

STATE OF WISCONSIN

PERSONNEL COMMISSION

ALLEN Bedynek-STUMM,
Petitioner,

v.

**Secretary, DEPARTMENT OF
TRANSPORTATION,**
Respondent.

**RULING ON
RESPONDENT'S
MOTION FOR
SUMMARY JUDGMENT**

Case Nos. 98-0168-PC & 98-0213-PC-ER

The hearing examiner issued a proposed ruling by cover letter dated March 8, 2001. The parties filed objections and the Commission received the final argument on May 1, 2001. The Commission has considered the parties' arguments and adopts the proposed ruling with modifications. For consistency, Mr. Bedynek-Stumm is referred to herein as the petitioner. Other changes are explained in alphabetical footnotes. A procedural history follows using the same paragraphs as included in the proposed ruling but reorganized in chronological order.

The parties agreed to hold the appeal (case number 98-0168-PC) in abeyance until investigation of the discrimination complaint (case number 98-0213-PC-ER) was completed (see Commission letter dated January 29, 1999).[^] An Initial Determination (ID) was issued in case number 98-0213-PC-ER on March 24, 2000. The conclusion reached in the ID was that probable cause did not exist to believe that the alleged discrimination occurred. The Petitioner filed a timely appeal of the ID and, accordingly, both cases were consolidated for hearing.

A prehearing conference was held on June 8, 2000, at which time the parties agreed to the following statement of the hearing issues (see Conference Report dated 6/8/00):

Case No. 98-0168-PC: Whether respondent committed an illegal act or an abuse of discretion in not appointing the appellant in October 1998, to one of two vacant positions in District 1 as a Transportation Customer Representative 2 Field (TCR2 Field).

[^] This sentence was changed to clarify that the parties agreed to hold the appeal in abeyance.

Case No. 98-0213-PC-ER: Whether there is probable cause to believe that respondent discriminated against complainant based on age, sex or race and/or retaliated against complainant for engaging in activities protected under the Fair Employment Act (FEA) when in October 1998, respondent did not select him for one of two vacant positions in District 1 as a TCR2 Field.

Respondent moved for summary judgment by cover letter dated June 30, 2000. Both parties filed written arguments. A conference was held on November 17, 2000, to attempt to resolve discovery disputes and to provide both parties an opportunity to clarify their written arguments (see Commission letter dated August 25, 2000). On January 26, 2001, the petitioner indicated he might wish to present additional arguments regarding the pending motion. Accordingly, the hearing examiner agreed to issue the ruling as a proposed ruling - a procedure that provides both parties with an opportunity to file objections.^B

The facts recited below are made solely to resolve this motion. Disputed facts are highlighted by footnotes.

FINDINGS OF FACT

1. The petitioner applied for one of two vacant positions as a Transportation Customer Representative 2 Field (TCR position) in respondent's District 1. The job announcement contained the following information (in relevant part):

JOB DUTIES: Provide driver licensing and vehicle registration services to the public. Give traffic law and sign recognition tests. Take photos of driver's license applicants. Determine and collect proper fees. Issue driving instruction permits, driver's licenses, motor vehicle registrations, titles and license plates. **KNOWLEDGE REQUIRED:** Interpersonal and verbal communication skills essential for providing licensing and registration services in direct and extensive public contact; mathematical computation skills such as addition, subtraction, multiplication and division; reading comprehension skills used to understand and apply laws. Keyboard skills such as those required for typing to enter data into computer records preferred.

2. Respondent had 26 vacant TCR positions in seven districts. Some candidates expressed interest in being hired in more than one district. Others, like petitioner, applied and

^B This sentence was changed to clarify that a proposed ruling was issued to accommodate petitioner's desire to file additional information.

were certified for only one district.^C Interviews were held at different locations throughout the State and the members of the interview panel were not the same at each location.

3. The same procedure was followed for all interviews. Each panel member rated each candidate's response to 7 pre-prepared questions using pre-prepared benchmarks.^D Each candidate received an 8th score based on communication and interpersonal skills demonstrated during the interview. The maximum score possible was 52 points, plus 4 "breaker points" for candidates who had keyboard abilities.

4. Each interviewer had a separate scoring packet for each candidate. The packet included a sheet for each question asked along with the benchmarks, as well as a summary sheet where each interviewer was expected to circle the candidate's score on each question. Sometimes the panel members failed to record a score on the sheets provided for each question asked. The questions asked and the benchmarks used for scoring were job-related.

