State of Wisconsin

Labor and Industry Review Commission

Kenneth Sortedahl Complainant **St. Croix District Attorney's Office** Respondent ERD Case No.201202934 EEOC Case No.26G201201501C	**Fair Employment Decision**[1] **Dated and Mailed:** AUG 0 7 2017

The decision of the administrative law judge (copy attached) is **affirmed**. Accordingly, the complaint in this matter is dismissed.

By the Commission:

Laurie R. McCallum, Chairperson

David B. Falstad, Commissioner

[1] **Appeal Rights:** See the green enclosure for the time limit and procedures for obtaining judicial review of this decision. If you seek judicial review, you **must** name the Labor and Industry Review Commission as a respondent in the petition for judicial review.

Appeal rights and answers to frequently asked questions about appealing a fair employment decision to circuit court are also available on the commission's website http://lirc.wisconsin.gov.

Procedural Posture

This case is before the commission to consider the complainant's allegation that the respondent discriminated against the complainant based on his age and sex in violation of the Wisconsin Fair Employment Act (WFEA). An administrative law judge (ALJ) for the Equal Rights Division of the Department of Workforce Development held a hearing and issued a decision. A timely petition for commission review was filed. The commission has considered the petition, the parties' briefs and their positions, and has reviewed the evidence submitted at the hearing. Based on its review, the commission agrees with the decision of the ALJ, and it adopts the findings and conclusion in that decision as its own.

Memorandum Opinion

Merits of Complainant's Claim

The respondent is the St. Croix District Attorney's office and employed the complainant, an assistant district attorney (ADA), since July 2004. *(T2.79)*[2]. The complainant was hired by the District Attorney, Eric Johnson (hereafter DA) who has been the DA for St. Croix County since 1989. *(T1.111).* The complainant is a male born August 27, 1965. *(T2.77).* At his time of hire with the respondent, the complainant had 12 years of experience as a practicing attorney in Wisconsin, including two years as a part-time ADA in Dunn County, Wisconsin. *(T2.78).* In 2011, the complainant earned $26.956 per hour as a full-time ADA and received state benefits. *(T1.102).*

In August of 2006, the DA placed the complainant on a performance improvement plan (PIP) because of numerous complaints from law enforcement, the victim/witness office, and a specific circuit court judge the complainant had considered running against in an election. *(T1.118, T2.40,41,49). (Ex.R8).* In May of 2007, the complainant successfully completed his PIP. *(T1.117) (Ex.R9).* The DA thought that the complainant's performance did improve because of his decision to move the complainant out of this specific court and place him in another circuit court. *(T2.49).*

After successfully completing the PIP in May of 2007, the complainant did not receive any evaluations, discipline or complaints. *(T2.85).* The DA admitted that since the complainant's PIP, he had not performed a written evaluation of any of the ADAs. *(T2.58).* And even though the DA had received complaints about the complainant since completing the PIP, the complaints were never reduced to writing or provided to the complainant. *(T2.68).*

In 2011, the St. Croix DA's office employed three female, full-time ADAs with less seniority at the St. Croix DA's office than the complainant: Sharon Correll (seniority date 1/17/2008); Amber Hahn (seniority date 1/5/2009); and Elizabeth Rohl (seniority date 1/3/2011). These women were between the ages of 28 and 33 in 2011. *(T1.40, 135). (Ex.C10).* Other ADAs included Francis Collins (seniority date

[2] The hearing in the case was held on May 21, 2015 and continued on August 26, 2015 and will be referred to as (T.1) and (T2.), respectively.

3/11/86); Kevin Gehler (seniority date 1/22/90); Kathryn Grosdidier (seniority date 10/7/03); and they were all older than the complainant. *(T2.11,35,46).* The complainant's seniority date with the St. Croix DA's office was 7/26/04.

January 2012 Position Reduction

In the fall of 2011, the DA learned he would be losing funding from a state grant at the end of 2011. *(T1.11, 44).* The grant termination would require the DA to lay-off a 1.0 full-time (FTE) ADA position. *(T1.44).* Both the director of the State Prosecutors Office[3], Philip Werner and the DA tried to maintain the funding without success. *(T1.17, 19, 46,47).* The DA was told he would need to lay-off one full-time ADA. The DA and Mr. Werner discussed who would be selected. *(T1.46-48).*

In 2011, the state's ADAs were covered under a collective bargaining agreement (CBA) until December 31, 2011, which ended as a result of Act 10. *(T1.9,21).* Under the CBA, the lay-off process was governed by seniority. *(T1.10,21).* Subsequently the state formulated a compensation plan to cover most of the provisions of the former CBA, but modified the first-in first-out seniority process, providing that seniority would not govern lay-offs and just cause would be the standard by which lay-off decisions would be judged. *(T1.24-26). (Ex.C3).* See also, Wis. Stat. § 230.44(1)(c) which provides the statutory standard of just cause governing demotions, lay-offs, suspensions and terminations of ADAs. At some point during their discussions about losing the grant funding, Mr. Werner explained to the DA that effective January 1, 2012, lay-offs would not have to be based on seniority but would be subject to the just cause standard under the statute. *(T1.26,46-49).*

