

discrimination. Alternatively, they contend that Complainant's salary was set at the minimum level for reasons unrelated to her age. Respondents have also filed a motion to dismiss this case under section 8-105(C) of the Human Rights Act (775 ILCS 5/8-105(C)) based upon the existence of a February, 1997 settlement offer tendered to Complainant.

Findings of Fact

Based on the record in this matter, I make the following Findings of Fact:

1. On September 16, 1981, Complainant began her employment with the Appellate Court, Third District (hereinafter referred to as "Appellate Court") as a personal, or "elbow" clerk to Tobias Barry, a Justice of the Appellate Court. At the time of her hire, Complainant was 35 years old and shared clerking duties with Ann Keefe, Justice Barry's "senior clerk" who had already been working for Justice Barry in his Ladd, Illinois office.

2. From September 16, 1981, through February 15, 1994, Complainant's work duties consisted of drafting pre-hearing bench memoranda in cases set for oral argument, researching the law on cases heard by Justice Barry, and drafting proposed opinions, dissents and special concurrences as directed by Justice Barry. In 1986 or 1987, Complainant became Justice Barry's "senior clerk" when Keefe left her position.

3. In the fall of 1990, Justice Barry ran unsuccessfully against Justice James D. Heiple, another Appellate Court Justice from the Third District, for an open seat on the Illinois Supreme Court.

4. By early February of 1994, Justice Barry informed Complainant and others of his intention to retire from the Appellate Court when his term ended in December of 1994. Complainant, who lived in Peru, Illinois, thereafter inquired about a staff attorney opening with the Appellate Court's Research Department located in Ottawa, Illinois. Unlike the elbow clerks hired by the individual Justices, staff attorney positions in the Appellate Court are selected by the entire Appellate Court.

5. In early February 1994, members of the Appellate Court held a meeting, during which Justice Barry proposed to the Justices that they hire Complainant as a staff attorney in the Research Department. The Justices eventually agreed to hire Complainant as a staff attorney, but entered into a second discussion regarding the setting of Complainant's salary. During this discussion, Gist Fleshman, the Clerk of the Appellate Court, Third District, informed the Justices that under the Illinois Supreme Court employee compensation and classification manual, the Justices could set Complainant's salary up to the midpoint of the range of salaries for research staff attorneys, or in Complainant's case, \$39,464. The Justices were also told that, while Complainant's current salary was more than the midpoint for research staff attorneys, they could not match her present salary without obtaining the prior approval of Justice Heiple, who represented the Third District on the Illinois Supreme Court. The Appellate Court members agreed to set Complainant's salary at the mid-point to provide Complainant with the most money she could obtain without having to seek approval from Justice Heiple and then directed Justice Barry to inform Complainant of their decision and to generate paperwork to effectuate Complainant's transfer to the Research Department.

6. A couple of days after the Appellate Court had decided to hire Complainant, Justice Barry directed Fleshman to verify with the Illinois Supreme Court's Administrative Office (AOIC) the midpoint of the salary for research staff attorneys. Fleshman thereafter called William Smith, the assistant director of the AOIC, who told him that he did not believe that the \$831 difference between Complainant's elbow clerk salary (\$40,295) and the midpoint salary for research staff attorneys (\$39,464) would require any involvement by the Supreme Court.

7. Thereafter, Fleshman relayed Smith's observations to Justice Barry, who also discussed the matter with Smith. Smith similarly told Justice Barry that he did not see a problem with attempting to match Complainant's "elbow clerk" salary, but directed Justice

Barry to put the request in writing. On February 16, 1994, Justice Barry wrote a letter to Smith noting that, under the compensation schedule, Complainant's salary as a research staff attorney would be \$39,464, but asking that Complainant be paid \$40,295 in light of her twelve years of good service as his clerk.

8. Once Smith received Barry's letter of February 16, 1994, he forwarded it on to Robert Davison, the Director of the AOIC. Upon reading Barry's letter, Davison became concerned about the salary request because the proposed \$40,295 salary request was outside of the Supreme Court's salary schedule and compensation plan, and because the proposed salary was beyond the \$36,000 that the AOIC had budgeted for the position that Complainant would be filling which had been held by Rosemary Calandra. Davison then informed Justice Heiple by telephone about the contents of Justice Barry's letter, and Justice Heiple indicated that Complainant could have the research staff attorney job, but that she could only be paid the minimum salary. Heiple further stated that Justice Kent Slater, the presiding Justice of the Appellate Court, Third District, could contact him with any additional information regarding Complainant's salary.