5. There was an overall rating sheet that was to be signed by each member of the interview panel. Each candidate's overall score on each of the interview questions was noted (by circling the applicable score), the points were totaled into a "Grand Total Points" score followed by the tie breaker points for keyboarding skills. Respondent has not explained how these overall rating sheets were developed when, for example, there was disagreement between panel members on the score given for a candidate's response to a question.

6. Five candidates, including the petitioner, were interviewed in Madison (district 1) on the afternoon of August 18, 1998.^E Julie Sauer was a member of the interview panel on this date. Her 16-year old daughter, Bridget, was present in the interview room. Bridget took notes of the candidates' responses while she was in the interview room and respondent has not produced her notes.^{1F} The petitioner was distracted by Bridget's presence. Information about these five candidates is shown in the table below:

^C This sentence was amended to clarify that the petitioner only applied for vacancies in District 1.

^D A sentence regarding the job-relatedness of the interview questions was deleted from ¶3. The information remains in ¶4.

^E This sentence was changed to indicate where the interview was held.

^{1F} Footnote #1 is amended as follows: "Respondent contests petitioner's statement that Bridget had any role in the hiring process. According to respondent, Bridget was reading a book and writing letters at a table in the interview room. (See respondent's Answer to the Complaint, dated February 1, 1999.)"

Candidate/ District(s) ^G	Age	Sex	Race	Overall Score
Petitioner District 1	63	Male	White	36
BL Districts 1, 3	51	Male	White	44
RK District 1	42	Male	White	50
MS District 3	50	Male	Unknown	32
BG District 1	35	Male	Unknown	30

7 The age, sex and race of the district 1 candidates who were interviewed on a date other than covered in the prior paragraph are noted in the table below.

Candidate	Age	Sex	Race	Overall Score
VN	51	Male	White	40
BG	52	Male	White	30
SF	34	Male	White	34
DW	47	Male	White	34
Mr. Mayo	29	Male	White	36
Ms. Mooney	38	Female	White	50
BL	Unknown	Female	Black	42
JM	Unknown	Male	White	44
RP	Unknown	Female	White	46

^H8. The selected candidates for the vacancies in District 1 were Donald Mayo and Kelly Mooney. The interview panel members for petitioner, Mr. Mayo and Ms. Mooney were

Only Ms. Schwoerer's affidavit addressed this disputed fact saying 'Bridget did not participate in the interview process' (§7, Schwoerer affidavit). The statement is of little value because there is no indication that Ms. Schwoerer was in the interview room or that she participated in the interview panel deliberations. Respondent presented no affidavits from Bridget or from the interview panel members."

^G The districts listed by a specific candidate are those for which the candidate applied.

^H This paragraph was amended to add information about the interview panel. The Commission also notes that respondent represented to the Commission in a letter dated February 23, 1999, that certain applicants "were all interviewed by the same panel." A review of the relevant documents (Exhs. 16-33, received by the Commission on February 23, 1999) shows the statement to be incorrect. The panel

the same. The panelists were Sandra Brisco, Deputy District Manager; Julie Sauer, Field Supervisor and John Bonlender, Field Supervisor. Ms. Brisco is African-American and was born in 1956. Ms. Sauer is white and was born in 1959. Mr. Bonlender is white and was born in 1950.

9. On August 28, 1998, the petitioner spoke with Michael Lovejoy, Director of respondent's Bureau of Human Resources. During this discussion, the petitioner told Mr Lovejoy about his objections to the presence of Bridget Sauer in the interview room (see ¶6 above). Mr. Lovejoy conducted at least an informal investigation.

¹10. Jane M. Schwoerer is a Personnel Assistant 2 in respondent's Bureau of Field Services. She was responsible for providing administrative support to the hiring process for all 26 vacant TCR positions. Ms. Schwoerer was expected to send reference forms to references listed by certain candidates, including the petitioner, Mr Mayo and Ms. Mooney. Ms. Schwoerer sent forms to some candidates' references on August 24, 1998, but failed to send forms to petitioner's references.²¹

^k10A. Petitioner listed no references on his application form and attached no reference letters thereto. (See petitioner's application marked as Exh. 5 of documents tendered by respondent to the Commission on February 1, 1999.) Petitioner later gave respondent the following references: 1) Albert Thorson, U.S. Office of Personnel Management, Minnesota; 2) Dr William Gingold, Director of Family Practice, Illinois and 3) J. Steven Banks, Director of Special Education Unit, Pennsylvania. (See reference-check documents tendered to the Commission on March 22, 2000.) None of these individuals provided respondent with a reference.

members for the interviews noted in Exhibits 27 and 29 were not the same as the panel members for the other candidates.

