

**EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
210 MONONA AVENUE
MADISON, WISCONSIN**

<p>Kathleen Lindas 1632 Maple Street Middleton, WI 53562</p> <p style="text-align: center;">Complainant</p> <p style="text-align: center;">vs.</p> <p>Madison Area Technical College 211 North Carroll Street Madison, WI 53703</p> <p style="text-align: center;">Respondent</p>	<p>RECOMMENDED DECISION</p> <p>Case No. 20256</p>
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A complaint was filed with the Madison Equal Opportunities Commission (MEOC) on March 2, 1984 alleging discrimination on the basis of age in regard to employment, specifically in regard to failure or refusal to hire.

Said complaint was investigated by Mary Pierce of the MEOC staff and an Initial Determination dated June 14, 1984 was issued concluding that probable cause existed to believe that age discrimination had occurred, as alleged.

Conciliation failed or was waived and the matter was certified to hearing. A hearing was held commencing on November 13, 1984. Based upon a review of the record, the Examiner enters the following Recommended Findings of Fact, Conclusions of Law and Order:

RECOMMENDED FINDINGS OF FACT

1. The Complainant, Kathleen Lindas, is an adult residing in the State of Wisconsin. Her date of birth is July 26, 1938.
2. The Respondent, Madison Area Technical College (Area Vocational, Technical and Adult Education District No. 4), is an employer doing business in the City of Madison.
3. The Complainant applied for a part-time position with the Respondent (also known as "MATC") as a testing project assistant in November of 1983. The position was for a maximum of 17 hours per week at a wage of \$7.56 per hour.
4. The Respondent publicized the job vacancy by posting a job announcement at designated locations at MATC and by making the announcement available to several other agencies in conjunction with the Respondent's affirmative action plan. The job announcement was posted at MATC on November 15, 1983 and required that all applications be submitted to the Respondent's personnel department by November 22, 1983.
5. Two other individuals, in addition to the Complainant, also applied for said testing project assistant position. Mary Knight, born September 11, 1951, was one of the other two applicants.
6. The Complainant learned about the job through her husband, an employee for the Respondent, who saw the job vacancy posted at MATC.
7. Knight learned of the job opening through a telephone conversation with Maria Hernandez, the supervisor of the Respondent's Adult Education Department. Knight had applied for a position with the Respondent as a proposal writer in October of 1983. Hernandez, although not the hiring authority for the proposal writer position, was one of the persons who interviewed Knight for said proposal writer job. Knight was not hired as a proposal writer, but Hernandez told Knight that another position would be opening and that Knight could contact Hernandez to check on it. Hernandez believed that Knight would be a good candidate for the testing project assistant job.
8. The necessary qualifications for the testing project assistant position were a minimum of two years of college (60 credits), previous employment in a position directly related to the nature of the work to be performed and possession of a valid Wisconsin driver's license.

9. The job responsibilities of the testing project assistant were to administer academic achievement tests, basic skills tests and/or other evaluation instruments on a group and individual basis, to complete a variety of reports and summaries and to maintain necessary files, to conduct follow-up studies and to type and conduct statistical computations.
10. At the time of her application for the testing project assistant job, the Complainant possessed the following college degrees:
 - a. A Bachelors degree in Education;
 - b. A Ph.D. in Curriculum and Instruction;
 - c. A Masters Degrees in each of the following four areas:

Teaching-English Language, Library Science, Instructional Technology, Educational Administration.
11. At the time of her application, Mary Knight had a Bachelors degree in Psychology and 8 credits toward a Master's Degree.
12. The Complainant had previously worked for the Respondent as an instructor of communication skills, reading and literature (1972-75) and as an instructor in the adult basic education program (April, 1977 to June, 1978). She had also been a graduate intern in the office of the Assistant Director for Instructional Services, Dean Wessels (January to June, 1977). Knight had never previously worked for the Respondent.
13. The Complainant had a more extensive knowledge of statistical analysis than Knight.
14. Knight could type faster than the Complainant.
15. Both Knight and the Complainant possessed the necessary qualifications, as described in Finding of Fact 8 (above), for the position.
16. Knight and the Complainant were each interviewed separately by Hernandez.
17. Knight and the Complainant were asked the same basic eight questions during their respective interviews, but there was some variation between the interviews in regard to follow-up or clarification questions.
18. The Complainant and Knight answered seven of the eight interview questions - Questions 1, 2, 4, 5, 6, 7 and 8 - approximately equally well except that the Complainant indicated she had done more studies than Knight (in response to Question 2) and the Complainant (in response to Question 4) had more ideas than Knight about possible other studies that could be conducted in the area of adult basic education.
19. The Complainant's answer to Question 3 was considered acceptable by the Respondent. Knight's answer to Question 3 was considered superior. In response to said Question 3 about what the applicant would do if she were having difficulty gathering data from a specific department, i.e., individuals, Knight indicated she would contact her superiors whereas Lindas indicated she would talk to the teachers (individuals) herself and discuss the rationale for the study and attempt to secure their cooperation on her (Lindas') own.
20. Hernandez made a decision to hire Knight for the job on the basis of the interviews, but would have reconsidered her decision had the reference checks not borne out her impression from the interviews. Hernandez did not notify the candidates of her decision until after she had completed the reference checks.
21. Hernandez selected Knight because she felt, in comparison to the Complainant at least, that Knight was more warm and professional in her approach to the interview and because Knight had communicated better during the interview.
22. When checking two of Knight's references, Hernandez received "glowing" recommendations about Knight.
23. In checking two of the Complainants references, Hernandez received one very positive reference and one "mixed" reference. The mixed reference came from a Dr. Black who said that Lindas was extremely competent, well educated and very well qualified but had interpersonal problems in getting along with people and working well with people.
24. Hernandez' reference checks supported the impression she gained at the interview that Knight could work with and get along with others better than the Complainant.
25. The Complainant's age was not a factor in the Respondent's failure or refusal to hire her as a testing project assistant.