9. On February 21, 1994, Davison telephoned Justice Slater and advised him that there was a problem with Complainant's proposed salary due to Justice Heiple's indication that Complainant should be paid at the minimum salary, but that he could telephone Justice Heiple with any additional information he might have on the issue. At the time Davison telephoned Heiple about this issue, he was unaware that Complainant had already started her new position on February 16, 1994 as a research staff attorney and was under the impression that Complainant would be taking the research staff position later in the year when Justice Barry retired.

10. On February 21, 1994, Justice Slater telephoned Justice Heiple and attempted to explain why the Appellate Court had extended the \$39,464 mid-point level offer to Complainant. During this telephone call there was no mention of Justice Barry's desire to

have Complainant retain her \$40,295 elbow clerk salary. Justice Heiple instructed Justice Slater to put his explanations in writing and indicated that he would respond to them.

11. On February 21, 1994, Justice Slater drafted a letter to Justice Heiple that set forth various reasons for offering Complainant \$39,464 for her services as a research staff attorney. Specifically, Justice Slater explained that the \$39,464 salary was justified both by Complainant's twelve years of experience as an appellate court law clerk and by her relative experience *vis a vis* the three current research staff attorneys, all of whom had been hired since April of 1991, with two making \$34,233 and one making \$36,000. Justice Slater further noted that Complainant's proposed salary would increase the average salary of research staff attorneys for the Third District to \$35,982, which was still lower than the average salaries paid to research staff attorneys in the Second (\$36,630), Fourth (\$40,295) and Fifth (\$36,854) Appellate Court Districts.

12. On February 23, 1994, Justice Heiple wrote the following letter to Justice Slater:

"Dear Kent:

Thank you for your letter of February 21, 1994. I will be happy to meet with you at your convenience to discuss the general subject of upgrading salaries in your Research Department. This is a matter of state-wide concern and will involve a comparison of compensation for all research personnel to determine why there is an apparent lack of parity.

The problem, if there is a problem, cannot be remedied by bringing in a new hire at the top salary. There is no justification for doing so. Indeed, so far as research clerks are concerned, beyond the first year there is little or no experience to be gained. A research clerk claiming 12 years' of experience really has but one year of experience repeated 12 times. This carries no merit. The only justification for paying senior clerks more money is to keep good people on the payroll and not go through the hiring and break-in process.

Hence, there is no possibility that I would approve the Third District hiring a new research clerk at a salary above the entry level for that position.

Please contact me when you would like to pursue the general topic further."

13. Justice Slater interpreted Justice Heiple's letter as a directive to set Complainant's salary at the \$32,571 minimum established by the Illinois Supreme Court's compensation and salary plan. Moreover, even though he knew that the Appellate Court had authority to offer new hires at rates up to the midpoint of the compensation and salary plan, Justice Slater did not take any additional steps at that time to try to obtain for Complainant a greater salary because he believed that his hands were tied once the matter had been referred to Justice Heiple.

14. On February 23, 1994, Justice Slater informed Complainant that her salary was going to be reduced to the minimum level of \$32,571 pursuant to the recommendation of Justice Heiple.

15. At some point between February 27, 1994 and April 1, 1994, Justices Barry and Slater, as well as Jerry Ursini, the Research Director of the Third District Appellate Court Research Department, told Complainant that the problem with Complainant's salary would be worked out.

16. In April of 1994, Complainant began contacting Davison directly to try to resolve the problem with her salary. On May 11, 1994, Davison wrote Complainant a letter indicating, among other things, that he had questioned her proposed salary in view of the fact that it was considerably higher than the salaries of the existing staff attorneys within the Third District and was higher than the budgeted amount of \$36,000.

17. On August 12, 1994, Complainant tendered a signed Charge of Discrimination to the Department of Human Rights, alleging that she had been the victim of "unequal wages" on account of her age and sex. She also asserted in the Charge that she was the victim of retaliation based upon the fact that she had been the elbow clerk for Justice Heiple's political rival. (Complainant's retaliation claim was dismissed for lack of jurisdiction.)

18. From August 12, 1994 to November 21, 1996, there is nothing in the record to indicate what happened to Complainant's Charge of Discrimination or whether Respondents

were ever served with the original Charge. On November 22, 1996, Complainant's Charge of Discrimination was refiled with the Department.

