



STATE OF WISCONSIN

PERSONNEL COMMISSION

* * * * *
WILMER McCOIC,
Complainant,
v.
Executive Director, WISCONSIN
LOTTERY [Chairperson, WISCONSIN
GAMING COMMISSION],
Respondent.
Case No. 88-0157-PC-ER
* * * * *

DECISION
AND
ORDER

Nature of the Case

This case involves a complaint of discrimination alleging that respondent discriminated against complainant on the basis of age and use of a honesty testing device when respondent failed to hire complainant. A hearing was held before Gerald F. Hoddinott, Commissioner.

Findings of Fact

1. On or around May 1, 1988, respondent advertised for applicants for 49 vacant Administrative Assistant 3-Field Service Representative (FSR) positions in its Sales Division. Each of these FSR positions was assigned to one of five district offices and had the following responsibilities:

Under the general direction of the District Sales Supervisor, this position will sell and market the state lottery product line to retail outlets in an assigned area of the district. The position works independently to maintain or improve the quality, timeliness, sales volume and scope of services to retailers. These responsibilities require extensive travel on a regular basis and may require additional hours of work to meet job requirements.

Each FSR position was responsible for providing these services for 100-120 retail outlets, for maintaining the security of and for delivering lottery tickets to each of these retail outlets, for placing point-of-sale materials at or near the cash registers of each of these retail outlets, and for handling inquiries and

complaints from retailers and from the public relating to the sale of these lottery tickets.

2. In response to this advertisement, 5,800 potential applicants for these FSR positions contacted respondent. Each of these potential applicants was mailed a packet of application materials, which included a document entitled "Achievement Inventory." This Achievement Inventory contained 84 questions relating to an applicant's experience, and was approved as an examination by the Division of Merit Recruitment and Selection (DMRS) of the Department of Employment Relations (DER), and was scored by DER. Each of the questions on this Achievement Inventory related to an aspect of the duties and responsibilities of an FSR position. Questions 33 through 38 related to experience in handling cash and, although FSR positions were not responsible for handling cash, they were responsible for handling "live" lottery tickets which the Director of the Sales Division thought was an equivalent responsibility. Also included in this packet was a document entitled "Verification Form" which cited those sections from the Wisconsin Statutes and Wisconsin Administrative Code requiring applicants for positions such as the instant one to provide accurate and complete information and explaining the penalties for not meeting this requirement; and asking the applicants to indicate which district they would be interested in being assigned to based on the district map provided as part of the packet. Complainant signed this form and indicated that he wanted to be considered for FSR positions in the Madison, Eau Claire, Green Bay, and Rhinelander districts but not for FSR positions in the Milwaukee district.

3. Based upon the scoring of his Achievement Inventory, complainant was certified as eligible for FSR positions in the Madison, Eau Claire, and Green Bay districts but his score was not high enough for certification in the Rhinelander district. At this time, complainant was residing in Juneau County which was part of the Rhinelander District. After the subject hiring decisions were made, Juneau County was placed in the Madison District.

4. Respondent established a standard process for interviewing certified candidates for the subject FSR positions. This process included an interview by one of the District Sales Managers or the Director of the Sales Division. If possible, a candidate was interviewed by the District Sales Manager for the district in which he or she was residing. Even if a candidate indicated an interest in

more than one district, he or she would be interviewed only once and the results of that interview considered by the District Sales Managers in these other districts. The only information available to the interviewers was each candidate's answers to the Achievement Inventory. This information did not include a candidate's age or date of birth.

5. Complainant arrived early for his scheduled interview. Due to an administrative oversight, his name was not on the interview schedule. Despite this oversight, complainant was interviewed by Dale Langer, the District Sales Manager for the Eau Claire and Rhinelander districts. Mr. Langer conducted interviews of 40 to 50 candidates and hired 10 of these candidates for the vacant FSR positions in these two districts.

6. The hiring criteria applied by Mr. Langer were: expressed interest in working in sales to retailers and working with the public; experience in route sales of impulse and controversial products; reliability; good organizational skills; ability to work independently within parameters established by supervisor; and ability to respond positively to supervision.

