EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
210 MARTIN LUTHER KING, JR. BOULEVARD
MADISON, WISCONSIN

Betty Peterson 441 College St Lake Mills WI 53551 Complainant vs. Madison Metropolitan School District 545 W. Dayton St. Madison WI 53703 Respondent	HEARING EXAMINER'S RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER Case No. 22728

This matter came before Madison Equal Opportunities Hearing Examiner Clifford E. Blackwell, III, on June 19-21, 2000. The Complainant, Betty Peterson, appeared by her attorneys Kelly and Petranech, by Brett C. Petranech. The Respondent, Madison Metropolitan School District, appeared by its attorney Frank J. Crisafi. On the basis of evidence and briefs submitted, the Hearing Examiner now makes his Recommended Findings of Fact, Conclusions of Law and Order, as follows:

RECOMMENDED FINDINGS OF FACT

1. The Complainant, Betty Peterson ("Peterson") resides in Madison, Wisconsin.
2. At the time of the complaint's filing, the Complainant was 49 years old.
3. The Complainant has been diagnosed with the condition fibromyalgia.
4. Fibromyalgia is a disorder with symptoms of musculoskeletal pain, fatigue, and anxiety.
5. The Respondent, Madison Metropolitan School District ("The District") is an agency organized under the laws of the State of Wisconsin to administer public education, principally located in Madison, Wisconsin at 545 W. Dayton St.
6. In November 1989, the Respondent hired the Complainant as a Special Education Assistant (SEA) and placed her in LaFollette High School's Cognitively Disabled-Severe (CD-S) unit.
7. The Complainant was assigned to schools within the district on a year-to-year basis.
8. Assistant Principal Connie Valenza ("Valenza") began work at LaFollette on March 1, 1995.
9. Part of Valenza's position included overseeing the CD-S unit, including administering performance evaluations. Teachers assigned day-to-day duties to the SEAs.
10. Valenza did not initially evaluate the Complainant, but did evaluate her for the first time in the 95-96 school year.
11. Beginning with the 1995-96 school year, LaFollette changed the structure of its special education program in that SEAs would be assigned to individual students rather than being assigned to teachers.
12. The structure change resulted in discontent and friction between teachers and SEAs.
13. Serious personality conflicts existed between some teachers and some SEAs.
14. In 1996, Valenza administered a performance evaluation that was favorable to the Complainant.
15. During the 1996-97 school year, the Complainant brought informational pamphlets about fibromyalgia to Valenza and informed Valenza that she had fibromyalgia.

16. The Complainant did not request work accommodations or offer any medical diagnoses concerning fibromyalgia and how it might affect her employment.
17. The Complainant's performance evaluation for the 1996-97 school year was poorer than those she had received in the past.
18. Valenza conducted the performance evaluation by indirect observation and input from a number of teachers.
19. The previous assistant principals had based their evaluations on direct classroom observation.
20. A special education teacher, Lisa Friend-Kalupa, stated that she did not get along with older people.
21. Various employees at LaFollette used the phrase "young blood" or "fresh blood."
22. The Complainant and Valenza had a conversation regarding the Complainant's possible need for a transfer to become a better employee, away from the adversarial atmosphere at LaFollette and what steps the Complainant should take concerning her fibromyalgia. This conversation was partially overheard by another SEA, Janeen Seifert.
23. Valenza assigned two younger SEAs to a student who entered the special education program. The positions were viewed as more desirable by some SEAs.
24. On May 30, 1997, the Complainant was notified that her assignment to LaFollette was not being renewed.
25. The decision not to renew the Complainant's assignment to LaFollette and transfer her was made by Valenza, Principal Mike Meissen, and an administrator, Jack Jorgensen.
26. The reasons the Respondent gave for the transfer were the Complainant's poor performance review and the desire to give her a fresh start away from LaFollette's combative atmosphere.
27. The decision to transfer was part of an overall plan to reassign SEAs who the administration felt were part of a disputatious group.
28. On August 15, 1997, the Complainant was notified that she would be transferred to Sennett Middle School.
29. Sennett Middle School is located approximately two blocks from LaFollette High School.
30. Sennett, unlike LaFollette, does not have air conditioning.
31. The Complainant was asked to use the stairs at Sennett, as opposed to the elevator she used at LaFollette.
32. Soon after she began at Sennett, the Complainant quit because of the effect that her work environment had on her physical and emotional condition.
33. The Complainant did not request an accommodation or alteration of her working conditions as a result of her difficulties at Sennett.
34. The Respondent did not transfer the Complainant because of her age.
35. The Respondent did not transfer the Complainant because of any real or perceived disability.