19. At some point in December 1996, Justice William E. Holdridge, who was at the time a presiding Justice of the Appellate Court, Third District, became aware of Complainant's Charge of Discrimination and spoke to Justice Heiple about the merits of Complainant's discrimination claim. During the discussion, Heiple indicated that he was of the belief that all of the research staff attorneys were being hired at the minimum level. Justice Holdridge, however, informed Justice Heiple that the Appellate Court had hired Anita Kopko at a salary above the minimum in September of 1995. This was the first time that Justice Heiple had become aware that any research staff attorney in the Third District had been hired at more than the minimum salary level. Eventually, Justice Heiple told Justice Holdridge to settle the case based on the circumstances of Kopko's beginning salary.

20. In January of 1997, Justice Holdridge was given the additional assignment of being Director of AOIC. Thereafter, Holdridge contacted Complainant to determine her version of her damages, and Complainant subsequently submitted a worksheet indicating her belief as to her back-pay loss. In February of 1997, Justice Holdridge proposed a settlement, which, among other things, reclassified Complainant's position to a senior research attorney position and gave Complainant a partial lump sum payment on her back-pay claim via a pay increase retroactive to July 1, 1996, along with \$963 annual payments spanning a period of 14 years (or until 2011) to recoup the remainder of her back-pay claim, in exchange for Complainant's dropping of her Charge of Discrimination. The settlement offer, though, required that Complainant stay employed as research staff attorney throughout the 14-year period in order for her to receive all of her back-pay claim.

21. On or about February 18, 1997, Complainant orally accepted the terms of the settlement offer, and Justice Holdridge began the paperwork so that Complainant could receive her increase in pay by the end of February 1997. At that time, Complainant offered

to sign a document reflecting the terms of the settlement, but Justice Holdridge declined Complainant's offer by indicating that, as an officer of the court, Complainant's word that she had accepted the settlement was good enough. A few days later, however, Complainant indicated to Justice Holdridge that she was not going to abide by her oral agreement.

22. At all times pertinent to this Complaint, Rule 5(D)(1) of the Illinois Supreme Court compensation and salary rules provided that:

“Prospective employees will normally be offered the minimum point of the salary grade. Administrative Authorities [including presiding Justices of the Appellate Court Districts] may offer the prospective employee a rate higher than the minimum point but within the Normal Starting Range providing the offer is close to the compensation paid to current employees with similar experience and training. Administrative Authorities may, under unusual circumstances, hire above midpoint but below maximum point only with the prior approval of the Supreme Court.”

23. At all times pertinent to this Complaint, the Illinois Supreme Court operated under a practice that permitted individual Supreme Court Justices to establish policy for the Appellate Court District from which he or she was elected. Moreover, this practice permitted individual Supreme Court Justices to set the salary of any employee within the individual Appellate Court District from which he or she was elected as long as the salary issue came to the attention of the individual Justice.

24. From July of 1988 to March 21, 1997, the Appellate Court, Third District hired the following research staff attorneys in its Research Department:

<u>Name</u>	<u>Date of Hire</u>	<u>Starting Salary/</u>
Gerald Ursini	(7/1/88)	\$26,556 (minimum)
Daniel Marsalli	(10/03/88)	\$26,556 (minimum)
Mickey Penosky	(11/1/88)	\$26,556 (minimum)
Rosemarie Calandra	(02/08/89)	\$26,556 (minimum)
Vicki Seidl	(10/10/89)	\$30,172 (minimum)
Robert Rymak	(4/1/91)	\$30,172 (minimum)
Elizabeth Ferrero	(4/29/91)	\$30,172 (minimum)
John Sturmanis	(8/5/92)	\$30,500 (minimum)
Rosemarie Calandra	(8/16/93)	\$36,000 (above \$32,571 minimum, but below \$39,464 mid-point)
Lynn Harrington	(12/09/93)	\$36,000 (above \$32,571 minimum, but below \$39,464 mid-point)
Bonita Welch	(2/16/94)	\$32,571 (minimum)

Valerie Walker	(5/31/94)	\$32,571 (minimum)
Anita Kopko	(9/1/95)	\$36,000 (above \$32,571 minimum, but below \$39,464 mid-point)

25. Beginning with the hiring of Robert Rymak in April of 1991, Justice Heiple had no role in the setting of starting salaries of any of the research staff attorneys for the Appellate Court, Third District, with the exception of Complainant, and was not aware of the age of any research staff attorney employed by the Appellate Court, Third District at the time of Complainant's hiring as a research staff attorney.

Conclusions of Law

1. Complainant is an "employee" as that term is defined under the Human Rights Act.
2. Both Respondents are "employers" as that term is defined under the Human Rights Act and were subject to the provisions of the Human Rights Act.
3. Complainant failed to establish a *prima facie* case of age discrimination in that she failed to produce direct evidence of age discrimination and further failed to establish under the indirect method that a "similarly situated" co-worker was treated more favorably.