7. During his interview of complainant, Mr. Langer concluded that complainant had experience in route sales of beef snacks to the relevant type of retail outlet; that beef snacks could be considered an impulse product and a controversial product due to health concerns; that complainant did not express a strong interest in sales but in attaining a management position with respondent; and that complainant was reluctant to relocate. After completing his interviews of all the candidates, Mr. Langer concluded that complainant did not have as extensive or as relevant experience as certain other candidates and did not express as strong an interest in route sales as these other candidates. As a result, Mr. Langer decided not to hire complainant. Mr. Langer placed complainant's interview materials in the "maybe" box in the personnel director's office to indicate that this was a candidate whom the District Sales Managers in the Green Bay and Madison Districts may want to consider. Complainant was not hired for an FSR position by respondent in any of its districts. Two of the candidates whose application materials were placed in this "maybe" box were selected for hire for vacant FSR positions in the Madison district.

8. Of the candidates hired for the Eau Claire District, one was age 50, one was age 51, and the other five were under the age of 40. Each of these five

expressed a strong interest in route sales in the Eau Claire District during his interview and described the following relevant experience:

a. Randy Skowland--new car sales in the Duluth area involving much public contact; establishing and servicing sales routes for a Superior television satellite business, including responsibility for advertising, marketing, promotions; sales representative for cigarette manufacturer, including product promotion, distribution and advertising; good knowledge of Superior, Ashland, and Bayfield area.

b. Michael Schremp--route sales of liquor to the same type of retailer which would be handling lottery products; sales representative for Milwaukee Cheese; general manager of a restaurant involving much public contact.

c. Jerry Coulson--sales consultant for a computer company; and route sales for a liquor distributor.

d. Michael Feight--route sales relating to placing vending machines, including cigarette vending machines, in the same type of retail outlets which would be handling lottery products; marketing experience and education.

e. Robert Wartman--route sales, distribution and servicing of bakery product.

9. In the Eau Claire District, of the 37 candidates certified for the vacant FSR positions, 18 were under the age of 40.

10. In the Madison District, of the 50 candidates certified for the vacant FSR positions, 21 were under the age of 40 and 29 were age 40 or over. Of the 11 candidates hired, 7 were under the age of 40 and 4 were age 40 or over.

11. In the Green Bay District, of the 45 candidates certified for the vacant FSR positions, 12 were under the age of 40 and 33 were age 40 or over. Of the 9 candidates hired, 4 were under the age of 40 and 5 were age 40 or over.

12. According to expert testimony, the hiring statistics in the Eau Claire, Madison, and Green Bay districts indicate that the difference in the hiring percentages based on age could be due to chance or intent; that the statistics do not establish a causal relationship between the difference in the hiring percentages based on age and an intent to discriminate based on age; and that the fact that 47% of respondent's total work force is age 40 or over is strong evidence that respondent does not discriminate on the basis of age in its hiring process.

13. At no time in the application and selection process did respondent require that complainant participate in a polygraph examination, a voice stress analysis, a psychological stress evaluation, or an other process designed primarily to evaluate a person's truthfulness.

14. Complainant was notified on or around August 23, 1988, that he had not been selected by respondent for an FSR position.

Conclusions of Law

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

2. The complainant has the burden to show that he was discriminated against by respondent on the basis of his age in regard to the hiring decisions made for the subject FSR positions in the Eau Claire, Madison, and Green Bay Districts.

3. The complainant has failed to sustain this burden.

4. The complainant has the burden to show that there is probable cause to believe that he was discriminated against by respondent on the basis of his age in regard to the hiring decisions made for the subject FSR positions in the Rhinelander districts.

5. The complainant has failed to sustain this burden.

6. The complainant has the burden to show that there is probable cause to believe that he was discriminated against by respondent on the basis of use of an honesty testing device in regard to the subject hires.

