EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
210 MONONA AVENUE, ROOM 500
MADISON, WISCONSIN

Marjory May 6522 Offshore Drive Madison, Wisconsin 53705 Complainant vs. State Medical Society of Wisconsin 330 East Lakeside Street Madison, Wisconsin 53703 Respondent	RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER Case No. 2584

A complaint was filed with the Madison Equal Opportunities Commission (MEOC), dated January 28, 1980, alleging discrimination on the basis of age and sex in regard to employment. Subsequent to an investigation by MEOC Human Relations Investigator, Mary Pierce, an Initial Determination was issued, dated December 9, 1980, finding probable cause to believe that the Respondent discriminated against the Complainant on the basis of age and sex in regard to both terms and conditions of employment (wage increase and job duties) and termination of employment, in violation of Section 3.23(7)(a), Madison General Ordinances. (NOTE: The complaint was actually received by the MEOC on February 27, 1981, although dated on January 20, also, the Initial Determination was not dated on the document, although the December 9, 1980 date appears as the date of issue in the file notation.)

Conciliation was waived and/or failed and the case was certified to public hearing. The issues in this case are recited in the Notice of Hearing, dated April 10, 1981. Respondent's Motion to Dismiss, dated April 3, 1981, was denied by the Examiner in a ruling dated April 10, 1981, and said ruling also included a clarification of the issues.

A hearing was held, beginning on May 12, 1981. The Complainant appeared in person and by Attorney Robert Greene. The Respondent appeared by Attorney William F. Mundt of MURPHY, STOLPER, BREWSTER and DESMOND, S.C., and by employee representative Lee Johnson and Brian Jensen. Based upon the record of the hearing and after consideration of the written arguments submitted by the parties, the Examiner proposes the following Recommended Findings of Fact, Conclusions of Law and Order:

RECOMMENDED FINDINGS OF FACT

1. The Complainant, Marjory May, is a fifty-eight (58) year old female.
2. The Respondent, State Medical Society of Wisconsin (hereinafter sometimes referred to as "SMS"), is an employer doing business in the City of Madison.
3. The Complainant was employed by the Respondent's Wisconsin Physicians Service (WPS) division from 1956 to June of 1977 when WPS was established as a separate corporation, and at which time she automatically became an employee of WPS.
4. Prior to her original employment with the Respondent in 1956, the Complainant had taken nursing courses at the University of Wisconsin and had training in X-ray technology at Johns Hopkins Hospital where she became qualified as an X-Ray Technician. She also had worked as an X-Ray Technician at both Johns Hopkins Hospital and at New York City's St. John's Episcopal Hospital, and such work included exposure to a wide variety of medical problems including open heart surgery.

5. While employed by the Respondent's WPS division, the Complainant worked first as a claims adjuster, then as a supervisor in the claims department, and finally as the Cost Containment Coordinator, which position she continued to hold when WPS became a separate corporation from SMS. The three different jobs had given her knowledge of the specifics of medical practice, the financing of health care, and the details of medical insurance.
6. In late 1977 and early 1978, the Physicians Alliance Division (PAD) of SMS sought to hire someone to do research and also to handle problems that member physicians were having with claims submitted to the Medicaid program for services rendered.
7. In early 1978, SMS contacted the Complainant about the position described in Finding of Fact 6. She was interviewed by Earl Thayer, SMS Treasurer and General Manager.
8. The Complainant was hired by the Respondent for the position described in Finding of Fact 6 and was treated as a transfer employee by the Respondent. She was given the title of Socio-Economics Coordinator, and the duties of the job were essentially undefined.
9. One major function the Complainant performed as Socio-Economies Coordinator was assisting physicians with the backlog of Medicaid claims that existed at the time, as well as those that arose subsequent to her employment. She also traveled regularly in the first several months of her employment, representing SMS and speaking to doctors and their staffs about the newly established mechanism for Medicaid services.
10. The Complainant's jab description, dated "7/79", states that the primary purpose of her position was "to provide effective support . . . regarding medical economic issues as well as to perform related research work as requested by the Division Director." It also shows that her duties were intended to include: development of Medicare and Medicaid policy, handling problems that physicians had with payment from all health insurance carriers, developing health insurance claims forms, staffing a number of committees involving health care economics issues, and doing research on the costs of medical practice.
11. Among the Complainant's accomplishments working in PAD was her contribution to the successful resolution of a problem involving the mechanism for Medicaid reimbursement of pediatrics and obstetric/gynecological services.
12. The Complainant also constructed and ran a survey of costs of operating medical practices. The Respondent believed the survey "defined well whit we were looking for". Many physicians did not respond to the survey, however, because they resented being asked questions about their income end expenses.
13. The Complainant successfully reduced the backlog of Medicaid reimbursement claims to the point where these claims occupied 10% to 20% of her working time at the time of her discharge. Said claims had initially comprised 75% of her job as Socio-Economics Coordinator.
14. Brian Jensen, the Complainant's Supervisor, made the following statements to various of Respondent's PAD employees during the course of the Complainant's employment:
    (a) He told Shirley Price-Marcus that he was "anxious to get rid of Ms. May".
    (b) Employees Kristine Wedeward and Mark Mendelson heard Jensen say that he wanted a "young, aggressive, loyal" staff.
    (c) He told Mendelson that the Complainant did not "fit in" and Jensen stated in reference to the Complainant that "he didn't need another mother".
    (d) Jensen discussed with Mendelson on various occasions that the futures of the Complainant and Ms. Price-Marcus were "tenuous".
15. Both Mendelson and Wedeward observed that the Complainant was being ignored in regard to work assignments.
16. In late 1978, Jensen told the Complainant that her position had only been budgeted for the first six months of 1979. She was not, however, discharged at the end of June, 1979.
17. The Complainant was entitled to salary review by Jensen in August of 1979, pursuant to SMS policy. The forms for such a review were sent to Jensen on August 8, 1979. However, the Complainant was not reviewed until after she was finally discharged by the Respondent in March of 1980.