CONCLUSIONS OF LAW

36. The Complainant, Betty Peterson, is an individual entitled to the protection of the City of Madison Equal Opportunities Ordinance, Sec. 3.23, M.G.O. by virtue of having a disability, real or perceived.=
37. The Complainant is entitled to the protection of the ordinance by virtue of her age (over forty years old) and being of an age group sufficiently different than others employed by the Respondent and treated more favorably.
38. The Respondent, Madison Metropolitan School District, is an employer subject to Sec. 3.23 (2) (m), M.G.O.
39. The Respondent did not discriminate against the Complainant on the bases of age when it transferred the Complainant to Sennett Middle School.

40. The Respondent did not discriminate against the Complainant on the basis of disability when it transferred the Complainant to Sennett Middle School.

ORDER

The complaint is hereby dismissed.

MEMORANDUM DECISION

In November 1989, the Complainant began working at LaFollette High School as a Special Educational Assistant (SEA). The Complainant's job duties included assisting cognitively disabled students and working with their Special Education teachers.

From her hire in 1989 to 1996, the Complainant had received only glowing performance evaluations. Initially, an assistant principal directly observed the SEAs and gave them numerical grades for their performance. The Complainant consistently rated at the highest level in multiple performance categories. In March 1995, Connie Valenza was hired as an Assistant Principal at LaFollette. Valenza submitted a positive evaluation of the Complainant for the 1995-96 school year in her first evaluation opportunity. This positive evaluation was consistent with evaluations the Complainant had received in the past.

In the 1996-97 school year, the Complainant's performance evaluation dropped significantly. Assistant Principal Valenza used a different method of evaluation than her predecessor, relying more on teachers' recommendations and informal observation than direct classroom observation. This new method was different than that Valenza had used in the preceding year. Valenza viewed the prior assistant principal as not taking the evaluations seriously and found the evaluation method to be ineffective and resulting in unreasonably high scores.

Beginning with the 1995-96 school year, the Complainant experienced a variety of adverse health conditions. The Complainant ultimately was diagnosed by her physician as having fibromyalgia. Fibromyalgia is a disorder with symptoms of musculoskeletal pain, fatigue, and anxiety. In January 1997, the Complainant gave Assistant Principal Valenza pamphlets about fibromyalgia and indicated the Complainant had fibromyalgia. At no time did the Complainant present anyone at LaFollette with a doctor's assessment of her condition or any limitations or accommodations that might be needed for her employment.

During the 1996-97 school year, a Special Education teacher, Lisa Friend-Kalupa, stated that she did not relate well with older people, including her own grandmother. The SEAs, including the Complainant, took this comment to indicate that Friend-Kalupa would not get along with them. At the time of the statement, the Complainant was forty-nine years old.

On May 30, 1997, the Complainant was notified that her assignment to LaFollette was not being renewed and that she would be transferred to a different school in the Madison district. For the following school year, the Complainant was transferred to Sennett Middle School, located two blocks from LaFollette. The Complainant was not told where she would be transferred to until August 1997. The Complainant suffered an increase in the severity of her fibromyalgia over the summer due to not knowing where she would be working that fall. Shortly after starting at Sennett, the Complainant suffered another increase her fibromyalgia's intensity, which the Complainant attributed to the added stress of working at Sennett. The Complainant quit the employment of the Respondent and is no longer working.

The Complainant claims that the decision to transfer her was a discriminatory act perpetrated by the Respondent, motivated by her age and/or her fibromyalgia. The issue for the Hearing Examiner to decide is whether the Complainant was transferred due to her age and/or fibromyalgia.

The Complainant purports to offer direct evidence of discrimination through a collection of statements made by various employees of the Respondent and the downturn of performance evaluations made by the Respondent. Direct evidence is "evidence which if believed by the trier of fact, will prove the particular fact in question without reliance on inference or presumption." Plair v. E.J. Brach & Sons, Inc., 105 F.3d 343, 347 (7th Cir. 1997). (internal quotation omitted). This evidence "must not only speak directly to the issue of discriminatory intent, it must also relate to the specific employment decision in question." Randle v. LaSalle Telecomm., Inc., 876 F.2d 563, 569 (7th Cir. 1989).

The Complainant's offerings do not constitute direct evidence that those responsible for the decision to transfer her were illegally biased. Offered statements must illustrate discriminatory bias against others on the bases of age or disability beyond the need for inference. Here, they do not. The whole of relevant comments made by the Respondent's employees are best characterized as few, far between, and not clearly teeming with bias. Valenza's few comments, consisting of phrases such as "young blood," can be used to leap toward a conclusion of age discrimination, but require presumptions and inference to get there. Valenza's alleged one-time comment that the Complainant might not be suitably placed due to her condition is evidence that Valenza regarded the Complainant as having a disability, but does not reach the high standard of being direct evidence of discrimination. Lisa Friend-Kalupa's various statements more closely resemble direct evidence, but for reasons explained below, there is not enough evidence that the decision to transfer the Complainant was made by Friend-Kalupa or under her substantial influence.

