

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

<p>Lila Stenbrotten 4904 Foxfire Trail Middleton, WI 53562</p> <p style="text-align: center;">Complainant</p> <p style="text-align: center;">vs.</p> <p>Wisconsin Dairy Herd Improvement Coop 6225 University Avenue Madison, WI 53705</p> <p style="text-align: center;">Respondent</p>	<p>FINAL ORDER</p> <p>Case No. 2849</p>
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This is a review of an appeal from an Examiner's Recommended Decision--including the Recommended Findings of Fact, Conclusions of Law and Order--dated June 1, 1984. Nine members of the Madison Equal Opportunities Commission (MEOC) heard oral arguments on this appeal on November 8, 1984.

Based upon a review of the record in its entirety, including consideration of the written and oral arguments of the parties, the MEOC enters the following:

FINAL ORDER

That the attached Recommended Decision-including the Recommended Findings of Fact, Conclusions of Law and Order-is hereby affirmed in its entirety, and this case shall be and hereby is DISMISSED.

Commissioners Amato, Conner, Cox, Hayden, McShan, Olson, Silvers, Trachtenberg and Ware all join in entering the FINAL ORDER, above.

Signed and dated this 30th day of November, 1984.

EQUAL OPPORTUNITIES COMMISSION
Barbara Cox
EOC President

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Respondent	
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A complaint of discrimination was filed with the Madison Equal Opportunities Commission (MEOC) on July 29, 1981 alleging discrimination on the basis of age and/or physical appearance in regard to employment (specifically, discharge). The complaint was investigated by agency Investigator Mary Pierce who issued an Initial Determination dated May 25, 1982 concluding that probable cause existed to believe that the Respondent had discriminated against the Complainant because of her age in violation of sec. 3.23, Madison General Ordinances and that no probable cause existed to believe that the Respondent had discriminated against the Complainant because of her physical appearance in violation of sec. 3.23, Madison General Ordinances.

The Complainant did not (timely) appeal the no probable cause finding pertaining to the allegation of physical appearance discrimination, and said allegation was effectively dismissed. The age discrimination allegation--for which probable cause had been found--was transferred to the conciliation process.

Conciliation failed or was waived and this case was certified to public hearing. The hearing was originally scheduled for January 10-14, 1983. However, the parties prevailed on the examiner to first address a Motion for Summary Judgment--brought by the Complainant--and the hearing was postponed to address said motion.

An "Examiner's Order On Motion for Summary Judgment" dated May 26, 1983 was issued denying summary judgment to either party. After some further prehearings, this case was heard commencing on December 19, 1983. Pursuant to a review of the hearing record and upon consideration of any post-hearing written arguments submitted by the parties, the Examiner proposes the following Recommended Decision:

RECOMMENDED FINDINGS OF FACT

1. The Complainant, Lila Stenbroten, is an adult female who was born on July 29, 1931 and who presently resides in the State of Wisconsin.
2. The Respondent, Wisconsin Dairy Herd Improvement Cooperative (WDHIC), is an employer doing business in the City of Madison, County of Dane, State of Wisconsin. The WDHIC was formerly known as the Agricultural Records Cooperative (ARC), and any reference to the WDHIC or the ARC is to be considered a reference to the same employer.
3. The Complainant was first employed by the Respondent in March, 1966 as a supervisor in the Data Control Department where she was initially subject to a six-month probationary period.
4. Sometime prior to the expiration of her probationary period, the Complainant applied for and was hired for a position in the finance department where she worked under the supervision of Roger Beneker for the next approximately 13 years. She was initially an accounting clerk with no specific job title for her first five to six years in the finance department; later she supervised one full-time person and her job title was changed to Assistant Director of Finance.
5. During her term of employment in the finance department under Beneker's supervision, the Complainant had:
 - (a) never shown a lack of initiative;
 - (b) never shown a negative attitude;
 - (c) never displayed a fluctuating up and down attitude;
 - (d) never been rude or discourteous;
 - (e) never been defensive when questions were asked.
6. William Battista was initially employed at the WDHIC from September, 1972 through March, 1978. He left as a result of dissatisfaction between himself and the Cooperative management.
7. In approximately late June or early July of 1979, Battista returned to the WDHIC as the General Manager, the top staff managerial position for the Respondent. The Respondent is also governed by a Board of Directors, but the General Manager has primary responsibility for the day-to-day operations of the WDHIC.
8. Several months prior to Battista's being appointed General Manager, the position of Director of Data Services was vacated by Joan Scheider. Scheider had been Director of Data Services at least since 1966 as Scheider had interviewed Stenbroten for her initial job at the WDHIC (see Finding of Fact 3).
9. Linda Stemper, then approximately 28 years old, served as an acting Director of Data Services for four to six months prior to Battista's becoming General Manager and naming a successor to Scheider.