¹ This paragraph was changed for clarification. Specific findings of fact are made rather than reciting portions of Ms. Schwoerer's affidavit.

²¹ Footnote #2 is amended as follows: "Respondent disputes petitioner's contention that reference forms were not sent to his references. The nature of the dispute is addressed in the discussion portion of this ruling."

^k This paragraph was added to provide information about the people petitioner used as references. The Commission also notes that respondent incorrectly stated in its motion for Summary Judgment that the petitioner's "application included the names of three references."

^L11. Mr. Mayo provided two supervisors as references – Lt. Sproelich of Oakhill Correctional Institution and Julie Olson Paul of Attic Inc. Foster House. He also provided the name of a co-worker, Kathy Stanek. Ms. Schwoerer sent reference forms to these individuals and all returned favorable reports. Mr. Mayo attached letters to his application form as “personal references,” such as from a high-school teacher. Respondent did not send reference forms to the personal references. (See Mr. Mayo’s application marked as Exh. 9 of documents tendered by respondent to the Commission on February 1, 1999. Also see reference-check documents tendered to the Commission on March 22, 2000.)

^M12. Kelly Mooney indicated on her application that she did not want her present employer contacted for a reference “unless job offer is contingent.” Her then-current employer was Merry Maids, which she had worked for since April 1997. Her only other prior employer (within the previous 10-year period requested) was Teel Plastics, Inc. She attached to her application a positive reference letter from Terry Teelin of Teel Plastics. After her interview, Ms. Mooney provided three references 1) Vicki Burnett of Tempo Employment Services, 2) Terry Teelin of Teel Plastics and 3) Susan Moore of the Baraboo National Bank. Ms. Moore had worked with Ms. Mooney (while Ms. Mooney was employed by Teel Plastics) to establish a payroll deduction plan for Teel Plastics’ employees. Ms. Schwoerer sent reference forms to all references including Terry Teelin whose reference letter was attached to Ms. Mooney’s application. Only Ms. Moore responded and she gave a favorable reference. (See Ms. Mooney’s application marked as Exh. 6 of documents tendered by respondent to the Commission on February 1, 1999. Also see reference-check documents tendered to the Commission on March 22, 2000.)

^L This paragraph was amended to provide additional information about the people Mr. Mayo used as “professional” versus “personal” references. Also clarified is that only letters from his personal references were attached to his application form.

^M This paragraph was changed to correct an error. Specifically, the proposed ruling indicated “It is unknown whether respondent sent a reference-check form to each of the additional references.” Prior to issuing the Commission’s ruling, materials submitted during the investigation (and kept separate from the hearing file) which were referenced in complainant’s arguments (i.e., p. 2 submission received on 4/10/01. “evidentiary documentations already possessed by the PC”) were reviewed and additional information was gleaned. Also, information unrelated to the reference-check process, such as the number of years Ms. Mooney worked for certain employers, was deleted from this paragraph (but remains in ¶16).

^N13. Respondent did not inform the petitioner that he could submit reference letters with his job application or that if he did, respondent might not require returned reference-check forms. It is unknown whether respondent told Mr. Mayo or Ms. Mooney (or any other candidate) that reference letters could be attached to their job applications. Except for the petitioner, Ms. Schwoerer sent out reference forms to other candidates' references even if a reference letter from the same person was included with the candidate's application.

^O14. In October 1998, Ms. Schwoerer assembled the information on the candidates and forwarded the same to her supervisor Carl Weishaar, Chief of respondent's Program Development Section. Mr. Weishaar reviewed the interview panel results of candidates, as well as the work history and references for candidates and made specific hiring recommendations to David Kussow, Director of respondent's Bureau of Field Services. Mr. Weishaar did not recommend petitioner for hire because respondent did not receive any response from petitioner's references and, accordingly, Mr. Weishaar did not view petitioner as a viable candidate. Respondent treated petitioner differently in this regard than one female candidate who was viewed as a viable candidate even though respondent did not receive any response from her references (Schwoerer affidavit ¶10).^P

