

Department of Workforce Development
Equal Rights Division
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Scott Walker, Governor
Raymond Allen, Secretary

DATED AND MAILED AUG 08 2016

Michael J. McKenna
2131 Shadowview Cir
Plover, WI 54467
Complainant

vs.

INITIAL DETERMINATION -
NO PROBABLE CAUSE

ERD Case No. CR201502456
EEOC Case No. 26G201600036C

County of Portage
1462 Strongs Ave
Stevens Point, WI 54481
Respondent

I. THE DIVISION DECIDED:

There is no probable cause to believe the County of Portage violated the Wisconsin Fair Employment Law, sec. 111.31--111.395, Stats., by:

- A. Discriminating against the Complainant in terms or conditions of employment because of age;
- B. Discriminating against the Complainant in terms or conditions of employment because of military service.

The complaint is therefore dismissed.

II. THIS MEANS:

The Equal Rights Division found no reason to hold a formal hearing on the complaint and is dismissing the complaint.

III. THE NEXT STEP IS:

The dismissal will become final unless the Complainant submits a written appeal letter to the Equal Rights Division, P.O. Box 8928, 201 East Washington Avenue, Room A100, Madison, Wisconsin 53708-8928. The appeal letter must be received within 30 days of the date this determination was mailed. (The DATE OF MAILING is stamped at the top of the Initial Determination.) In the appeal letter, the Complainant must state the specific reasons for appealing.

If the Complainant files a timely appeal, this case will be certified for a formal administrative hearing. After the hearing, an Administrative Law Judge will decide if there is probable cause to believe that a violation occurred. A notice of hearing stating the date,

time and place of hearing will be sent to the parties. This notice will also include an information sheet, as well as a copy of the statutes and administrative code. At the hearing, the parties will be given the opportunity to present evidence to support their cases. Neither the Initial Determination, nor the evidence presented to the Equal Rights Division during the investigation of this case, will automatically become part of the record at hearing. The Administrative Law Judge will only consider evidence presented at the hearing. The parties may wish to consult with an attorney for legal advice. The Division will close this case without further action if no timely appeal is received.

IV. DATE OF FILING AND/OR INITIAL WRITTEN CONTACT:

- A. The Complainant first contacted the Division in writing on August 31, 2015, alleging employment discrimination. The Division accepted the Complainant's complaint on September 23, 2015, following revisions.

V. THE DIVISION DECIDED THERE WAS NO PROBABLE CAUSE BASED ON THE FOLLOWING INFORMATION:

- A. The Respondent, the County of Portage, is a political subdivision of the State of Wisconsin. The Respondent is subject to the Wisconsin Fair Employment Law (WFEL) and employs more than twenty individuals.
- B. The Complainant, Michael J. McKenna, has been employed by the Respondent since March 1998 as Corporation Counsel, the senior civil legal advisor to the county. The Complainant identifies his birthdate as September 20, 1958, and himself as having served in the military.
- C. The Complainant claims that the Respondent has discriminated against him in terms or conditions of employment because of his age and military service. The Complainant claims that there was a hostile work environment. The Complainant's claims related to his 2013 discipline have been dismissed elsewhere and are only discussed as relevant background information here.
- D. The Complainant's supervisor during the relevant period was County Executive Patty Dreier, who was first elected in 2010. The Complainant received positive performance evaluations prior to Dreier becoming his supervisor. Dreier exercised greater control over department heads than her predecessor.
- E. The Complainant claims Dreier's frequent comments about succession planning are age-related and designed to force his resignation so she could replace him with a younger and less expensive employee. The Complainant claims the comments increased in frequency after 2013 and after his Deputy left in 2014. The Respondent denies that succession planning and related comments were about anything other than ensuring continuity of services if department heads were unavailable or left service. Dreier set succession planning as a goal for department heads generally and discussed it with all department heads.
- F. The Complainant also claims Dreier made comments about the Respondent's provision of veterans' benefits, including a statement that the Respondent should not be supporting the "extravagant lifestyles" of its county veterans and that she supported a decrease in benefits in September 2011.