10. Around the time of his hire as General Manager, Battista circulated a memorandum at the WDHC announcing an opening for the position of Director of Data Services. Among other things, Battista indicated in the job announcement memorandum that he wanted the Data Services department to be headed by someone with a "fresh outlook" and that he wanted to get the ARC "headed in a positive direction once again." (see Exhibit 24 dated July 3, 1979).
11. Battista, then (in July of 1979) approximately 30 years old, considered three persons for the position of Director of Data Services in 1979:
 - (a) Linda Stemper, then approximately 28 years old, who was serving as acting director;
 - (b) Lila Stenbroten, then almost 48 years old, who had been recommended for consideration by Beneker;
 - (c) Diana Wickham, then approximately 36 years old,
12. Battista appointed the Complainant to the position of Director of Data Services and she began in mid-July of 1979.
13. Subsequent to Stenbroten's appointment as Director of Data Services, Stemper was transferred to a different department at Battista's direction, after October 26, 1979 but prior to January 1, 1980.
14. Battista sent Stenbroten a memorandum dated October 26, 1979 indicating that some concerns had been expressed to him about the Complainant by some other employees. As it turned out, the concerns were primarily those of some supervisory employees under the Complainant's direction: Virginia Johns, Mary Ann Timm and Diana Wickham. The supervisors wanted more information about changes that were to take place in the Data Services department, but the three had not brought the issue to Stenbroten.

A meeting was held that included Stenbroten and the employees involved and the concerns were addressed and resolved.

15. The Complainant was reviewed by Battista at the end of her six-month probationary period as Director of Data Services in January of 1980, Battista requested that the Complainant work more closely with the data entry department but told the Complainant that in general she was doing quite well.

The issues related in Findings of Fact 13 and 14 (above) were not mentioned at all during the January, 1980 review and the Complainant received a salary increase to \$23,000 per year as a result of having completed her probationary period.

16. In February of 1980, Johns applied for an open managerial position within the Department of Data Services. Johns complained to Stenbroten when Stenbroten refused to immediately instate her (Johns) into the vacancy. While Stenbroten indicated to Johns that she (Stenbroten) was going to take more time before making a decision, Johns believed that Stenbroten did not like her (Johns) and wanted to appoint someone else to the vacancy.

Although Stenbroten did appoint Johns to the vacancy, it was Johns' belief that she was appointed only after Timm turned the position down. Johns has harbored resentments about the situation and hostility toward Stenbroten ever since.

17. In June of 1980, Stenbroten denied Johns' request to travel to Menomonie, Wisconsin for some business meetings on the basis that Johns was needed to take care of the heavy workload in Madison. Johns appealed to Battista who authorized Johns to go in order that she could travel with Stemper, who otherwise would have traveled alone, and in order that Johns could work with persons in Menomonie on editing reports in order to improve data entry.
18. In July of 1980, the Complainant was again reviewed by Battista and was given a ten (10) per cent merit pay increase to \$25,300 per year annual salary.
19. Sometime during the summer of 1980, Battista walked by Johns and Cathy Martin who were engaged in a discussion, Martin, who was also a supervisor in the Data Services department under Stenbroten's direction, was talking to Johns about how she (Martin) felt her relationship with Stenbroten had deteriorated.

Battista invited the two women into his office where a discussion ensued regarding their concerns about Stenbroten. Martin suggested that any concerns be discussed with Stenbroten as Martin did not believe Stenbroten to be aware of them.