After an unsuccessful attempt to extend the grant, the DA learned that the grant would be exhausted by the middle of December, not on December 31, 2011 as he was originally told. *(T1.133).* The DA was able to secure county money to fund the 1.0 FTE position until the end of December 2011. (T1.62). Without this money, the 1.0 FTE would have expired prior to December 31, 2011 while the CBA was still in effect, permitting seniority to govern the lay-off process. Had seniority applied, ADA Elizabeth Rohl would have been selected as she was the least senior ADA having been hired in January of 2011 and was still on probation. *(T1.99).* However, the 1.0 FTE position lasted until December 31, 2011 and the CBA was no longer in effect.

In November of 2011, the DA told the complainant he had been selected for lay-off. *(T1.130).* When the complainant asked the DA why he had been selected over the three younger women ADAs, the DA replied that he wanted to keep the younger women in the office together and that they were the future of the office. *(T2.102).* The DA did not cite the complainant's performance in any way when he told the complainant he had been selected for lay-off. *(T2.102,103).*

On December 27, 2011, the DA sent the complainant a letter informing him that his position had been reduced from 1.0 FTE to 0.2 FTE, effective January 1, 2012. The

[3] The State Prosecutors Office is a one-person office consisting of a director who acts as a liaison between the 71 county DA offices and the state.

DA also laid off ADA Kathryn Grosdidier, who had been working a 0.2 FTE position. *(T2.10). (Ex.R3).* ADA Grosdidier was in her late fifties and had more seniority than the complainant. *(T2.11).* Francis Collins and Kevin Gehler, males who were older than the complainant and had more seniority than the complainant, kept their full-time ADA positions. *(T2.35,46).* Shortly after the complainant's lay-off, the DA appointed the complainant as special prosecutor for 32 hours per week at $40 per hour. As a special prosecutor the complainant worked as an independent contractor, without any state benefits. He performed the same work he did for the DA's office as an ADA. *(T1.102).*

The complainant filed a grievance challenging his position reduction and this serves as the basis of his WERC claim.[4] *(T2.113).* On the day of the grievance hearing, the complainant overheard a conversation between the DA and ADA Amber Hahn. The complainant heard the DA tell ADA Hahn that she, Sharon Correll and Elizabeth Rohl were the future of the office and he wanted to keep them together. *(T2.109).* That same day, the complainant overheard the DA tell ADA Elizabeth Rohl the same thing. *(T2.108,109,113,114).* Later that month, the complainant overheard the DA tell the head of the local Public Defender's Office that "last-in first-out" was no way to go because that would mean having to lay-off ADA Elizabeth Rohl and the DA wanted to keep the younger women together because they were the future of the office. *(T2.119).*

July 2012 Layoff

In the spring of 2012, the DA learned he would lose another 1.0 FTE ADA position because of the loss of another grant. On June 28, 2012, the DA sent the complainant a letter informing him that because of the loss of the grant he was laying off the complainant from his 0.2 FTE position effective, July 1, 2012. *(T2.120). (Ex.C7).* ADA Elizabeth Rohl also received a lay-off notice on the same day indicating that her 1.0 FTE position was being reduced to 0.2 FTE. *(T1.67).* The DA however was able to secure county funds to keep ADA Rohl at a full-time position so her lay-off never actually occurred. *(T1.144,145).* After his lay-off, the complainant continued as a special prosecutor for St. Croix County and also worked as a part-time ADA for Polk County. *(T2.120,147).* ADA Kevin Gehler, a male in his fifties also retained his job. Francis Collins was retiring at that time.

Posting for ADA on the same Day as June Layoff Letter

On the same day the DA sent the lay-off letters to the complainant and ADA Elizabeth Rohl, the DA posted a position opening for a full-time ADA because Francis Collins, a male in his early sixties was retiring. *(T1.146).* The DA requested that the pay range be increased because a triple homicide was going to be prosecuted in the county. *(T1.75). (Ex.C23).* The job was reposted with a higher pay range. *(T1.71,72).* The complainant applied for this position but did not receive an interview. *(T1.155).* The DA selected Michael Nieskes, a former district attorney and circuit court judge in Racine County. The DA did not interview any other

[4] The WERC decision, finding the DA had just cause to choose the complainant for reduction and lay-off was affirmed by the court of appeals in February of 2017.

candidates for the position, even though he had received 60-70 applications. *(T1.150).* The DA met with Mr. Nieskes before the job posting and had placed him on an organizational chart dated August 17, 2012, before he had formally offered the job to Mr. Nieskes. *(T1.150-153).* ADA Nieskes is a male in his early sixties. *(T2.47).*

The DA hired another ADA, a women aged 35, since hiring Mr. Nieskes. The complainant applied but was not granted an interview. *(T1.156).* When explaining why the complainant was chosen for the reduction in January 2012 and then the lay-off in July 2012, the DA articulated that his performance did not match the performance of the other ADAs whom he considered were excellent and above-average, regardless of sex or age. *(T2.43-46,56).* The DA did not commit anything to writing but his observations were based on seeing the assistant district attorneys work, conversations with judges, staff and law enforcement. He graded the complainant as a "C to C-" performance and the remaining ADAs were each given an "A". *(T2.39,43,44,46).* The DA believed the complainant to be the weakest performer on his staff and chose him for the reduction and lay-off.

