

STATE OF WISCONSIN

PERSONNEL COMMISSION

MARJORIE LUNDQUIST,
Complainant,

v.

**President, UNIVERSITY OF
WISCONSIN-SYSTEM,**
Respondent.

DECISION AND ORDER

Case No. 95-0081-PC-ER

BACKGROUND

A hearing was held in the above-noted case on December 4-5, 1997, after which time the parties requested an opportunity to file briefs and such request was granted. The briefing schedule was delayed to accommodate the parties' request for copies of the hearing tapes. The briefing schedule was delayed further at complainant's request. The Commission received the final brief on June 24, 1998.

The parties agreed to the following statement of issue for hearing (see conference report dated September 22, 1997):

Whether the respondent discriminated against complainant on the basis of age, race or sex in connection with its failure to hire her for the subject Industrial Hygienist position.

FINDINGS OF FACT

1. Complainant is a white female who was 56 years old at the time of the hiring decision in question. (See Exh. R-24, for complainant's age.) The successful candidate, Ernest Stracener, is a 1/16 Native American male, who was 24 years old at the time of the hiring decision in question. (See Exh. C-7, p. 5 of letter dated 1/10/96, for Mr. Stracener's age.)¹

¹ Complainant stated in her initial brief that by inadvertence the age of herself and Mr. Stracener were omitted in the record. The ages are in the record in the exhibits referenced in ¶1 of the Findings of Fact.

2. Respondent advertised for the position of Environmental Health Specialist - Objective, Industrial Hygienist (IH) in the Current Opportunities Bulletin dated May 30, 1994. Relevant excerpts from the job announcement (Exh. R-1) are noted below (with same emphasis as in the original document):

Job Duties: As an IH, responsible for the promotion of occupational health and safety in the UW System. Serve as the UW System's staff IH working with staff on indoor air quality, ergonomic, electromagnetic radiation, radon and other comfort and health related workplace concerns. Substantial contact with campus administration, environmental health and safety, occupational safety, physical plant, IH, staff benefits, human resources and other campus staff to plan and accomplish loss prevention. Responsible for independently performing IH sampling and interpreting the results and meanings of complex analysis; conducting field investigations and research related to IH; functioning as the UW System's scientific expert on IH, confined space entry, and respiratory protection, and providing technical training in environmental health and safety principles and requirements. **Well qualified candidates will have professional academic preparation in a science or environmental health discipline to include an emphasis in IH or preparation in an unrelated field and several years work experience in IH and environmental compliance.**

Knowledge required: IH techniques and methods to include air contaminant monitoring and interpretation of sampling analysis results; general HVAC and industrial ventilation principles; knowledge of established safety standards, codes, state statutes, and NIOSH guidelines; advanced analytical and statistical skills; basic spreadsheet and data base knowledge; basic adult training techniques and experience; excellent oral and written communication skills; and the ability to establish and maintain effective working relationships with individuals both internally and externally.

3. Complainant had a greater breadth of experience and training in the IH field than did Mr. Stracener (Exhs. C-1 through C-4). Also, she was certified by the American Board of IH, and Mr. Stracener was not.

4. Respondent required candidates to complete an Achievement History Questionnaire (AHQ) which was scored and used to determine whether the candidate was sufficiently qualified to be invited for an interview. Complainant applied for the

position and submitted an AHQ. She received the highest numerical score on the AHQ (Exh. R-8) and was invited to interview for the position as were five additional candidates. The six individuals interviewed were comprised of 3 females (including complainant) and three males (including Mr. Stracener). Mr. Stracener received a passing score on the AHQ but would not have been entitled to an interview but for expanded certification for racial minorities (pursuant to §230.25(1n), Stats.).

5. Interviews were held on August 12 and 18, 1994. (Exh. R-11) The following two individuals conducted the interviews: 1) Patricia Kandziora, Manager of the Department of Environmental Health and Safety, a white female who was 38 at the time of the interviews; and 2) Leigh Leonard, Associate Manager of the Department of Environmental Health and Safety, a white female who was 35 at the time of the interviews. (See Exh. C-7, p. 2 for ages of the interview panel.) Ms. Leonard was the first-line supervisor for the vacant position. Neither interviewer knew the AHQ scores of the interviewed candidates. Both interviewers thought Mr. Stracener was White; they were unaware of his Native American minority status.