Determination

Complainant has failed to prove by a preponderance of the evidence that Respondents acted on the basis of her age when they set her salary at the minimum level for her research staff attorney position.

Discussion

Preliminary Matters.

Complainant has filed a motion seeking to amend the Complaint to conform to the proof set forth at the public hearing by adding Justice Heiple individually as a Respondent in this matter. Specifically, Complainant contends that the record established that Justice Heiple violated section 6-101(B) of the Human Rights Act (775 ILCS 5/6-101(B)) by aiding and abetting the Appellate Court "to breach its contract to pay [C]omplainant at a starting

rate of \$39,464.” Respondents, though, submit that Justice Heiple cannot be liable under section 6-101(B) because he is not an “employer” as contemplated under the Human Rights Act.

Assuming, *arguendo*, that Justice Heiple can potentially be sued individually under section 6-101(B), I find that other factors lead me to conclude that Complainant has not satisfied all of the provisions set forth in section 5300.660 of the Commission’s procedural rules (56 Ill. Admin. Code, Ch XI, §5300.660) for adding parties to a complaint. Specifically, section 5300.660(a)(4) requires that Complainant establish that Justice Heiple knew within the original 180-day time frame for filing Charges of Discrimination that Complainant’s Charge of Discrimination grew out of a transaction or occurrence involving him. I agree with Complainant that Justice Heiple was aware of the refiled Charge of Discrimination shortly after the refiled date in November of 1996. However, Complainant tendered her initial Charge to the Department in August of 1994, and there is nothing in the record to indicate that Justice Heiple (or frankly anyone other than Complainant and perhaps the intake officer at the Department of Human Rights) knew about Complainant’s Charge of Discrimination at that time or at any time within 180 days from the February, 1994 setting of Complainant’s salary at the minimum level.

More problematic, though, is Complainant’s attempt to add a cause of action without giving Justice Heiple any opportunity to obtain counsel and defend himself in the matter. Indeed, advance notice of a potential cause of action that would for the first time subject Justice Heiple to personal liability is crucial here, where Justice Heiple’s defense to an aiding and abetting charge under section 6-101(B) was potentially antagonistic to stances maintained by various Appellate Court Justices as to who was responsible for the setting of Complainant’s starting salary. Moreover, Complainant’s belated attempt to add Justice Heiple as a party at the conclusion of the public hearing is inconsistent with her stance at the public hearing, which, if Complainant had her way, would have precluded Justice Heiple

from observing the entire proceedings due to his status as a mere witness. (Vol. 1, at pp. 6-10.) Thus, for all of the above reasons, Complainant's motion to conform the pleadings of the Complaint to add Justice Heiple as a party-respondent will be denied.

The second preliminary matter concerns Respondents' motion to dismiss this case under section 8-105(C) of the Human Rights Act (775 ILCS 5/8-105(C)). Under that section, a respondent may obtain a dismissal of a case where it offers and the complainant declines to accept the terms of a settlement, which eliminate the effects of the charged civil rights violation and prevent its repetition. In this regard, Respondents contend that the February, 1997 settlement offer by Justice Holdridge satisfies the elements of section 8-105(C) because the offer gave Complainant in excess of \$21,000 in back wages, a promotion to a senior research attorney position with a higher job grade, and a rate of pay that was higher than what Complainant would have received at that moment had she been given the midpoint salary in February of 1994. Indeed, Respondents note that in terms of monetary relief, Justice Holdridge's offer was actually over \$1,000 more than what Complainant had submitted to him as her back-pay claim.

Complainant, though, asserts that she was not obligated under section 8-105(C) to accept Justice Holdridge's offer, since she would have been required, among other things, to initially accept an initial lump sum payment that was \$17,000 less than what was immediately owed to her, and then continue her employment with the Appellate Court for fourteen more years in order to recoup the balance of her back-pay loss. Additionally, she submits that Justice Holdridge's offer was not especially fair given the evidence that AOIC personnel were contemplating alternatives that would have paid off her back-pay claim on a much sooner basis. Complainant also notes that there was no mention in Justice Holdridge's offer as to pension credit/payments, and that the terms of the offer did not indicate any assurance that others with relevant experience would not be hired at the minimum level. In reviewing the dictates of section 8-105(C), I agree with Complainant that

she was not mandated to accept any offer that required that she wait, let alone work, fourteen more years to receive her back-pay claim. Accordingly, Respondents' motion to dismiss must be denied since Justice Holdridge's settlement offer did not conform to the dictates of section 8-105(C).