Where there does not exist suitable direct evidence, the Hearing Examiner may use the familiar McDonnell Douglas/Burdine approach to locate indirect evidence of discrimination. The courts and administrative agencies must examine the record for indirect evidence of discrimination. In this approach, the Commission utilizes the burden-shifting paradigm set forth in McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed 2d 207 (1981). In this approach, the Complainant must first set forth evidence that by itself is sufficient to demonstrate a prima facie claim of discrimination. If the Complainant meets this initial burden, the burden shifts to the Respondent to present a legitimate, nondiscriminatory reason for its action. This is not a burden of proof, but one of articulation. Maier v. Sam's Club, MEOC Case No. 19992203 (Comm. Dec. 10/1/01, Ex. Dec. 3/30/01). If the Respondent presents such an explanation for its action, the burden once again shifts, this time back to the Complainant to demonstrate that the reason proffered by the Respondent is either not credible or is otherwise a pretext for discrimination. The ultimate burden of proof remains with the Complainant to demonstrate each and every element of discrimination including the entitlement to damages and the amount of damages.

The elements of a prima facie case of discrimination include membership in a protected class, a sufficiently adverse employment action, and reason to believe the action occurred as a result of membership in the protected class. The Hearing Examiner will first examine the Complainant's claims of membership in the protected classes of disability and age.

As part of establishing a prima facie case of discrimination based on disability, a Complainant must show membership in the protected class by satisfying the definition of disability for purposes of the Madison Equal Opportunities Ordinance.[1] The Complainant seeks to show that the Respondent

regarded her as having a disability by virtue of a conversation that took place in early 1997. The parties disagree as to the content of the conversation, creating a credibility issue.

According to the Complainant's testimony, Assistant Principal Valenza told the Complainant that she did not believe that LaFollette was handling her disability properly. The Complainant additionally alleges that Valenza indicated that the Complainant needed to be transferred to another school more suited to handling the Complainant's disability. A co-worker, Janeen Seifert, witnessed a portion of the conversation between the Complainant and Valenza.

According to Valenza's testimony, the Complainant tried to persuade her that the Complainant was a good employee. Valenza agreed, but said that the Complainant might need to be in a different position in order to reach that potential. The Complainant also inquired if Valenza had read the materials on fibromyalgia that she had given her. Valenza told the Complainant that she had but that the Complainant needed to get a doctor's assessment of her fibromyalgia and that the Respondent would decide if she was better placed at LaFollette or another school where her disability might be better accommodated.

Based on the testimony of the parties, the Hearing Examiner accepts the Respondent's portrayal of the conversation. In general, the Hearing Examiner is impressed with Valenza's credibility. The testimony of Seifert does confirm that the Complainant and Valenza had a conversation that concerned disability. However, Seifert only overheard part of the conversation, and according to Valenza's recounting of events, it is easy to see how Seifert and the Complainant could recall the conversation as centering around a need to transfer the Complainant for reasons due to her disability. The Hearing Examiner interprets Valenza's statement as an expression of concern for the Complainant as opposed to an expression of an intent to harm or injure the Complainant.

Regardless of which version of the conversation the Hearing Examiner accepts, it is clear that Valenza may have regarded the Complainant as having a disability. Valenza's directions to the Complainant to obtain a doctor's evaluation is evidence that she regarded the Complainant as having a disability, even if the condition was not fully represented to her as a disability. While not direct evidence, the statement shows an awareness of a condition that might be a disability. This could lead one to the conclusion that she belongs in the protected class disability. As such, the Complainant is a member of the protected class "disability."

The Complainant also alleges age as a basis of discrimination in the decision to transfer her. To demonstrate membership in the protected class "age", the Complainant must show that she is part of a discrete age group that has received less favorable treatment. The Respondent does not dispute that the SEAs ranged in age and that the Complainant is older than younger SEAs who received more favorable treatment than the Complainant. The Complainant demonstrates membership in the protected class "age."

After showing membership in a protected class, the Complainant must show that the Respondent's actions constitute an adverse action against her.

The Complainant argues that the involuntary transfer to another school constituted an adverse employment action. The Complainant was employed by Respondent, a school district, and not employed solely by LaFollette High School. The Complainant was employed such that she would be assigned annually to a school and would perform her SEA duties. The Respondent is not barred from allocating its human resources in ways it sees fit provided the allocation is not done with discriminatory intent. While it may be most efficient to keep someone where she is comfortable and

familiar, the Respondent does not need to take those factors into consideration when making a placement decision.

