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JAMES DURFEE,  
                     Complainant,

v.

Secretary, DEPARTMENT OF  
 AGRICULTURE, TRADE AND  
 CONSUMER PROTECTION,  
                     Respondent.

Case No.      94-0042-PC-ER

\* \* \* \* \*

DECISION  
AND  
ORDER

This matter is before the Commission on a complaint of age and sex discrimination as protected against under the Wisconsin Fair Employment Act. The following is based on an evidentiary hearing on this charge held November 7, 1994.

FINDINGS OF FACT

On October 18, 1993, the respondent, the Department of Agriculture, Trade and Consumer Protection (DATCP), hired someone other than complainant James Durfee for the position of Program Assistant 2.

On March 16, 1994, Durfee filed a complaint with this Commission charging DATCP with age and sex discrimination for failing to hire him for the Program Assistant 2 position.

Currently, three point six percent (3.6%) of DATCP's Program Assistant 2 positions are held by males.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction of this matter pursuant to §230.45(1)(b), Wis. Stats.
2. Complainant has the burden to show he was discriminated for reasons of his age and/or sex by respondent when they failed to hire him for a Program Assistant 2 position on October 10, 1993.
3. Complainant has failed to sustain this burden.
4. Complainant was not discriminated against as alleged.

DISCUSSION

The issue in this case is whether respondent discriminated against complainant on the basis of age and/or sex when it did not hire him as a Program Assistant 2 on October 18, 1993.

Using the McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 5 FEP Cases 965 (1973) and Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 25 FEP Cases 113 (1981) method for analyzing discrimination claims, complainant must initially prove that he is in a protected group under WFEA, that he applied for a position for which he was qualified, that he was not hired and that respondent hired someone not in complainant's protected group.

Complainant was the sole witness in this matter. Complainant testified that the incidence of appointment of males to Program Assistant 1 and 2 positions by respondent is 3.6 percent. In support, complainant submitted a handwritten document (Complainant's Exhibit 1) showing the following:

1) Dept. of Agriculture, Trade and Consumer Protection

	<u>Female</u>	<u>Male</u>	<u>% Male</u>
Program Assistant 2 (PA 2)	27	1	3.6
Program Assistant 1 (PA 1)	18	--	0

Complainant also testified that respondent was the source of this information. Other than summation, no other testimony or documentary evidence was presented by complainant.

Respondent objected to the introduction of complainant's exhibit into evidence on the basis of no foundation and hearsay. Complainant's exhibit was admitted into evidence, but the parties were advised that the ultimate finding of fact could not be based on this document. Respondent did not cross examine complainant and moved for dismissal of the case.

The hearing examiner advised respondent that he had no authority to grant the motion, but would recommend it to the Commission, and that if this recommendation was not accepted by the Commission, this matter would be continued and respondent could proceed with its case. Complainant was given an opportunity to respond to respondent's motion and he declined.

Statistical evidence is often used to establish a prima facie case of unlawful discrimination. In such instances, other historical statistical evidence is provided including the available labor pool, the number of qualified protected group applicants certified for the position and the number of such applicants who were interviewed. Here, in this case, the only statistical evidence presented was that 3.6% of respondent's Program Assistant 2 positions are held by males. It is the belief of the Commission that this evidence, standing alone, is insufficient to establish a prima facie case of sex discrimination. Accordingly, the Commission cannot find in complainant's favor.

Regarding the issue of age discrimination, complainant presented no evidence on this point. Even if it could be inferred that he was in the protected age category, there is nothing in the record regarding the ages of the people hired or of the employer's work force in this job category.

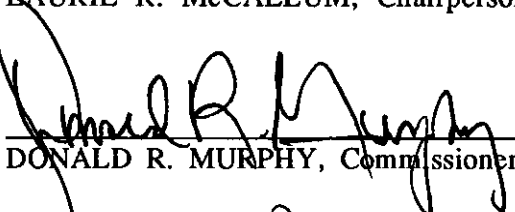
ORDER

Respondent's motion to dismiss is granted and complainant's claim of age and/or sex discrimination for failing to hire him as a Program Assistant 2 in October 1993 is dismissed.

Dated: December 22, 1994 STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

DRM:rcr

  
DONALD R. MURPHY, Commissioner

  
JUDY M. ROGERS, Commissioner

Parties:

James Durfee  
5142 Torino Court  
Middleton, WI 53562

Alan Tracy  
Secretary, DATCP  
P.O. Box 8911  
Madison, WI 53708

**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.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.)