The merits.

This case offers the Commission an interesting glimpse as to the different roles played by "elbow" clerks and research staff attorneys in the issuance of opinions and Rule 23 Orders by the Appellate Court, Third District, and how these differences can affect the amount of money a research staff attorney can earn with that court. According to Complainant, she was the victim of age discrimination when, after transferring from her "elbow" clerk position of over twelve years to a research staff attorney position, Justice Heiple directed that her salary be reduced from the \$39,464 that Justice Barry told her was her starting salary to the \$32,571 minimum level established for research staff attorneys by the Illinois Supreme Court salary schedule. However, after reviewing the transcripts and the documentary evidence in this matter, I agree with Respondents that factors other than Complainant's age led to the eventual setting of Complainant's salary at the minimum level for a research staff attorney.

To understand why Complainant loses on her age discrimination claim, it is necessary to understand the legal framework for discrimination claims, which requires that complainants prove intentional discrimination in one of two distinct methods. In the first method, a complainant may present direct evidence that establishes by a "clear nexus" that her age was a determining factor "without reliance on inference or presumption." (See for example, **Miller v. Borden, Inc.**, 168 F.3d 308, 312 (7th Cir. 1999), and **Belha and Modform, Inc.**, ___ Ill. HRC Rep. ___ (1987CF2953, January 31, 1995, slip op. at p. 9).) While direct evidence may take the form of circumstantial evidence, the evidence still must do more than create a permissible inference of discrimination, in that the proffered evidence

must present a “convincing mosaic of [age] discrimination” regarding the motivation of the decision-maker. (See, **Troupe v. May Department Stores Co.**, 20 F.3d 734, 737 (7th Cir. 1994) and **Belha**, slip op. at p. 9.) Once a complainant has established by direct evidence that the respondent had placed a substantial reliance on her age, the burden shifts to the respondent to prove by a preponderance of the evidence that it would have made the same adverse decision even if the complainant’s age had not been considered. See, **Lalvani v. Illinois Human Rights Commission**, 324 Ill.App.3d 774, 775 N.E.2d 51, 64-65, 257 Ill.Dec. 949, 962-63 (1st Dist., 2nd Div. 2001).

In contrast to the direct method of establishing an age discrimination claim, the indirect method seeks to establish a *prima facie* case of discrimination through the elimination of legitimate, non-discriminatory reasons for the adverse act. In this regard, the Commission and the courts have applied a three-step analysis to determine whether there has been a violation under the Illinois Human Rights Act. (See, for example, **Clyde v. Human Rights Commission**, 206 Ill.App.3d 283, 546 N.E.2d 265, 151 Ill.Dec. 288 (4th Dist. 1991) and **Ray and Cima Electrical & Mine Services**, ___ Ill. HRC Rep. ___ (1992SA0130, September 11, 1995).) Under this approach, the complainant must first establish a *prima facie* case of unlawful discrimination by a preponderance of the evidence. Then, the burden shifts to the respondent to articulate a legitimate, non-discriminatory reason for its action taken against the complainant. If the respondent is successful in its articulation, the presumption of unlawful discrimination is no longer present in the case (see, **Texas Department of Community Affairs v. Burdine**, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981)), and the complainant is required to prove by a preponderance of the evidence that the respondent’s articulated non-discriminatory reason is a pretext for unlawful discrimination.

Thus, Complainant has attempted to establish her age discrimination case using both direct and indirect methods. As to the direct evidence method, Complainant cites to

Justice Heiple's February 23, 1994 letter to Justice Slater as evidence of Justice Heiple's animosity against her based on her age. In the letter, Complainant contends that Justice Heiple made a negative reference to her twelve years of prior experience as an elbow clerk, and that such a reference can only be based on her age since it is impossible to gain twelve years of experience without advancing at least as many years in age. Justice Heiple's alleged ageist bias was also demonstrated, according to Complainant, when he used of the term "senior clerks" when explaining why Complainant's salary should be set at the minimum level.