6. Each interview was conducted using the same format. Ms. Kandziora provided an opening statement which described how the position functioned in the office and the expectations of the position; as well as emphasizing that working together was the ultimate office goal. Ms. Kandziora and Ms. Leonard then shared the responsibility to ask each candidate the interview questions (Exh. R-13). Follow-up questions were asked if needed. After the interview questions were answered, each candidate gave a presentation pursuant to advance notice provided in the letter which invited them for an interview (Exh. R-10), which stated in pertinent part as shown below:

From the nature of the achievement history questionnaire, you probably have gleaned that this position interacts frequently with campus staff and faculty. For that reason we would also like to give you an opportunity to showcase for the interview team a fifteen minute training or information session on the topic of your choice.

7. The questions asked at the interview are shown below (Exh. R-13).

Q-1. Describe your professional qualifications and work history that are relevant to this position.

Q-2. A campus librarian contacts you to enlist your help with an indoor air quality problem in her building. He has been suffering symptoms including a sore throat and lethargy, especially late in the work day. Describe what steps you would take to prepare to respond to this request for assistance.

Q-3. This position requires the candidate to be able to work independently and manage multiple priorities. Please describe how you would do that.

Q-4. What is the most challenging situation you have encountered during your professional experience? How did you finally meet that challenge and what did you learn from the experience?

Q-5. Describe your experience with and philosophy toward training to meet environmental health and safety program requirements. Identify specific subject areas that you would be comfortable conducting training on.

Complainant's Interview

8. Ms. Kandziora's notes of complainant's responses are in the record as Exh. R-14. Ms. Leonard's notes of complainant's responses are in the record as Exh. R-15. Both interviewers' notes were made during the interview. Complainant's recollection of her answers to the questions are in the record as Exh. C-5.

9. Complainant noted in response to the first question as to why she was interested in the position (Exh. C-5) that she had IH work experience in the private sector and in the federal government sector, so she felt working for in the state sector would "round out" her experience. She indicated she was interested in an IH position which was challenging in the sense of involving a broad scope of issues which the vacant position appeared to offer. She pointed out that there was an unusually good fit between her expertise/experience and the demands of the position as noted in the job announcement (Exh. R-1).

10. The interviewers' notes accurately reflected complainant's answer to the second question about indoor air quality. The interviewers had three concerns with her

answer. One was that complainant identified good listening skills as important when talking to employees about IH concerns, yet complainant did not evidence good listening skills during the interview. For example, complainant often interrupted while the interview questions were being asked which necessitated the interviewers to back track to ensure that complainant understood all portions of the question asked. The second concern was that complainant said one of the early steps she would take in investigating a complaint about indoor air quality would be to conduct a survey. Respondent previously had developed a protocol for investigating indoor air quality complaints with one of the first steps being to check out the heating, ventilation and air conditioning (HVAC) system; and with conducting a survey being "way down" on the protocol list. The third concern was complainant's acknowledged unfamiliarity with respondent's organization.

11. The third interview question related to working independently with multiple responsibilities. Complainant recalls the interviewers saying the campuses did not have a local employee handling IH responsibilities for the campus (Exh. C-5), to which complainant responded she would give campuses an incentive to hire such an individual by telling the campuses she would schedule a visit as soon as possible after a local person was hired. Ms. Leonard's notes indicate complainant's response included a statement that the best way to handle multiple responsibilities is to delegate to staff or to hire consultants. This was viewed as a negative response because complainant should have known from the description provided of the office that staff did not exist to whom the IH position could delegate. The suggestion of contractors also was viewed as an ineffective response because respondent does not have the money to hire consultants. In short, complainant's answer in the context of the IH vacant position did not demonstrate that complainant would be successful in handling multiple responsibilities.

12. The fourth question related to the candidate's most challenging situation. Complainant related her experience working for the Library of Congress where her immediate supervisor did not agree always with her recommended solution to IH problems. Complainant indicated she successfully handled these conflicts by going to the

second-line supervisor to obtain approval for her approach to a problem and was able to do so without her first-line supervisor being aware that she had gone over his head. The interviewers felt the response demonstrated that complainant was not a “team player” which was an important factor in the hiring decision. Complainant explained at hearing why her answer should not have been viewed negatively by the interviewers (Exh. C-5 and C-6), but such explanation was not given at the time of the interviews. The interviewers’ negative reaction was reasonable based on the needs of the job and on what was said at the interview.