Age and Sex Discrimination Claims

The complainant alleged the respondent discriminated against him because of his age and sex when his full-time position was reduced, and then when he was terminated by lay-off.

The ALJ found that the respondent did not discriminate against the complainant on the basis of age or sex but rather the DA showed a preference for employees he considered excellent and above average attorneys regardless of age or sex. The ALJ also found that Attorney Nieskes' hire in particular belies a discriminatory animus toward older men.

There are two ways the complainant can prove discrimination under the Wisconsin Fair Employment Act (WFEA), by the indirect evidence method, as originally set forth in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), or by introducing direct evidence of discrimination.

While the WFEA is to be interpreted as the legislature intended, federal decisions can be consulted for guidance. *Moore v. LIRC,* 175 Wis.2d 561, 570, 499 N.W.2d 289 (Ct. App. 1993). Most recently the 7th circuit in *Ortiz v. Werner Enterprises, Inc.,* 834 F.3d 760 (7th Cir. 2016), adopted a unified approach to analyzing evidence under either method (indirect or direct), when determining whether discrimination has been proven.

Specifically, the court held:

> That legal standard ... is simply whether the evidence would permit a reasonable factfinder to conclude that the plaintiff's race, ethnicity, sex, religion, or other proscribed factor caused the discharge or other adverse employment action. Evidence must be considered as a whole,

> rather than asking whether any particular piece of evidence proves the case by itself or whether just the "direct" evidence does so, or the "indirect" evidence. Evidence is evidence. Relevant evidence must be considered and irrelevant evidence must be disregarded, but no evidence should be treated differently from other evidence because it can be labeled "direct" or "indirect". *Id. at 765.*

The 7th circuit in *Ortiz* overruled specific decisions in that circuit to the extent they relied on "convincing mosaic" as a governing legal standard. *Id. at 765.* The 7th circuit also clarified that its decision "does not concern *McDonnell Douglas* or any other burden-shifting framework, no matter what it is called as a shorthand." *Id. at 766.* The 7th circuit concluded that all evidence, direct or indirect, "belongs in a single pile and must be evaluated as a whole." *Id. at 766.*

Using the guidance offered by the 7th circuit in *Ortiz,* the question to be answered is whether the evidence supports a finding of discrimination based on the complainant's age or sex when the DA decided to reduce and then lay-off the complainant.

Under the indirect method, the complainant has the initial burden of proving a *prima facie* case of discrimination by a preponderance of the evidence. *Zunker v. RTS Distributors,* ERD Case No. CR201004089, (LIRC June 16, 2014). To establish a prima facie case of discriminatory discharge, the complainant must show that he is a member of a protected group, he was qualified for the job, he was discharged, and others not in the protected group were treated more favorably, or he was replaced by someone not within the protected class. *Kelly v. Sears Roebuck and Co. ERD Case No. CR201000439, EEOC Case No. 26G201000703C (May 30, 2014).*

In this case, the complainant established that he was 1) a member of a protected group, 2) qualified for the job as an ADA and 3) his job position was reduced and then terminated under circumstances which gave rise to an inference of unlawful discrimination (younger female ADAs kept their jobs). The complainant having established a *prima facie* case of discrimination, the respondent then has the burden of presenting a legitimate, nondiscriminatory reason for its decision to reduce the complainant's position and then terminate his position by lay-off. *Josellis v. Pace Industries.,* ERD Case No. CR199900264, EEOC Case No. 26G990735 (LIRC Aug. 31, 2004), citing *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248 (1981). A finding in the complainant's favor will result when the *prima facie* case of discrimination is not rebutted by the articulation of a non-discriminatory reason. *Foust v. City of Oshkosh Police Dept.,* ERD Case No. 9200216. EEOC Case No. 26G920639 (LIRC April 9, 1998).

The respondent's proffered reason for its actions was based on the complainant's weaker performance vis-à-vis the other ADAs. The DA testified that he found the three women ADAs to be better performers and gave each a grade of "A." *(T2.42,43).* The DA also gave the two older male ADAs, Francis Collins and Kevin Gehler

similar grades of "A." *(T2.46).* He believed all these attorneys to possess the ability to handle complex cases in a skilled manner.

The DA did not have this similar opinion of the complainant, explaining that he did not handle big felony cases and gave the complainant a grade of "C to C-." The DA indicated that the complainant had plateaued as an ADA while the younger female ADAs had potential and the older ADAs were more experienced. *(T1.139, T2.45).* The DA also cited the complainant's inability to get along with the staff in the victim/witness unit of the DA's office, even after his successful completion of his PIP and commented he still received complaints from law enforcement about the complainant. *(T1.116,118, T2. 41).* These evaluations and grades were not written down but based on personal observations, observations by others, discussions with and comments from judges, law enforcement, other staff members including the witness/victim unit, including varying complaints in particular from the staff of the witness/victim unit.