15. The petitioner's job application indicated that he has a high school diploma, a bachelor's degree (from UW-Stevens Point including courses in psychology, social sciences, foreign languages, sociology, biology and education) and a graduate degree (from UW - Milwaukee in Special Programs and Rehabilitation Psychology). He also noted on his application

^N This paragraph was changed to clarify that the Commission does not know if petitioner was treated differently from other candidates in regard to including reference letters with the job application. This topic was not covered in affidavits or arguments submitted by respondent. The paragraph also was changed to correct an error. Specifically, the proposed ruling incorrectly indicated that if reference letters were attached to the application form then respondent would not send out reference-check forms. In fact, Ms. Schwoerer did send out reference forms regardless of whether the candidate already had attached a reference to his/her application form.

^O This paragraph was changed from reciting portions of Mr. Weishaar's and Ms. Schwoerer's affidavits to stating findings of fact.

^P Mr. Weishaar stated in his affidavit (¶5) that he did not view petitioner as a viable candidate because no reference forms were returned by his references. His statement is consistent with respondent's letter of June 22, 1999, in which it was stated: "Each of the applicants who was hired or declined an offer had a reference that returned a work history/reference check to the Respondent."

form that he has a "Class A (WI) License in Administration/Supervision (Education)" and that he was a "WI Certified Driver Education Instructor" at UW-Stevens Point during a "Summer Session." He noted on the application form that during the past 10 years he worked as shown below:

Independently employed as a Projects Consultant from 10/94 and continuing.
Duties: "In contractual response to imprecise parameters of target project(s), develop project protocols, official documents, briefs, prescribed forms and actionate response filings. Initiate associate appearances at various organizational entities, agencies, institutions & conduct conferences with associates in accord with project design. Perform such compliance actions as are in accord with, or required, to effect necessary agreement with respective legislation/legal entities. Observe security of sensitive data."

Employed with the U.S. Office of Personnel Management as an employment examiner from August 1978 to October 1994. Duties: "Administrative/supervisory responsibilities for all federal examinations to general public, Dept. of Defense applicants, university/secondary/technical colleges, populations, including scoring and determining provisions for handicapped. Collected/protected sensitive personal/personnel data and performed within rigid, and interpreted for implementation, federal regulations. Established/maintained professional relationships with individuals/groups from diverse cultural/ethnic origins. (Qualified for WI State Patrol Inspector, and Special Investigator, Defense Investigation Services.)"

16. Ms. Mooney's job application indicated that she has a high school degree and has taken courses in commercial art (from "WWTC" in La Crosse, Wisconsin) and in liberal arts (from the UW-Baraboo). She noted on her application that during the past 10 years she worked as shown below:

Employed with Merry Maids since April 1997. Duties: "All tasks associated with running a small business for an absentee owner: Human Resources, Safety, Marketing, Customer Service, etc."

Employed with Teel Plastics, Inc. as a Personnel Administrator from July 1984 to November 1996. Duties: "Recruiting, staffing, orientation, training, safety administration, legal compliance."

^Q16A. Mr. Mayo's job application indicated that he has a high school diploma and a bachelor's degree (from Marian College in Fond du Lac in "Admin. of Justice.") He noted on his application that during the past 10 years he worked as shown below:

Employed with the Department of Corrections at Oakhill Correctional Institution as a Correctional Officer 2 from June 1992 to Present. Duties: "Currently the Visiting/Transportation Officer " Duties performed include: providing institutional security- (enabling public safety), doing thorough searches of institutional grounds, inmate living areas, personal search of inmates, transport inmates off-grounds property, monitoring inmate visits, transport inmates off-grounds."

Attic Correction Services as House Manager from November 1994 to March 1996. Duties: "Same as above and in addition: performed drug testing on the inmates, verified inmates' whereabouts and job attendance, assigned inmates house chores, oriented new arrivals to the rules and regulations and what is expected of them while there."

Rock River Hills Supper Club as Cook from June 1990 to June 1992. "Assisted the manager in the kitchen, over-saw other kitchen help, and did most of the preparing of food."

^R17. The interview panel made the following notations on the overall-scoring sheet for petitioner: "Very analytical" "Bottom-line oriented" "Not a people person." The panel rated petitioner's communication skills as a 6 (out of 8 maximum points). The interview panel made the following notations on the overall-scoring sheet for Ms. Mooney: "Excellent candidate" "Good interpersonal skills" "Good smile" "Seems like she'd learn fast." The panel rated Ms. Mooney's communication skills as an eight. The interview panel made no similar notations on the overall-scoring sheet for Mr. Mayo. The panel rated Mr Mayo's communication skills the same as the petitioner's.

