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 TARI WAY,
 Complainant/Appellant,
 v.
 President, UNIVERSITY OF
 WISCONSIN-SYSTEM,
 Respondent.
 Case No. 78-122-PC
 79-PC-ER-4
 * * * * *

DECISION
 AND
 ORDER

NATURE OF THE CASE

This matter involves two cases arising out of the termination of appellant's probationary employment with the Department of Physical Education and Dance, UW-Madison. Ms. Way filed a complaint of discrimination (Case No. 79-PC-ER-4), and, following an initial determination that there was no probable cause to believe that discrimination had occurred, requested a hearing on the issue of probable cause. She also had filed an appeal (Case No. 78-122-PC) under §230.45(1)(f), stats., and Article IV, §10, of the contract between Council 24, AFSCME, AFL-CIO, and the state, of her probationary termination. These two cases were ordered consolidated for hearing on the following issues, see order entered on November 17, 1980:

79-PC-ER-4:

1. Whether Respondent terminated Ms. Way's employment at the Department of Physical Education and Dance on July 19, 1978 because of her age in violation of sec. 111.32(5)(b), Stats.
2. Whether Complainant was handicapped at the time of her employment at the Department of Physical Education and Dance. If so, what was the nature of the handicap?
3. Whether the handicap placed restrictions on her ability adequately to undertake her job-related responsibilities. If so, what were the restrictions?

4. Whether Complainant informed Ms. Doris Ardelt, her supervisor, of her handicap and its restrictions.

5. Whether Complainant requested an accommodation which would have permitted her adequately to undertake her job-related responsibilities.

6. Whether Respondent terminated Complainant's employment at the Department of Physical Education and Dance because of her handicap in violation of sec. 111.32(5)(f), Stats.

7. Whether Complainant opposed any discriminatory practice under sec. 111.32, Stats., or made a complaint under sec. 111.32, Stats., prior to the time of her termination.

8. Whether Complainant's supervisors knew of Complainant's opposition to discriminatory practices or complaints under sec. 111.32, Stats., and terminated her employment because of such opposition or complaints. (Issues proposed by respondent)

* * *

4. Whether Respondent engaged in discriminatory practices under Sec. 111.32, Stats.

5. Whether I was terminated because of complaints about believed discriminatory practices by the Respondent. (Issues proposed by appellant)

78-122-PC:

1. Whether the termination of appellant's probationary employment by the School of Education, Department of Physical Education and Dance, University of Wisconsin-Madison, was arbitrary and capricious or illegal or an abuse of discretion.

2. Whether the Commission has jurisdiction over the subject matter of this appeal.

FINDINGS OF FACT

1. The complainant received an original appointment to a Typist 2 position in the classified, civil service in the Department of Physical Education and Dance effective January 25, 1978, with a 6 months probationary period.

2. Prior to her appointment, the complainant interviewed with Ms. Ardelt, who was to be her immediate supervisor.

3. During the interview, the complainant indicated that she was allergic to cigarette smoke and inquired as to whether smoking was permitted in the ~~the~~ Department. Ms. Ardelt responded that smoking was permitted only in the "kitchen" (break area) and that she was sympathetic to the complainant's situation as she too was allergic to smoke.

4. During the course of her employment with the department from the date of her appointment as aforesaid until her termination effective July 19, 1978, her work consisted of typing and other clerical duties. It was characterized by excessive errors, excessive time required to complete work, and excessive inappropriate questioning of the judgment of professional staff.

5. Ms. Ardelt met with the complainant in late March, 1978, and on May 25, 1978, and counseled complainant with respect to her inadequate performance and warned her that she was in jeopardy of not passing probation if her performance did not improve.

6. The termination of the appellant's employment was initiated and effectively recommended by Ms. Ardelt, with the concurrence of the appointing authority.

7. During the course of her employment with the Department of Dance and Physical Education, the complainant suffered from asthma that was aggravated by cigarette smoke.

8. There usually was an amount of smoke in the kitchen significant enough to cause the complainant to suffer appreciable discomfort.

9. There normally was not similarly significant cigarette smoke elsewhere in the departmental offices frequented by the complainant.

10. The complainant's problems with cigarette smoke were not causally related to the deficiencies in her performance as set forth in finding #4, above.

11. The complainant never requested any accommodation with respect to her smoke sensitivity, and none was denied.

12. The complainant applied on May 10, 1978, for a transfer to another position within the department.

13. Following that request, Ms. Drake, another employee in the Department, contacted the School of Pharmacy, where complainant previously had been employed, regarding her performance there.

14. While Ms. Drake received a negative report from the School of Pharmacy on complainant's performance there, no mention was made of any complaints of discrimination in connection with complainant's employment there.

15. The complainant met with Vice-Chancellor Kearn in the late spring of 1978 and discussed her perceived problems at the Department of Physical Education and Dance, including complaints of excessive smoke.

16. Following this meeting, Kearn's secretary called Ms. Drake regarding this meeting, and Ms. Drake conveyed this information to Ms. Ardelt, who thus became aware of at least the general substance of the meeting.

17. The complainant's date of birth is August 3, 1923.

18. Following the complainant's termination, she was replaced by another Typist 2.

19. The respondent did not terminate Ms. Way's employment at the Department of Physical Education and Dance on July 19, 1978, because of her age in violation of §111.32(5)(b), stats.