18. On January 7, 1980, the Complainant was given a memo by Jensen informing her that she was terminated, effective March 15, 1980. The reason given was that the SMS budget for 1980 required reduction in staff of "several positions". The Respondent classified employees in at least two categories: exempt and non-exempt. The Complainant was an exempt employee. Kristin Wedeward, a non-exempt employee, was discharged at the same time as Complainant.
19. On February 12, 1980, the Complainant received a termination memorandum from Jensen indicating that budget and "substantial reduction in your day-to-day work" given its reduced priority were the reasons for her termination (effective March 15, 1980).
20. Just prior to the time of the Complainant's actual termination on March 15, 1980, the position of Field Consultant was open in the PAD. The Complainant was considered to be unqualified for the job by Jensen and Lee Johnson, SMS Director of Administrative Services. Johnson considered that the Complainant was not "political", that she would not want to move to the area where the job was located, and that she was not physically able to do the job. Johnson arrived at these conclusions without ever discussing the matter with the Complainant. The Complainant never specifically applied for the Field Consultant position. Timothy Lynch was hired as Field Consultant on March 24, 1980. Jensen never discussed the Field Consultant position with the Complainant either.
21. Seniority is used whenever possible by SMS as a factor in personnel decisions. The Complainant had retained all of her seniority and was considered to have about 24 years of seniority at the time of her discharge.
22. Rick Reas, a 25-year old social worker from Ozaukee County, was hired in May of 1978 as a research assistant. He was promoted to the position of Executive Assistant to the Director of PAD, effective January 1, 1979. On September 23, 1979, Reas was promoted and given additional duties. When first hired as a research assistant, part of his work involved assisting the Complainant with physicians' Medicaid reimbursement claims. Reas was familiar with the recipient end of the medical insurance programs. The Complainant had no experience (or little experience) with the recipient end.
23. At the same time Reas was being promoted to work more on professional liability in 1979 (January 1), Shirley Price-Marcus who had been responsible for professional liability work prior to that time was discharged on January 3, 1979. The reason given for Price-Marcus' discharge was that PAD could no longer support staff activity "in the professional liability area", and for that reason her position was written out of the budget in 1979. Price-Marcus was 43 years old at the time of her discharge by Respondent. Price-Marcus was a female; Reas was a male. Reas' promotions were made by Jensen.
24. During late 1979, Jensen decided that his legislative coordinators (or lobbyists) were not performing their jobs adequately. Jensen further decided that they would not work as legislative coordinators in the next session of the Legislature. The legislative coordinators at the time were Michael Brozek, a 27-year old male, and Donald Lord, a 31year old male.
25. Jensen developed a plan which resulted in Doug Nelson becoming the sole legislative coordinator, Brozek leaving PAD to work directly for Thayer, and Lord performing in-house research and committee staffing functions. However, the Respondent still considered Lord to be a Legislative Coordinator as the period during which he was assigned research duties was a period of legislative inactivity. In addition to research, Lord was also assigned to staff the Quality Assurance Committee, the Independent Practitioners Committee, and the Cost Containment Committee. Neither Lord or Brozek were discharged by the Respondent.
26. The following personnel actions were taken by the Respondent for "exempt" employees in the PAD between February 14, 1978 and May 11, 1981:
    (a) 60% of the females, two of three, employed as of 2/14/78, were involuntarily terminated;
    (b) 18% of the males, two of seven, employed as of 2/14/78, were involuntarily terminated;
    (c) 50% of all employees over 40 years of age, two of four, as of 2/14/78, were laid off and have never been recalled (including the Complainant);
    (d) 20% of all employees under 40 years of age, one of five, employed as of 2/14/78, were involuntarily terminated;
    (e) 75% of all employees who have been hired or who transferred into the PAD since 2/14/78 were male, six of eight;

(f) 25% of all employees who have been hired or who transferred into the PAD since 2/14/78 were female, two of eight;
(g) 100% of all hires and transfers in the PAD since 2/14/78, six employees hired and two transferred in, have been under 40 years of age;
(h) 100% of all employees receiving promotions in the PAD since 2/14/78, six employees, have been both male and under 40 years of age.

