

**RICHARD LEE GOODHART,**  
**Complainant,**

v.

**President, UNIVERSITY OF WISCONSIN**  
**SYSTEM (La Crosse),**  
**Respondent.**

**Case No. 98-0065-PC-ER**

**FINAL<sup>1</sup> DECISION AND**  
**ORDER**

**NATURE OF THE CASE**

This case involves a complaint of discrimination in violation of the WFEA (Wisconsin Fair Employment Act; Subchapter II, Chapter 111, Stats.) on the basis of age and WFEA retaliation regarding certain personnel transactions. Following complainant's withdrawal of certain aspects of this complaint, this case proceeded to hearing with regard to the following issues:

1. Whether there is probable cause to believe that complainant was retaliated against for engaging in fair employment activities by respondent in 1997-98 with respect to the following activities:
  - a) In May 1997, Director Paul Theobald cancelled complainant's fall 1997 extension class without notice,
  - b) Starting in May 1997, Director Paul Theobald allegedly demanded that complainant retire,
  - c) In December 1997, complainant was denied off load payments for his January 1998 class,
  - d) In January 1998, respondent altered complainant's class schedule,
  - e) In January 1998, respondent changed complainant's course schedule,

---

<sup>1</sup> This case is before the Commission following the issuance of a proposed decision pursuant to §227.46(2), Stats. The Commission has adopted the proposed decision as its final disposition of this matter, with some limited editorial changes, and a change to Finding of Fact 11 to add some material that is found in the opinion but which was not set forth explicitly in the Findings.

f) On January 13, 1998, respondent used new factors in his performance evaluation that proposed to change complainant's performance evaluation,

g) In about October 1997, Director Paul Theobald informed Chair Kent Koppleman that complainant was not an acceptable candidate to serve as Interim Chair.

\* \* \*

2. Whether there is probable cause to believe that complainant was discriminated against on the basis of age by respondent in the following terms and/or conditions of his employment:

\* \* \*

b) Starting in May 1997, Director Paul Theobald allegedly demanded that complainant retire, and

c) On January 13, 1998, respondent used new factors in his performance evaluation that proposed to change complainant's performance evaluation.

3. Whether complainant was discriminated against on the basis of age by respondent in the following terms and/or conditions of his employment:

a) In May 1997, Director Paul Theobald cancelled complainant's fall 1997 extension class without notice,

b) In December 1997, complainant was denied off load payments for his January 1998 class,

c) In January 1998, respondent altered complainant's class schedule, and

d) In January 1998, respondent changed complainant's course schedule.<sup>2</sup> Report of prehearing conference held on September 13, 1999 (numbering changed to keep consecutive).

#### FINDINGS OF FACT

1. Complainant was born on July 9, 1939. He has been employed by respondent since 1966, and during the relevant period was an associate professor in respondent's Foundations of Educational Policy and Practice Department (FEPP), School of Education.

---

<sup>2</sup> The investigator's initial determination in this case found "probable cause," *see* §PC 1.02(16), Wis. Adm. Code, to believe discrimination occurred as to some issues and "no probable cause" as to other issues. Those issues for which probable cause has been found are being heard on the merits of each claim, while those issues for which no probable cause was found, and which complainant appealed, are being heard on the question of whether there is probable cause to believe discrimination occurred, *see* §PC 2.07, Wis. Adm. Code. Ellipses indicate where issues have been withdrawn.

2. In summer 1996, Paul Theobald (Associate Dean and Director for the School of Education) commenced his employment on campus. On November 10, 1997, Douglas Hastad commenced serving as Dean of Human Development Programs, which included the School of Education.

