

STATE OF WISCONSIN

PERSONNEL COMMISSION

RONALD HALVORSEN,
Complainant,

v.

**Secretary, DEPARTMENT OF
WORKFORCE DEVELOPMENT,**
Respondent.

Case No. 02-0009-PC-ER

**RULING ON MOTION
TO DISMISS**

This matter is before the Commission to resolve respondent's original motion to dismiss for a failure to state a claim and lack of jurisdiction, which was filed with the Commission on February 25, 2002, along with a brief and an affidavit in support of the motion. A letter was sent by then Commissioner Rogers explaining that the Commission may not grant the motion if there are disputes of material facts. The letter states that complainant has the responsibility to point out any facts recited by respondent that he disputes and provide his version of events for each disputed fact. The complainant did not file a response. The following findings of fact are based on information supplied by the parties, appear to be undisputed, and are made solely for the purpose of deciding this motion.

FINDINGS OF FACT

1. The position of Vocational Rehabilitation Supervisor-District Director was announced in the Current Opportunities Bulletin (COB) on March 26, 2001.
2. The application deadline was April 16, 2001.
3. There were vacancies in Fond du Lac, Milwaukee, Eau Claire and Janesville at the time of the announcement. The announcement also indicated that a vacancy was anticipated in Racine.

4. In April 2001, Complainant applied for the position and indicated interest in working in Racine/Kenosha, Milwaukee, Washington, Waukesha and Ozaukee.

5. Complainant received a rank of "3" (out of 25) on the statewide exam.

6. Complainant did not receive an interview, a rejection letter, or any communication from respondent.

7. Complainant sent two e-mails to respondent but did not receive any response.

8. No positions have been filled from the register. DVR is reviewing its organizational structure and is uncertain about the outcome with respect to the positions in question.

9. The certification request for the Milwaukee position was cancelled. The duties were reassigned to current staff.

10. The department continues to have active certifications for Racine, Eau Claire and Fond du Lac. DVR is uncertain whether or when these positions will be filled.

11. Complainant filed this complaint with the Commission on January 24, 2002.

12. The affidavit of Christine Goslawski, a Human Resources Specialist-Senior (Staffing Analyst), employed by respondent in the Bureau of Human Resource Services, Administrative Services Division was signed and notarized on February 2, 2002, and filed with the Commission on February 25, 2002, which includes the above facts, has not been opposed in any way by complainant.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter of this complaint pursuant to §§111.375(2), 230.45(1)(b), Stats.

2. Respondent did not take any adverse employment action by rejecting complainant's application for employment, or by otherwise failing to hire him.

3. Respondent did not discriminate against complainant pursuant to the WFEA (Wisconsin Fair Employment Act; Subchapter II, Chapter 111, Wis. Stats.)

OPINION

The complainant filed a discrimination complaint with the Commission, alleging he was not considered during the hiring process for the position(s) of Vocational Rehabilitation Supervisor District Director, based solely on his age. Respondent argues the Commission lacks the authority under §230.45(1)(b), Wis. Stats., to investigate the present complaint. Specifically, respondent contends that because a hiring decision was not made, interviews were not scheduled, certification requests were not approved, positions were not filled and recruitment not undertaken, no adverse employment action was taken with regard to the complainant, and the Commission does not have the authority to review the complaint.

The complaint itself falls within the Commission's jurisdiction because it alleges "I believe I was eliminated from competition based solely upon my age." In other words it alleges that what happened to him amounted to a failure to hire. A complaint does not need to allege more than this to state a claim under the WFEA. *See, e. g., Hawk v. Docom*, 99-0047-PC-ER, 6/2/99.