The above statistics exclude Mary Rodriguez, a female, who was hired as an administrative assistant and later promoted to an exempt status. In her capacity as an exempt employee, the PAD pays 10% of her salary and exercises no authority over her. The above statistics also reflect employment actions taken subsequent to Jensen's promotion to PAD Division Director on March 26, 1978, except that Jensen's promotion is included in (h).

27. The PAD budget for payroll was $227,300 in 1978, $226,000 in 1979 and $236,000 in 1980. The payroll adjustment (increase) factor for 1979 wad 7%. The payroll adjustment (increase) factor for 1980 was 9%.
28. The maximum PAD payroll budget for 1980, based on the Respondent's own figures, would have been expected to be as follows:

    $226,000 (1979 payroll budget) minus $20,250 (the approximate total of the Complainant's and Wedeward's combined salary for the three-fourths year which they were deleted) times 9% (the payroll adjustment factor for 1980 to be applied to the remaining salaries) equals EXPECTED BUDGET INCREASE FOR 1980.

    The calculated figure for the 1980 expected payroll budget increases is $18,517,50. The EXPECTED PAYROLL BUDGET FOR 1980 is the sum of $205,750 (the difference between the 1979 payroll budget and the deleted parts of the Complainant's and Wedeward's salaries) and the $18,517.50, or a total of $224,267.50. The amount would increase slightly if the Complainant and Wedoward received salary increases for the portion of 1980 that they did work. However, the amount would be expected to be reduced somewhat as they did not work a full quarter year.

    NOTE:The $20,250 (three-fourths of $27,000) was arrived at by assigning a $17,000 figure to the Complainant's salary (the approximate salary testified to) and a $10,000 figure to Wedeward's salary. Wedeward's salary is not specifically on the record, however (either by testimony or exhibits). The Examiner therefore suggests that the Commission hold the record open for the submission of accurate testimony in this regard. This Finding of Fact should then be adjusted accordingly.

    Because I do not believe this Finding of Fact to be crucial (as explained in the Memorandum Opinion), I have not reopened the record on my own motion, but leave it for determination upon appeal (if any).

29. Respondent's goal has been to build up six months of monetary reserves. The Respondent's actual reserves have increased from 2.11 months to 2.6 months between 1978 and 1980 (the 1980 figure is projected). Reserves are the additional amounts of money the Respondent has on hand (essentially, in liquid assets) in proportion to the amount of its annual budget.
30. Kristin Bjurstrom was hired as a Field Consultant by the Respondent in 1981. She was approximately 30-years old at the time of her hire and is a female. She listed no governmental political activity, per se, on her application.

RECOMMENDED CONCLUSIONS OF LAW

1. The Complainant is a member of both the protected classes of age and sex 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 unlawfully discriminate against the Complainant on the basis of sex in regard to termination nor in regard to failure to grant her a salary increase in August or September of 1979. Termination includes "layoff".
4. The Respondent discriminated against the Complainant on the basis of age in regard to layoff and/or discharge (termination) from her employment in 1980 in violation of Section 3.23, Madison General Ordinances.
5. The Respondent discriminated against the Complainant on the basis of age in regard to failure to grant her a salary increase in August or September of 1979 in violation of Section 3.23(7)(a), Madison General Ordinances.

RECOMMENDED ORDER

1. That the Respondent cease and desist from discriminating against the Complainant on the basis of age.
2. That the Respondent reinstate the Complainant into the next available position for which she is qualified and for which the salary exceeds $17,000 plus all benefits, rights and privileges she would have received had she not been laid off or discharged in 1980. Said position shall be the next available "exempt" position unless "exempt" status is waived by the Complainant.
3. The Respondent pay to the Complainant all amounts she would have received had she not been laid off or discharged by the Respondent on March 15, 1980, less any statutory setoffs. Any amounts required to be paid directly to government agencies shall not operate to reduce the amount of backpay (but shall reduce the amount specifically received by the Complainant). This order is intended to include both backpay and front pay. The Respondent shall continue to pay the Complainant until such time as she is reinstated. This order is also intended to include reimbursement and/or immediate reinstatement of all seniority, pension contributions, and all other rights, privileges and benefits of employment that the Complainant would have received and/or would in the future receive had she not been laid off and/or terminated on March 15, 1980.
4. The Complainant shall be paid the additional amounts of money she would have received had she been awarded a merit pay increase in August or September of 1979. Respondent shall pay her said merit pay increase based on the average increase received by all exempt employees who received merit pay increases in 1979.
5. That all sex discrimination claims be and hereby are dismissed.

MEMORANDUM OPINION

The burden of proof in a case of alleged disparate treatment is always on the Complainant.[1] She first must prove a prima facie case of discrimination by a preponderance of the evidence,[2] i.e., she first must prove sufficient facts which if not otherwise explained, would lead to the inference that more likely than not an employment action was taken due to impermissible factors.[3] The Complainant raises such an inference regarding the layoff or discharge issue by the combination[4] of the following factors being established by a preponderance of evidence.[5]

I. Prima Facie Case of Age Discrimination

(1) The Complainant was a member of a protected class: she was fifty-eight (58) years old (Note: the protection of the Madison Ordinance extends to any person at least over eighteen (18), if not to younger persons).