But how does either piece of evidence establish the "clear nexus" to age discrimination seemingly required by the courts and the Commission? Initially, while I agree with Complainant that Justice Heiple need not specifically mention "age" in order for a statement to constitute "age" discrimination, I doubt that Justice Heiple's reference to her twelve years of experience could ever be treated as "direct" evidence of age discrimination under the circumstances of this case. For example, in **Hazen Paper Company v. Biggins**, 507 U.S. 604, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993), the United States Supreme Court addressed a similar issue regarding an employer's consideration of an employee's years of service in the context of a termination that was allegedly motivated by the employer's desire to avoid the vesting of pension rights. In finding that an employer's interference with the vesting of pension rights did not violate the age discrimination provision of the ADEA, the Court concluded that because age and years of service are analytically distinct "it is incorrect to say that a decision based on years of service is necessarily 'age based'", especially where the act of pension vesting could occur to individuals under the age of 40. **Id.** at p. 611-12.

This distinction between age and years of service also applies to Justice Heiple's reference to senior clerks having twelve years of service in his letter of February 23, 1994 because his reference could theoretically pertain to individuals under the age of 40.

Admittedly, Complainant was over the age of 40 at the time Justice Heiple drafted his February 23, 1994 letter. Yet, this fact was immaterial to the Hazen Paper Court, which applied its holding to an employee who was 62 years old at the time of his termination and still found no statutory equivalence between age and years of service. Complainant's only other claim of direct evidence of age discrimination comes in the form of a reference by Justice Heiple to "senior clerks" in his February 23, 1994 letter. However, given the fact that "senior clerks" is a term of art used by judicial personnel, including Complainant, to describe nothing more than individuals having relatively more experience working within the judicial system, Complainant comes up short on this argument as well since "senior clerks" could still refer to individuals under the age of 40.

Complainant, however, asserts that Justice Heiple's references to her years of experience and to "senior" clerks is circumstantial evidence of an anti-age animosity since, at the time he drafted his February 23, 1994 letter to Justice Slater, Justice Heiple had to know that his "opinion"/directive to place her at the bottom of the pay scale meant that she would be treated more harshly than her less-experienced co-workers. This is so, Complainant posits, because Justice Slater's February 21, 1994 letter informed Justice Heiple of the salaries and hire dates of the existing research attorneys in the Appellate Court's Research Department, as well as the fact that a recent hire (Lynn Harrington) had been given a salary that was more than the entry level for a research staff attorney. Finally, Complainant submits that Justice Heiple's decision to reduce her salary to the minimum level could not have been an implementation of an age-neutral policy since Justice Heiple failed to reduce at the same time the salary of Harrington, who was only 27 years old at the time of Justice Heiple's letter.

These arguments, though, only generate "dead-ends" in a mosaic that Complainant submits establishes direct evidence of age discrimination. Specifically, Complainant's comparison of salary treatments given to the other research staff attorneys provides some

evidence of intentional *age* discrimination only if she could show that Justice Heiple had been aware of the ages of all of the research staff attorneys, and yet directed that Complainant's salary be set at the bottom of the pay scale "because of her age." While the record shows that Justice Heiple had been aware of the hire dates of the other research staff attorneys in the Research Department, there is nothing in the record to indicate that he had been aware of Complainant's specific age or, for that matter, the ages of any of the attorneys in the Research Department, all of whom had been hired after Justice Heiple had left the Appellate Court in December of 1990. Similarly, Justice Heiple's failure to retroactively reduce Lynn Harrington's salary as a consequence of his directive to set Complainant's salary at the minimum level has no obvious age discrimination connotation since, unlike the request made by Justice Barry on behalf of Complainant, Justice Heiple had never been asked to review Harrington's salary, which was well below the mid-point threshold for involvement by a Justice of the Illinois Supreme Court. Thus, for all of the above reasons, I find that Complainant has not presented sufficient "direct evidence" to establish a *prima facie* case of age discrimination.

As to Complainant's use of indirect evidence to establish a *prima facie* case of age discrimination, the courts and the Commission have required that a complainant show that: (1) she was in a protected age classification; (2) she experienced an adverse act; and (3) younger co-workers who were similarly situated to the complainant were treated more favorably. (See, for example, **Clyde v. Human Rights Commission**, 206 Ill.App.3d 283, 564 N.E.2d 265, 151 Ill.Dec. 288 (4th Dist. 1990).) While the parties are not at odds with respect to the first two elements of the above *prima facie* case scenario, the parties are in dispute as to whether Complainant has satisfied the third element as to whether younger co-workers who were similarly situated to her were treated in a more favorable fashion. Here, Complainant contends that younger research staff attorneys, who had beginning salaries

that were greater than the minimum level, are appropriate comparables for her age discrimination claim.