^S18. The interview panel's overall scores for the petitioner, Ms. Mooney and Mr.

^Q This paragraph was added to list the employment history noted in Mr. Mayo's job application.

^R This paragraph was changed to add pertinent information about the rating forms for petitioner and Ms. Mooney and to add comparable information regarding Mr. Mayo.

^S Paragraphs 18 and 19 of the proposed ruling have been deleted and replaced with ¶¶18-24 here. These changes were made to detail which interview questions were inappropriately scored and why. The new findings show that Ms. Mooney's score was not necessarily appropriate in all instances, which is contrary to the finding in ¶18 of the proposed ruling.

Mayo are noted below for questions 1 through 7.

Question # Topic	Maximum Points	Petitioner's Score	Ms. Mooney's Score	Mr. Mayo's Score
1. Relevant work exp.	8	8	8	6
2. Cultural diversity wk exp.	6	2	6	6
3. Customer service awareness	6	4	6	4
4. Customer service	6	6	4	4
5. Working with supervisor	6	4	6	4
6. Teamwork	6	4	6	2
7. Cultural diversity	6	2	6	4

19. The overall scores given for the petitioner, Ms. Mooney and Mr Mayo were appropriate considering the benchmarks used and responses noted by the panelists to the following questions: 1, 4 and 7

20. The panel's scoring of question 2 is suspect. Mr. Mayo's score for question 2 was appropriate. However, Ms. Mooney received the maximum points without meeting items #2 and #4 used as the benchmark to define "extensive" experience in this field. She should have received 4 points. Petitioner received 2 points whereas he should have received four.

21. The panel's scoring of question 3 is suspect. The scoring was based on whether the candidate mentioned specific factors. One panelist checked 6 factors mentioned by petitioner, which entitled him to a score of six, while the other panelists only gave him 4 points and the overall score used without explanation from respondent was 4 points. Furthermore, the notes for Ms. Mooney indicate that she mentioned 3 factors yet received 6 points. Mr. Mayo's score of 4 points for this question was correct.

22. The panel's scoring of question 5 is suspect. Ms. Mooney received maximum points for a response, which was similar to petitioner's answer and less meritorious than Mr. Mayo's answer. Ms. Mooney should have received 4 points, as did petitioner, and Mr. Mayo should have received 5 points.

23. The panel's scoring of question 6 is suspect. Ms. Mooney's answer was no better than Mr. Mayo's yet she received the 6-point maximum while he received only 2 points.

Petitioner received 4 points, but his response merited 2 points as compared to the benchmarks.^{3T}

24. Petitioner would have had a higher score (32) than Ms. Mooney (31) if their interview responses would have been scored correctly.

CONCLUSIONS OF LAW^U

1. The Commission has jurisdiction over the appeal (Case Number 98-0168-PC) pursuant to §230.44(1)(d), Stats.

2. Respondent failed to meet its burden to show entitlement to summary judgment in the appeal (Case Number 98-0168-PC).

3. The Commission has jurisdiction over the discrimination and retaliation claims (Case Number 98-0213-PC-ER) pursuant to §230.45(1)(b), Stats.

4. Respondent has the burden to show entitlement to summary judgment in the discrimination/retaliation case (Case Number 98-0213-PC-ER) and has met this burden only in part, as summarized below:

- a. Retaliation claim: Respondent met its burden on both hiring transactions.
- b. Race claim: Respondent met its burden on both hiring transactions.
- c. Age claim: Respondent failed to meet its burden on both hiring transactions.
- d. Sex claim: Respondent met its burden with regard to Mr. Mayo's hire but not with regard to Ms. Mooney's hire.

DISCUSSION

The use of summary judgment procedures in this administrative forum has been affirmed by the Court of Appeals, *Balele v. Wis. Personnel Comm., et al.*, 223 Wis.2d 739, 589 N.W.2d 418 (Ct. App. 1998).

^{3T} Footnote 3 is amended as follows. "Neither party did an analysis of the interview panel's scores as appears in ¶¶18-23 above. The Commission presumes that each party would dispute the portion of those findings which do not support their arguments as presented in the present motion (i.e., respondent would dispute that any irregularity occurred with respect to the scoring of Ms. Mooney's interview)."