(2) The Complainant's Supervisor, Brian Jensen, made various statements to other employees indicating that her age was an adverse factor to him and also indicating that he wanted to get rid of her (see Finding of Fact 14).

(3) The Complainant had been an excellent employee and was qualified to do her job at the time of discharge.

(4) All six exempt employees hired by the PAD, under the supervision of Brian Jensen, were less than 31 years old at the time of hire; the oldest of the two exempt transfers into PAD during Jensen's supervision was just over 35 years old at the time of transfer.

(5) The Complainant was inadequately considered for an available Field Consultant position.

(6) Two employees, both less than 31-years old, had been retained in PAD or SMS and assigned other duties despite inadequate performance ton, Legislative Coordinators.

II. Respondent's Reason for Layoff (Discharge)

Once a prima facie case of discrimination has been established, the burden of proof shifts to the Respondent to articulate a legitimate, non-discriminatory reason(s) for the employment action.[6] In this case, the Respondent's reasons for the Complainant's layoff (discharge) were essentially as follows:

(1) budget constraints
(2) her job became non-essential
(3) she was not qualified for the available Field Consultant job

III. Pretext

The Respondent need only articulate the reasons for the employment action; it is not necessary for the Respondent to persuade the Examiner that the reasons were, in fact, relied on in taking the employment action(s).[7] The burden of proof is then on the Complainant to show that the reason(s) was/were pretextual or unworthy of credence.[8]

A. Budget

The Complainant did not present sufficient evidence to carry her burden that budget was not a consideration (see Finding of Fact 30). However, even if budget were a consideration, and I construe this fact in the Respondent's favor, a finding of age discrimination is not precluded. In this case, as shall be discussed below, the Complainant was treated disparately in deciding which employee would be laid off (discharged), and age was a determining factor in laying off (discharging) the Complainant.

B. Non-Essentiality of Job

The Complainant had performed her duties so well that she had, in a sense, "worked herself out of a job" (so to speak). Between eliminating the backlog of problems with physician reimbursements (reducing her time spent on these from 75% to 20%) and completing development of the uniform claim form (that had originally occupied about 30% of her time), she had effectively run out of work. She argues that she should have been assigned some of the duties Reas was assigned, but admits she was not versed in the "recipient" end of medical insurance.

However, the argument that she had run out of work is shown to be pretexual in that two other younger employees (Brozek and Cord, see Finding of Fact 24 and 25), who were not performing

adequately as legislative coordinators, were found other duties. Brozek, in fact, was transferred out of PAD to work under Thayer. While the Respondent attempts to explain the reason for Brozek being retained as due to the negative political impact his discharge would have had for the Respondent, such reason is suspect in light of the totality of the facts and circumstances (refer to the six elements discussed earlier in the prima facie case section).

C. Field Consultant Position

The Respondent points to the Complainant's performance on a survey task, her alleged inability to speak and write, her not being "political", doubts about her physically being able to do the job and doubts about her desire to move as reasons the Complainant was not hired for the available Field Consultant positions in 1979 and 1980 ("transferred" may be more appropriate a term than "hired"). These reasons were shown to be pretextual in that the survey problems were not her fault (see Finding of Fact 12), she was a very good public speaker (see Mendelson's testimony), doubts about her physical ability and doubts about her desire to move are purely speculative in that they were never discussed with her, her writing was not shown to have been faulty during her 24-plus years of work for SMS, and there is some doubt as to whether being "political" was an actual requirement (although it was a stated requirement for the job). Bjurstrom, for example, who was hired in 1981 as a Field Consultant shows an impressive resume, but does not appear to list any governmental political activity except perhaps what can be inferred by her duties in various real-estate related activities. Given that Bjurstrom was 30 years old at the time of her hire and indicates Jensen as a referral (on her application), the Complainant again casts a cloud of doubt on the "political" requirement. Finally, Thayer brings up the notion that the Complainant did not proffer original solutions to problems; it appears to be no more than a notion.

IV. Age Was A Determining Factor In Respondent's Decision to Discharge of Lay Off

While age may not have been the sole factor leading to the Complainant's layoff, that age was a determining factor[2] sufficient to base a finding of discrimination upon is supported by the following combination of evidence: there was an animus toward the Complainant expressed by her Supervisor, Jensen, because of her age; she was a good (and/or excellent) employee; whereas new duties were found for some younger employees performing inadequately, she was laid off (discharged) without being considered adequately for alternative duties in PAD or SMS; the employer promoted, hired and transferred into PAD persons who were generally under 31 years of age, or at least under 36 years of age; another 43-year old woman employee had been discharged because her duties allegedly had become non-essential, but was later replaced by an employee in his twenties.

The Respondent attempts to pass the responsibility for the Complainant's lay off (discharge) mainly to Thayer (instead of Jensen). However, the evidence on the record indicates that while Thayer technically possessed the ultimate hire and fire authority, supervisors (including Jensen) had a determining influence in the ultimate job fate of employees (evidenced in part by the fact that Thayer had ordered certain employees at different times to be budgeted out, yet they were retained well beyond their scheduled departure dates).

