

STATE OF WISCONSIN

PERSONNEL COMMISSION

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ROBERT W. McGRATH,
 Complainant,

v.

President, UNIVERSITY OF
WISCONSIN (Parkside),
 Respondent.

Case No. 83-0090-PC-ER

* * * * *

DECISION
AND
ORDER

NATURE OF THE CASE

On July 12, 1983, complainant filed a charge of discrimination with the Personnel Commission alleging respondent discriminated against him because of his age in regard to his retirement in violation of the Fair Employment Act, Subch. II, Ch. 111, Wis. Stats. An Initial Determination finding Probable Cause to believe that complainant was discriminated against as alleged was issued by the Commission on November 23, 1984. A prehearing conference was held on February 18, 1985 before Anthony J. Theodore, General Counsel at which time the parties were unable to agree upon an issue for hearing. By Interim Decision and Order dated May 2, 1985, the Hearing Examiner, Dennis P. McGilligan, found that the issue as framed by the respondent was more appropriate for hearing. Said issue is as follows:

Whether respondent discriminated against the complainant on the basis of age with respect to his early retirement from his employment at the UW-Parkside in June, 1983.

Hearing in the matter was held at Parkside on May 13 and 14, 1985, before the aforesaid Hearing Examiner. The parties completed their briefing schedule on July 8, 1985.

FINDINGS OF FACT

1. Complainant was born May 11, 1922 and was 61 years of age when the complaint was filed.

2. Complainant began his employment at the University of Wisconsin - Parkside, hereinafter referred to as Parkside, in 1973 as a Power Plant Operator 2 in the state classified civil service. After approximately one year, complainant was promoted to the position of Superintendent II. In 1977 complainant was again promoted, this time to the position of Superintendent III. In June of 1978 complainant became the Acting Director of the Physical Plant. For his performance as Acting Director, complainant was nominated for the Academic Staff Distinguished Service Award by Gary Goetz, the Assistant Chancellor for Administration and Fiscal Affairs (including responsibility for the Physical Plant).

3. In 1979, Jack Dudley was hired on a permanent basis as the Director of the Physical Plant, and became complainant's supervisor. In June of 1979 complainant was made an Assistant Director of Utilities. As Assistant Director complainant continued in charge of both the power plant and the maintenance mechanics. To assume the duties of Acting Director and Assistant Director, complainant took a leave of absence to accept limited appointments and served at the pleasure of the appointing authority.

4. On March 25, 1981, Dudley wrote a memo which gave credit to complainant, and his power plant operators and maintenance mechanics for an excellent performance in energy conservation for the fiscal year 1979-80.

5. By letter dated May 27, 1982, Dudley gave complainant a written reprimand for failing to meet critical purchasing deadlines for a new computer center air conditioner project. Dudley also spoke on at least one

other occasion with complainant regarding problems with his performance. The Commission finds the concerns about complainant's performance manifested by these actions by respondent were warranted.

6. By 1982, Dudley had concluded that some reorganization of the Physical Plant Department was necessary. In his judgment, Parkside's heating and ventilating needs could better be served by a division between the supervision of personnel within the power plant itself, and those working "outside" as maintenance mechanics in the campus buildings. The complainant had been supervising both of these areas. Dudley concluded -- based on his observations as a supervisor regarding the needs of the Physical Plant and performance problems that he perceived in complainant -- that McGrath's abilities were best suited to the power plant area, and that his duties should be limited accordingly. To achieve this result, Assistant Chancellor Goetz informed complainant by letter dated September 30, 1982, that his limited appointment as Assistant Director would end, and advised him of his right to be restored/reinstated to the classified civil service. Effective January 1, 1983, complainant did return to the classified civil service as a Power Plant Superintendent 2.

7. During this same period of time, an Early Retirement Program was being offered to State employes for which the complainant was qualified. The complainant made several inquiries regarding that program and retirement benefits in general on behalf of other employes. At no time during this period did he pursue early retirement on his own behalf.

8. On June 7, 1983, Plant Director Dudley and Assistant Chancellor Goetz held a meeting with complainant to discuss an impending change in personnel which would affect him. Goetz and Dudley advised complainant that

a reorganization in plant operations was forthcoming. They also told complainant that they intended to eliminate his position, but that he would retain his civil service rights upon layoff. They informed him that they wanted someone with more expertise and an engineering degree. They also informed him of the availability of the early retirement option. No other positions were offered to complainant and no details were given him with respect to his rights upon layoff. The meeting was a short one. Complainant responded in shock to the above and replied that he felt they were trying to "throw him out."