The respondent has articulated a legitimate, non-discriminatory reason for reducing the complainant's position and laying him off. The complainant must now prove the respondent's proffered non-discriminatory reason is false or a pretext for discrimination. *Puetz Motor Sales v. LIRC,* 126 Wis.2d 168, 172-73, 376 N.W.2d 372 (Ct. App. 1985). *Stern v. RF Technologies,* ERD Case No. 200200780, EEOC Case No. 26GA200870 (LIRC Feb. 6, 2004). The focus of a pretext inquiry is whether the stated reason for an action is honest. *Thobaben v. County of Waupaca Sheriff's Department,* ERD Case No. CR200602483, EEOC Case No.26G200601466C (LIRC Dec. 23, 2011). The decision-maker in a discrimination case may not substitute its business judgment for that of the employer. The respondent's stated reason may fail to be accurate, wise or well-considered, but still be non-discriminatory. *Ebner v. Dura Tech,* ERD Case No. CR200504645, EEOC Case No. 26G200600372 (LIRC Apr. 23, 2009).

The complainant asserts that the DA's decision to retain the three younger female ADAs in lieu of his reduction and lay-off created an inference of discrimination. In support of this argument he contends the DA's verbal evaluations were a pretext and were only offered as an articulated reason after the complainant filed his grievance. The complainant was not given any reason for his selection for the reduction or lay-off at the time they occurred. Moreover, the complainant argues the DA's "grading system" lacks true comparative judgment because the evaluations were not written or contemporaneous with any annual evaluation.

As the record demonstrates, the DA did not create written performance evaluations but assessed the ADAs based on personal observation and communication with judges, law enforcement and other DA office personnel. While the State Prosecutors Office had evaluations available to DAs, the DA in St. Croix County was not alone in choosing not to complete them for his staff. *(T1.86-89).* This demonstrates the DA treated all the ADAs similarly regarding annual feedback, or lack thereof, in this case. It also explains why the DA offered only verbal evaluations of his ADAs. Further, the complainant cites no authority for his theory that contemporaneous

evaluations, like the ones offered by the DA at the hearing, are improper or invalid. The DA testified credibly as to how he based his evaluations and why he chose the other ADAs over the complainant.

The complainant asserts that the DA never personally observed him at work. It is difficult to believe that the DA would not have had sufficient interactions with his staff of 7 ADAs on a regular basis. *(T1.170).* Given the smaller size of his office, the DA was in a good position to have sufficient contact with his ADAs to form reasoned opinions and evaluations and his testimony should not be disregarded or discredited just because his reason for choosing the complainant was not articulated at the time of the complainant's reduction and subsequent lay-off.

The complainant also argues that his production numbers were higher than anyone else's and contradict the DA's assessment of his performance. *(Ex.C16).* However, even if the complainant handled more cases than the other ADAs, he did not fare as well when compared with the other ADAs in the DA's judgment not because of the quantity of cases but the manner in which they were handled. *(T2.56,57).* The DA's evaluations took into consideration personality and office dynamics. For example, the DA did not think the complainant was a good communicator, especially with the staff in the victim/witness office and believed the complainant had plateaued as an ADA. The DA's articulated reason for choosing the complainant had a basis in fact and was sufficient to motivate the DA in selecting the complainant for reduction and lay-off instead of the other ADAs.

Other evidence also supports the finding that the DA's articulated reason sufficiently motivated his choice, and was not based on discriminatory animus. In regard to the January 2012 position reduction, Kathryn Grosdidier, a female and older than the complainant, was completely laid-off when the complainant's position was only reduced. *(T2.11).* Further, along with retaining the three younger female ADAs, Francis Collins and Kevin Gehler, older male ADAs were also retained instead of the complainant. These personnel decisions support the conclusion that the DA's decision was not based on the complainant's age or sex but instead reflect the DA's personal assessment and evaluation of the complainant vis-à-vis the other ADAs, regardless of anyone's sex or age.

Regarding the subsequent employment actions that occurred in July of 2012, the DA laid off both the complainant and a younger female ADA Elizabeth Rohl. The DA was able to find funding for ADA Rohl, so she continued without any break in her employment. After the lay-off, the complainant continued to work as a special prosecutor for the St. Croix DA's office and worked part-time for Polk County as an ADA. The other ADAs continued in their employment, including ADA Kevin Gehler, a male who was older than the complainant. The retention of ADA Gehler does not support proof of discriminatory animus against the complainant given ADA Gehler's sex and age.

ADA Francis Collins, a male and older than the complainant, retired at this time, setting up the job posting for a full-time ADA in July 2012. Along with many others,

the complainant applied for that job but was not granted an interview. Only one candidate was interviewed and then hired. This attorney, Mike Nieskes, was older than the complainant and had experience as a DA in another county for many years. Again this personnel decision undercuts the complainant's argument that he was discriminated against because of his sex and age, when the DA selected an older male attorney for the position.