Martin's relationship with Stenbroten had changed very much for the better just prior to Stenbroten's discharge, an impression which Martin communicated to Battista on the evening prior to Stenbroten's termination.

20. In September of 1980, Battista and Johns drove to Neenah, Wisconsin on a day trip for a business meeting. Sometime during the course of this trip, Battista indicated to Johns that Stenbroten's position would become vacant. Johns had hoped that Stenbroten would lose her job, and Johns also hoped that she (Johns) would be promoted into Stenbroten's position although she (Johns) believed Stemper might have also been under consideration.
21. On October 15, 1980, Battista called Stenbroten into a meeting in his office. He terminated Stenbroten at this meeting, and within a few minutes appointed Johns as Acting Director of Data Services, later making her Director. Johns had been with the WDHIC since 1972 and had a stronger background than the Complainant in certain areas, but the Complainant had more across the board experience to function as Director of Data Services.
22. Prior to the meeting on October 15, 1980, the Complainant had received no oral or written indication that her job was in jeopardy.
23. At the meeting with Stenbroten on October 15, 1980, Battista discussed various reasons with the Complainant which he felt warranted her termination. Battista spoke in general terms and would not support any of his reasons with specific names of persons who had complained or with specific incidents. Among the reasons Battista discussed with Stenbroten were as follows:
 - A. Complaints from employees (not department heads) about Stenbroten's:
 - lack of initiative
 - negative attitude
 - fluctuating attitude
 - lack of respect for employees
 - being more of a figurehead than a leader
 - B. Complaints from department heads about Stenbroten's:
 - negative attitude
 - uncooperative attitude
 - sarcastic attitude
 - defensive attitude
 - C. Battista's concerns about Stenbroten's handling of:
 - Johns' trip to Menomonie
 - data control people visiting associate labs

Battista expressed these and other concerns to Stenbroten based on written notes he had prepared no less than a day prior to the meeting (see Exhibit 1E).

24. Johns was the primary source of information about Stenbroten upon which Battista relied in making his decision to terminate her.
25. Just prior to Stenbroten's discharge on October 15, 1980, the following persons were employed in various managerial and supervisory positions for the WDHIC (see Exhibit 30):
 - (a) William Battista, General Manager, 31 years old
 - (b) Howard Oertel, Administrative Manager, 43 years old
 - (c) Diana Wickham, Production Coordinator, 36 years old
 - (d) Michael Endres, Director of Data Processing, 31 years old
 - (e) Roger Beneker, Director of Finance, 46 years old
 - (f) Leland Hutchinson, Director of Field Services, 42 years old
 - (g) Lila Stenbroten, Director of Data Services, 49 years old
 - (h) Dwaine Dickinson, Director of Special Services, 55 years old
 - (i) Chauncey Yost, Assistant to Director of Data Processing, 45 years old
 - (j) Virginia Johns, Manager of Data Control, 31 years old
 - (k) Jeanne Marshall, Data Entry Manager, 35 years old
 - (l) Catherine Martin, Manager of Office Communications, 31 years old
 - (m) Connie Sheetz, Assistant to Director of Finance, 31 years old
 - (n) Cornell Meinholz, Computer Operations Manager, 43 years old

26. Between October 15, 1980 and January 1, 1982, inclusive, the following managerial changes occurred (see Exhibit 31):
- (a) Lila Stenbroten was terminated and Virginia Johns became Director of Data Services;
 - (b) Marcia Howard, approximately 31 years old, was appointed to replace Johns as Manager of Data Control
 - (c) Linda Stemper, approximately 30 years old, was named Assistant to Director of Field Services.
27. Age was not a factor in Battista's decision to terminate the Complainant.

RECOMMENDED CONCLUSIONS OF LAW

1. The Complainant is a member of the protected class of age within the meaning of sec. 3.23, Madison General Ordinances,
2. The Respondent is an employer within the meaning of sec. 3.23, Madison General Ordinances.
3. The Respondent did not unlawfully discriminate against the Complainant on the basis of her age in regard to discharge from her employment in violation of sec. 3.23, Madison General Ordinances.