13. The fifth interview question related to the candidate’s training philosophy and experience. Complainant responded saying written materials were important as part of oral training and that repetition helped the trainees grasp concepts. Complainant said the trainer needs to know both the underlying concepts as well as specific instructions and tasks to achieve the goals. She indicated she had experience training in the IH areas of lead, health effects and compliance with regulations. (Exh. R-15)

14. The interview then proceeded to the point where complainant was to give her training/information session (see ¶5 above). The lead in to this portion of the interview was handled by Ms. Kandziora. She said complainant had 10-15 minutes for her showcase presentation. Complainant bristled at this because she interpreted it as a statement that she would have less than the 15 minutes previously promised in the interview letter. Complainant strongly felt she was entitled to the full 15 minutes and she had rehearsed her presentation with that goal in mind. When she was told she had 10-15 minutes for her presentation she responded saying she would take as long as she needed. Both interviewers picked up on complainant’s hostility and felt it was inappropriate. Complainant’s presentation was on the topic of lead exposure effects on the fetus. Ms. Leonard found the presentation interesting and well presented for an audience of IH professionals. Ms. Kandziora felt the presentation would have shown greater relevance to the vacant position if it had been geared in everyday language to a general audience because of the job requirement to communicate IH concepts to a wide variety of individuals.

15. The interviewers were aware of the variety of IH experience which complainant had but discounted the breadth of her experience to a significant extent because the main focus of complainant's experience was narrow, involving the hazards of lead and video terminals which were not "hot topics" for respondent.

16. Complainant was "unfocused" during her interview. She would begin one subject, leave it abruptly and start on another subject making it difficult for the interviewers to understand her responses to the questions.

Ernest Stracener's Interview

17. Ms. Kandziora's notes of Mr. Stracener's interview are in the record as Exh. R-14. Ms. Leonard's notes of his interview are in the record as Exh. R-16.

18. The first question related to professional qualifications and work history. Mr. Stracener indicated he had experience doing environmental and IH work for Sharp-line, including waste minimization. He noted he was preparing to take a test (IHIT) as the first step to getting certified by the American Board of IH. He had a double major in chemistry and occupational safety. He had some background with ventilation systems, had worked in a research lab and had some experience with ergonomics. He had no prior experience with an employer whose buildings were numerous (multi-site) and spread out and this lack of experience was viewed as a negative by Ms. Kandziora.

19. Mr. Stracener's response to the second interview question about an air quality complaint was that he would first check the ventilation system. His answer was the same as the first step in respondent's protocol relating to air quality problems. He indicated he had a lot of experience with air monitoring and explaining the results. He gave an example of a past experience where the solution he recommended was the strategic placement of a fan. Ms. Kandziora concluded from his example that Mr. Stracener had the ability to develop effective, innovative and inexpensive solutions to IH problems.

20. In response to the third question regarding working independently and managing multiple responsibilities, Mr. Stracener indicated he had worked independ-

ently in a chemical research lab. As to multiple responsibilities, he said it is “too simple” to set priorities based solely on acute versus chronic safety issues (such as one person falling down an elevator shaft versus several people being exposed to chemicals over a long period of time). He preferred setting priorities based on urgency and risk and discussed how this could be done. He acknowledged that complaints needed immediate attention. He stressed that his philosophy was to create an environment where loss prevention was emphasized (such as through safety training) as opposed to reacting to problems as they arose.

21. Mr. Stracener described as his most challenging experience (question 4), an OSHA investigation, which was the first large-scale monitoring project he had undertaken. The analytical and monitoring effect was significant. He said the problem also involved an educational effort to explain the results to employees. He explained in the training how you can smell chocolate chip cookies at a certain point in their baking to illustrate that just because a chemical odor exists it does not mean danger of contamination exists in every instance. His example lead the interviewers to believe that he was innovative in developing ways to explain complex concepts to lay people. He also viewed the OSHA investigation as an “opportunity” rather than as a nuisance or threat which Ms. Kandziora found refreshing. He described a “neat” ergonomics experience redesigning use of exacto knives because people were being cut by recapping the knife. His use of terms like “neat” and “memorable” were interpreted as showing high enthusiasm for his IH work.

22. Question five asked about the candidate’s training philosophy and experience. Mr. Stracener indicated he preferred training and engendering cooperation as opposed to being perceived as exercising a heavy enforcement hand. His philosophy of training was to empower individuals to recognize IH problems and to prevent them. He said he has presented training in hazardous waste, fork lift operation, chemical incompatibility, hazardous “comm” weekly and “PPE training”.