V. Merit Increase

Given that the Respondent ties the failure to grant a merit increase in 1979 (August or September) to the Complainant's prospective termination (layoff), a finding of discrimination regarding the layoff necessitates a finding of age discrimination regarding the merit increase.

VI. No Finding of Sex Discrimination

I will briefly state that while the Complainant did establish a prima facie case of sex discrimination, the evidence is not sufficient to carry her burden on the sex discrimination claims. The statistics are not as

probative or revealing as those for age discrimination, the alleged comment made (by Jensen that he knew a young man who would like her job, presumably Reas) was not witnessed by anyone other than the Complainant, and a woman was hired as a Field Consultant (albeit, later in time). Consequently, I recommend that the sex discrimination claims be dismissed.

Signed and dated this 20th day of October, 1981.

Allen T. Lawent
Hearing Examiner, EOC

FOOTNOTES

[1]Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24, 18 EPD par. 8673.

[2]Texas Department of Community Affairs v. Burdine, 25 EPD par. 31,544.

[3]Furncp v. Waters, 438 U.S. 567, 17 EPD par. 8401.

[4]While McDonnel-Douglas Corp. Green, 411 U.S. 792, 5 FEP 965, establishes a model for the prima facie case in a hire situation under Title VII, the U.S. Supreme Court acknowledged that a prima facie case will vary and that the test will depend upon the facts and circumstances in given instances, depending on the employment action taken. While age is not specifically covered by Title VII under federal law (it is covered by a separate federal act), the concept of the prima facie case (and its variances) is appropriately borrowed and applied to the local ordinance at issue.

[5]This is not a disparate impact case. While statistical comparisons may have probative value in disparate treatment cases (such as this one is), statistics alone are generally insufficient to establish a prima facie case of discrimination (or to rebut an articulated reason as discriminatorily pretextual).

In F1owers v.Crouch-Walker, 552 F. 2d 1277, 14 EPD 7510, the Complainant established a prima facie case as follows:

(1) he was a member of the protected class
(2) he was qualified for the job that he was performing
(3) he was satisfying the normal requirements of his work
(4) he was discharged
(5) he was replaced by someone outside the protected class

In this case the Complainant was laid off (or discharged). Consequently, replacement is not a necessary factor to establish a prima facie case. The Complainant did establish the first four elements outlined in Flowers. In lieu of the fifth element, she showed in combination that certain adverse statements were made by her supervisor relating to age, a tendency by PAD to hire all younger employees in that division, the retention of two younger employees who had been performing their jobs as legislative coordinators inadequately, and the discharge of a 43-year old employee whose job had been determined to be non-essential and her replacement by a 25-year old (Reas).

[6]see Board of Trustees v. Sweeney, supra.

[7]same as Footnote 6.

[8]Same as Footnote 6.

[9]Geller v. Markham, 24 EPD par. 31,417 (Court of Appeals, 2nd Cir., 1980); While Geller is a case arising under the Age Discrimination in Employment Act, it supports the proposition that age need only be a determining factor and not the (sole) determining factor to support a finding of age discrimination. The standard use in construing protected categories (other than age) under the Wisconsin Fair Employment Act and under this ordinance has been similar. And as age its not separated (as under federal law) from the other categories of the ordinance (by separate legislation), the argument that the intent was to apply a similar standard (as applied to the other categories) is even stronger. see Appleton Electric v. DILHR (Kreider), No. 155-255 (Dane Cir., Currie, Nov. 7, 1977 and Wisconsin Department of Agriculture v. Wisconsin Labor and Industry Review Commission, 17 EPD par. 8607 1978) for the proposition that (as paraphrased in Wis. Dept. of Ag., supra from Muskego-Norway C.S.J.S.D. v. WERB, 35 Wis. 2d at p.562) an employer's conduct is not insulated from a finding of illegality when one of the motivating factors is legally

protected (e.g. race, age, handicap, union activities, etc.) no matter how many other valid masons might exist for the action complained of.

EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
210 MONONA AVENUE, ROOM 500
MADISON, WISCONSIN

Marjory May 6522 Offshore Drive Madison, Wisconsin 53705 Complainant vs. State Medical Society of Wisconsin 330 East Lakeside Street Madison, Wisconsin 53703 Respondent	FINAL ORDER Case No. 2584

The Examiner issued the Recommended Findings of Fact, Conclusions of Law and order dated October 20, 1981 (including subsequent technical corrections made in letters dated October 21, 1981 and November 4, 1981). Timely exceptions were filed by both parties, briefs were submitted, and oral arguments were subsequently heard by eight members of the Commission on April 15, 1982.

Based upon a review of the record in its entirety, including consideration of the briefs and the oral arguments, the Madison Equal Opportunities Commission (MEOC) enters the following

FINAL ORDER

That the attached Recommended Findings of Fact, Conclusions of Law and Order (hereinafter "Examiner's Decision") is hereby AFFIRMED in its entirety except as follows:

(A) All the testimony of Shirley Price-Marcus shall be stricken from the record:

(B) Finding of Fact 14 (a) is hereby DELETED.