RECOMMENDED ORDER

That this case be and hereby is dismissed.

MEMORANDUM OPINION

The ultimate burden of proof in a case under sec. 3.23, Madison General Ordinances alleging discrimination on the basis of age in regard to discharge is that the Complainant must show by a preponderance of the evidence that age was a (but not necessarily the sole) substantial determining factor in her discharge.¹

Generally, the order and respective burdens of proof in cases alleging disparate treatment, such as this one, is best summarized by Texas Department of Community Affairs v. Burdine, 101 S. Ct. 1084, 25 ETD par. 31,544 (1981). Burdine holds that "the ultimate burden of persuading the trier of fact in this case, the Hearing Examiner) that the defendant (Respondent) intentionally discriminated against the plaintiff (Complainant) remains at all times with the plaintiff (Complainant)." (Note: the parenthetical phrases were added to the quotation for clarification purposes)

A. Prima Facie Case of Discrimination

Burdine goes on to explain that initially the Complainant must prove by a preponderance of the evidence a prima facie case of disparate treatment. The prima facie case, for which there is no formula but which will vary depending on the factual situation involved, "raises an inference of discrimination only because it is presumed that the employer's acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors."

Burdine must be read, however, in light of a later case entitled U.S. Postal Service Board of Governors v. Aikens, 103 S. Ct. 1478, 31 EPD par. 33, 477 (1983). Aikens essentially holds that where all the evidence has been allowed into the hearing record—that is, where the Respondent has been required to go forward after the Complainant's initial presentation and the Complainant has been given the opportunity to present any rebuttal evidence s/he may have—it is necessary only to determine whether the Complainant has carried her ultimate burden of proof (in this case, to show age discrimination).

In short, Aikens stands for the proposition that where all the evidence has been let into the record, as it was in this case, the analysis should focus on the Complainant's ultimate burden of proof and not on her interim burden (of whether she established a prima facie case of discrimination).²

Consequently, I need not and will not spend any time analyzing whether Stenbroten made out a prima facie case of age discrimination. Rather, I will proceed directly to an analysis of whether or not Stenbroten has

persuaded me, by a preponderance of the evidence, that her age was a substantial determining factor in her discharge.

B. The Ultimate Burden

1. Respondent's Reasons For The Discharge

In following the Burdine order of proof, the next step is to consider what allegedly legitimate, nondiscriminatory reasons were articulated by the employer and to determine whether the Complainant has shown that age was nevertheless a substantial determining factor in her discharge.

It must be recognized that, under Burdine, the Respondent's burden is a light one. Under Burdine, the Respondent need not persuade me that it was actually motivated by the reasons it offers. It is sufficient that the employer raises a genuine issue of fact as to whether it discriminated against the Complainant. (The Respondent is obviously free to present more evidence than merely what is sufficient to raise a genuine issue of fact; however, that is all the employer is required to do.)

In this case, there is evidence that Battista prepared a list of reasons which he discussed with Stenbroten just prior to terminating her at the October 15, 1980 meeting (see Finding of Fact 23 and Exhibit 1E). The reasons included, but were not limited to, concerns about the Complainant's attitude (negative, uncooperative, defensive, fluctuating, sarcastic), performance (lack of initiative) and style (lack of respect for other employees). It is those reasons which Battista discussed with Stenbroten on the date of her termination that constitute the Respondent's alleged legitimate, nondiscriminatory reasons for her discharge.

2. Pretextuality

The final step in the Burdine analysis is to determine whether the Complainant has shown, by a preponderance of the evidence, that the employer's articulated reasons were a pretext for age discrimination; i.e., that the Respondent was nevertheless motivated in at least substantial part by the Complainant's age in discharging her.

Before examining the key factual issues in this case, I will briefly discuss some factual issues that are typical in age discrimination cases but are not involved here.

There is no evidence here, for example, that Battista made any negative comments, explicitly or implicitly, about the Complainant's age, about any other employee's age, or about age or older employees in general. There is no evidence here that the Complainant was fired to deny her a pension (or a higher level of pension benefits). There is no evidence here that the Complainant was fired and replaced in order to save salary costs (and relating that to her age); any salary savings in this case was purely incidental to the employer's actions and was not a motivating factor to discharge her.