3. Both Hastad and Theobald were of the opinion that the assignment of teaching overloads should be more in line with the policies both of respondent and NCATE (National Council for Accreditation of Teacher Education), the accrediting body for UWLX (UW-LaCrosse). According to these policies, faculty were supposed to be teaching a “normal” load of credits—11 credits in the School of Education. This is at least *in part because the faculty have responsibility for professional activities beyond classroom activities—i. e., scholarship (primarily research and presentations) and professional service (e. g., serving on academic committees).* According to UW-System policy, “[r]ecurring needs for a faculty member to assume special institutional responsibilities should be handled through some method other than overload payments . . . . Exceptions are subject to specific advance approval of the Chancellor(s) or designee whose Unit(s) is (are) involved and must be of an unusual, short term, or nonrecurring nature.” Respondent’s Exhibit 17, p. 9.

4. In 1994, complainant had advised his department chair of his intent to retire by June 30, 1997

5. Respondent’s unwritten policy was that faculty members who were planning on retirement relatively soon were allowed to boost their earnings for purposes of enhancing their retirement payments by teaching on an overload basis for the last three years prior to retirement. This was done for complainant and he was permitted to teach classes in “overload” in anticipation of his retirement. By May, 1997, complainant had been teaching on an overload basis for an entire three year pre-retirement cycle.

6. Theobald told complainant by a May 20, 1997, email, that he would “like the chance to chat with you (hopefully this week) about where you’re at with your retirement plans at this point. Please call Carol at 5-8116 and she’ll set up an appointment with me.” Complainant did not respond until a July 23, 1997, email as follows: “[a]t this time, I have no plans for retirement.”

7. At that point in time, complainant had been at UWLX since 1966, and most recently had been teaching in the School of Education since 1991, when he had returned to teaching after a stint in administration. During this period since his return to teaching, complainant had not published anything of professional significance, had made no professional presentations, and had not engaged in any professional activity. He had not achieved the rank of a full professor and did not have full graduate faculty status.<sup>3</sup>

8. Under the circumstances, Theobald came to the conclusion complainant should not continue to teach on an overload basis. Hastad subsequently concurred in this judgment.

9. The foregoing decision and the resulting denials of approval for complainant to teach specific courses on an overload basis, and other changes in his schedule, were motivated by the foregoing policy regarding overloads, complainant's completion of a pre-retirement three year overload cycle which had resulted in the complainant earning considerable compensation over his base salary, and by the assessment that if complainant wanted to continue as a faculty member he should devote more time to scholarly activities and professional service. The decision was not motivated in any way by complainant's age or by an intent to retaliate against complainant for having engaged in protected activity under the WFEA.

10. Respondent's decision regarding complainant's overload teaching resulted in the denial of approval for complainant to teach on an overload basis in the fall of 1997, and in the beginning of 1998,<sup>4</sup> as well as certain other changes in complainant's teaching schedule.

11. In 1997, respondent was processing complaints of sexual harassment against complainant filed by three female students. During the course of that process, complainant met with respondent's agents and complained about how respondent was handling this process. Complainant did not raise any concerns about violations of the WFEA. These harassment complaints were resolved in late July, 1997, by an agreement involving complainant, the students, and respondent.

---

<sup>3</sup> Graduate faculty status determines the ability of a faculty member to engage in such activities as teaching graduate level courses. For example, full graduate faculty status enables the faculty member to serve on thesis committees.

<sup>4</sup> This involved a course taught in the January intercession, or "J" term.

12. In part because Theobald had become aware of the ongoing investigation into the sex harassment complaints, and he did not want the issue of complainant's overload teaching to appear to be involved with the sex harassment investigation, and in part because complainant had not responded to his May 20, 1997, email inquiring into complainant's retirement plans for two months, Theobald did not meet with complainant until August 13, 1997

13. At the August 13, 1997, meeting, Theobald informed complainant that he would not be teaching the fall semester extension course and that he would not be assigned further overload teaching, and inquired regarding complainant's retirement plans. Theobald did not demand or request that complainant retire. Theobald did indicate that complainant had made a good deal of money through overload teaching during the preceding years.

