(1)(b) and 111.32(2) and §230.44(1)(d), Wis. Stats.
2. The respondent is an employer within the meaning of §111.32(3), Wis. Stats.
3. The appellant/complainant has the burden of proving that the hiring decision made by respondent was an illegal act or an abuse of discretion or that the respondent discriminated against him on the basis of handicap or age.
4. The appellant/complainant has not sustained his burden or proof.

OPINION

The issue governing the appeal is "Whether the failure to appoint the appellant to the position of BMH2 with University of Wisconsin Hospital and Clinics was an illegal act or an abuse of discretion." Appellant did not assert in the record, either specifically or by implication, the existence of any illegality (other than the complaint of discrimination considered as a separate matter below). The record does, however, support an inference that appellant is basing his appeal on an alleged abuse of discretion.

The respondent interviewed each of the certified applicants who was interested in the positions and who showed up for the scheduled interview. Each interviewee was interviewed by the same person and asked the same questions. The interviewer, Mike Mayer, was an experienced interviewer and was familiar with janitorial work in general and the duties and responsibilities of the subject BMH2 positions in particular. The same selection criteria were applied to each interviewee: appearance, extent and nature of janitorial experience, previous work record including attendance, attitude, and knowledge of pertinent cleaning procedures. Mr. Mayer kept a

written summary of the information he obtained from each written application and during each interview and his impression and assessment of each interviewee.

The record clearly shows that appellant had been terminated from two previous jobs because: 1) he had initiated an angry verbal attack on a nun at St. Catherine's school who was escorting a group of children and who walked on a floor appellant had just waxed; and 2) he had a personality conflict with his supervisor at the U.S. Department of Housing and Urban Development. It was reasonable for respondent to consider the bases for these terminations in its evaluation of appellant's qualifications for the BMH2 positions. First, it would not be unusual in a hospital setting for health care personnel to have to cross a freshly waxed floor if necessary to attend to a patient. Second, past work performance and work relationships are certainly one indication of probable future work performance and relationships.

The record also clearly shows that appellant's written application indicated that he had about one year of general janitorial experience. Although appellant testified at the hearing in this matter as to the existence of additional janitorial experience, he did not offer information as to any such additional experience in his interview.

The record also clearly shows that appellant advised respondent in his interview that he had had attendance problems in previous employment.

Finally, the record shows that, in Mr. Mayer's opinion, appellant's answers to interview questions did not evidence a satisfactory knowledge of cleaning procedures or times or the special requirements of hospital cleaning.

Mr. Mayer's written summaries clearly show that those applicants ultimately hired had better recent work records, better attendance, and better knowledge of pertinent cleaning procedures than appellant. In addition, of the three applicants hired who did not have more years of janitorial experience than appellant, one had actually performed janitorial work at University of Wisconsin Hospital and Clinics, one had many years of experience in the construction industry and an outstanding work record there, and one had cleaning experience in the food preparation business which involves special knowledge of health and sanitation standards similar to those involved in a hospital setting.

Respondent's hiring decisions were based upon these comparisons of the respective qualifications of the applicants as measured by the selection criteria formulated by respondent, respondent's evaluation of appellant's qualifications and those of the applicants ultimately hired for the positions was reasonable in view of the information available to respondent at the time, the same selection criteria were uniformly applied to each applicant, and these selection criteria were reasonable in view of the type of position under consideration.

In McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817 (1973), the United States Supreme Court set forth the analytical framework for evaluating an employment discrimination complaint. The complainant, by a preponderance of the evidence, must first establish a prima facie case: (1) that he is a member of a protected class; (2) that he was the subject of an adverse personnel action by the respondent/employer; and (3) by facts from which a reasonable inference can be drawn that the adverse personnel action was caused by his membership in the protected class.

Complainant has established that, as a person with a physical handicap who was over the age of 40 at all times relevant to this matter, he is a member of a protected class on the basis of both his handicap and his age and that respondent was aware of complainant's handicap and age at the time of the hiring decisions. Complainant has also established that respondent did not hire complainant for the BMH2 positions for which he was certified and, thus, complainant was the subject of an adverse personnel action by respondent.

In the discussion of the appeal which was consolidated with the complaint of discrimination, it has already been concluded that the hiring decisions were based upon respondent's reasonable conclusion that appellant/ complainant was not as well qualified for the positions as those applicants ultimately hired.

It must be concluded, then, that respondent's decision not to hire complainant was based on neither his handicap nor his age but his qualifications relative to those of the other applicants. Such a conclusion is further reinforced by the fact that respondent did hire three handicapped applicants for these BMH2 positions and that, although the record does not specifically indicate the ages of those applicants hired for these positions, as of October, 1981, respondent's hiring statistics show that 34% of the BMH2s employed at University of Wisconsin Hospital and Clinics were over the age of 40 when hired.

Respondent's decision not to hire appellant/complainant was neither illegal nor an abuse of discretion and was not discriminatory on the basis of handicap or age.


ORDER

The appeal and the complaint of discrimination are dismissed.

Dated: March 31, 1983 STATE PERSONNEL COMMISSION


DONALD R. MURPHY, Chairperson

LRM:jmf


LAURIE R. McCALLUM, Commissioner


JAMES W. PHILLIPS, Commissioner

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