- G. Dreier does not recall any statement regarding the "extravagant lifestyles" of county veterans. The only comments Dreier recalls were with regard to a change to the Respondent's military leave policy, which had provided thirty days of paid leave and the difference in salaries for ten working days or fourteen calendar days after that in addition to legally-required leave entitlements. The policy changed to paying the difference in salaries for the first thirty days in 2011. Dreier recalls commenting about the generous nature of the policy and that it allowed military employees to effectively receive double salary. Dreier's husband is a military veteran.
- H. In May 2013, Dreier issued the Complainant his yearly performance evaluation. The document rated the Complainant positively, but noted a few issues with the Complainant communicating information to Dreier and loyalty to her office. The Complainant objected to the negative indications.
- I. On July 3, 2013, Dreier issued the Complainant a Written Verbal Warning. The warning mentioned the evaluation comments and stated the Complainant expressed a concern that the Respondent's Strategic Plan was unexecutable at a public meeting despite having had ample opportunity to bring his concerns to Dreier's attention.
- J. The Complainant objected to the warning. The Complainant stated that Supervisor Don Butkowski asked him about the binding nature of the documents and whether further action would be required, with the Complainant responding the plan could be amended and was not "self-executing," with further legislative action needed to fund and achieve the goals of the plan. The Complainant stated that Butkowski confirmed this and that it was merely a statement that further action was needed.
- K. Dreier indicated that the Written Verbal Warning would be removed from the Complainant's file if no further performance issues arose before December 30, 2013. The Respondent removed the warning from the file after that date.
- L. Dreier directed the Complainant to provide a monthly departmental report at some point. Dreier also required regular reports from the Highway Commissioner, the Emergency Management Director, the Solid Waste Administrator, and the County Health Care Administrator. At least three of those four are more than ten years younger than the Complainant. The Respondent claims the Complainant provided information only when specifically prompted and did not inform Dreier of issues.
- M. In April 2014, Dreier issued the Complainant a performance evaluation that was generally positive. The evaluation noted the Complainant had recently become the City of Stevens Point's municipal court judge and that it would be important for the Complainant to keep interactions about his municipal court duties separate from his work for the Respondent and outside of work time, to abide by the regulations on secondary employment, and to avoid ethical conflicts or the perception of them.
- N. On March 3, 2015, Dreier issued the Complainant a Written Warning. The warning stated the Complainant failed to inform her that the Town of Grant had filed a claim against the Respondent, which she learned of a week later from the media. The warning said Dreier previously spoke with him regarding similar issues.
- O. The Complainant states, with regard to the prior conversation, that the Town of Grant's demand letter was included in the October 2014 County Board meeting packet, that procedure required by law required all claims to be filed with County

Clerk and forwarded to Respondent's insurance agent by the Risk Management Specialist in the Finance Department, and that Dreier said that she did not wish to change claims procedures at that time despite it not including special notice to her.

- P. The Town of Grant indicated the demand was not meant to be a claim at that October meeting. It sent a letter stating this in January 2015. The letter from October does not appear to be a formal claim. The Respondent provided a copy of the formal claim received by the Respondent on February 11, 2015.
- Q. The Complainant objected to the warning, stating the claims had been ongoing throughout Dreier's term and information about the 2014 conversation. He stated Dreier was changing the claims procedure without notice by issuing the warning. The Complainant noted Dreier publically supported the Town of Grant's claim despite the County Board denying it. The Complainant stated he was bearing the burden of advising both the executive and legislative branches. The Complainant alleged Dreier was discriminating against him based upon age and veteran status.
- R. The Complainant states that, per normal procedure, the claim was to be presented to the County Board for review, which would have occurred in March 2015 and that there was no new information. The Complainant states the County Clerk, Shirley Simonis, and the Risk Management Specialist, Colleen Brandt, did not inform Dreier of the claim despite being more responsible but were not disciplined. Simonis was born in 1957 and is an elected official. Brandt was born in 1959 and reports to the Finance Director.
- S. The Respondent indicates the Complainant took breaks from his duties on nights he had municipal court to perform duties for the municipal court, with the Complainant using his vacation with the Respondent to attend to those duties and then returning to work. The Respondent notes that the Complainant's ability to attend committee meetings was, at times, negatively impacted by the court duties. The Respondent's policy on secondary employment states that an employee is not allowed to interrupt their regular workday by taking vacation or compensatory time for secondary employment and that secondary employment is allowed outside normal work hours if it did not interfere with their ability to perform their duties for the Respondent.
- T. The Respondent's jail held subjects held on municipal court charges. On February 3, 2015, Sheriff Michael Lukas reported the Complainant was conducting municipal court in the jail during regular work hours. Lukas felt it was inappropriate. The Complainant took an hour of vacation to attend to those duties. Lukas wished to receive advice from the Office of the Corporation Counsel regarding the practice's appropriateness, but did not believe he would receive unbiased advice. On February 19, 2015, Lukas sent a memo stating to the Stevens Point and Plover Chiefs of Police, copied to the Complainant, stating that municipal court could not be held in the jail, as it was not open to the public, disrupted operations, and jeopardized security.
- U. The Complainant responded that this appeared to be in response to a case where jail personnel had stated that they would not bring a defendant to court and the court was invited to hold the hearing in the jail on February 3, 2015. The Complainant said he would not have done so if personnel had indicated policy prohibited it.
- V. In May 2015, Dreier issued the Complainant an evaluation stating there were issues with conflicts of interest, with complaints from county officials on this, and with