23. Both interviewers were impressed with Mr. Stracener’s presentation. He brought a respirator with paper illustrations and explained how to keep a respirator

clean to operate effectively. He turned all materials towards the interviewers (his audience) so they could follow. He “walked through” dismantling the respirator and then reassembling it. He explained the importance of each step in language which could be understood by lay people.

After Interviews

24. Ms. Kandziora and Ms. Leonard conferred after all interviews were completed and identified Mr. Stracener as the number one candidate and LF (a female) as the number two candidate. Both had worked in a UW setting and this was a factor in their high rank after interviews.

25. Reference checks were conducted for Mr. Stracener.

26. Ms. Kandziora offered the position to Mr. Stracener by telephone at which time he indicated “if it makes any difference” I am 1/16 Native American.

27. An affirmative action (AA) hiring form was completed (Exh. R-19) because one of the people interviewed had a visible handicap. The record does not indicate that the AA form was needed under the circumstances of this hiring, but respondent’s AA officer was either in the process of retiring or had retired leaving respondent without firm guidance on such matters. The AA form provided the following information:

A disabled applicant was not as qualified for this position as was Mr. Stracener. Our recommendation was partly based on Mr. Stracener’s broad-based experience in handling IH equipment, complaints, management strategies, contact with OSHA in adversarial circumstances and communicating risk to complainants in emotionally charged situations. Mr. Stracener has an applied science background with a chemistry degree and safety and IH emphasis and experience.

28. Mr. Stracener accepted respondent’s offer to work in the position. The hiring confirmation letter is in the record as Exh. R-21, showing an effective date of September 26, 1994.

CONCLUSIONS OF LAW

1. Complainant, after hearing, withdrew her claim of sex discrimination.
2. It is complainant's burden of proof to show that respondent hired someone other than herself because of her race. She failed to meet her burden of proof.
3. It is complainant's burden of proof to show that respondent hired someone other than herself because of her age. She failed to meet her burden of proof.

OPINION

Under the Wisconsin Fair Employment Act (FEA), the initial burden of proof is on the complainant to show a prima facie case of discrimination. If complainant meets this burden, the employer then has the burden of articulating a non-discriminatory reason for the actions taken which the complainant may, in turn, attempt to show was a pretext for discrimination. *McDonnell-Douglas v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 5 FEP Cases 965 (1973), *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 25 FEP Cases 113 (1981).

I. Allegation of Sex Discrimination

Complainant withdrew the allegation of sex discrimination in her initial post-hearing brief (p. 2) saying she "concedes there is insufficient evidence in the hearing record to sustain a charge of sex discrimination." Accordingly, this allegation is dismissed at complainant's request.

II. Allegation of Race Discrimination

A prima facie case of race discrimination would exist if the record showed that: 1) complainant is a member of a class protected under the Fair Employment Act (FEA), 2) she applied and was qualified for the available position, and 3) she was rejected under circumstances which give rise to an inference of unlawful discrimination. The record, arguably, supports a prima facie case. Complainant's race (White) is a class protected under the FEA, she was certified as qualified for an interview and the person hired was not White. The people making the hiring decision, however, did not know

that the selected candidate was not White until after the recommendation had been made to hire him. This lack of knowledge about the hired person's race is sufficient to rebut the prima facie case of race discrimination.

Complainant contended that race discrimination exists because the person selected would not have been eligible to interview except for his race. The practice of expanded certification for underutilized positions, however, is authorized by statute (§230.25(ln), Stats.) The Commission has upheld the proper use of expanded certification under the statute as non-discriminatory. *Gygax v. DOR & DER*, 90-0113-PC-ER, 12/14/94. There is no indication in the record that respondent's use of expanded certification was improper. Accordingly, the use of expanded certification here is insufficient to show that race discrimination occurred.

III. Age Discrimination

A prima facie case of age discrimination would exist if the record showed that: 1) complainant is a member of a class protected under the Fair Employment Act (FEA), 2) she applied and was qualified for the available position, and 3) she was rejected under circumstances which give rise to an inference of unlawful discrimination. The record supports a prima facie case. Complainant was over age 40 when she interviewed for the position, she was certified as qualified for an interview and the person hired was under age 40.

The burden then shifts to respondent to articulate a legitimate, non-discriminatory reason for hiring someone other than complainant. Respondent met this burden saying Mr. Stracener was more qualified for the position than complainant.

The burden shifts back to complainant to attempt to show that respondent's stated reason is pretextual. Complainant raised several arguments regarding pretext. All arguments were considered and rejected. The main arguments are discussed below.