Commissioners Abramson, Amato, Goldstein, Hall, Mendez, Swamp and Thome all join in affirming the Examiner's Decision as modified above.

Commissioner Galanter dissented.

OPINION

I. Shirley Price-Marcus' Testimony

Regarding Shirley Price-Marcus' testimony, while the Commission does not find nor has the Respondent shown any actual impropriety in the Examiner's permitting her testimony to be taken, the Commission finds that the taking of her testimony creates an appearance of impropriety so great as to warrant the striking of her testimony from the record, as well as the striking of Finding of Fact 14(a) which is the only finding of Fact based on her testimony.

The appearance of impropriety is created by the facts that Price-Marcus is a present MEOC Administrative Secretary II (and was at the time she testified), and that she had been previously employed by and discharged by the Respondent, State Medical Society. Consequently, Price-Marcus was not a neutral third-party, and present MEOC employees who are not neutral third parties shall not be permitted to testify in MEOC proceedings (except as described in the footnote below)[1] before another agency employee (Examiner).

However, even with the striking of Price-Marcus' testimony and with the deletion of Finding of Fact 14(a) from the Examiner's Decision, the Commission finds that the Examiner's Conclusions of Law and Order are supported by the remaining Findings of Fact for reasons described in the Examiner's Memorandum Opinion. Consequently, the taking of Price-Marcus' testimony was harmless error.

We also point out that Finding of Fact 23 is not based on Price-Marcus' testimony, but is instead supported by stipulated exhibits and the Respondent's testimony.

II. Mary Pierces Testimony

Unlike Price-Marcus, Human Relations Investigator Pierce is a neutral third party who conducted the lawful investigation in this matter. It is a usual practice to permit investigators to testify in these administrative proceedings when requested to do so by either party. Consequently, the taking of Pierces testimony was proper.

Signed and dated this 21st day of April, 1982.

A. Gridley Hall, EOC President
James C. Wright, EOC Executive Director

FOOTNOTES

[1]Should the party calling the MEOC employee-witness, where the employee-witness is not a neutral third party, insist on the taking of the employee's testimony, under most circumstances it would be appropriate for the Examiner to remove himself (herself) from the case rather than to refuse to permit the testimony, particularly where the party shows that the employee-witness has critical testimony to give regarding the merits of the case. In this case, however, the Commission has found Price-Marcus' testimony not to have been critical and has struck it from the record.

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

STATE MEDICAL SOCIETY OF WISCONSIN Petitioner, vs. MADISON EQUAL OPPORTUNITIES COMMISSION and MAJORY MAY Respondents	DECISION and ORDER ON REVIEW Case No. 82-CV-2560

BEFORE HON. RICHARD W. BARDWELL, CIRCUIT JUDGE, BRANCH #1

This matter is before the Court on certiorari to review a determination by the City of Madison Equal Opportunities Commission (commission or MEOC) that the State Medical Society of Wisconsin (SMS)

violated sec. 3.23, Madison General Ordinances, by discriminating against Marjory May on the basis of age in regard to layoff and/or discharge (termination) and by its failure to grant May a salary increase in August or September of 1979. Petitioner SMS asserts on appeal that the commission erred in determining that May established a prima facie case of discrimination; that it erred by failing to find that the determinative factors in May's discharge were budget restrictions and the evaporation of her job duties; that it erred by making findings of material fact contrary to uncontroverted testimony and stipulated exhibits; and that under the facts and circumstances, the remedy provided constitutes an abuse of the commission's discretion.

The record reveals the following facts with respect to May's employment history. May was originally hired as a claims adjuster for the Wisconsin Physician's Service (WPS), the health insurance division of the SMS in 1956. She was promoted to claims supervisor in either 1960 or 1961 and became the cost containment coordinator for the claims department in 1976. By order of the Commissioner of Insurance, the SMS divested itself of its interest in WPS in 1977 and WPS was separately incorporated. As a result, May became a WPS employee. However, she retained her seniority and pension rights with the SMS despite the divestiture.

The executive director of the SMS, Earl Thayer, offered May the position of socio-economics coordinator with the SMS in January, 1978, which she accepted and began work on February 14, 1978. The SMS treated May's new position as an employee transfer and the sick leave May had accumulated at WPS was similarly transferred to the SMS. The socio-economics coordinator position was eliminated by the SMS effective March 15, 1980, and the SMS has not since that date reinstated the position nor hired an employee to perform the duties of that position.

The scope of review on certiorari is limited to the following: (1) whether the MEOC kept within its jurisdiction; (2) whether it acted according to law; (3) whether its action was arbitrary, oppressive or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that it might reasonably make the order or determination in question. State ex rel. Ruthenberg v. Annuity &Pension Board of City of Milwaukee, 89 Wis. 2d 463, 472, 278 N.W. 2d 835 (1979). As stated by former Chief Justice Hallows, "the test on certiorari for sufficiency of the evidence is the substantial evidence test." Stacy v. Ashland County Department of Public Welfare, 39 Wis. 2d 595, 602, 159 N.W. 2d 639 (1968). The court in Stacy further stated:

> Of course, in applying the substantial evidence test this court does not pass on credibility or assay the evidence to determine which view preponderates or what evidence supporting a theory is of the greater weight. This court, however, must evaluate the evidence, which has been determined to be credible and accepted by the trier of fact to see if its sufficiency reaches that degree of substantiality in terms of burden of proof to support a finding or of convincing power that reasonable men acting reasonably might reach the decision the administrative agency did.