20. The complainant was handicapped by asthma aggravated by cigarette smoke during her employment at the Department of Physical Education and Dance.

21. The aforesaid handicap did not place restrictions on her ability to adequately undertake her job-related responsibilities.

22. The complainant did inform her supervisor, Ms. Ardelt, of her handicap and its restrictions, as set forth above in finding #3.

23. The complainant did not request any accommodation which would have permitted her adequately to undertake her job-related responsibilities.

24. The respondent did not terminate complainant's employment at the Department of Physical Education and Dance because of her handicap in violation of sec. 111.32(5)(f), stats.

25. Prior to her termination, complainant opposed alleged discriminatory practices under sec. 111.32, stats., by her complaints to Vice-Chancellor Kearl as set forth in finding #6, and by informal complaints with respect to her employment at the School of Pharmacy.

26. The complainant's supervisors knew in substance of complainant's opposition to discriminatory practices under sec. 111.32, as set forth in finding #16, but did not terminate her employment because of such opposition.

27. The respondent did not engage in discriminatory practices under §111.32, stats.

28. The complainant was not terminated because of complaints about believed discriminatory practices by the respondent.

CONCLUSIONS OF LAW

1. The Commission lacks subject matter jurisdiction over No. 78-122-PC.

2. Case No. 79-PC-ER-4 is properly before the Commission pursuant to §230.45(1)(b) and §PC 4.03(3), Wis. Adm. Code, for a determination as to probable cause.

3. The complainant has the burden of proof with respect to the question of probable cause.

4. The complainant has not satisfied that burden.

5. There is not probable cause to believe that the respondent discriminated against the complainant in the manner alleged and as set forth in the statement of issues.

OPINION

With respect to the appeal of the termination of appellant's probationary employment, recent decisions of the Court of Appeals have established conclusively that this Commission does not have jurisdiction over this subject matter. See Board of Regents v. Wisconsin Personnel Commission (Dropik), No. 80-1411; Young v. Personnel Commission, Miller v. Personnel Commission, No. 80-1684, June 24, 1981; review denied, September 1, 1981, motion for reconsideration denied, October 19, 1981; State ex rel DHSS v. Wisconsin Personnel Commission (Wagaman), No. 80-1762, August 25, 1981. Therefore, that appeal, No. 78-122-PC, must be dismissed, and no finding will be made as to whether the termination was arbitrary and capricious.

With respect to the discrimination complaint, No. 79-PC-ER-4,

the general framework for decision is as set forth by the United States Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 5 FEP Cases 965 (1973); see Anderson v. DILHR, Wis. Personnel Commission , No. 79-PC-ER-173 (7/2/81). In the case of a discharge from or termination of employment, such as this, the complainant establishes a prima facie case by showing that she was a member of a protected class, that she was doing her job well enough to rule out the possibility that she was discharged or terminated for inadequate job performance, and that she was replaced with someone of similar qualifications. See, e.g., Loeb v. Textron, Inc., 20 FEP Cases 29, 37 (U. S. Court of Appeals, 1st Cir. 1979). The burden then shifts to the employer to articulate a legitimate reason for the discharge, and the complainant then must show that this was not the real reason but rather a pretext for discrimination. In a proceeding such as this on probable cause, the analytical framework is similar but the complainant need only show that there is probable cause to believe discrimination occurred--i.e., she must show that there is "reasonable ground for belief supported by facts or circumstances strong enough in themselves to warrant a prudent person in the belief that discrimination probably has been ... committed." § PC 4.03(2), Wisconsin Administrative Code.

In this case, there was ample evidence that the complainant's performance on the job was not at the level that the employer reasonably could expect. Most of the evidence offered by the complainant was testimony from people who had a quite limited basis for the evaluation of her work.

As to the claim of handicap discrimination, there was little if any evidence that complainant's asthmatic condition was causative with respect

to the performance problems that lead to her discharge. The complainant attempted to show at the hearing that there in fact were no problems with her work performance. There was conflicting evidence as to the presence of smoke outside the kitchen, but the majority of the witnesses and the strong preponderance of the credible evidence were to the effect that this was not a problem. Given this record, it is difficult to perceive what kind of obligation for accommodation the respondent had.

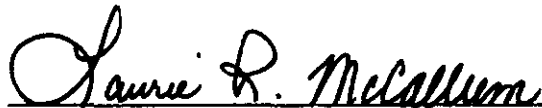
With respect to the allegation of retaliation, the fact that the complainant's supervisor was aware that she had complained to Vice-Chancellor Kearl is of limited significance when compared to the record of complainant's performance and her supervisor's continuing concern regarding her performance.

ORDER

Case No. 78-122-PC is dismissed for lack of subject matter jurisdiction. Case No. 79-PC-ER-4 is dismissed upon a determination of no probable cause to believe that discrimination occurred.

Dated: March 8, 1982 STATE PERSONNEL COMMISSION

AJT:jmf



LAURIE R. McCALLUM, Commissioner

Parties:

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Robert O'Neil, President
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JAMES W. PHILLIPS, Commissioner

Donald R. Murphy, Chairperson abstained from voting on this decision due to his employment with the University of Wisconsin at the time this complaint was filed.