14. In October 1997, the department identified complainant as the interim chair of the Department for Koppelman's absence from January 1998 through June 1998. However, Theobald in effect vetoed this decision, and Barb Chaney was appointed as the interim dean.

#### CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this case pursuant to §230.45(1)(b), Stats.

2. The complainant has the burden of proof as to all of the issues for hearing.

3. In order to satisfy his burden of proof as to issues of probable cause—i. e., whether there is probable cause to believe respondent discriminated against complainant as alleged—complainant must establish “a reasonable ground for belief, supported by facts and circumstances strong enough in themselves to warrant a prudent person to believe that a violation probably has been or is being committed as alleged in the complaint.” §PC 1.02(16), Wis. Adm. Code.

4. In order to satisfy his burden of proof as to those issues which are being heard on the merits—i. e., whether respondent did or did not discriminate against complainant as alleged—complainant must establish the necessary facts by a preponderance of the evidence. *See Currie v. State*, 210 Wis. 2d 380, 390, 565 N. W. 2d 523 (Ct. App. 1997).

5. The complainant has not sustained his burden of proof as to any issues.

6. [1]<sup>5</sup> There is no probable cause to believe that complainant was retaliated against for engaging in fair employment activities by respondent in 1997-98 with respect to the following activities:

a) In May 1997, Director Paul Theobald cancelled complainant's fall 1997 extension class without notice,

b) Starting in May 1997, Director Paul Theobald allegedly demanded that complainant retire,

c) In December 1997, complainant was denied off load payments for his January 1998 class,

d) In January 1998, respondent altered complainant's class schedule,

e) In January 1998, respondent changed complainant's course schedule,

f) On January 13, 1998, respondent used new factors in his performance evaluation that proposed to change complainant's performance evaluation,

g) In about October 1997, Director Paul Theobald informed Chair Kent Koppleman that complainant was not an acceptable candidate to serve as Interim Chair.

7. [2] There is no probable cause to believe that complainant was discriminated against on the basis of age by respondent in the following terms and/or conditions of his employment:

\* \* \*

b) Starting in May 1997, Director Paul Theobald allegedly demanded that complainant retire, and

c) . On January 13, 1998, respondent used new factors in his performance evaluation that proposed to change complainant's performance evaluation.

8. [3] Complainant was not discriminated against on the basis of age by respondent in the following terms and/or conditions of his employment:

a) In May 1997, Director Paul Theobald cancelled complainant's fall 1997 extension class without notice,

---

<sup>5</sup> Numbers in brackets conform to those used in the "NATURE OF THE CASE," above at pp. 1-2.

b) In December 1997, complainant was denied off load payments for his January 1998 class,

c) In January 1998, respondent altered complainant's class schedule, and

d) In January 1998, respondent changed complainant's course schedule.

### OPINION

Under the WFEA, 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).

#### Fair Employment Retaliation

Complainant contended that respondent retaliated against him for engaging in fair employment activities. A fair employment activity includes opposing any discriminatory practice under the WFEA or complaining, testifying or assisting in any proceeding under the FEA. §111.322(3), Stats. The first element of a prima facie case of WFEA retaliation is that the complainant participated in a protected activity. *See, e. g., Hecht v. UWHCA*, 97-0009-PC-ER, 3/17/99. In the post-hearing brief submitted through counsel, complainant identified certain meetings with management during which he complained about how the sexual harassment claims against him were being handled. However, there is no evidence in the record that in these meetings his complaints went beyond allegations of "unfair" treatment to raise any specific complaints related to the WFEA—e. g., that his complaint was being handled differently from female faculty. Therefore, the Commission will not address any further the issues related to WFEA retaliation.

#### Age Discrimination

There are two groups of issues under this heading. Issues [2]. b) and c) are before the Commission on the question of probable cause, while issues [3] a), b), c), and d) involve the question of whether discrimination actually occurred.

