

**BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA**

In the Matter of the Appeal by	)	SPB Case No. 01-1461E
	)	
<b>MARIE ROSE JOHNSON</b>	)	<b>BOARD DECISION</b>
	)	(Precedential)
From the appeal of discrimination	)	
complaint in the position of Office	)	
Technician (T) with the Department of	)	<b>NO.02-08</b>
Social Services at Los Angeles	)	
	)	September 11-12, 2002
	)	

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**APPEARANCES:** Michael Posner, Esq., on behalf of appellant, Marie Rose Johnson; Charlene Lopez, Senior Staff Attorney, Supervisor, on behalf of respondent, Department of Social Services

**BEFORE:** Ron Alvarado, President; William Elkins, Vice President; Florence Bos and Sean Harrigan, Members.

**DECISION**

This appeal is before the State Personnel Board (SPB or Board) after the Board granted the petition for rehearing filed by Marie Rose Johnson (appellant) to examine whether appellant established a prima facie case of age discrimination during an evidentiary hearing before an SPB Administrative Law Judge (ALJ). In this decision, the Board adopts the McDonnell Douglas framework for reviewing discrimination cases and concludes that, during the hearing before the ALJ, appellant submitted sufficient evidence to establish a prima facie case of age discrimination. The Board remands this matter to the Chief ALJ (CALJ) to assign it for further evidentiary hearing in accordance with this decision.

## **BACKGROUND**

### Factual History

Appellant is employed by the Department of Social Services (DSS) as an Office Technician. In July 1999, appellant competed in a promotional examination for the classification of Disability Evaluation Analyst (DEA). Appellant received a score of 85 on that examination and was initially ranked in the 6<sup>th</sup> rank.

In September 1999, DSS conducted hiring interviews to fill DEA positions and hired 10 of the applicants who were interviewed. Although appellant was interviewed, she was not one of the 10 applicants who were chosen as DEAs.<sup>1</sup>

Appellant was approximately 59 years old at the time she was interviewed for promotion to a DEA. Three of the 10 applicants who were hired by DSS as DEAs were over 40 years of age: two were 45 years old and one was 49 years old. The seven remaining applicants who were hired as DEAs were under 40 years old.<sup>2</sup>

Appellant testified that one of the applicants who was hired by DSS was in Rank 7, one rank below her on the eligibility list.

### Procedural History

Appellant appealed to SPB asserting that DSS discriminated against her on the basis of age when it did not promote her to the position of DEA. The ALJ issued a Proposed Decision granting DSS's motion to dismiss appellant's case for failure to

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<sup>1</sup> Although appellant was initially ranked in Rank 6 on the DEA eligibility list, DSS conceded that, at the time that it conducted the interviews and hired employees into the position of DEA, appellant was reachable.

<sup>2</sup> Of the seven hired applicants who were under 40, four were in their 20s and three were in their 30s.

establish a prima facie case. The Board initially adopted the ALJ's Proposed Decision, but thereafter granted appellant's Petition for Rehearing.

The Board has reviewed the record in this matter, including the transcripts, exhibits and written arguments, and has heard the oral arguments, and now issues the following decision.

### **ISSUES**

The following issue is before the Board for review:

Did appellant establish a prima facie case of age discrimination?

### **DISCUSSION**

(Framework for Establishing Discrimination)

Appellant asserts that DSS illegally discriminated against her by failing to promote her to the position of DEA because of her age.

California's state civil service system is grounded upon the constitutional mandate that "permanent appointment and promotion shall be made under a general system based on merit ascertained by competitive examination."<sup>3</sup> Government Code § 18500, the first provision in the State Civil Service Act, makes clear that applicants for state employment must be chosen based upon merit, free from illegal discrimination:

It is the purpose of this part:

- (a) To facilitate the operation of Article VII of the Constitution.
- (b) To promote and increase economy and efficiency in the state service.
- (c) To provide a comprehensive personnel system for the state civil service, in which:
  - (1) Positions involving comparable duties and responsibilities are similarly classified and compensated.

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<sup>3</sup> Article VII, Section 1(b) of the California Constitution.