The crux of the Complainant's contentions are otherwise. The Complainant primarily tried to show that Battista was attracted to younger women (particularly women in their thirties as opposed to women of the Complainant's age) and the Battista-despite being married-was having an intimate (presumably sexual) relationship with Johns who ultimately replaced the Complainant as Director of Data Services. Additionally, the Complainant tried to show that Battista was engaged in a "youth movement" aimed at eliminating older women managers (those of the Complainant's age) in favor of younger ones (those around Johns' age).

The record simply does not support that Battista and Johns were involved in an intimate relationship,³ and the Complainant's statistical evidence regarding Battista's alleged partiality toward promoting younger women to managerial positions at the expense of older women is of minimal probative value and unpersuasive under the facts of this case.⁴

To summarize the evidence, the Complainant has showed that she was employed by the Respondent for approximately 14-15 years in various positions, the last as Director of Data Services for approximately 15 months. Stenbroten was promoted into the position when she was 48 years old. Battista chose Stenbroten over both a 28-year old old woman (Stemper) who was serving as acting director and a 36-year old woman

(Wickham). It was Battista who also discharged Stenbroten and replaced her with Johns of October 15, 1980. Johns was 18 years younger than Stenbroten and approximately the same age as Battista.⁵

Notwithstanding the reasons Battista gave Stenbroten for her discharge (see Finding of Fact 23 and Exhibit 1E), the record supports that the Complainant was performing satisfactorily in her job. She had received an annual salary increase from \$23,000 to \$25,300 only three months prior to her discharge. There is no evidence that the Complainant had received any oral or written warnings in regard to any of the so-called problems or concerns that Battista discussed with her on the day she was terminated. Neither Battista nor anyone else had previously approached her with these concerns. Further, except for Johns (and Martin on one occasion), there is no evidence to support that any other employees, managerial or otherwise, had expressed these concerns to Battista. Or even if they had, one has to be skeptical of their significance in that it was Battista who authorized the Complainant's \$2300 annual salary increase and there is no evidence that the Complainant's job performance or attitude suddenly deteriorated in the last three months after the salary increase.

There is strong evidence, however, that as the result of various workplace incidents (see Findings of Fact 16 and 17), Johns believed that the Complainant did not like her and that Johns harbored feelings of resentment and hostility toward the Complainant. Johns complained to Battista about Stenbroten on various occasions and Johns hoped the Complainant would lose her job. While Johns believed she had more background in some areas, Johns felt that Stenbroten had more across-the-board experience to be Director of Data Services, Yet Johns did hope that she would get the Complainant's job once Battista told her (Johns) in September of 1980 that the position would soon become vacant.

The evidence supports that Johns was a primary protagonist contributing to the loss by Stenbroten of her job. There is no evidence that Johns' hostility toward the Complainant and Johns' efforts to undermine the Complainant's position had anything to do with the Complainant's age. Nor, as stated earlier in this opinion, is there any evidence that Battista and Johns were involved in an intimate relationship such that it could be concluded that Battista gave more weight to Johns' complaints and/or rewarded Johns with a job because Battista was attracted to women of Johns' age (as opposed to women of the Complainant's age).

Essentially, Stenbroten was the victim of a personality conflict and a power struggle which had nothing to do with her age. Because Stenbroten was not aware of any direct complaints from Battista or anyone else and because Stenbroten's performance reviews had gone relatively well (prior to her termination), Stenbroten does not appear to have grasped the significance of what had transpired between her and Johns.

That the Complainant's discharge was unfair and wrongful because she was abruptly terminated without warning is an issue which cannot be decided in the context of this administrative proceeding. The only issue for me to consider is whether or not the Complainant's age was a substantial determining factor in her discharge as Director of Data Services (regardless of whether the discharge was "fair" or "unfair"). The Complainant has not carried her burden of proof in this regard.⁶

Signed and dated this 1st day of June, 1984.

