State of Wisconsin

Labor and Industry Review Commission

William Mitchell, Complainant **State of Wisconsin** **Department of Natural Resources**, ERD Case No. CR201801226 EEOC Case No. 26G201800838C	**Fair Employment Decision**[1] October 30, 2023 mitchwi.doc:103

The decision of the administrative law judge is **affirmed**. Accordingly, the complainant's complaint is dismissed.

By the Commission:

/s/
Michael H. Gillick, Chairperson

/s/
Georgia E. Maxwell, Commissioner

/s/
Marilyn Townsend, Commissioner

[1] **Appeal Rights**: See the green enclosure for the time limit and procedures for obtaining judicial review of this decision. If you seek judicial review, you **must** name the Labor and Industry Review Commission as a respondent in the petition for judicial review. Appeal rights and answers to frequently asked questions about appealing a fair employment decision to circuit court are also available on the commission's website http://lirc.wisconsin.gov.

Procedural Posture

This case is before the commission to consider the complainant's allegation that the respondent discriminated against him in terms and conditions of employment because of age, and terminated him because of age, in violation of the Wisconsin Fair Employment Act (hereinafter "Act"). An administrative law judge for the Equal Rights Division of the Department of Workforce Development held a hearing and issued a decision. The complainant filed a timely petition for commission review.

The commission has considered the petition and the positions of the parties, and it has reviewed the evidence submitted at the hearing. Based on its review, the commission agrees with the decision of the administrative law judge, and it adopts the findings and conclusions in that decision as its own.

Memorandum Opinion

The complainant alleges he was discriminated against, in violation of the Act, when he was required to re-apply for an LTE Conservation Warden position as a result of the respondent restructuring its department and was required to perform sit-ups during a physical fitness exam in a way that was more stringent than the instructions he had received prior to the administration of the exam. In his petition for commission review, the complainant argues that requiring applicants undergoing a physical fitness exam to extend their elbows past their knees while performing sit-ups was more difficult for older applicants because of their ages and that the respondent's use of the physical fitness exam was designed to phase out older LTEs.

Discriminatory motive

The evidence in this case does not establish that the respondent was motivated by discriminatory reasons in requiring a physical fitness test for LTE wardens. Although at the hearing the complainant's witness speculated this was the reason for the testing, the commission is not persuaded. Credible witnesses for the respondent testified that they were unaware of any age-related motivation for the requirement, and the complainant did not offer evidence, direct or indirect, to suggest otherwise.

Disparate impact

Although the complainant does not specifically state that he is arguing a disparate impact theory, the commission interprets his allegation that the testing requirement had a discriminatory impact on older applicants as such. This line of argument also fails. Disparate impact must be proved by actual statistical evidence, significant (in the statistical sense) to the confidence level required by law, comparing the effect of an employer's selection device or standard on employees in the different groups being compared. *Kaczmarek v. City of Stevens Point*, ERD Case No. 200200370 (LIRC Aug. 12, 2003). Disproportionality of a distribution of one group of employees is proven in disparate impact cases almost exclusively by some kind of expert statistical analysis. Moncrief v. Gardner Baking Company, ERD Case No. 9020321 (LIRC July 1, 1992). Generally, in a disparate impact case in Wisconsin, the employee must first show that the facially neutral employment practice has a statistically significant

discriminatory impact on the protected class of employees. If the employee makes that showing, the employer then must show that the practice is "job related" or is justified by "business necessity." If the employer makes that showing, the employee must then present evidence that an alternative practice exists which would serve the employer's interests but would have less adverse impact on the protected employees. *Turman v. Brady Co.*, ERD Case No. 8450418 (LIRC Oct. 17, 1985).

This case is before the commission on the issue of probable cause. Under the Act, "probable cause" is defined as "a reasonable ground for belief, supported by facts and circumstances strong enough in themselves to warrant a prudent person to believe that a violation of the act probably has been or is being committed." Wis. Admin. Code § DWD 218.02(8). Probable cause "lies somewhere between preponderance of the evidence and suspicion." *Braunschweig v. SSG Corp.,* ERD Case No. CR200400816 (LIRC Aug. 31, 2006).

Even if the commission were to accept the complainant's allegations in this case as sufficient to establish probable cause to believe that the respondent's practice of requiring a fitness exam had a disproportionate impact on older applicants, the respondent has established that the fitness testing it required was job related, and the complainant has failed to offer any alternative that would serve the employer's interests but would have a less adverse impact on older workers. The respondent restructured its law enforcement work and, as a result of that restructuring, LTE wardens assumed additional law enforcement duties. The test was created by an outside organization retained by the respondent for the purpose of testing the skills necessary for the job. Absent any offer of a less onerous alternative, the disparate impact theory cannot provide a basis for a finding of a violation under the Act.

For the reasons above, the commission concludes the complainant has failed to establish that the respondent discriminated against him based upon his age, either directly or as a result of a neutral practice that has an adverse impact on individuals in the protected age group. Accordingly, the complainant's complaint is dismissed. [2]

cc: Attorney Joseph Winandy

[2] The commission also notes that Wis. Stat. § 111.33(2)(f) provides, in relevant part, that it is not employment discrimination because of age "to exercise an age distinction with respect to employment in which the employee is exposed to physical danger or hazard, including, without limitation because of enumeration, certain employment in law enforcement or fire fighting." Even if the complainant had met his burden of establishing that the test used in this case had a disparate impact on older workers, the commission would have to remand for further evidence as to the applicability of this section. Given the commission's other findings in this case, remand is not necessary.