^U The conclusions of law were reorganized for clarity. Also, changes were made to comport with the Commission's ruling.

The Commission reviews motions for summary judgment using the following standard (*Balele v. DNR*, 98-0046-PC-ER, 1/25/00):

On summary judgment the moving party has the burden to establish the absence of a genuine, that is, disputed, issue as to any material fact. On summary judgment the court does not decide the issue of fact; it decides whether there is a genuine issue of fact. A summary judgment should not be granted unless the moving party demonstrates a right to a judgment with such clarity as to leave no room for controversy; some courts have said that summary judgment must be denied unless the moving party demonstrates his entitlement to it beyond a reasonable doubt. Doubts as to the existence of a genuine issue of material fact should be resolved against the party moving for summary judgment.

The papers filed by the moving party are carefully scrutinized. The 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. If the movant's papers before the court fail to establish clearly that there is no genuine issue as to any material fact, the motion will be denied. If the material presented on the motion is subject to conflicting interpretations or reasonable people might differ as to its significance, it would be improper to grant summary judgment.

Certain factors must be kept in mind in evaluating the present motion. First, the petitioner has the burden of proof in both cases. Second, the petitioner is unrepresented by counsel who presumably would be versed in the sometimes-intricate procedural or evidentiary matters that can arise on such a motion. Third, this type of administrative proceeding involves a less rigorous procedural framework than a judicial proceeding. Therefore particular care must be taken in evaluating each party's showing on the motion to ensure that the petitioner's right to be heard is not unfairly eroded by engrafting a summary judgment process designed for a judicial proceeding. *Balele v. Univ. of Wis. System*, 91-0002-PC-ER (6/11/92). These factors were cited with approval in *Balele v. Wis. Personnel Comm., et al.*, 223 Wis.2d 739, 589 N.W.2d 418 (Ct. App. 1998).

I. Retaliation Claim (Case No. 98-0213-PC-ER)

Petitioner contends respondent did not hire him for either district 1 position because of his participation in an activity protected under the Fair Employment Act (FEA). This allega-

tion is analyzed under the probable cause standard. In order to make a finding of probable cause, facts and circumstances must exist that are 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. In a probable cause proceeding, the evidentiary standard applied is not as rigorous as that which is required at the hearing on the merits.

The initial burden of proof under the FEA is on the petitioner to show a prima facie case.^v If the petitioner meets this burden, the employer then has the burden of articulating a non-discriminatory reason for the actions taken which the petitioner, in turn, may 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).

A prima facie case of retaliation under the FEA requires evidence that 1) the petitioner participated in a protected activity and the alleged retaliator was aware of that participation, 2) there was an adverse employment action, and 3) there is a causal connection between the first two elements. A "causal connection" is shown if there is evidence that a retaliatory motive played a part in the adverse employment action.

The petitioner failed to establish the first element of the prima facie case because he did not participate in a protected activity. The claimed protected activity is his telephone contact with Mr. Lovejoy in which he complained about Bridget Sauer's presence during his interview on August 18, 1998. The retaliation protections under the FEA are contained in §111.322(2m) and (3), Stats., and do not include complaints about an adolescent's presence during an interview. Accordingly, respondent's motion to dismiss is granted for this claim.

II. Discrimination Claims (Case No. 98-0213-PC-ER)

Petitioner contends respondent did not hire him for either district 1 position because of his age, race and sex. This claim also must be analyzed under the probable cause level of

^v This sentence was changed to clarify that the McDonnell Douglas analysis applies to retaliation and discrimination claims under the FEA.

proof and under the analytical framework of *McDonnell Douglas v. Green, Id.* and *Texas Dept. of Community Affairs v. Burdine, Id.*

A prima facie case involving a hiring decision requires evidence that the petitioner 1) is a member of a class protected by the FEA, 2) applied for and was qualified for an available position and 3) was rejected under circumstances that give rise to an inference of unlawful discrimination. The petitioner, who was 63 at the time of the hiring transactions, established a prima facie case of age discrimination because the two individuals hired were 29 and 38 years old.^w He has not established a prima facie case of sex discrimination with respect to the hire of Donald Mayo because he is of the same sex as the petitioner. He established a prima facie case of sex discrimination with respect to the hire of Kelly Mooney who is of a different sex than the petitioner. He failed to establish a prima facie case of race discrimination because both individuals hired were of the same race as the petitioner.