9. A day or two following the meeting, complainant inquired and applied for early retirement by speaking to Dick Cummings of the Parkside Personnel Office. At the time of the aforesaid June meeting, complainant had not been considering the early retirement option and was not thinking of retirement until he reached the age of 62 or 63.

10. By letter dated June 22, 1983, complainant submitted his letter of resignation as follows:

My last day of work will be Thursday, June 30, 1983 as requested by Mr. Gary Goetz and Mr. Jack Dudley; the reason being that the Position of Power Plant Superintendent is to be eliminated and I am being forced into early retirement.

Complainant's last day of work was actually June 19th in order to take advantage of the early retirement legislation.

11. Following complainant's retirement, Parkside created a new position, entitled Assistant Director of Utilities. Recruitment for this position was begun in January, 1984. The newspaper advertisement indicated that Parkside preferred to hire a candidate with a Mechanical Engineering degree, five years related experience and the ability to obtain a Stationary Engineering degree. The successful candidate, who accepted the position, met

the requirements and was approximately 41 years old. Several months later he resigned and another candidate, 31 years old, accepted the position.

12. The following constitute respondent's sole reasons for the decision noted above to reorganize the physical plant operations and to eliminate complainant's position:

- a. Beginning in late 1981 and early 1982, complainant's work performance was deteriorating.
- b. Respondent wanted to follow the trend of some other campuses to hire an experienced HVAC engineer to cope with the new and more sophisticated technology in that area. Complainant is not a licensed engineer and holds no engineering degree.
- c. Budget constraints, forced respondent to reorganize and upgrade positions, including complainant's, rather than hire an additional employe.

13. The aforesaid representatives of the respondent mentioned the early retirement option to complainant at the June 7th meeting with the intent to help complainant benefit from all possible options, not to push him into a decision to retire early because of his age. Respondent knew complainant had previously inquired about the program, and thought that he might be interested.

14. The complainant's age was not a factor in respondent's decision to reorganize the physical plant and to eliminate his position.

CONCLUSIONS OF LAW

1. The Personnel Commission has jurisdiction over this discrimination complaint pursuant to §230.45(1)(b), Wis. Stats.

2. The respondent is an employer within the meaning of §111.32(6)(a), Wis. Stats.

3. The complainant had a burden of proving by a preponderance of the evidence that the respondent discriminated against him on the basis of age with respect to his early retirement from his employment at the UW-Parkside in June, 1983.

4. The complainant has not met his burden.

OPINION

In reviewing complaints of discrimination, the Commission will apply the analytical framework established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Dept. of Community Affairs v. Burdine, 540 U.S. 248 (1981). The complainant has the initial burden of establishing a prima facie case of discrimination. In the present case, the complainant must first establish: (1) that he is a member of a protected class; (2) that he was the subject of an adverse personnel action by the respondent; 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.

It is undisputed that complainant was over the age of 40 at all times material herein and that he is a member of a protected class on the basis of his age. The record also supports a finding that complainant was the subject of an adverse personnel action by the respondent. In this regard it is undisputed that respondent reorganized the physical plant operation and eliminated complainant's position. The record is also clear that complainant retired under protest. The only question remaining is whether a reasonable inference can be drawn that said action was caused by his membership in the protected class.

The Commission is of the opinion that such a reasonable inference can be drawn. In this regard the record indicates that complainant had occupied positions with respondent of both Superintendent III and Acting Director as well as Assistant Director with the Physical Plant. Respondent intended to reorganize and restructure complainant's position not because complainant was

unable to perform the duties of a Superintendent II in the power plant but because it wanted the position to perform a broader range of functions. However, as noted above complainant had essentially performed the duties of the newly created position of Assistant Director of Utilities in the past. He had done so in a largely but not completely satisfactory manner. Yet, he was given the option by respondent at the aforesaid June 7th meeting to be laid off or retire. He ultimately was replaced by a younger man. Based on all of the foregoing, an inference can be drawn that respondent's actions noted above were caused by complainant's membership in the protected class.

Once a prima facie case is established, the burden shifts to the respondent to show a legitimate, nondiscriminatory basis for its actions. The respondent argued that it had a legitimate basis for reorganizing the physical plant and restructuring complainant's position. In this regard respondent stated that it was dissatisfied with complainant's performance and that it wished to follow the trend of some other campuses and hire an experienced HVAC engineer to cope with the new and more sophisticated technology in the physical plant area.