7. The complainant has failed to sustain this burden.

Opinion

The parties agreed to the following issues:

1. Whether complainant was discriminated against on the basis of age when he was not hired for the position of Administrative Assistant 3-Field Service Representative (FSR) by respondent on August 23, 1988, for the Madison, Green Bay and Eau Claire Districts.

2. Whether there is Probable Cause to believe complainant was discriminated against on the basis of age when he was not hired for the position of Administrative Assistant 3-FSR by respondent on August 23, 1988, for the Rhinelander district.

3. Is there Probable Cause to believe complainant was discriminated against with the use of an honesty testing device (Achievement Inventory) during the hiring process for Administrative Assistant 3-FSR positions by respondent in the summer of 1988.

Issue 1-Discrimination-Eau Claire, Madison, and Green Bay Districts

In analyzing a claim such as the one under consideration here, the Commission generally uses the method of analysis set forth in McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668, 5 FEP Cases 965 (1973), and its progeny, to determine the merits of the complainant's charge. Under this method, the initial burden is on the complainant to establish the existence of a prima facie case of discrimination. The employer may rebut this prima facie case by articulating legitimate, non-discriminatory reasons for the actions taken which the complainant may, in turn, attempt to show were in fact pretexts for discrimination.

In the context of a hiring decision, the elements of a prima facie case are that the complainant (1) is a member of a class protected by the Fair Employment Act (FEA), (2) applied for and was qualified for an available position, and (3) was rejected under circumstances which give rise to an inference of unlawful discrimination.

At the time of the hiring process, complainant was 54 years old and, as a result, a member of a class protected by the FEA, i.e., persons 40 years of age or older; had applied for and, as the result of his certification, was qualified for the vacant FSR positions in the Eau Claire, Madison, and Green Bay Districts; and, due to the fact that persons under the age of 40 were hired for some of these positions, was rejected under circumstances which give rise to an inference of age discrimination. Complainant has succeeded in establishing a prima facie case of age discrimination.

The burden then shifts to respondent to articulate a legitimate, non-discriminatory reason for its hiring decisions. Respondent has explained that the successful candidates had more extensive relevant experience than complainant and expressed more interest in route sales than complainant. On its face, these reasons are both legitimate and non-discriminatory.

The burden then shifts to complainant to show that the reasons offered by respondent are a pretext for discrimination. Complainant's basic arguments in this regard are that he had a "feeling" during the interview that he

was being discriminated against because of his age although he could "find no fault with the interviewer" and was "sure" that the interviewer had followed the set guidelines for the interview; that he didn't feel that a ten-minute interview was a long enough period of time for an interviewer to be able to assess a candidate's personal characteristics; that he told the interviewer that he had a lot of experience and he felt this led the interviewer to conclude that he was over the age of 40; and that he didn't get an opportunity to compete in the Madison district.

The record shows that each of the candidates interviewed by Mr. Langer were asked the same questions and given the same opportunity to respond. The record also shows that each of the candidates interviewed for the vacant FSR positions, including complainant, was given one interview, usually by the District Sales Manager for the district in which they lived. Complainant was given the same opportunity to compete for any of the FSR positions for which he was certified as any other certified candidate.

Simply because an interviewer may have concluded from a candidate's appearance or explanation of many years of work experience that the candidate was over the age of 40 does not, in and of itself, demonstrate that discrimination based on age took place. It merely establishes one of the requisite elements of proof, i.e., that the decision-maker was aware of the complainant's protected status. In this case, this would have been the only way that Mr. Langer could have been aware of complainant's age since the materials relating to complainant's candidacy available to Mr. Langer during the interview did not refer to complainant's age or date of birth. For purposes of this analysis, the Commission will assume that Mr. Langer concluded that complainant was over the age of 40 based on either his appearance or his explanation of his work experience or both.