- (2) Appointments are based upon merit and fitness ascertained through practical and competitive examination.
- (3) State civil service employment is made a career by providing for security of tenure and the advancement of employees within the service insofar as consistent with the best interests of the state.
- (4) The rights and interests of the state civil service employee are given consideration insofar as consistent with the best interests of the state.
- (5) Applicants and employees are treated in an equitable manner without regard to political affiliation, race, color, sex, religious creed, national origin, ancestry, marital status, **age**, sexual orientation, disability, political or religious opinions or nonjob-related factors. ....(Emphasis added.)<sup>4</sup>

Pursuant to Board Rules 54, 54.2 and 547.1,<sup>5</sup> any employee who believes that he or she was subjected to illegal discrimination within the state civil service may submit a complaint to his or her appointing power. If the appointing power does not resolve the complaint to the employee's satisfaction, the employee may file an appeal with the Board. When reviewing a discrimination appeal, the Board looks for guidance to Title

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<sup>4</sup> In addition to Government Code § 18500, Government Code § 19700 of the State Civil Service Act also specifically prohibits discrimination in the state civil service based upon age as follows:

The board, its executive officer, or any appointing power shall not adopt any rule, either written or unwritten, prohibiting the employment of any person in any state position who is otherwise qualified therefor, solely because of his or her age, except as provided in Section 18932.

Government Code § 18932, in relevant part, provides:

The board shall not establish any minimum or maximum age limits for any civil service examination, except in the cases of positions involving public health or safety or having the powers and duties of a peace officer, as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 of the Penal Code, and for trainee positions the board may establish minimum and maximum age limits.

...

Any person possessing all the minimum qualifications for any state position is eligible, regardless of his or her age, to take any civil service examination given for that position, except as provided in this section.

Government Code § 19702 prohibits discrimination against state employees or applicants and sets forth procedures for the Board to follow when reviewing discrimination complaints and appeals. In addition, Board Rule 547, Title 2, California Code of Regulations, § 547, prohibits discrimination in violation of state or federal law in state employment practices.

<sup>5</sup> Title 2, California Code of Regulations, §§ 54, 54.2 and 547.1.

VII of the Civil Rights Act of 1964 (Title VII),<sup>6</sup> the Age Discrimination in Employment Act (ADEA),<sup>7</sup> the Americans with Disabilities Act of 1990 (ADA),<sup>8</sup> the Fair Employment and Housing Act (FEHA),<sup>9</sup> and court and administrative decisions that have applied these laws.

In McDonnell Douglas Corp. v. Green,<sup>10</sup> the U.S. Supreme Court developed the following framework for allocating the burdens of proof and production in a case under Title VII that alleges discriminatory treatment: (1) first, the complaining employee must prove a prima facie case of discrimination by a preponderance of the evidence; (2) if the complaining employee proves a prima facie case, the burden shifts to the appointing power to produce evidence of a legitimate, nondiscriminatory reason for the adverse employment decision; (3) if the appointing power carries this burden, the burden shifts back to the complaining employee to show that the appointing power's proffered reason was not its true reason, but, instead, a pretext for discrimination. Although this framework shifts the burden of production to the appointing power after the employee establishes a prima facie case, the ultimate burden of proving that the appointing power engaged in illegal discrimination remains with the complaining employee.<sup>11</sup>

The Board finds that this framework established by the U.S. Supreme Court in McDonnell Douglas, and applied by both federal and state courts in many subsequent

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<sup>6</sup> 42 U.S.C. §§ 2000e et seq.

<sup>7</sup> 29 U.S.C. §§ 621 et seq.

<sup>8</sup> 42 U.S.C. § 12101 et seq.

<sup>9</sup> Government Code §§ 12925 et seq.

<sup>10</sup> (1973) 411 U.S. 792.

<sup>11</sup> St. Mary's Honor Center v. Hicks (1993) 509 U.S. 502, 507-8.

cases that have reviewed discriminatory treatment complaints,<sup>12</sup> provides a very useful and workable process for the Board to follow when reviewing discrimination appeals filed with SPB.<sup>13</sup>

(Prima Facie Case)

The question in this case is whether appellant established a prima facie case of age discrimination during the hearing before the ALJ.

The elements of an employee's prima facie case are flexible depending upon the nature of the alleged discrimination.<sup>14</sup> In this case, the Board finds that in order to prove a prima facie case of discrimination in promotion on the basis of age, appellant must show that: (1) she is over 40; (2) she applied and was qualified for promotion; (3) she was denied a promotion, despite her qualifications; and (4) other employees who had

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<sup>12</sup> See, e.g., Guz v. Bechtel National, Inc. (2000) 24 Cal.4th 317; Muzquiz v. City of Emeryville (2000) 79 Cal.App.4th 1106; and Horn v. Cushman & Wakefield Western, Inc. (1999) 72 Cal.App.4th 798, which applied the McDonnell Douglas framework when reviewing age discrimination cases brought in state court under FEHA.