However, I agree with Respondent that none of the proffered research staff attorneys are suitable comparatives. Specifically, in order for a co-worker to be “similarly situated” for purposes of establishing an inference of discrimination, a complainant must show at the very least that the same person made the relevant decision for both the complainant and the proposed comparable. This is so, because “different decisions, concerning different employees, made by different supervisors...sufficiently account for any disparity in treatment, thereby preventing an inference of discrimination.” (See, **Snipes v. Illinois Department of Corrections**, 291 F.3d 460, 463 (7th Cir. 2002).) Thus, under this line of authority, the fact that other younger research attorneys in the Appellate Court’s Research Department began their tenures at salaries above the minimum level is irrelevant because Justice Heiple played no role in the hiring or setting of their compensation levels. See also, **Radue v. Kimberly-Clark Corp.**, 219 F.3d 612 (7th Cir. 2000), and **Buie v. Quad/Graphics, Inc.**, 366 F.3d 496 (2004).

Moreover, Complainant has no real answer to the question as to how Justice Heiple could have committed intentional age discrimination if, as the record shows, he had no input into the hiring or setting of compensation levels for any research staff attorney proffered by Complainant as a comparative, or more important, any knowledge as to any of their ages. According to Complainant, it is simply enough to note that she had better qualifications than any of her proposed comparables due to her more extensive post-law school experience. Complainant might have a valid point if the Appellate Court was the “decision-maker” with respect to the setting of her salary since, under that circumstance, it would be fair to consider how the court treated her as opposed to the others whom it hired and set the

compensation level.¹ But the Appellate Court was not the decision-maker with respect to the setting of Complainant's salary since all of the Appellate Justices who testified indicated that they felt compelled to go along with Justice Heiple's direction because he had become involved in the matter.

True enough, the Illinois Supreme Court had a written policy regarding the setting of beginning salaries for new hires that provided for a range of starting salaries for research staff attorneys. However, the Illinois Supreme Court also operated under a practice that gave sitting Supreme Court Justices the power to alter this policy within their own Districts. The differences in average salaries for research staff attorneys among the downstate Appellate Court Districts noted by Justice Slater in his February 21, 1994 letter to Justice Heiple only reinforce the notion that a discrimination claim cannot be patched together based on the decisions made by as many as eight potentially different decision-makers (i.e., four downstate Appellate Court Districts, as well as the Districts' sitting Justices of the Illinois Supreme Court). Thus, having failed to show how Justice Heiple was inconsistent in any fashion with the treatment of research staff attorneys for which he was either directly or indirectly responsible, I find that Complainant has failed to establish a *prima facie* of age discrimination under the indirect method.

Ordinarily, Complainant's failure to establish a *prima facie* case of discrimination ends the matter. However, where, as here, Justice Heiple's explanation for why he set Complainant's salary at the minimum level also forms the basis for Respondents' articulation for the adverse decision, the issue becomes one as to whether Complainant has shown by a preponderance of the evidence that the articulated reason was a pretext for unlawful discrimination. (See, **Irick v. Illinois Human Rights Commission**, 311 Ill.App.3d 929, 726 N.E.2d 167, 244 Ill.Dec. 571 (4th Dist. 2000).) But before getting to the analysis of

¹ Complainant, however, has not justified why Marilyn Kujawa, a First District research staff attorney is an appropriate comparable if the Appellate Court, Third District, had no role in the

Justice Heiple's rationale for placing Complainant at the bottom of the pay scale, I must address Complainant's contention that Justice Heiple's rationale does not qualify as a "legitimate", nondiscriminatory reason for making an adverse employment decision because his negative treatment of her prior experience did not relate to her job or to any economic circumstance. Complainant cites no case law requiring that an articulated reason must make "business sense", and I would note that the only requirement established by the Commission for stating a qualifying "articulation" is that the proffered articulation be sufficient to explain why the employee was chosen for the employment transaction at issue. (See, **Koke v. City of Springfield, Illinois**, ___ Ill. HRC Rep. ___ (1994SA0233, February 3, 1997).) Indeed, where the Commission in **Koke** observed that it would not violate the Human Rights Act if the reason an employee suffered an adverse act was because he or she had been randomly selected by picking his or her name out of a hat (**Koke**, slip op. at p. 12), I find that Justice Heiple's explanation for his treatment of Complainant sufficiently qualifies as a "legitimate", non-discriminatory reason for the action taken against her.