keeping Dreier's office informed, with the February 2015 matter mentioned. Dreier directed the Complainant not to split workdays between Corporation Counsel duties and secondary employment, avoid using work time or county resources to work on secondary employment, and to keep her informed as proactively as possible.

- W. A letter from Dreier with more detail on the concerns about the secondary employment was attached, with Dreier stating directly that she believed the two positions conflicted, but was unable to consult with Corporation Counsel for an unbiased opinion. Dreier noted that asking the Deputy Corporation Counsel to give an opinion about matters in which there was a potential conflict would place the individual in an uncomfortable position and that they should not have to work around the Complainant so the Complainant could have a second job.
- X. The Complainant responded. He alleged discrimination and said he did not believe there was a conflict, with the Corporation Counsel in Wood County performing such duties without issue for over fifteen years. The Complainant denies that these matters are civil matters connected with the Office of Corporation Counsel.
- Y. Dreier supervises eighteen other individuals, sixteen of whom are department heads. Seven of the individuals are older than the Complainant or younger but within five years of age of the Complainant. One of the seven is not a department head. Three of the seven were hired during Dreier's tenure as County Executive. Dreier hired one at an age older than the Complainant. Three of the eighteen are veterans, two of whom were hired during Dreier's tenure.
- Z. Dreier has involuntarily terminated three department heads during her tenure. Two were older than the Complainant. One was within five years of his age and had been hired during Dreier's tenure. One was replaced by an individual born in 1950 on an interim basis. Dreier disciplined two individuals other than the Complainant during her tenure, both born in 1964. Dreier extended the probations of two individuals, born in 1959 and 1947, respectively. One remains employed by the Respondent.
- AA. The Complainant claims that Dreier harasses department heads over the age of forty to replace them with younger and more inexpensive employees. The Complainant pointed to eight specific changes with regard to department heads. The Respondent denies any harassment occurred and notes that none of the listed employees were involuntarily discharged and that two left before Dreier became County Executive. One of the individuals named sent a statement to the Division stating Dreier had appointed him to his position 2.4 years prior to retirement, that he did not feel harassed or intimidated, and that he retired due to being sick of the work.
- BB. The Complainant claims Dreier ignored serious issues in other departments while disciplining him for trivial issues. The Complainant claims the following as issues in other departments: budget overruns, delays in new financial programs, and a failure to deal with certain parcels by Finance; lack of any comprehensive training program and a failure to deal with morale issues by Human Resources; ongoing crises with infrastructure by Facilities; lack of emergency preparedness, massive purchases of unnecessary sandbags, and ambulance issues in the Emergency Management; jail suicides and other issues in Law Enforcement; and patient care issues with the Health Care Center. The Complainant notes those departments and the Highway Department as not finishing items which were on Dreier's priority list for 2010. The indicated departments were run by individuals more than ten years younger.