Complainant has, however, failed to demonstrate pretext. Complainant has failed to show that Mr. Langer's conclusions regarding complainant's relevant experience as it related to the relevant experience of the successful candidates was inconsistent with the information available to Mr. Langer or was not as Mr. Langer represented it to be. The record does not contain any information relating to the work experience of the successful candidates for the vacant FSR positions in the Madison and Green Bay Districts so a comparison is not possible. In the Eau Claire District, the record shows that candidates

Skowland, Schremp, Coulson, and Feight had route sales and servicing experience relating to liquor or cigarettes for the same type of retail outlets which would be handling lottery tickets. Certainly, this type of product, from the standpoint of being a "controversial" product, would be more comparable to lottery tickets than would the beef snacks to which the route sales experience described by complainant in his interview related. Although the record does not show that candidate Wartman had experience with a "controversial" product, the record does contain Mr. Langer's testimony that Mr. Wartman, through his interview, showed that he had more extensive route sales and servicing experience than that described by complainant in his interview and the complainant did not successfully rebut this showing.

The complainant did not show that Mr. Langer's conclusion that these other candidates had shown more interest and enthusiasm for route sales and servicing than complainant was inconsistent with the information available to Mr. Langer at the time he drew this conclusion or was not as Mr. Langer represented it to be. In addition, complainant has failed to show that the interview criteria utilized by Mr. Langer, i.e., relevant work experience and interest in route sales and servicing, were not reasonably related to the requirements of the subject FSR positions. Complainant has failed to show pretext.

Complainant also argued that respondent's hiring statistics for these FSR positions demonstrate that respondent's hiring practices had a disparate impact on those candidates age 40 or over. However, the expert statistician who served as one of respondent's witnesses at hearing testified that these hiring statistics do not lead to a conclusion of age discrimination and this expert opinion was not rebutted by complainant.

Issue 2-Probable Cause-Rhineland District

Although the issue here is one of probable cause, the Commission will use the method of analysis set forth in McDonnell-Douglas and described above. In view of the fact that complainant was not certified for consideration for vacant FSR positions in the Rhineland District, complainant has failed to show that he was qualified for these positions, and, as a result, has failed to make out a prima facie case of age discrimination in this regard.

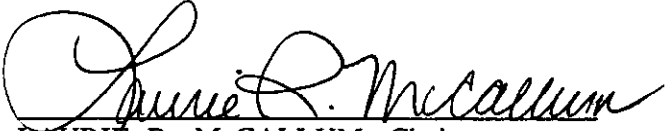
Issue 3-Probable Cause-Honesty Testing Device

Complainant has failed to show that respondent required him to undergo a polygraph examination, a voice stress analysis, a psychological stress evaluation, or any other procedure primarily designed to test his truthfulness. Simply requiring a candidate to certify that the answers he or she gives to an examination are true and correct does not constitute administering an honesty testing device within the meaning of the FEA. The primary purpose of an honesty testing device is to assess a person's truthfulness; the primary purpose of the Achievement Inventory was to assess the relevant work experience of candidates for the subject FSR positions.

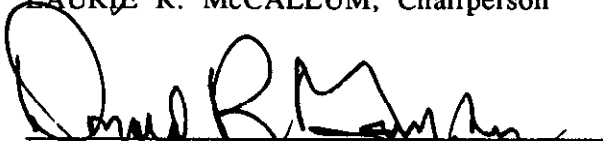
Order

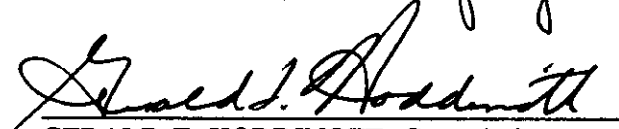
This complaint is dismissed.

Dated: December 17, 1992 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

LRM/lrm/gdt


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner

Parties:

Wilmer McCoic
234 Tremont Street
Mauston, WI 53948

John Tries
Chairperson, WI Gaming Commission*
150 E Gilman Ste 1000
P O Box 8979
Madison WI 53708-8979

*Pursuant to the provisions of 1991 Wis. Act 269 which created the Gaming Commission effective October 1, 1992, the authority previously held by the Executive Director of the Wisconsin Lottery with respect to the positions that are the subject of this proceeding is now held by the Chairperson of the Gaming Commission.

**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 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.