As to the issue of pretext, Complainant contends that Justice Heiple's rationale cannot be the truth because it flies in the face of the desire by the Appellate Court to take advantage of her twelve years' of prior experience as an elbow clerk when it chose to hire her as a research staff attorney, and its intention to pay her as much as it could because of her prior experience. Moreover, she submits (and I agree) that Justice Barry's request to continue her salary at the elbow clerk level was certainly reasonable given her extensive background in writing decisions for the Appellate Court. However, what Complainant must be arguing is that Justice Heiple's negative reference to her prior experience, when directing that she be placed at the bottom of the pay scale for research staff attorneys, was so unreasonable that it created an inference of age discrimination because Justice Heiple did not subjectively believe the substance of his explanation. Indeed, courts have recognized

setting of her salary.

that the more objectively unreasonable an explanation is, the more likely the decision-maker did not actually believe it. See, Bechold v. IGW Systems, Inc., 817 F.2d 1282,1285 (7th Cir. 1987).

Complainant, though, has not shown how Justice Heiple's belief that research staff attorneys do not acquire appreciable levels of experience after their first year of employment was so unreasonable so as to permit me to find that Justice Heiple did not honestly believe the truth of his explanation. Specifically, Justice Heiple, and even others on the Appellate Court, held the view that the cases assigned to the research staff were of lesser importance and difficulty and tended to be criminal appeals, which typically contained only one or two straightforward issues that did not require any "hands on" supervision by an Appellate Court Justice. Moreover, the record reflects that research staff attorneys for the Appellate Court, Third District generally drafted decisions in cases where oral argument had been waived either because they had been deemed too insignificant by the research director to warrant oral argument or because oral argument had not been requested by the parties. Indeed, in many occasions the cases assigned to research staff attorneys wound up as non-published Rule 23 Orders having no precedential value beyond the holding of the particular case.

Thus, when viewed from what Justice Heiple and others thought about the routine and limited nature of the decisions drafted by the research staff attorneys, Justice Heiple's observations about research staff attorneys merely repeating the experience received during the first year of employment was not so unreasonable so as to call into question his belief in the honesty of his explanation. More illustrative of the genuine nature of Justice Heiple's observations about experience levels of research staff attorneys is his track record indicating that all of the research staff attorneys of whom he had at least an indirect role in setting their salaries began at the minimum pay level. And this is so, regardless of who walked into the front door of the Appellate Court wanting a job as a research staff attorney. Thus, given this background and consistency in placing individuals in the research

department at the minimum level, I cannot say that Justice Heiple's failure to give significance to Complainant's prior experience constituted evidence of pretext in this age discrimination claim.²

True enough, Complainant and certain Appellate Court Justices vigorously disagreed with Justice Heiple's assessment concerning the value of Complainant's prior experience, with Complainant even indicating that the effort put forth by elbow clerks was more than matched by the effort of research staff attorneys who must produce written decisions at a greater volume. But Complainant's own assessment concerning her self-worth, or for that matter, opinions from third parties about what Complainant should be making in any particular job are neither here nor there since the only opinion that counts in this age discrimination claim is that of Justice Heiple, which the record reflects (and the Complainant insists) is the decision-maker with respect to the setting of her salary. (See, for example, **Anderson v. Baxter Healthcare Corp.**, 13 F.3d 1120, 1124-25 (7th Cir. 1994), and **Dale v. Chicago Tribune Co.**, 797 F.2d 458, 464-65 (7th Cir. 1986).) Moreover, as former Justice Michael McCuskey noted, the disagreement that he and others had with Justice Heiple about the utility of prior experience for research staff attorneys was only one of policy that began at least in the mid-1980's, when Justice Stouder and others on the Appellate Court advocated that everyone should start at the minimum pay scale, and changed in the 1993-1994 time period when he and Justice Slater made the decision to attract more experienced individuals to the research staff and to pay them accordingly. However, as courts have counseled, disparities in treatment created by shifts in policies or by differing applications of a common policy by different decision-makers cannot create an

² Complainant has not challenged Justice Heiple's other rationale in his February 23, 1994 letter to Justice Slater for not paying Complainant at the mid-point level, i.e., a problem regarding a statewide inequality of average salaries cannot be remedied by paying only one attorney in the Research Department at the top rate.

inference of discrimination, let alone evidence of pretext. See, Snipes, 291 F.3d at 463.

Recommendation

For all of the above reasons, I recommend that: (1) the motion to amend the complaint to add Justice Heiple individually as a party-respondent be denied; (2) the motion to dismiss this case pursuant to section 8-105(C) be denied; and (3) the Complaint and underlying Charge of Discrimination by Bonita Welch be dismissed with prejudice on the merits.

HUMAN RIGHTS COMMISSION

BY: _____
MICHAEL R. ROBINSON
Administrative Law Judge
Administrative Law Section

ENTERED THE 30TH DAY OF SEPTEMBER, 2004