<sup>13</sup> The Board recognizes that the Fair Employment and Housing Commission (FEHC) in Department of Fair and Employment and Housing v. Church's Fried Chicken, Inc. (1990) FEHC Dec. No. 90-11; 1990 WL 312878 (Cal.F.E.H.C.) rejected the McDonnell Douglas framework as an appropriate process to be followed in appeals filed before FEHC. The Board finds that, even though the McDonnell Douglas framework may not work for FEHC, given SPB's hearing procedures, adoption of the McDonnell Douglas framework is appropriate.

<sup>14</sup> Hersant v. California Department of Social Services (1998) 57 Cal.App.4th 997, 1002-3; Heard v. Lockheed Missiles & Space Co., Inc. (1996) 44 Cal.App.4th 1735, 1750-1; Caldwell v. Paramount Unified School District (1995) 41 Cal.App.4th 189, 199-200.

similar qualifications, but were significantly younger, were promoted at the time when she was not.<sup>15</sup>

The Board finds that, while sparse, the evidence offered by appellant during the evidentiary hearing was adequate to establish a prima facie case of age discrimination. DSS conceded that appellant established the first two elements of a prima facie case: she is over 40 and she applied for and was qualified for promotion to a DEA. Appellant also established the 3<sup>rd</sup> element of the prima facie case: that, despite her qualifications, she was denied a promotion.

DSS disputes that appellant established the 4<sup>th</sup> element of the prima facie case: that other employees who had similar qualifications, but were significantly younger, were promoted at a time when she was not.

During the evidentiary hearing, DSS argued that, since three of the 10 applicants who were hired as DEAs were in appellant's protected class because they were over 40, appellant could not establish one of the necessary elements of her prima facie case. Appellant contended that, because those three other applicants were significantly younger than she was, she adequately stated a claim for age discrimination. The Board agrees with appellant.

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<sup>15</sup> See, McDonnell Douglas, *supra.*, 411 U.S. at p. 802. During the evidentiary hearing, both the parties and the ALJ adopted the prima facie case set forth in Becka v. APCOA/Standard Parking (CD Cal. 2001) 146 F.Supp.2d 1109. In that case, the court held that an employee, who asserted that he was demoted for discriminatory age reasons, had to establish the following prima facie case: (1) that he was over 40 years old; (2) that some employment action was taken; (3) that at the time of the action, the employee was satisfactorily performing his job; and (4) that the employee was replaced by a significantly younger person with equal or inferior qualifications. While that prima facie case may be appropriate when an employee asserts that s/he was dismissed or demoted because of age; it is not applicable when an employee asserts that s/he was not promoted because of age.

In O'Connor v. Consolidated Coin Caterers Corp.,<sup>16</sup> the United States Supreme Court found that an employee who complained that he was discharged because of his age stated a cause of action for illegal age discrimination even though the person who replaced him was over 40 years old, because the complaining employee was significantly older than his replacement. As the Court explained, the ADEA:

does not ban discrimination against employees because they are aged 40 or older; it bans discrimination against employees because of their age, but limits the protected class to those who are 40 or older. The fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out *because of his age*. Or to put the point more concretely, there can be no greater inference of *age* discrimination (as opposed to "40 or over" discrimination) when a 40-year-old is replaced by a 39-year-old than when a 56-year-old is replaced by a 40-year-old....

the fact that a replacement is substantially younger than the plaintiff is a far more reliable indicator of age discrimination than is the fact that the plaintiff was replaced by someone outside the protected class. (Emphasis in original.)<sup>17</sup>

Because appellant, at age 59, was significantly older than the three persons hired as DEAs who were in her protected age class (ages 45, 45 and 49), appellant has adequately established this component of the 4<sup>th</sup> element of her prima facie case.

Next, DSS argues that appellant failed to meet the final component of the 4<sup>th</sup> element of a prima facie case – that other employees who had similar qualifications were promoted at the time when she was not – because appellant failed to show that she was more qualified than the 10 applicants who were promoted. DSS contends that the mere fact that one of the applicants that DSS hired was ranked below appellant on

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<sup>16</sup> (1996) 517 U.S. 308.

<sup>17</sup> Id. at pp. 312-313.



the eligibility list was not sufficient evidence to establish this component of the 4<sup>th</sup> element of the prima facie case. The Board disagrees.