Complainant contends that respondent discriminated against him in certain terms and conditions of his employment because of his age. A prima facie case of age discrimination requires a showing that: 1) the complainant is 40 or more years old, 2) he was adversely affected by the actions alleged to have occurred and 3) there is some evidence which gives rise to an inference of age discrimination. *See, e. g., Sprenger v. UW-Green Bay, 85-0089-PC-ER, 12/30/86.*

Complainant was born on July 9, 1939, and thus is protected by the WFEA with regard to all these issues. With regard to issue [2]. b), he has failed to establish a prima facie case because he did not establish that Theobald demanded that he retire, and thus there was no adverse action. Even complainant's own testimony does not support a conclusion that Theobald made such a demand. Complainant said that in their August 13, 1997, meeting Theobald recommended or suggested retirement. Theobald denied this. In the Commission's opinion, the record supports a conclusion that Theobald and complainant did discuss retirement at this time, but complainant did not establish that Theobald demanded complainant retire.

As to issue [2]. c) ("On January 13, 1998, respondent used new factors in his performance evaluation that proposed to change complainant's performance evaluation."), complainant appears to have abandoned this contention, because it was not raised in the post-hearing briefs and apparently not addressed during the hearing.<sup>6</sup> To the extent this issue encompasses respondent's concerns about complainant's scholarly and professional activity, such concerns were not an adverse action but part of the rationale for other actions.

Issue [3] involves respondent's decisions denying complainant the ability to teach off-load courses. Complainant was adversely affected by respondent's decisions that he would not be allowed to teach off-load courses, which resulted in the loss of the opportunity to earn additional remuneration over his base salary. An inference of age discrimination arises from the fact that the department approved complainant teaching

---

<sup>6</sup> There was discussion at a January 13, 1998, meeting involving complainant, Theobald, Hastad, and complainant and his attorney, about complainant's lack of scholarly activity and research as it



these courses prior to respondent's veto. Thus, complainant has established a prima facie case as to these issues.

Respondent has articulated a legitimate non-discriminatory rationale for its decisions that complainant could not teach these courses. In summary, respondent asserts that complainant was allowed to teach the offload courses for three years in anticipation of his retirement. Once complainant decided not to retire, concerns about his lack of scholarly activity and professional service came into focus. Respondent therefore determined that complainant should return to a regular teaching load while addressing these problems. At this point, the question is whether complainant has established that respondent's articulated rationale is a pretext for age discrimination.

Before addressing this question directly, it should be pointed out what is *not* involved in the decision of this case. It is clear that during the period in question there was a power struggle between the department and the administration in the persons of Associate Dean Theobald and Dean Hastad. The latter two were relative newcomers to their roles in this case—Theobald began his tenure in July 1996, just prior to the events that gave rise to the instant discrimination complainant, and Hastad became dean in November 1997. On the record before the Commission, it appears they had opinions on several issues that were significantly different from those which prevailed in the department. These included the criteria that should be considered in the assignment of off-load courses, and the role of the administration in these decisions. Underlying this dispute were different opinions on the importance of scholarly activity and professional service by post-tenure faculty. However, the issue before the Commission is limited strictly to the question of whether the decisions made by Theobald and Hastad were motivated by considerations of complainant's age. The Commission determines only whether the rationale for the decisions made by respondent was actually a pretext for a decision motivated by complainant's age, and does not determine which party to this dispute was right or wrong in the context either of the dynamics of university governance, or in a more general sense.

---

related to complainant's course schedule. There is no indication that there was any adverse action taken against complainant at this meeting.

Much of complainant's case involves what appear to be attempts to show that the administration's handling of the issue of complainant's off-load teaching was unfair, inadequately noticed, and contrary to UWS policies regarding faculty governance. While, as discussed above, it is not the Commission's role to sit in ultimate judgment on these matters, they are relevant because an employer's failure to follow its own policies can be probative of pretext. *See, e. g., Sherkow v. Wis. DPI*, 17 FEP Cases 152 (W. D. Wis., 1978); *affirmed in part, Sherkow v. Wis. DPI*, 23 FEP Cases 939 (7<sup>th</sup> Cir., 1980) (The extension of an employee's probation contrary to the civil service code constituted evidence of pretext.).