After a review of the present complaint and respondent's motion to dismiss, the Commission finds the motion would more appropriately be analyzed as a motion for summary judgment. The Commission may summarily decide a case when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Balele v. Wis. Pers. Comm.*, 223 Wis. 2d 739, 745-748, 589 N.W. 2d 418 (Ct. App. 1998). Generally speaking, the following guidelines apply. The moving party has the burden to establish the absence of any material disputed facts based on the following principles: a) if there are any relevant facts in dispute, the motion cannot be

granted; however, if there are disputed facts which are *not* relevant, this will not defeat the motion; b) inferences to be drawn from the underlying facts contained in the moving party's material should be viewed in the light most favorable to the party opposing the motion; and c) doubts as to the existence of a genuine issue of material fact should be resolved against the party moving for summary judgment. *See Grams v. Boss*, 97 Wis. 2d 332, 338-9, 294 N.W. 2d 473 (1980); *Balele v. DOT*, 00-0044-PC-ER, 10/23/01. The non-moving party may not rest upon mere allegations, mere denials or speculation to dispute a fact properly supported by the moving party's submissions. *Balele, Id.*, citing *Moulas v. PBC Prod.*, 213 Wis. 2d 406, 410-11, 570 N.W. 2d 739 (Ct. App. 1997). If the non-moving party has the ultimate burden of proof on the claim in question, that ultimate burden remains with that party in the context of the summary judgment motion. *Balele, Id.*, citing *Transportation Ins. Co. v. Huntziger Const. Co.*, 179 Wis. 2d 281, 290-92, 507 N.W. 2d 136 (Ct. App. 1993).

In a case of this nature, the initial burden of proceeding is on the complainant to show a prima facie case of discrimination. If the complainant meets this burden, the employer then has the burden of articulating a legitimate, nondiscriminatory reason for the action taken which the complainant then attempts to show was a pretext for discrimination. The complainant has the ultimate burden of proof. *See Puetz Motor Sales Inc. v. LIRC*, 126 Wis. 2d 168, 172-73, 376 N.W.2d 372 (Ct. App. 1985).

In an age discrimination case, in order to establish a prima facie case of discrimination, the complainant must show that: (1) he is an individual who is age 40 or over, as set forth in §111.33(1), Wis. Stats., (2) he applied and was qualified for the available position, and 3) he was rejected under circumstances which give rise to an inference of unlawful discrimination.

Complainant contends that because he ranked 3 out of 25 on the examination but did not receive an interview, rejection letter, or any form of communication from respondent that he was eliminated from consideration based solely on his age (his birth date is 2/15/44).

Respondent argues complaint does not cite a hiring decision or any other act that constitutes a basis for a complaint of discrimination under the WFEA. To support its argument, respondent provided an affidavit signed and notarized by Christine Gowalski, Human Resources Specialist-Senior (Staffing Analyst). The affidavit states that none of the positions have been filled from this particular register because of a review of the respondent's organizational structure. In addition, the certification request for the Milwaukee position was cancelled, with the job responsibilities reassigned to current staff. At the time of the filing of respondent's motion to dismiss, the certifications for Racine, Eau Claire, and Fond du Lac were still active. It is undisputed that complainant was not interviewed and that he did not receive a rejection letter.

In a February 28, 2002, letter, the Commission advised complainant as follows:

Respondent's motion, if granted, would result in dismissal of this case. The Commission may not grant the motion if there are disputes of *material* facts. It is complainant's responsibility to point out in his brief any fact recited in respondent's brief that he disputes and to provide his version of events for each disputed fact. If complainant fails to dispute facts or if he files no responsive brief, the Commission will presume that the facts recited in respondent's brief are true.

Complainant did not respond to complainant's motion and brief. He did not offer any evidence to dispute respondent's contention that a hiring decision has not yet been made for the reasons provided by respondent. Complainant neither presented any evidence that the certified register was ever used to recruit candidates for interviews to fill a position, nor that someone else was selected for the position(s) in question. Complainant has not articulated any action by the respondent that can be considered discriminatory.

Based on the submissions of both parties, and the undisputed explanation that respondent has not made a hiring decision, the Commission finds there is no genuine issue of material fact to defeat a *motion for summary judgment*.

ORDER

Respondent's motion to dismiss is granted.

Dated: May 29, 2002.

STATE PERSONNEL COMMISSION

KST/AJT:020009Cru11.1


ANTHONY J. THEODORE, Commissioner


KELLI S. THOMPSON, Commissioner

Parties:

Ronald G. Halvorson
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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 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