Allen T. Lawent
EOC Hearing Examiner

FOOTNOTES

¹State Medical Society v. MEOC (May), No. 82 CV 2560 (Dane County Circuit Court, Hon. Richard W. Bardwell, 3/2/83).

²Aikens helps to put the significance of the so-called prima facie case into perspective. After a Complainant has completed his/her initial presentation of evidence during the course of a typical discrimination proceeding, the Respondent customarily makes a motion to dismiss on the grounds that the Complainant has failed to establish a prima facie case of discrimination (i.e., that the Complainant has not raised an inference of discrimination for which it is necessary for the Respondent to rebut).

Where such a motion to dismiss is granted, the Respondent is relieved of its need to present any evidence (which may save the Respondent time and expense as well as dispose of the case). Should the Complainant then appeal, the prima facie case would be at issue (i.e., that the motion should not have been granted and the Respondent should have to go forward).

However, where the Respondent's motion to dismiss at this juncture (if such a motion is made) is denied (either because the Complainant has established a prima facie case or because the Complainant has adduced sufficient evidence in the initial presentation to warrant the proceeding to continue before a decision is made), the proceeding will then continue to completion. Generally, the Respondent will put in its evidence and the Complainant will have an opportunity for rebuttal.

Once the case has been completed in terms of evidentiary presentation, the point in Aikens is that an analysis of the prima facie case is really unnecessary. If the Complainant has failed on the ultimate burden to prove discrimination, then it makes no difference whether he or she had established a prima facie case. Similarly, if a Complainant has successfully met the ultimate burden to show discrimination, then necessarily the Complainant had met the interim (prima facie case) burden. In any case, once all the evidence has been allowed in, as in this case, the focus should be on the ultimate burden.

³The evidence at most shows only that Battista and Johns may have had a social drink together on occasion and that Battista watched Johns bowl for a company bowling team on one or more occasions (which presumably included some other WDHIC female employees). There is also evidence that Johns and Battista were in Menomonie for business meetings, but no evidence that they spent any time "alone" (just the two of them). They also traveled together on a day trip to Neenah for business.

While there is some evidence that Battista and Johns socially liked each other, the evidence is quite insufficient to establish that they were engaged in any sort of an intimate relationship.

⁴While statistical evidence may be probative in a disparate treatment case (and statistical evidence is the crux of disparate impact cases), the evidence presented here is of little value in establishing any kind of discriminatory preference by Battista for younger women managers. Finding of Fact 26 indicates that three women in their early thirties received promotions in one arbitrary stretch of time (between October 15, 1980 and January 1, 1982). The Complainant presented no evidence to show why these promotions were specifically age biased by their circumstances (e.g., that older persons were passed over for the jobs), nor is the number significant enough to warrant any conclusion of age bias. Further, the Complainant attempted to show some other examples of age biased hiring. In this Examiner's view, the fact that Sue Kau (28) was terminated and replaced by a woman approximately 24 had nothing to do with age discrimination. Nor did the fact that Gerald Loefer, an employee who was approximately 54 when he died, was replaced by a 24-year old (Gail Eldred) as a result of his death.

Additionally, the Complainant did not establish that Battista was responsible for all of the hires of the younger (relative to the Complainant) women managers as there is evidence that department heads had certain hiring responsibility, and the Complainant failed to establish what influence (if any) Battista exerted in those instances where he was not directly responsible for hiring the individual.

⁵Under the Madison ordinance, Johns and Stenbroten were technically in the same protected class (persons 18 years of age and older) for purposes of age discrimination protection. However, the fact that Stenbroten was replaced by a person technically within the protected class did not by itself preclude a finding of age discrimination, see McCorstin v. U.S. Steel Corp., 23 EPD par. 31,112.

⁶In this case, the Complainant argues that she had some expectation of fairness or perhaps progressive discipline (based on the employee handbook) prior to termination. Even assuming that the Complainant's termination was "unfair" and outside the procedure that the Complainant was entitled to, this evidence is not persuasive that discrimination occurred in this case. "Unfairness" must be distinguished from discrimination, and while such evidence may be probative of discrimination, it generally is not conclusive of discrimination and must be weighed with the other surrounding facts and circumstances.