Complainant contended in her initial post-hearing brief (pp. 39-43), that the position description (PD) developed for the vacant position demonstrates age bias. Complainant relied in great part on her *suspicion* that Ms. Kandziora purposefully developed

the PD in a way to favor younger candidates. The PD, for example, did not require the successful candidate to be ABIH certified at the time of hire but did require such certification within 6 years thereafter. (Exh. R-3, p. 2.) Complainant contends this was a conscious choice made by Ms. Kandziora for the purpose of favoring younger candidates. There are two basic problems with these arguments. First, there is insufficient evidence in the record to establish that Ms. Kandziora made such a conscious choice.² Accordingly, the theories advanced in complainant's brief remain in the realm of speculation, which is insufficient to establish pretext. The second basic problem with complainant's argument is the hearing record does not establish that a correlation exists between people age 40 or over, and attainment of ABIH certification.

Complainant attempted to demonstrate pretext by asserting that the "tone of her interview" was more stressful than Mr. Stracener experienced. She acknowledged, however, that another candidate over age 40 (RH age 44 at the time of interview) described his interview as "friendly" in tone. The friendly tone of RH's interview suggests the tone of interview was not dependent upon a candidate's age. Complainant attempted to distinguish her situation from RH's by saying complainant was more of a threat to hiring a younger candidate because RH was not ABIH certified at the time of interview. RH's certification status is not in the record. Accordingly, complainant's argument is insufficient to show pretext.

Complainant attempted to demonstrate pretext by asserting that Ms. Kandziora told complainant she had 10-15 minutes to make her presentation to purposefully provoke a negative response which would then be used to say complainant was not the best qualified candidate. Complainant was the only candidate who was told by Ms. Kandziora that the presentation should be made in 10-15 minutes. At least two explanations are possible. First, it could be that Ms. Kandziora deviated from the scripted question as an inadvertent oversight. Second, it could be the deviation was intentional. The record is insufficient to determine which is the more plausible explanation. Since com-

² This sentence was changed to indicate that the entire record lacked such evidence, not just that such evidence was missing from Ms. Kandziora's testimony.

plainant has the ultimate burden of persuasion, she failed to demonstrate that the statement was made intentionally to provoke her.

Complainant also felt the interviewers should have solicited additional information about her response to interview question four regarding her most challenging situation. As noted in the findings of fact, both interviewers felt complainant's response about going behind her supervisor's back was a negative indication that complainant was not a team player. Complainant's argument is that an experienced candidate for a job would not think a tale of deceiving her boss would present her in a favorable light at an interview. She contends the interviewers' interpretation was so contrary to reasonable expectation that the interviewers should have asked clarifying questions. The Commission disagrees. Complainant's response to question four was reasonably interpreted negatively by both interviewers, including Ms. Leonard who complainant believes had no age bias.³

Complainant faulted the interviewers for accepting Mr. Stracener's answer to question two about indoor air quality simply on the basis that his response matched respondent's own protocol. Complainant argued his answer would be correct only if each building had one ventilation system. The problem here is the record contains no information that Mr. Stracener's answer would be correct only if each building had one ventilation system. Accordingly, this argument is insufficient to demonstrate pretext.

The final main argument of pretext raised by complainant is based on her superior experience and training in the IH field as compared to Mr. Stracener's. The hiring decision here turned on factors other than training and experience, as noted in the findings of fact. These other factors (such as inability to listen, not a team player) were relevant to the position and were valid to consider. They are not indicative of pretext. *Hinze v. DATCP*, 91-0085-PC-ER, 12/28/93 (If the civil service process required that only criteria susceptible to an objective grade or score be used when selecting a candidate, the process would not incorporate an opportunity for the appointing authority to conduct personal interviews. One purpose of such interviews is to subjectively assess

each candidate's communication skills and enthusiasm.) *Smith v. UW-Madison*, 90-0033-PC-ER, 7/30/93 (No discrimination was found in hiring where the decision not to select complainant was based on reasons other than her protected status, including her attitude and friendliness expressed during the interviews.)

ORDER

This case is dismissed.

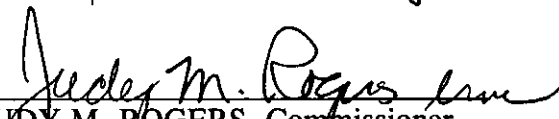
Dated: September 23, 1998.

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STATE PERSONNEL COMMISSION


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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 (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) 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

³ The final sentence in this paragraph was deleted as unnecessary.

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.)

2/3/95