Because the respondent's evidence "raised a genuine issue of fact as to whether it discriminated" against the complainant, Burdine, 450 U.S. 248, 254, the employee is given an opportunity to demonstrate that the reason proffered by the respondent is pretextual. In this case, the complainant testified that his performance was satisfactory. Another witness, Norman Madsen, a former employe of Parkside and a professional acquaintance of the complainant's, testified that he was the complainant's immediate superior at

the time complainant was first elevated to the rank of supervisor. Madsen also testified that he thought complainant could perform the duties which appear in the job description for the Assistant Director of Utilities. Respondent, on the other hand, offered testimony that it was displeased with complainant's performance. (See Findings of Fact 5. and 6.) In particular, respondent relied on a letter of reprimand dated May 27, 1982 which it gave complainant.¹ Complainant did not contest this written reprimand at the time it was issued. In addition, the record supports a finding that the letter was at least partially justified. Based on the entire record, the evidence on complainant's work performance is somewhat contradictory. In any event, there is not a preponderance of evidence in the record that respondent's concerns about complainant's work performance were pretextual.

The Commission next turns its attention to the other reason given by respondent for its actions noted above. In this regard the record indicates that almost from the beginning of Dudley's employment as Director of the Physical Plant he began evaluating the needs of the plant. Eventually, he decided that changes in the technical sophistication of Parkside's heating and cooling ("HVAC") system required personnel having the skills and capabilities to meet the new, more complex problems of operation. He knew that some other campuses had hired licensed, degreed engineers to perform these functions. After some discussion respondent decided that an engineer should

¹The respondent offered several other examples of complainant's alleged poor work performance which were not supported by the record.

be hired. However, because of budget limitations, respondent decided it was necessary to reorganize the power plant in such a way that an existing position could be converted to use for the engineer slot. Ultimately, complainant's position was chosen for this purpose.

Complainant takes issue with respondent's decisions noted above which led to restructuring of his position. However, irrespective of their correctness and/or wisdom, there is no persuasive evidence in the record that the reasons for any of these decisions were pretextual.

Complainant argues that respondent's mention of the retirement option at the June 7th meeting is evidence of respondent's discriminatory motive. It is true that as a result of respondent's actions, particularly with respect to the conduct of the June 7th meeting, complainant retired under protest. It is also true that at said meeting respondent mentioned the early retirement option. However, the record as a whole supports a conclusion that respondent discussed same with the intent to help complainant benefit from all possible options, not to push him into a decision to retire early because of age.

Finally, complainant argues that he was qualified to fill the newly created position of Assistant Director of Utilities. Indeed, the record supports a finding that complainant did meet the minimum qualifications for said position. However, respondent preferred to hire a candidate with an engineering degree and the ability to obtain a Stationary Engineer's license in order to meet their needs for the physical plant. Whether this was the

proper approach or not is debatable.² However, there is no persuasive evidence in the record that respondent had a discriminatory motive in making this decision.

Based on all of the above, and the record as a whole, the Commission finds it reasonable to conclude that the respondent did not discriminate against the complainant on the basis of age with respect to his early retirement from his employment at the UW-Parkside in June, 1983.

²Goetz testified that new equipment meant the need for "someone trained to learn and to grow." This phrase certainly raises a red flag concerning the possibility of discrimination. However, the record as a whole suggests that this phrase referred to respondent's belief that an engineer could best run the physical plant rather than an intent to hire a younger person to fill the position. As noted above respondent wanted to follow the lead of some other campuses and hire an engineer to meet the demands of new technology in this area.

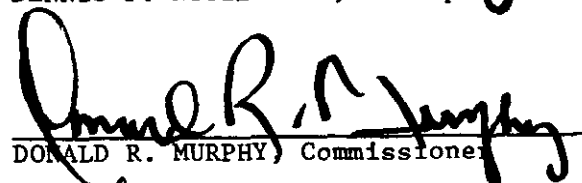
ORDER

The instant complaint of discrimination is hereby dismissed.

Dated: September 26, 1985

STATE PERSONNEL COMMISSION


DENNIS P. MCGILLIGAN, Chairperson


DONALD R. MURPHY, Commissioner


LAURIE R. McCALLUM, Commissioner

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