STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

STATE MEDICAL SOCIETY OF WISCONSIN Petitioner, vs. MADISON EQUAL OPPORTUNITIES COMMISSION and MARJORY MAY Respondents.	DECISION AND ORDER ON REVIEW Case No. 82CV2560

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. 3.21, Madison General Ordinances, by discrimination 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 employe 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 employe to perform the duties of that position.

The scope of review on certiorari is limited to the following: (l) 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 (1970). 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 630 (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 nr 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 employe 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, 101 S. Ct. 1098, 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 alleged discriminatory conduct. However, to require, as the SMS asserts should be required, the replacement/search factor to establish a prima facie case, places an impossible burden on an employe 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 employe. 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 employe'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 FED 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 employe; and
4. her immediate supervisor, Brian Jensen, made various statements which indicated his preference for younger employes; he showed a tendency to hire only young employes, and younger employes 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 employes. 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 employe. 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 MEOC 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 employes . . . " 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 be 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 employe 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 employes 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, l982).

The two situations are distinguishable. In the Madison General case, the discriminated against employe 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 employe.

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.

Dated March 2, 1983.

BY THE COURT:

RICHARD W. BARDWELL
CIRCUIT JUDGE