Stacy, supra, 39 Wis. 2d at 603. Accord State ex rel. Beierle v. Civil Service Commission of the City of Cudahy, 41 Wis. 2d 213, 218, 163 N.W. 2d 606 (1969).

I. THE PRIMA FACIE CASE

The SMS submits that the factors relied on by the MEOC in determining that May had established a prima facie case were insufficient to support its conclusions and that the MEOC further erroneously interpreted the law. The SMS asserts that May failed to establish a prima facie case (and the examiner erred as a matter of law) by not requiring May to show that she was replaced by another employee or that the SMS continued to seek applicants of May's qualifications for a position of employment. To establish a prima facie case, the United States Supreme Court has held that the plaintiff alleging prohibited discrimination must prove by a preponderance of the evidence that:

1. the plaintiff is a member of a protected class;
2. the plaintiff applied/worked for the employer and was qualified;

3. the plaintiff was not selected/discharged; and
4. the employer continued to seek applicants with plaintiff's qualifications.

McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed 2d 668 (1973). Accord Texas Department of Community Affairs v. Burdine, 450 U.S. 248, l0l S. Ct. l089, 67 L. Ed. 2d 207 (1981).

We concur with the parties that the McDonnell Douglas factors of the prima facie case are appropriately applied to cases of alleged discrimination under Madison General Ordinances and that those elements of the prima facie case must be altered to fit the circumstances of the aliened discriminatory conduct. However, to require, as the SMS asserts should he required, the replacement/search factor to establish a prima facie case, places an impossible burden on an employee alleging discrimination when the employment position has been eliminated by the employer. In fact, to require it would permit the employer to escape in most cases liability for bona fide claims of age discrimination.

If the plaintiff shows by a preponderance of the evidence that age was a determining factor in the layoff/position elimination decision by the employer, the plaintiff has established a prima facie case. The SMS appropriately cites in its brief cases from various jurisdictions which establish that a discharge for economic reasons is not tantamount to discrimination in employment simply because of the age of the discharged employee. However, in all of the cases relied on by the SMS, age was found not to be a factor in the employer's decision to eliminate the employee's occupied position of employment. When age is a factor in the employer's decision, a prohibited act of discrimination may have taken place. See McGuen v. Home Insurance Co., 25 FEP Cases 1772 (5th Cir. 1981); Hayden v. Rand Corp., 605 F. 2d 453 (9th Cir. 1979); Bonham v. Dresser Industries, Inc., 569 F. 2d 187 (3rd Cir. 1977) cert. denied, 439 U.S. 821, 99 S. Ct. 87, 58 L. Ed. 2d 113 (1978).

Here May was found to have established a prima facie case by showing:

1. she was a member of a protected class (stipulated to by the parties)
2. she had worked for the SMS and or WPS for 24 years;
3. she was a well-qualified, excellent employee; and
4. her immediate supervisor, Brian Jensen, made various statements which indicated his preference for younger employees; he showed a tendency to hire only young employees, and younger employees were retained by creating new positions for them.

May's evidence is of the kind which the Second Circuit stated would support an inference that an employer's decision was based on prohibited reasons: evidence of a "youth movement" and statements made by the employer indicating a preference for younger employees. Stanojev v. Ebasco Services, Inc., 643 F. 2d 914 (2nd Cir. 1981).

The SMS further submits that it was error as a matter of law for the MEOC to fail to include a finding that May was qualified for an existing job position and therefore May failed to establish a prima facie case. The SMS states that the law is that "May must show that she was qualified for a position, or as qualified as persons to whom she is comparing herself in promotion or job tenure. Pinckney v. County of North Hampton, 512 F. Supp. 989, 999, 27 FEP Cases 528 (D.C. Pa. 1981)." Petitioner's Brief, p. 10.

It is not the qualifications for another available position which is at issue here -- it is the disparate treatment to which May was subjected that comprised the essential element to May's claim of age discrimination -- not whether she was qualified for or competed for (which she did not) another position with the SMS. We find the MEOC to have committed no error in finding that May established a prima facie case absent a showing that she was qualified for another available position of employment with the SMS.

II. PRETEXT

There is no doubt that the SMS articulated legitimate, nondiscriminatory reasons for its actions regarding May's position of employment when the burden shifted to it under Burdine, supra, and the MEOC so found. As Burdine prescribes, the burden then shifted back to May and she bore the burden of persuading the MEOC that the reasons stated by the SMS were a pretext for discrimination. Age need not be shown to be the sole cause of the discharge, it does however need to be shown to have been a causative or determinative factor where the employer has mixed motives in discharging an employee. Geller v. Markham, 635 F.2d 1027 (2nd Cir. 1980), cert. denied 451 U. S. 945, 101 S. Ct. 2028, 68 Ed. 2d 332 (1981).