The Board finds that the fact that at least one of the applicants who was hired as a DEA was in a lower rank than appellant on the examination eligibility list adequately satisfies the requirement of the 4<sup>th</sup> element of the prima facie case that other employees who had similar qualifications were promoted at the time when she was not. Because appellant has established a prima facie case of age discrimination, this matter will be remanded for further evidentiary hearing to allow DSS to produce evidence of a legitimate, nondiscriminatory reason for not promoting appellant, and for appellant to rebut any evidence DSS may submit.

(DSS's Case)

During the evidentiary hearing, appellant submitted her performance evaluations for the periods from March 1992 through October 1, 1997 and January 25, 2000 through October 2001. DSS objected that appellant did not submit any performance evaluations for the time period during which the alleged age discrimination occurred. Appellant contended that the performance evaluations for the relevant time period could not be relied upon by DSS or taken into consideration by the Board because a stipulation entered between the parties precluded review of those evaluations. The Board disagrees with appellant's contentions.

The exhibits submitted into evidence by appellant show that DSS served an adverse action upon appellant, effective September 17, 1999, pursuant to which appellant's salary was reduced by 5% for 6 months. Appellant appealed that adverse

action to SPB. On December 8, 1999, the parties entered into a stipulation for settlement, which was approved by a Board delegate on December 31, 1999. Pursuant to that stipulated settlement, appellant and DSS agreed that the adverse action would be modified to a 5% reduction in salary for 3 months. As part of that stipulated settlement, DSS agreed that it would remove the notice of adverse action and “all supporting documents thereto” from appellant’s official personnel file. The stipulated settlement provided further that the notice of adverse action and the supporting documents would remain in DSS’s legal office file.

The term “supporting documents” is not defined in the stipulated settlement. In addition, there is no language in the stipulated settlement to indicate that the term “supporting documents” was intended to include appellant’s performance evaluations for the time period relevant to this discrimination action. Even if the term “supporting documents” could be read to include appellant’s performance evaluations for the relevant time period, there is nothing in the stipulated settlement to suggest that DSS was precluded from reviewing either those performance evaluations or the adverse action when considering appellant for promotion to a DEA. The Board will not read DSS’s mere agreement to remove the notice of adverse action and supporting documents from appellant’s official personnel file as a preclusion prohibiting DSS from considering either that adverse action or any of appellant’s performance evaluations when taking future employment action with respect to appellant in the absence of

explicit language in the stipulated settlement to that effect.<sup>18</sup> The Board, therefore, finds that appellant's stipulated settlement does not preclude DSS from relying upon, or submitting into evidence as part of its case in this action, the 1999 adverse action against appellant or appellant's performance evaluations for the relevant time period.

### **CONCLUSION**

The Board finds that appellant established a prima facie case of age discrimination. The Board, therefore, remands this matter to the CALJ to assign this matter for further evidentiary hearing to permit DSS to produce evidence of a legitimate, nondiscriminatory reason for not promoting appellant, and appellant to rebut any evidence DSS may submit.

### **ORDER**

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is hereby ORDERED that:

1. This case shall be remanded to the Chief Administrative Law Judge to reassign this matter to another Administrative Law Judge and to set it for further evidentiary hearing;
2. The assigned Administrative Law Judge shall allow the Department of Social Services to produce any evidence it may have of a legitimate, nondiscriminatory

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<sup>18</sup> See, Jack H. Tolchin (1996) SPB Dec. No. 96-04, p. 14. (The Board found that it could consider a prior adverse action in assessing penalty, notwithstanding the removal of that adverse action from the employee's official personnel file.) See also, Anderson v. State Personnel Board (1987) 194 Cal. App. 3d 761, 770-1. (The court found that the Board could consider an earlier letter of reprimand against a disciplined employee when reviewing a pending adverse action even though that letter of reprimand had been removed from the employee's personnel file in accordance with Government Code § 19589.)

reason for failing to promote Marie Rose Johnson; and Marie Rose Johnson to submit her rebuttal to any evidence that the Department of Social Services may submit;

3. After completing the evidentiary hearing in this matter, the Administrative Law Judge shall submit a new proposed decision to the State Personnel Board for consideration, which addresses all the relevant issues, including whether Marie Rose Johnson proved, by a preponderance of the evidence, that the Department of Social Services engaged in illegal age discrimination.
4. Pursuant to Government Code § 19582.5, this decision is certified for publication as a precedential decision.

**STATE PERSONNEL BOARD**

Ron Alvarado, President  
William Elkins, Vice President  
Florence Bos, Member  
Sean Harrigan, Member

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I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on September 11-12, 2002.

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Walter Vaughn  
Executive Officer  
State Personnel Board

[Johnson-dec]