Other evidence adduced at the hearing must also be considered when determining whether the complainant established that this reduction and lay-off were based on his age and sex.

The complainant was told by the DA at the time of his job reduction that he wanted to "keep the younger women together" and they were the "future of the office." *(T2.102).* The DA was further overheard by the complainant telling ADA Amber Hahn and ADA Elizabeth Rohl, and the local Public Defender Liesl Nelson essentially the same thing, that these ADAs were the future of the office. *(T2.109,114,118).* The director for the State Prosecutors Office, Philip Werner, also recalled a conversation with the DA where he told him that these women were the future and that this conversation took place before the 2012 reduction and when the CBA was still in effect until December 31, 2011. *(T1.78,79).*

The respondent argues that the phrase "future of the office" is facially neutral and not derogatory of older workers. See, *Walters v. Norton,* 326 F. Appx. 644, 651 (3rd Cir. 2009). In this case the employer told the plaintiff, an older woman, that he chose a younger male worker over her because he had superior interpersonal skills and he would be "better for the office in the long run." The court held that those words alone could not be reasonably viewed as "sufficient to prove by a preponderance of the evidence" that age was the determinative cause of the younger male worker's promotion. The court in granting summary judgment found this phrase merely referred to the future of the office. In support of this finding, the court cited, *Kellor v. Orix Credit Alliance, Inc.* 130 F.3rd 1101, 1111-1112 (3rd. Cir. 1997), where the following statement did not create a triable issue of fact in an age discrimination claim: "if you are getting too old for the job, maybe you should hire one or two young bankers."

Here, the commission is not persuaded the DA's statement about keeping the younger women and referring to them as the future of the office is sufficient to prove discrimination. The respondent argues that these statements referred to the excellent capabilities of these women he hoped would be staffing the DA's office. The DA referred to his succession planning and wanting to leave the DA's office in good hands when he eventually retired. *(T1.160).* The DA was looking for the best attorneys to carry on the county's interests and his decision was not based on the complainant's age or sex, especially since older male ADAs continued in their positions and the DA hired an older male for the new ADA position in July 2012. These statements were facially neutral given their context and the DA's credibility regarding how he desired to leave the office when he eventually retired.

The complainant also argues that the timing of several decisions made by the DA is evidence of discrimination. The complainant points to the DA's ability to obtain county money to extend the positions in late 2011 with the effect of avoiding the CBA's seniority lay-off procedure. The complainant argues that it could certainly be inferred that the decision to extend the layoffs into 2012 was based on his age and sex, given the DA's statement of keeping the three younger female ADAs together. However, other older male ADAs also retained their employment, again supporting a conclusion that the DA's decision was not based on discriminatory animus but rather on his evaluations which found the complainant to be the weakest performer vis-à-vis the other ADAs.

The complainant also notes the DA was able to find county money once again to keep ADA Elizabeth Rohl in continuous employment despite issuing her a lay-off notice along with the complainant in June of 2012. The complainant fails to acknowledge that ADA Kevin Gehler, an older male also kept his ADA position along with the younger female ADAs. This personnel decision fails to demonstrate discrimination when an older male ADA was retained.

The commission found the DA credible when he testified how he formed his evaluations of his ADA staff and why the complainant was selected for position reduction and lay-off. Budget cuts required the DA to make difficult personnel decisions which he based on his personal assessment and evaluation that the complainant did not perform at the same excellent level that the other ADAs did. Further, the DA's personnel decisions- whether keeping the older male ADAs or hiring an older male ADA- controvert the complainant's argument of discrimination.

Thus, after assessing the credibility of the witnesses and the weight of all the evidence adduced at the hearing, the commission determines, as did the ALJ, that the complainant failed to prove by a preponderance of the evidence that the respondent discriminated against the complainant because of his sex or age.

Issue Preclusion

The respondent argues that issue preclusion requires the commission to adopt the findings of the Wisconsin Employment Relations Commission (WERC) that were made as part of the complainant's civil service appeal. The WERC decision[5], finding the DA had just cause to choose the complainant for reduction and lay-off was affirmed by the court of appeals in *Sortedahl v. Wis. Empl. Rels. Comm'n,* No. 2015AP1938, unpublished slip. Op. (Wis. Ct. App. Feb. 1, 2017).

Claim preclusion, not an issue here, means a final judgment is conclusive in all subsequent actions between the same parties as to all matters which were litigated or which might have been litigated in the former proceedings. *DePratt v. West Bend*

[5] The transcript of the WERC hearing was admitted at the ERD hearing and used to question witnesses. (Ex.C27).

Mut. Ins. Co., 113 Wis. 2d 306, 310, 334 N.W.2d 883 (1983). This is more akin to res judicata and its purpose is to prevent repetitive litigation.

