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STATE OF WISCONSIN **RECEIVED** COURT DANE COUNTY

RUBY MARKHAM, SEP 2 1986
Petitioner, Personnel MEMORANDUM DECISION
-vs- Commission

WISCONSIN DEPARTMENT OF SOCIAL SERVICES AND STATE PERSONNEL COMMISSION, Case No. 82 CV 1187

Respondents.

In 1979 the petitioner, who was employed as a typist in the Department of Health and Social Services, applied for nine different secretarial positions within the Department. Each position applied for involved different interviewers and hiring personnel. The petitioner had either the highest or second highest certification exam score for all of the positions. In each case, a different applicant was chosen.

The petitioner filed a complaint under Sections 111.31 through 111.37, Stats., with the State Personnel Commission alleging age discrimination in that the Department failed to hire her because she was fifty-seven years old when she applied for the positions.

In 1981, an equal rights officer of the Commission, acting pursuant to Section PC 4.03(1), Wis. Adm. Code, determined that there was probable cause to suspect discrimination because in eight of the nine positions, the person hired was thirty-four or

younger. Subsequently, petitioner dropped her complaint as to the ninth position in which a fifty-four year old woman was hired.

The Commission held a hearing pursuant to Section PC 4.07, Wis. Adm. Code, and by a decision and order dated February 9, 1982, it determined that the petitioner failed to establish that the Department had discriminated against her because of age and dismissed her claim.

Petitioner now seeks judicial review of the Commission's decision and order pursuant to Chapter 227, Stats.

In Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981), a sex discrimination case, the Supreme Court utilized the test adopted in McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973), which set out the allocation of burdens of proof in discrimination cases. Under the guidelines of the above cases, the burden of proof and burden of proceeding in discrimination cases would be:

1. That the petitioner must prove a prima facie case of discrimination by showing that she is a member of a protected class (age 40-65); that she applied and was qualified for a job for which the employer was seeking applications; that despite her qualifications she was rejected;
2. That while the ultimate burden of proof always remains with the petitioner, the establishment of the foregoing prima facie case shifts the burden of proceeding to the respondent, who then must articulate some legitimate nondiscriminatory reason for its action;
3. If the respondent satisfies this burden, the petitioner then has an opportunity to show that the articulated nondiscriminatory reason or reasons for the respondent's action are actually a pretext for a discriminatory reason.

In the instant case, the respondent concedes that the petitioner had established a prima facie case.

The Commission concluded that the respondent had met its burden of articulating some legitimate nondiscriminatory reasons for its actions of hiring someone other than the petitioner for each of the eight contested positions. The Commission also concluded that the petitioner had failed to show that the respondent's articulated reasons for its action were pretexts for a discriminatory reason.

The Commission's decision sets forth 13 findings of fact. The petitioner contests findings numbers 5 through 13. The respondent contends that the findings are amply supported by substantial evidence in the record.

The Commission's findings support its conclusions, decisions and order. The remaining issue before the court is an evaluation of the record to determine if the findings of the Commission are supported by substantial evidence and whether any of the department's actions depend on any finding of fact that is not supported by substantial evidence in the record.

Section 227.20(6) and (10), Stats., set forth directions to guide the court in its review of the evidence in the record:

(6) If the agency's action depends on any fact found by the agency in a contested case proceeding, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. The court shall, however, set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by substantial evidence in the record.

(10) Upon such review due weight shall be accorded the experience, technical competence, and

specialized knowledge of the agency involved, as well as discretionary authority conferred upon it. . . .

The credibility of witnesses and the weight to be attached to the reasonableness of the evidence as a whole is for the Personnel Commission. Hilboldt v. Wisconsin R.E. Brokers' Board, 28 Wis.2d 474, 482 (1965). A reviewing court should not pass on the credibility of witnesses nor on the weight of the evidence. Copland v. Dept. of Taxation, 16 Wis.2d 543, 555 (1962).

The law is established that the inferences to be drawn from the evidence are for the Commission, State ex rel. Pallange v. Wis. R.E. Brokers' Board, 241 Wis. 77 (1942), and stand if drawn from established facts which logically support them, but may not be based on conjecture. St. Joseph's Hospital v. Wisconsin R.E. Board, 264 Wis. 396 (1953).

In Reinke v. Personnel Board, 53 Wis.2d 123, 138-39, 191 (1971), the court set forth the substantial evidence test:

The term "substantial evidence" should be construed to confer finality upon an administrative decision on the facts when, upon an examination of the entire record, the evidence, including the inferences therefrom, is found to be such that a reasonable man, acting reasonably, might have reached the decision; but, on the other hand, if a reasonable man, acting reasonably, could not have reached the decision from the evidence and its inferences then the decision is not supported by substantial evidence and it should be set aside.

. . .

We deem that the test of reasonableness is implicit in the statutory words "substantial evidence." However, in applying this test the crucial question is whether a reviewing court is only to consider the evidence which tends to support the agency's findings, or whether it is also to consider the evidence which controverts, explains, or impeaches the former. Use of the statutory words "in view of the entire record as

submitted" strongly suggests that the test of reasonableness is to be applied to the evidence as a whole, not merely to that part which tends to support the agency's findings.

"Substantial evidence" is not equated with preponderance of evidence, since there may be cases where two conflicting views may each be sustained by substantial evidence.

Petitioner relies heavily on the fact that she had the highest or second highest certification exam score for all of the positions. But the record reveals that the legal counsel for the Department pointed out that the score is only a guide for employers and only one factor to be considered and that the certification document itself states that all applicants were to be given equal consideration. The record further reveals that some applicants had no scores because they were not certified and were eligible for filling the positions based on their status as transfers. The Commission found that in each instance the hiring personnel had a valid nondiscriminatory reason for choosing an applicant other than the petitioner.

In evaluating the record as to these findings of the Commission, the reviewing court must be guided by Sections 227.20(6) and (10), Stats., as quoted above and by the relevant court decisions cited above.

Applying the "substantial evidence" test to the record herein, it is clear that the Commission's findings are supported by substantial evidence and none of the Commission's conclusions or actions depend on any finding that is not supported by substantial evidence in the record.

The petitioner has not satisfied the requirements for a reversal of the Commission's decision and order, and they are therefore affirmed.

Dated: August 20, 1986.

BY THE COURT:

A handwritten signature in cursive script, reading "Ervin M. Bruner", with a long horizontal flourish extending to the right.

Ervin M. Bruner
Reserve Circuit Judge