The Complainant, by virtue of her years of good service, could argue that to be terminated completely without notice would be an adverse action, but that is not the case here. The Respondent was within its rights as an employer to laterally transfer the Complainant. The transfer of the Complainant without her consent is not a per se violation of the ordinance nor is it a per se adverse action within the meaning of the ordinance. Even if the transfer could be classified as an adverse action, the record does not support a conclusion that the transfer came because of the Complainant's disability or age.

The Complainant portrays the transfer as being adverse by virtue of the difficulties the Complainant experienced. The Complainant testified that unfamiliar surroundings, having to use stairs rather than an elevator, and having to work without air-conditioning all exacerbated her fibromyalgia, making Sennett a materially less desirable position. Any person legitimately transferred by an employer will undoubtedly experience some period of disorientation. There is no evidence that the Respondent had any knowledge or belief that the transfer would cause the Complainant's fibromyalgia to become worse. In addition, there is no evidence that her age made the transfer an adverse action as the adverse effects described by the Complainant all dealt with her fibromyalgia.

There is no evidence on this record that shows that the Complainant, at either LaFollette or Sennett, requested any accommodations for her condition. There is no evidence that anyone at Sennett was aware of the Complainant's fibromyalgia. It is the Complainant's burden to request an accommodation and when she experienced difficulties at Sennett, the Complainant did not seek help. In sum, the transfer itself was not an adverse employment action. As such, the Complainant fails to present a prima facie case for discrimination.

Even if the transfer was an adverse employment action, the record lacks evidence indicating that the transfer was made wither because of the Complainant's disability or age. The Respondent had a legitimate, nondiscriminatory reason for the transfer, to alleviate the caustic tensions between some teachers and some SEAs in the CD-S unit. The Respondent determined that it would be easiest and best to reassign the SEAs than the teachers. The Respondent cites the Complainant's declining performance evaluations as a reason why she, in particular was transferred. The Respondent also contends that the less than stellar performance evaluation resulted at least in part from the tension between the SEAs and the teachers.

The Complainant fails to credibly rebut the Respondent's proffered explanations. The Complainant generally attacks Valenza's credibility, however as noted above, the Hearing Examiner generally finds Valenza to have been forthright, calm, and reasonable in her testimony. In reaching the conclusion that Valenza's testimony was generally more credible than that of the Complainant, the Hearing Examiner does not find that the Complainant intentionally lied or intended to mislead the Hearing Examiner. The Complainant's testimony in general was somewhat vague and she was admittedly not in a position to know all of the considerations and circumstances going into the Respondent's decision.

The Respondent asserts that a reason for the transfer was a poor performance evaluation of the Complainant. The Complainant maintains that the transfer decision and the poor evaluation were made due to Valenza's animus towards the Complainant and older SEAs. Also, the Complainant claims that Friend-Kalupa, a teacher, had inordinate influence in the transfer decision through the poorer evaluation.

The Complainant claims that animus from Friend-Kalupa helped to taint performance evaluations. Unlike her predecessor, Valenza relied on informal observation and the comments of teachers to evaluate the SEAs. On this record, the Hearing Examiner is not convinced that Friend-Kalupa wielded so much influence as to single-handedly cause the Complainant to receive a poor evaluation. The evidence does suggest that Friend-Kalupa has a strong personality. However, the Hearing Examiner finds that the weight of the evidence points to Friend-Kalupa being one voice among several Valenza listened to, as opposed to the overwhelming force behind the evaluation.

At the Cognitively Disabled-Severe unit at LaFollette High School, there were two groups of people whose personality conflicts mutually contributed to an unappealing work atmosphere. The record clearly documents problems between a group of SEAs and the CD-S teachers. The situation was typical of instances where one group has power over another and controls the day-to-day work environment of those employees. By happenstance, the two groups were divided by age lines. The Ordinance exists to assist people who have been wronged because of their membership in a protected class. People with conflicts who happen to belong in a protected class do not automatically merit protection due to membership.

The Hearing Examiner finds it unfortunate that conditions in the CD-S unit at LaFollette had deteriorated to the extent that the Respondent needed to take such drastic action to remedy the situation. However, in taking that action, the Hearing Examiner is convinced that it did not act with discriminatory intentions.

For the foregoing reasons, the complaint is dismissed.

Signed and dated this 16th day of November, 2001.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell III
Hearing Examiner

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[1]Madison General Ordinance Sec. 3.23(2)(m) defines disability, in part, as:
a. A physical or mental impairment which substantially limits one or more of such person's major life activities; or
b. A record of having such an impairment; or
c. Being regarded as having such an impairment.