Issue preclusion, which is the issue here, refers to the effect of a judgment in foreclosing relitigation in a subsequent action of an *issue of law or fact* that has been actually litigated and decided in a prior action. *Northern States Power Co. v. Bugher,* 189 Wis. 2d 541, 550, 551, 525 N.W.2d 723 (1995). Under the doctrine of issue preclusion, the issue sought to be precluded must have been actually litigated previously. *Lindas v. Cady,* 183 Wis. 2d 547, 559, 515 N.W.2d 458 (1994).

Thus, the first series of questions are whether the issues or facts sought to be precluded was actually litigated before WERC, whether the disputed factual issues were properly before the WERC, and whether the parties had the opportunity to litigate before WERC. See, *Aldrich v. LIRC and Best Buy,* 2012 WI 53, 341 Wis. 2d 36, 814 N.W.2d 422; *Banty v. Dings Co. Magnetic Group,* ERD Case Nos. CR2008,03382, CR200903205, EEOC Case Nos. 26G200900100C, 26G201000006C, (LIRC July 31, 2012). The answers to these questions are "yes" as they relate to the factual issues as to why the complainant was chosen for reduction and lay-off by the respondent.

However because issue preclusion is a narrower doctrine than claim preclusion, the courts require a "fundamental fairness" analysis to determine whether applying issue preclusion comports with the principles of fundamental fairness. *Lindas v. Cady,* 183 Wis. 2d at 559. The central goal of the fundamental fairness analysis is to protect the rights of all parties to a full and fair adjudication of all issues involved in the action. *Aldrich v. LIRC,* 2012 WI 53, 341 Wis.2d 36, ¶ 109, 76, 801 N.W.2d 457. The decision should be made with special attention to guarantees of due process which require that a person must have had a fair opportunity procedurally, substantively and evidentially to pursue the claim before a second litigation will be precluded." Id. at 76, ¶ 109; *Banty v. Dings Co. Magnetic Group,* ERD Case Nos. CR200803382, CR200903205, EEOC Case Nos. 26G200900100C, 26G201000006C (LIRC July 31, 2012).

The fundamental fairness analysis requires consideration of the following factors:

> "(1) could the party against whom preclusion is sought, as a matter of law, have obtained review of the judgment; (2) is the question one of law that involves two distinct claims or intervening contextual shifts in the law; (3) do significant differences in the quality or extensiveness of proceedings between the two courts warrant relitigation of the issue; (4) have the burdens of persuasion shifted such that the party seeking preclusion had a lower burden of persuasion in the first trial than in the second; or (5) are matters of public policy and individual circumstances involved that would render the application of collateral estoppel [issue preclusion] to be fundamentally unfair, including inadequate opportunity or incentive to obtain a full and fair adjudication in the initial action?" *Michelle T. v. Crozier, 173 Wis. 2d at 689.*

Notably, the five factors are not exclusive or dispositive and the weight given to each factor is discretionary. *Aldrich v. LIRC,* 341 Wis. 2d 77, ¶ 111-112.

The respondent first raised the defense of issue preclusion (collateral estoppel)[6] after the ERD hearing had been held in its post-hearing brief, arguing that issue preclusion requires the commission to accept the findings of fact made by the WERC in the complainant's civil service appeal. The complainant asserts that issue preclusion is an affirmative defense and is waived if not timely raised.

Case law indeed holds that the defense of collateral estoppel may be be waived if not timely raised. *Newhouse v. Citizens Sec. Mut. Ins. Co.,* 170 Wis.2d 456, 467, 489 N.W.2d 639 (Ct. App. 1992); *Maclin v. State,* 92 Wis.2d 323, 328, 284 N.W.2d 661 (1979). *Currier v. Baldridge,* 914 F.2d 993, 996 (7th Cir. 1990). The time to have raised this issue was prior to the ERD hearing, not after a two day hearing occurred on the issue of discrimination. Under these circumstances, the respondent waived its right to raise issue preclusion before the commission.

However, even if the respondent had timely raised issue preclusion, the commission would not have applied the doctrine to its review here because it is satisfied that it would have been fundamentally unfair to the complainant.

Although the adverse employment action taken against the complainant served as the basis for his claims before WERC and the commission, the claims are distinct and before two separate commissions without overlapping jurisdiction. The complainant's civil service appeal before the WERC is limited to the issue of whether the complainant's lay-off was with just cause, determined by the appropriate standard adopted by the Wisconsin Supreme Court in *Weaver v. Wisconsin Personnel Board,* 71 Wis.2d 46, 49, 237 N.W.2d 183 (1976). The complainant's discriminatory claims before the commission, filed under chapter 111 of the Wisconsin Statutes, concern the issue of whether the respondent discriminated against the complainant based on his sex or age when the adverse employment actions were taken against him. Not only are these claims distinct, but there are significant differences in these separate proceedings that would not warrant the application of issue preclusion. The respondent in the WERC proceeding has to prove just cause for its adverse employment actions taken against the complainant, while in a discrimination claim the complainant must establish by a preponderance of the evidence that the respondent discriminated against the complainant in violation of the WFEA. Consequently, these different burdens and legal questions pursued in different proceedings before different tribunal bodies may result in different strategies being used by the parties at hearing. Consideration of these factors suggests an unfair disadvantage to the complainant given his pursuit of his two distinct claims.