Respondent's motion is granted with respect to the petitioner's claims for which he failed to establish a prima facie case. An analysis of the remaining claim (sex discrimination with respect to Ms. Mooney's hire and age discrimination with respect to both hires) continues in the following paragraphs.

The burden shifts to respondent to articulate a legitimate, non-discriminatory reason for hiring Mr. Mayo and Ms. Mooney rather than the petitioner. Respondent met this burden by stating that the petitioner was not hired because the individuals he named as references did not return the reference-check form.

^xThe burden then shifts to the petitioner to attempt to show that respondent's articulated reason is pretextual. As discussed below, there is reason to doubt respondent's articulated reason for not hiring the petitioner and such doubts are of sufficient degree to defeat respondent's motion for summary judgment on the age claim for both hires and on the sex claim for Ms. Mooney's hire.

The United States Supreme Court has held that where the employer's non-discriminatory reason is rejected it may be appropriate to conclude that discrimination oc-

^w This sentence was changed to include petitioner's age.

^x The discussion of pretext has changed to reflect the Commission's rationale.

curred, *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S. Ct. 2097 (2000).

The Court's reasoning is noted below:

[I]n *St. Mary's Honor Center* . . . we held that the factfinder's rejection of the employer's legitimate, nondiscriminatory reason for its action does not *compel* judgment for the plaintiff. 509 U.S. at 511. The ultimate question is whether the employer intentionally discriminated, and proof that "the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason is correct." *Id.* at 524. In other words, "it is not enough to *disbelieve* the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination." *Id.* at 519.

In reaching this conclusion, however, we reasoned that it is *permissible* for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation. Specifically, we stated:

"The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination." *Id.* at 511.

Id., 530 U.S. at 146-147 (Emphasis appears in the original.)

The Commission first notes that there is insufficient evidence to create a suspicion of mendacity (lying) on respondent's part that would fall within the parameters of *Reeves*, but there are several instances of incorrect or incomplete information. Examples are noted in footnotes F, H, K, N and P. The most serious omission is addressed in footnote P and concerns respondent's initial statement to the Commission that each applicant hired had returned references. It was not until Ms. Schwoerer's affidavit was tendered with the present motion that respondent disclosed that an exception was made for a female candidate.

Respondent also has not provided a direct explanation of why the female candidate was considered a viable candidate even though her references did not reply to respondent's reference-check forms. The closest information resembling an explanation is shown below:

Ms. Schwoerer's Affidavit, ¶10: Under date of August 24, 1998, I sent requests for work history to the references listed by the other candidates (other than peti-

tioner). Other candidates either had one or more references returned or in one case a letter of reference was provided by the candidate with her application.

Mr. Weisshaar's Affidavit, ¶5: I did not recommend Mr Bedynek-Stumm for the District I openings because the department did not receive any response from any of his references and thus he was not considered a viable candidate. Applicants with lower interview scores but with complete applications, acceptable qualifications, interview scores and reliable work history and references were offered positions. As the result of this process, Mr Kussow hired the two applicants that I recommended for the District 1 TCR openings. One of the applicants had the same interview score as Mr Bedynek-Stumm but also had positive references. Mr Bedynek-Stumm was notified of his non-selection by letter dated October 28, 1998.

It appears respondent is suggesting that the female candidate was considered viable based solely on a reference letter attached to her application. Yet such speculative explanation^Y is inconsistent with respondent's practice of sending out a reference-check form even for a reference whose recommendation letter was attached to the application form. Sending out the reference checks under these circumstances apparently served the purpose of validating the references.

The foregoing leads to the conclusion that respondent's proffered non-discriminatory reason is suspect on the basis of sex. The preferential scoring Ms. Mooney received from the interview panel buttresses the conclusion that sex played an impermissible part in the selection process (see ¶¶18-24, Findings of Fact).