- CC. The Respondent contends that the listed departmental issues are not comparable, as they are departmental issues which have no simple solution or for which financial funds to address them do not exist and notes that the Complainant points to no examples of other individuals not being disciplined for issues similar to his.
- DD. The Complainant points to a claim from a County resident against the Highway Department for \$159,564.06 for inappropriately cutting trees on his property. Crew members rather than the department head appear to have responsible.
- EE. A witness provided a statement stating Dreier had allowed former Justice Programs Director Kathy King to have a conflict of interest by virtue of being responsible for a contract while being a voting member of the contractor and having a financial interest in seeing the program succeed. The individual alleged this was illegal and Dreier was fully aware and turned a blind eye because the activities fit within her political agenda. King was born two years before the Complainant.
- FF. The Complainant named seven witnesses who he believed could speak to Dreier's discriminatory motives. The Division contacted the five who were not current management employees of the Respondent, as well as three other non-management employees of the Respondent he indicated could speak to other matters. The Division had asked the Complainant to provide a signed written statement from any current management employee witness rather than their contact information. He did not do so. Two who responded provided no meaningful information.
- GG. Another who responded stated the following. She had no knowledge of the Complainant's situation other than via newspaper articles. She felt threatened and intimidated by the County Executive, who, on many occasions, set unachievable performance standards and said, "If you can't get this done, we can find someone who will." Dreier would meet with her spontaneously in private without stating the purpose, which left her unprepared and gave Dreier the opportunity to make her look incompetent. She was happy to retire because it was nearly impossible to work for Dreier, and she was stressed by Dreier's unrealistic expectations.
- HH. Another witness stated the following. He and another individual were removed from a department at the age of 61, with one replaced by an individual who had a long-term involvement with Dreier. Dreier threatened to remove him from his position after receiving complaints regarding him from an individual whom other individuals avoided dealing with due to his threatening behavior. The witness believed Dreier used a reduction in force layoff to discharge him to disguise age discrimination, as she left the position as open and unfilled rather than eliminating it. Not filling the position closed a budget hole. Dreier replaced employees with friends and did not follow procedures and laws. County employees had a fear and distrust of Dreier.

VI. INVESTIGATOR'S EXPLANATION:

- A. There is insufficient evidence to support a finding of probable cause that the Respondent violated the WFEL with regard to the Complainant. Nothing the Complainant describes is sufficiently severe or pervasive as to establish a hostile working environment. Even occasional or sporadic use of slurs does not meet this high legal standard. The most the Complainant describes is allegedly unjustified

criticism of performance, references to succession planning, provision of monthly reports, and a reference to extravagant lifestyles, which is far less than that.

- B. With regard to the 2015 discipline of the Complainant, it appears Dreier disciplined the Complainant because she was surprised by the media alerting her to the formal claim by the Town of Grant. That Dreier was aware such a claim would eventually be formally made does not mean that she would not have liked to have been notified it had been formalized prior to being alerted to it by the media. Further, indicating that one did not want to change a formal claims procedure is not inconsistent with also wanting to receive notice of claims when they were made.
- C. With regard to the letter and evaluation later in 2015 relating to the Complainant having a conflict of interest, it would not appear to be unreasonable to consider the Complainant's two positions to conflict, particularly when the Complainant appears to have been directly violating policy with regard to secondary employment. There was clearly at least one situation where the Complainant's secondary employment as municipal judge involved interactions with the Respondent's employees, which would appear consistent with a conflict of interest.
- D. With regard to the claim younger department heads were not treated similarly, the Complainant points to no examples of other individuals failing to inform Dreier of information she likely would have wanted to know or engaging in a conflict of interest. The only information regarding another conflict of interest was about Dreier allowing an employee older than the Complainant to have such a conflict. The Complainant himself indicates, with regard to the discipline, that other individuals in his age range were more responsible and yet were not disciplined. Both of these things are inconsistent with age discrimination. The Respondent's characterization of the departmental issues the Complainant points to as general issues often connected to a lack of funding does not seem to be inaccurate. The issue with the trees does not appear to have been caused by that department head.
- E. Discussing succession planning is a normal thing to do in an organization and is not in itself suggestive of age discrimination. All departments, not just those with older heads, were required to succession plan. The Respondent continues to employ department heads in the Complainant's age range, including some hired during Dreier's tenure. The statement of the one witness appears more consistent with Dreier creating openings for friends rather than age discrimination. The other, while indicating mistreatment, made no suggestion the mistreatment was due to age.
- F. Describing a generous benefit for service members as providing an extravagant lifestyle, while without tact, is not in itself sufficient to be suggestive of general bias against military veterans. Two current department heads are veterans hired during Dreier's tenure. The other comparable data does not appear to create a suggestion of discrimination sufficient to support a finding that probable cause exists.

Eric Ferguson
Equal Rights Officer

cc: Complainant
Respondent
Oyvind Wistrom, attorney for the Respondent
EEOC