[6] Collateral estoppel denotes issue preclusion. Restatement Second of Judgments § 2

The circumstances here do not warrant application of the doctrine of issue preclusion because the issue was waived by the respondent and if it had not been waived, it would have been fundamentally unfair to the complainant to adopt the WERC findings.

cc: Attorney William Haus
Assistant Attorney General Rachel Bachuber

STATE OF WISCONSIN
DEPARTMENT OF WORKFORCE DEVELOPMENT
EQUAL RIGHTS DIVISION

Kenneth Sortedahl
W888 Evergreen Ct
Spring Valley, WI 54767

Complainant,

v.

DECISION AND ORDER
ERD Case No. CR201202934
EEOC Case No 26G201201501C

St Croix County District Attorney's Office
1101 Carmichael Rd, Rm 2301
Hudson, WI 54016

Respondent.

In a complaint filed with the Equal Rights Division ("Division") of the Department of Workforce Development on September 20, 2012, the Complainant, Kenneth Sortedahl ("Sortedahl"), alleged that the Respondent, St. Croix County District Attorney's Office (or "the County"), violated the Wisconsin Fair Employment Act (WFEA) by:

a) Discriminating against the Complainant in terms or conditions of employment because of age;
b) Terminating the employment of the Complainant because of age;
c) Discriminating against the Complainant in terms or conditions or employment because of sex;
d) Terminating the employment of the Complainant because of sex.

An Equal Rights Officer for the Division concluded in an Initial Determination issued June 18, 2014 that there was probable cause to believe that the County violated the Law as alleged by Sortedahl. Accordingly, the Division certified his complaint to a hearing on the merits.

Administrative Law Judge (ALJ) Maria Selsor held a hearing on the merits regarding Sortedahl's complaint on May 21, 2015 and August 26, 2015 in Hudson, Wisconsin. Sortedahl appeared in person and by his attorney, William Haus of Haus, Roman & Banks, LLP. The Respondent appeared by its attorney, Steven Kilpatrick with the Wisconsin Department of Justice. A transcript of the hearing was not prepared. Post-hearing briefs were submitted, and the final brief was filed on March 1, 2016.

Based upon the testimony taken and the evidence received at the hearing in this matter, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The Respondent is a governmental entity serving the people of St. Croix County, Wisconsin and which operates a district attorney's office.

2. Sortedahl is a male born on August 27, 1965. He began working as an Assistant District Attorney for the County in July 2004. At the time of his hire, he had 12 years of experience as a practicing attorney in Wisconsin, including two years as a part-time Assistant District Attorney for Dunn County, Wisconsin.

3. Sortedahl was hired by District Attorney Eric Johnson (hereafter "D.A. Johnson"). D.A. Johnson has been the District Attorney for the County since 1989.

4. In 2011, Sortedahl earned $26.956 per hour as a full-time Assistant District Attorney and received State benefits.

5. The State of Wisconsin generally funds the compensation of Assistant District Attorneys throughout the state. However, each of Wisconsin's 71 D.A. offices is its own employing unit. Each office makes independent decisions about hiring and firing, and is not required, for example, to honor seniority in other counties or take employees from other counties who have been laid off.

6. As the District Attorney for the County, D.A. Johnson had independent authority to hire and fire employees in the District Attorney's office.

7. During 2011, St. Croix County District Attorney's office employed three female, full-time assistant district attorneys with less seniority than Sortedahl: Sharon Correll, seniority date January 17, 2008; Amber Hahn, seniority date January 5, 2009; and Elizabeth Rohl, seniority date January 3, 2011. All of them were between the ages of 29 and 33 in 2011.

8. In 2006, D.A. Johnson put Sortedahl on a Performance Improvement Plan ("PIP") to address complaints about him from law enforcement, victim/witness staff, and circuit court Judge Needham.. Sortedahl successfully completed the PIP in 2007.

9. Sortedahl never received any other feedback – good or bad - from D.A. Johnson regarding his performance.

10. Around September 2011, D.A. Johnson learned that he would be losing funding at the end of 2011 due to the termination of a grant. The grant termination would require him to lay-off 1.0 full-time equivalent (FTE) position from the Assistant District Attorney's office.

11. After learning of the need to lay off one of his Assistant District attorneys, D.A. Johnson contacted Philip Werner, Director of the State Prosecutor's Office at the Department of Administration. D.A. Johnson asked Werner if he needed to follow seniority in selecting who would be laid off. Werner told D.A. Johnson that the Collective Bargaining Agreement ("CBA") for District Attorneys remained in effect until the end of 2011 (approximately 2-3 more months). Under the CBA, lay-offs had to be implemented on a seniority basis, i.e. last one in, first one out.

12. Werner told D.A. Johnson that beginning on January 1, 2012, lay-offs would no longer have to be based on seniority, but would still be subject to a just cause standard. D.A. Johnson asked Werner if Werner could find funding for the 1.0 FTE position. Werner attempted, but was unable to secure the requested funding.