While the ME0C acknowledged that the SMS had legitimate budgetary reasons for ceasing to fund May's position of employment, it more importantly found that age was a determining factor in the SMS's layoff decision. The MEOC found its conclusion supported by a combination of evidence. The MEOC summarized:

> . . . there was aminus toward the complainant expressed by her supervisor, Jensen, because of her age; she was a good (and/or excellent) employee; whereas new duties were found for some younger employees performing inadequately, she was laid off (discharged) without being considered adequately for alternative duties in PAD or SMS; the employer promoted, hired and transferred into PAD persons who were generally under 30 years of age, or at least under 36 years of age; another 43 year old woman employee had been discharged because her duties allegedly had become non-essential, but was later replaced by an employee in his twenties.

R. 626.

While the record is replete with conflicting evidence, it is for the MEOC, not the court, to assay and weigh the evidence. As long as the facts found and the conclusions and inferences drawn from those facts are supported by the substantial evidence, the decision of the commission is not to be disturbed on review. The findings show the mixed motives of the SMS and we find that based on the evidence, the MEOC could properly conclude that the evidence presented showed that May was treated differently because of her age and the reasons proferred by the SMS were pretextual.

However, with respect to the MEOC's finding and conclusion of law that May was unlawfully discriminated against with regard to not receiving a salary increase, we find that conclusion not supported by the substantial evidence. The record is devoid of any evidence which would support a finding that May would have received a wage increase even had she received a salary review. Consequently, Conclusion of Law No. 5 and Order No. 4 are reversed.

III. SPECIFIC FINDINGS OF FACT

The SMS challenges the hearing examiner's statement in his memorandum opinion adopted by the MEOC that ". . . supervisors (including Jensen) had a determining influence in the ultimate job fate of employees . . . " We disagree with the SMS that this "statement is contrary to the conceded, undisputed fact that Mr. Thayer was responsible for the termination of May." The record supports the MEOC's statement which is not contrary to stipulated exhibits and testimony. We therefore will not order the statement stricken.

The SMS additionally challenges Finding of Fact No. 21:

> Seniority is used whenever possible by SMS as a factor in personnel decisions. The complainant has retained all her seniority and was considered to have 24 years of seniority at the time of discharge.

The SMS submits this finding to he contrary to the substantial evidence in the record and numerous stipulated exhibits. We find such evidence inconclusive. The "employee master record" (R. 413) indicates that May was treated as a transfer employee whereas an interoffice memorandum (R. 417) states that May's employment with the WPS terminated on February 14, 1978, and in a stipulation between the parties (R. 36), the parties

stipulated that May's date of hire by the SMS was February 14, 1978. Further clouding the issue is the fact that May's sick leave balance was transferred (R. 412) and May's testimony (R. 29) that Thayer had told her she would retain her seniority. It is consequently unclear whether the stipulated exhibits implicitly refute May's testimony with respect to seniority.

Because seniority may be an important consideration in fashioning a proper remedy, this issue is remanded. The MEOC is directed to make a finding consistent with the record or to reopen the record if necessary. In this regard, the MEOC is further directed to determine the seniority of other SMS employees relevant to May's disparate treatment, specifically Lord and Brozek.

IV. REMEDY

As the parties acknowledged at oral argument, the remedy in this case presents a difficult issue. The SMS asserts that the remedy ordered by the MEOC is an abuse of its discretion and is anomalous because it orders back pay and front pay but not reinstatement. The MEOC asserts that front pay was the only realistic remedy until an appropriate position was available for May in light of our decision in Madison General Hospital v. Equal Opportunities Commission, Case No. 81 CV 1925 (July 9, 1982).

The two situations are distinguishable. In the Madison General case, the discriminated against employee was found qualified for a position of employment, the problem was the position was occupied. Here, there has been no finding that May was qualified for another position of employment with the SMS, occupied or unoccupied. Considering the absence of such a finding, and the fact that terminating May's position of employment was economically justified, back pay is unwarranted and front pay is an extremely speculative remedy and we therefore find it unreasonable. Liquidated damages in an amount less than equal to back pay to compensate May for the disparate treatment she suffered appears to be the most equitable remedy under the facts of this case. Such damages are a proper remedy under the Age Discrimination in Employment Act, 29 U.S.C. s. 626, see Buchholz v. Symons Mfg. Co., 445 F. Supp. 706 (E.D. Wis. 1978); Combes v. Griffin Television Inc., 421 F. Supp. 841 (W.D. Okla. 1976), and serve as an appropriate reference point for the MEOC in disparate treatment cases where the employer was found to have economic justification for the actions taken, yet at the same time committed a prohibited act of discrimination against the affected employee.

Accordingly, the ruling of the MEOC is affirmed in part, reversed in part, and remanded for further proceedings consistent with this decision. Counsel for the MEOC is to prepare the appropriate order with a copy to be submitted to counsel for the SMS prior to its submission to the Court for signature.

Date: March 2, 1983

BY THE COURT:
Richard W. Bardwell