Petitioner's age claim also survives the present motion. Respondent has not revealed the age of the female candidate for which an exception was made. However, based on the information known by the Commission at this time (see ¶¶6 and 7, Findings of Fact), the petitioner was eleven years older than the next oldest candidate ("BG," male, age 52). Accordingly, it is appropriate to infer that the female candidate who received favorable treatment also was younger than the petitioner. In the context of the present motion (and at the lower probable cause standard), the presumed discrepancy between their ages is significant and sufficient

^Y An employer moving for summary judgment cannot expect to prevail where speculation is necessary to accept or condone respondent's offered reason for the action taken of which the employee complains. To the contrary, inferences must be drawn in the light most favorable to the party opposing the motion.

to infer that age played a part in the hiring process. *See generally, O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 313 (1996); *Hartley v. Wisconsin Bell, Inc.*, 124 F.3d 887 (7th Cir. 1997); and *Hoffmann v. PRIMEDIA Special Interest Publications*, 217 F.3d 522 (7th Cir. 2000).

III. Appeal (Case No. 98-0168-PC)

The petitioner filed an appeal over the hiring transactions at issue, pursuant to §230.44(1)(d), Stats., the text of which is shown below.

(1) [T]he following actions are appealable to the commission under §230.45(1)(a):

(d) A personnel action after certification which is related to the hiring process in the classified service and which is alleged to be illegal or an abuse of discretion may be appealable to the commission.

In *Ebert v. DILHR*, 81-64-PC, 11/9/83, the Commission stated:

The term “abuse of discretion” has been defined as “a discretion exercised to an end or purpose not justified by, and clearly against, reason and evidence.” *Lundeen v. DOA*, 79-208-PC, 6/3/81. The question before the Commission is not whether the Commission would have made the same decision if it substituted its judgment for that of the appointing authority. Rather, it is a question of whether, on the basis of the facts and evidence presented, the decision of the appointing authority may be said to have been “clearly against reason and evidence.” *Harbort v. DILHR*, 81-74-PC, 4/2/82.

The Commission has interpreted the above to require consistent application of the selection criteria. *See, e.g., Jorgensen v. DOT*, 90-0298-PC, 6/12/91. Here, respondent applied the interview benchmarks more favorably for Ms. Mooney than for the petitioner (as noted in ¶¶18-24, Findings of Fact).^z

^{^^}Bridget Sauer’s (alleged) participation in evaluating interviewed candidates despite her lack of qualifications for the task also could be characterized as an abuse of discretion. Respondent’s failure to send reference-check forms to petitioner’s references also might be

^z This sentence was changed to state the information as a fact established for purposes of this motion.

^{^^} This paragraph was added to reflect the Commission’s rationale.

considered as an abuse of discretion. *See, Jensen v. UW-Milwaukee*, 86-0144-PC, 11/4/87 (where no abuse of discretion was found for respondent's failure to check the appellant's references) and *Jacobson v. DILHR*, 79-28-PC, 4/10/81 (where an abuse of discretion was established).

^{BB}The Commission adds, for clarity, the following observation. It could be argued that the discrimination claims, which survived the motion in the discrimination case, constitute actions alleged to be "illegal" within the meaning of §230.45(1)(d), Stats. The proper vehicle for considering discrimination claims, however, is under the Fair Employment Act and not under §230.45(1)(d), Stats. *See, Witt v. DILHR & DER*, 85-0015-PC, 9/26/85. Petitioner raises no other arguments of illegality and, accordingly, the appeal will proceed solely on the question of whether an abuse of discretion occurred.

^{CC}IV Summary

The statement of the hearing issue for the appeal (Case No. 98-0168-PC) as affected by this ruling is noted below:

Whether respondent committed an abuse of discretion in not appointing the appellant in October 1998, to one of two vacant positions in District 1 as a Transportation Customer Representative 2 Field (TCR2 Field).

The statement of the hearing issue for the complaint (Case No. 98-0213-PC-ER) as affected by this ruling is shown below:

Whether there is probable cause to believe that respondent discriminated against complainant:

- a) based on his sex when in October 1998, respondent selected Kelley Mooney for one of the vacant TCR2 Field positions in District 1, and
- b) based on his age when in October 1998, respondent selected Kelley Mooney and Mr Mayo for the two vacant TCR2 Field positions in District 1.

^{BB} This paragraph was added for clarity.


^{CC} This section was added for clarity.

ORDER^{DD}

Respondent's motion for summary judgment in Case No. 98-0168-PC is denied. Respondent's motion for summary judgment in Case No. 98-0213-PC-ER is granted in part and denied in part as detailed in this ruling.

Dated: July 26, 2001.

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

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JUDY M. ROGERS, Commissioner

^{DD} The wording of the Order was changed to conform to the Commission's ruling.