13. D.A. Johnson later learned that the grant would actually be exhausted in early/mid-

December, rather than the end of December 2011. D.A. Johnson found a way to use county money to fund the 1.0 FTE position for 2-3 weeks, through the end of the year.

14. If D.A. Johnson had not taken this step, the 1.0 FTE position would have expired in early/mid-December 2011 while the CBA was still in effect. Assistant District Attorney Rohl would have been selected for lay-off because she had the least seniority. Rohl had been hired in January 2011 and was still on probation.

15. D.A. Johnson selected Sortedahl for lay-off because he believed Sortedahl was the weakest performer and had the least potential among the assistant district attorneys. D.A. Johnson believed Correll, Hahn, and Rohl were excellent attorneys with a lot of potential. He based his opinion on his experience working with and observing all of the assistant district attorneys in the small office and receiving feedback from others about their performance.

16. In November 2011, D.A. Johnson informed Sortedahl that he had been selected for lay-off. Sortedahl asked D.A. Johnson why he had been selected. D.A. Johnson replied that he wanted to keep the younger women in the office together and that they were the future of the office. He did not cite Sortedahl's performance in any way.

17. On December 27, 2011, D.A. Johnson sent Sortedahl a notice informing him that his position would be reduced from 1.0 FTE to 0.2 FTE effective January 1, 2012. Also effective January 1, 2012, D.A. Johnson laid off Assistant District Attorney Kathleen Grosdidier who had been working 0.2 FTE. This totaled 1.0 FTE in lay-offs.

18. D.A. Johnson arranged for Sortedahl to be appointed as Special Prosecutor for 32 hours per week at $40 per hour as an independent contractor.

19. Sortedahl filed a grievance to challenge his layoff.

20. D.A. Johnson and Sortedahl have adjacent offices. On January 19, 2012, Sortedahl overheard a conversation between D.A. Johnson and Assistant District Attorney Hahn in D.A. Johnson's office. D.A. Johnson told Hahn that she, Correll, and Rohl were the future of the office and he wanted to keep them together.

21. Shortly after, Assistant District Attorney Rohl came in D.A. Johnson's office. Sortedahl overheard D.A. Johnson tell Rohl that he wanted to keep the younger women together because they were the future of the office.

22. In the spring of 2012, D.A. Johnson learned that he would lose another assistant district attorney position as a result of the loss of another grant.

23. On June 28, 2012, D.A. Johnson sent Sortedahl a letter informing him that because of the loss of the grant, he was laying Sortedahl off from his 0.2 FTE position effective July 1, 2012.

24. Rohl also received a layoff notice reducing her position from 1.0 to 0.2 FTE. However, D.A. Johnson managed to secure county funds to keep Rohl at a full-time position so her layoff never actually occurred.

25. On June 28, 2012, the same day that D.A. Johnson notified Sortedahl that he was laid off, he posted a position opening for full-time assistant district attorney, which resulted from a

retirement.

26. Sortedahl applied for the position. D.A. Johnson did not interview Sortedahl for the position opening. Instead, he hired Michael Nieskes, a former district attorney and circuit court judge in Racine County. D.A. Johnson requested and received authorization to offer Nieskes higher than mid-point compensation in the salary range. D.A. Johnson did not interview any other candidates for the position.

27. Nieskes is a male in his sixties.

28. After his lay-off, Sortedahl continued as a Special Prosecutor for St Croix County and as a half-time Assistant District Attorney for Polk County. His duties as a Special prosecutor are the same duties he performed as an Assistant District Attorney for St. Croix County but as an independent contractor without any State benefits.

29. Since the 1990s, D.A. Johnson had not done written evaluations for any of the assistant district attorneys.

30. D.A. Johnson did not discriminate against Sortedahl on the basis of sex or age. Rather, D.A. Johnson showed a preference for employees that he considered excellent and above-average attorneys, regardless of sex or age. Nieskes' hire in particular belies a discriminatory animus toward older men.

CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of the Wisconsin Fair Employment Act.

2. The Complainant is a person in a protected category.

3. The Complainant has failed to prove, by a preponderance of the evidence, that the Respondent violated the WFEA by discriminating against the Complainant in terms or conditions of employment because of age.

4. The Complainant has failed to prove, by a preponderance of the evidence, that the Respondent violated the WFEA by terminating the employment of the Complainant because of age.

5. The Complainant has failed to prove, by a preponderance of the evidence, that the Respondent violated the WFEA by discriminating against the Complainant in terms or conditions or employment because of sex.

6. The Complainant has failed to prove, by a preponderance of the evidence, that the Respondent violated the WFEA by terminating the employment of the Complainant because of sex.

Based upon the Findings of Fact and Conclusions of Law made above, the Administrative Law Judge now issues the following:

ORDER

That the complaint in this matter is hereby dismissed with prejudice.

Dated at Milwaukee, Wisconsin JUN 08 2016

Maria Selsor
Administrative Law Judge

cc: Complainant
Respondent
William Haus, Attorney for Complainant
Steven Kilpatrick, Attorney for Respondent
EEOC