RECOMMENDED CONCLUSIONS OF LAW

1. The Complainant is member of the protected class of age within the meaning of section 3.23, Madison General Ordinances.
2. The Respondent is an employer within the meaning of Section 3.23, Madison General Ordinances.
3. The Respondent did not discriminate against the Complainant on the basis of her age in regard to failure or refusal to hire her as a testing project assistant.

RECOMMENDED ORDER

That this case be and hereby is dismissed.

MEMORANDUM OPINION

The Supreme Court's decision in Aikens¹ makes an analysis of the prima facie case unnecessary. It may, for arguments sake, simply be presumed that the Complainant met her interim burden and the focus is then on whether she met her ultimate burden to prove that age was a (though not necessarily the sole) substantial or determining factor in the Respondent's failure or refusal to hire her.

The analysis must include an examination of the reasons articulated by the Respondent for its action(s) and then an examination of whether the Complainant has shown those reasons to be pretextual and that age bias - at least in substantial or determining part - motivated the Respondent.

I. Respondent's Articulated Reasons

The Respondent's essential reasons for not hiring the Complainant were purely subjective and were based on the impression that Hernandez had, as a result of the applicants' respective interviews, that Knight could better get along with co-workers and others than Lindas could.

II. Complainant's Attempt to Show Pretext

Where subjective factors are involved in selecting one applicant over another, it is particularly important to carefully scrutinize those subjective factors to assure that they are not a smokescreen for unlawful discrimination. And it is also important to view the totality of the circumstances in order to determine whether the Complainant has met her ultimate burden of establishing age discrimination by a preponderance of the evidence.

Although this Examiner finds that some of Hernandez' concerns were really quite trivial in isolation - particularly her concern about the way the Complainant handled her papers at the interview - the bottom line is that Knight came across overall as a person who could better get along with others than the Complainant in a job where the ability to get along with others was important. And one of the Complainant's own references, Dr. Black, reinforced that impression such that this Examiner finds Hernandez' impression to have been an honest one and not pretextual of age discrimination.

In the absence of the independent corroboration that the Complainant had difficulty in getting along with others, the Respondent would have had a much more difficult time defending against the Complainant's claim.

The Complainant attempts to argue that the reference checks are irrelevant to the liability stage. Essentially, the Complainant argues that Hernandez' had made her decision to hire Knight prior to the reference checks, and that the decision was age-biased. Therefore, the Complainant's argument is that she proved age discrimination in the selection process and the burden of proof then shifts to the Respondent to show why it should be relieved of its obligation to afford make-whole relief to the Complainant (and the reference checks would only be relevant, if at all, to the remedy issue).

The Complainant's logic is correct, but it can only be applied if the evidence supports a finding that the selection process was unlawfully age-biased. However, the Complainant did not carry her burden of proof to show that the Respondent's selection of Knight was age-biased.² The issue turns on Hernandez' credibility as to why she chose Knight.

The Examiner finds, despite some apparent incongruencies³ in her reasons given for the decision to hire Knight, that Hernandez' testimony is credible insofar as it was Hernandez' overall belief - based on the interviews - that Knight had a warmer and more professional approach to the interview than the Complainant; i.e., that Knight would better be able to work with and get along with others. The reference checks of the candidates, while not directly a factor in Hernandez' decision, are nevertheless probative of the credibility of Hernandez' interview impressions.⁴

I do reject, however, the Respondent's contention that Knight and the Complainant were equally qualified in terms of education and experience. That they were both adequately qualified for the job in terms of education and work experience did not grant the Respondent a license to ignore the Complainant's relative strengths. The Complainant had a more advanced knowledge of statistics, she had previously been involved in a greater number of statistical studies and had more ideas than Knight about further adult basic education studies that could be conducted. Although Knight was a more accomplished typist than the Complainant, the Complainant had the overall advantage in job-related education and work experience.

Nevertheless, given that both candidates were adequately qualified for the job, it was not improper in this case for Hernandez to value Knight's greater ability to get along with supervisors and others more highly than the Complainant's greater academic and experience strengths.

Signed and dated this 11th day of March, 1985.

EQUAL OPPORTUNITIES COMMISSION

Allen T. Lawent
Hearing Examiner

¹U.S. Postal Service of Governors v. Aikens, 103 S. Ct. 1478, 31 EPD par. 33,477 (1983). Aikens makes clear that once all the evidence has been let into the record (i.e., the case has proceeded to completion without being dismissed via an interim motion), the analysis should focus on the Complainant's ultimate burden of proof, not the interim burden.

²The Complainant also attempted to show that a William Woods, 60, previously employed by the Respondent, should have been considered for the testing project assistant position in accordance with the Respondent's affirmative action plan. The evidence does not support that the Respondent had any affirmative action obligation to consider Woods, nor that its failure to consider Woods was in any way age-biased. While Woods may have been entitled to some special affirmative consideration had he applied, the fact is that he did not apply for the vacancy at issue.

³See discussion of incongruencies on pages 22 - 25 of the Complainant's brief; although the Examiner does not specifically adopt the Complainant's interpretation of the meaning of the incongruencies between Complainant's Exhibit 24 and the Complainant's testimony at hearing (Transcript, Vol. II, pp. 41 - 42).

⁴Hernandez also checked with two persons at MATC who had previously worked with the Complainant: Dean Wessels who gave the Complainant a very positive reference and Sharon Lembke who believed the Complainant was technically very competent but would have difficulty following supervision.