

does not indicate whether the interviewers could or did conclude from the candidates' appearances that complainant was older than the successful candidate.

4. In complainant's opinion, his interview "went extraordinarily well."

5. Two months after his interview, complainant contacted DER and was advised that someone else had been selected for the position.

6. The employment references complainant had provided to DER were not contacted by DER as part of the recruitment and selection process.

7. Complainant had applied for and not been hired for 5 or 6 other positions within state service.

8. Complainant was employed by the State of Wisconsin at the time of the subject recruitment and selection as a labor market analyst for the Job Service Division of the Department of Industry, Labor and Human Relations.

9. Complainant was 50 years old at the time of the subject recruitment and selection and the successful candidate was 41 years old at that time.

10. Complainant testified at hearing that he didn't wish to argue that he was more qualified than any of the other candidates for the position and presented no evidence in this regard.

11. Complainant testified at hearing that his basis for believing that he was discriminated against on the basis of his age rested solely on the fact that he was older than the successful candidate.

12. Complainant requested, pursuant to prehearing discovery, certain information from respondent relating to hiring statistics broken down on the basis of the age of the candidates. Respondent provided certain information in response to complainant's discovery request but indicated to him that DER did not routinely keep the age-based statistics he was requesting. In this response, respondent also advised complainant that if he had any questions or objections to DER's response to his discovery request, he should contact DER or the Commission. Complainant never contacted DER or the Commission in this regard.

Conclusions of Law

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

2. Complainant has the ultimate burden of establishing by a preponderance of the evidence that he was discriminated against on the basis of his age in regard to the subject hiring decision.

3. Complainant has not sustained this burden.

Opinion

The issue in this case to which the parties agreed is:

Did the respondent discriminate against the complainant on the basis of age with respect to the decision not to select him for the position of Personnel Specialist 4-Compensation Analyst/Coster.

The applicable case law is very clear in holding that a complainant in a discrimination case such as the instant one, has the burden to prove, by a preponderance of the evidence, the requisite facts. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). This means that, in his case in chief, complainant must present factual evidence which is sufficient to form the basis for a conclusion by the Commission that complainant has been discriminated against on the basis of his age.

The analytical framework for discrimination cases alleging disparate treatment, as this one appears to allege, was laid out in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668, 5 FEP Cases 965 (1973). This framework provides that the burden is first on the complainant to show a prima facie case of discrimination; that this burden then shifts to respondent to rebut this showing by articulating a legitimate, non-discriminatory reason for its action; and that the burden then shifts back to the complainant to show that this reason is a pretext for discrimination.

In the context of a case challenging a hiring decision, a complainant would establish a prima facie case of age discrimination by showing that he: (1) was in the protected age category; (2) that he applied for a job for which he was qualified; (3) that, despite his qualifications, he was not hired; and (4) that an applicant not in the protected age category was hired. In this case, complainant established the first three elements, but did not establish the fourth element because the successful candidate also was in the protected category.

Another means of establishing a prima facie case using a similar approach to that outlined above when the successful candidate is in the

protected age category is to establish a substantial age difference. While a nine year age differential might be considered adequate in many cases, here there is no indication on the record that the employer was aware of the age of either complainant or the successful candidate. Since the complainant has the burden of proof and has not produced any evidence on this point, it must be concluded that the employer had no such knowledge. There also is nothing on this record with respect to the appearance of the successful candidate, and the Commission cannot conclude solely from their ages that there was a significant difference between the two candidates in terms of youthfulness of appearance. Complainant has failed to show a prima facie case of age discrimination.

Discrimination can also be proved by direct evidence of discrimination or by indirect evidence showing disparate impact.

Complainant has not alleged nor has he presented any direct evidence of discrimination. Such evidence could consist, for example, of comments made by an interviewer relating to complainant's age, of an employer's stated policy that he/she did not intend to hire anyone over the age of 40, etc. In addition, complainant has not alleged nor has he presented any evidence that would show that any of respondent's policies or practices had a disparate impact on candidates over the age of 40. Although complainant showed that he had requested certain statistics from respondent as part of prehearing discovery, he has not shown that this information was improperly denied him or that he made any effort to question or challenge respondent's failure to provide this information to him. In addition, complainant did not provide any evidence, statistical or otherwise, showing such a disparate impact.


The Commission's practice is to provide those filing equal rights complaints with the means, through discovery devices, of preparing and prosecuting their complaints, and to provide each of them ample opportunity to bring their case to hearing and to present their case at hearing. However, it is not the Commission's responsibility nor the respondent's to determine the complainant's theory of his or her case or to present it or prove it. The filing of a complaint under the Fair Employment Act requires an effort on the part of the filing party as well as on the adjudicator and the respondent and, in this case, the complainant failed to make this effort. A vague statement by the complainant that he felt that age-based hiring statistics, if they had been

available, would have shown age discrimination in hiring by respondent and that he believed that he was discriminated against on the basis of his age because he was older than the successful candidate are simply not enough to sustain the complainant's burden of proof.

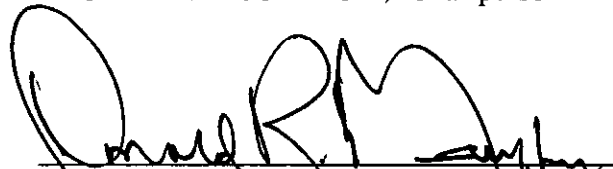
Order

The Motion to Dismiss filed by respondent is granted and this complaint is dismissed.

Dated: December 29, 1992 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

LRM/lrm/gdt


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner

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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.