In the instant case, management's position was supported by specific state and NCATE policy provisions applicable to UWLX. The UW-System policy on off-load or overload teaching includes the following:

The salary received by full time faculty members is considered to be full compensation for university activity during their appointment period. Thus, such faculty members may not receive compensation for an overload activity from any funds administered within the University System, regardless of source, except through procedure and within standards provided in this policy.

Recurring needs for a faculty member to assume special institutional responsibilities should be handled by some method other than overload payments.

Exceptions are subject to specific *advance approval* of the Chancellor(s) or designee whose Unit(s) is (are) involved and must be of an *unusual, short term, or nonrecurring nature*. Respondent's Exhibit 17, pp. 9-10 (emphasis added)

The NCATE Standards provide: "Faculty teaching loads, including overloads and off-campus teaching, are mutually agreed upon and limited to allow faculty to engage effectively in teaching, scholarship, and service." *Id.*, p. 26. In this context, respondent had a reasonable basis for its decision, supported by relevant policies. While the department took the position that management's actions usurped the department's prerogatives with regard to the principles of faculty governance, the foregoing authorities clearly lend support to respondent's position that the administrators had the ultimate responsibility to approve or disapprove off-load teaching assignments. Furthermore, respondent's position was reinforced by the fact that complainant had come to the end of

three years of off-load teaching in accordance with an apparently unwritten campus policy to allow such overloads as part of a pre-retirement cycle.

An additional rationale for respondent's decision was its opinion that not only had complainant been teaching on overload for three years, but also his performance with regard to scholarly activities and professional service had been lacking. This was a bone of contention between the parties in this proceeding. Complainant tried to show that this rationale was pretextual by arguing that the department had given him a favorable post-tenure evaluation in 1997 and was of the opinion that his scholarly activities were adequate, that NCATE had not cited the department for any deficiencies in this area, and that concerns about these matters had never before been raised prior to the position taken by Theobald and Hastad. While the Commission agrees that these facts are probative of pretext, there is certain undisputed evidence that provides support for respondent's position. Respondent pointed out that complainant had been on the faculty since 1966, but had neither reached the rank of full professor nor attained full graduate faculty status, and that he had no publications and no professional presentations during the relevant period. Furthermore, Theobald and Hastad were recent appointees to their respective positions and brought a new perspective to a number of issues. Thus, while the record supports the conclusion that there was a legitimate difference of opinion between management and the department on this issue, respondent's position was not so bereft of support that there was any appreciable evidence of pretext.

It should be noted that while Theobald denied being motivated by concern about the amount of money complainant had made during his three year pre-retirement cycle, significant evidence concerning his comments on this subject leads the Commission to conclude that this played at least some role in the decisions. However, such a concern is related to the respondent's reasons discussed above, and do not tend to show that his stated reasons constituted a pretext for age discrimination. Similarly, there are indications that complainant suspected that Theobald's decisions about his off-load teaching were connected to the sexual harassment complaints concerning complainant. To the extent that this was the case, this also would not be probative of age discrimination.

ORDER

This complaint of discrimination is dismissed.

Dated: January 25, 2001.

STATE PERSONNEL COMMISSION

Laurie R. McCallum  
LAURIE R. McCALLUM, Chairperson

AJT:980065Cdec.doc

Judy M. Rogers  
JUDY M. ROGERS, Commissioner

Parties:

Richard Lee Goodhart  
1405 Farnam Court  
La Crosse, WI 54601

Katherine Lyall  
President UW System  
1720 Van Hise Hall  
1220 Linden Drive  
Madison, WI 53706

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