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TARI WAY,

 Complainant,

v.

President, UNIVERSITY OF
WISCONSIN-SYSTEM,

 Respondent.

Case No. 78-PC-ER-52

* * * * *

DECISION
AND
ORDER

NATURE OF THE CASE

This case is a complaint of discrimination heard pursuant to §230.45(1)(a), stats., following an initial determination that there was probable cause to believe that the respondent discriminated against the complainant. The Commission, in an interim order dated November 17, 1980, determined the following issues for hearing:

1. Whether Complainant was handicapped at the time of her employment at the School of Pharmacy, University of Wisconsin-Madison, that is, from October 28, 1978 to November 23, 1978. If so, what was the nature of the handicap?
2. Whether the handicap placed restrictions on her ability adequately to undertake her job-related responsibilities; if so, what were the restrictions?
3. Whether Complainant notified her supervisor, Ms. Billie Hubacher, of the handicap and restrictions.
4. Whether Complainant requested any accommodation which would have permitted her adequately to undertake her job-related responsibilities.
5. Whether Respondent terminated Ms. Way because of a refusal to make such accommodation, in violation of sec. 111.31-111.37, Stats. [proposed by respondent]
6. Whether improper termination of employment resulted in loss of fringe benefits to which I otherwise would be entitled. [proposed by complainant]

* * *

"Whether the respondent terminated Ms. Way because of her complaints or other communications she may have made with respect to her alleged handicap or its accommodation or lack of accommodation." [ordered by Commission]

FINDINGS OF FACT

1. The complainant was interviewed on October 20, 1977, for a position in the School of Pharmacy, UW-Madison, classified as a Technical Typist 1.

2. This interview was conducted by Ms. Hubacher, the supervisor of the position, and included the following points:

a) Ms. Hubacher reviewed with the complainant the position description and the duties and responsibilities of the position, work rules, hours (7:45 - 4:30), and breaks (two 15 minute coffee breaks plus a 45 minute lunch break).

b) The complainant stated that she did not like smoke and inquired if there was smoking in the office. She did not state that she was asthmatic.

c) Ms. Hubacher responded that there was no smoking permitted in the office but that it was permitted in the "break" room, and showed the complainant the location of both the break room and the desk which would be used by complainant which was located outside the break room approximately 8 feet from the door to the room. The complainant made no complaint about this arrangement.

3. The complainant was appointed to the position in question with a 6 month probationary period and commenced work on October 26, 1977.

4. On her first day of work the complainant reported at 10:30 a.m. and had no explanation for her late arrival.

5. The complainant continued to be late for work on an almost daily basis. She also regularly took longer than permitted for breaks and lunch.

6. On a number of occasions the complainant left the office during the day for extended periods without notifying her supervisor.

7. The complainant's typing frequently was inadequate as to quality and quantity and she sometimes refused to follow instructions, and frequently argued with her supervisor about work assignments.

8. On one occasion she failed or refused to follow instructions as to how to type the signature of a faculty member on a number of letters, and then refused her supervisor's direction to retype the letters.

9. On another occasion she was given an examination to type and was warned to use extreme care in safeguarding the exam from possible student scrutiny and, specifically, not to leave it uncovered if she left her post while working on it. Notwithstanding these instructions, the complainant asked a student how to spell a word contained in the examination, and left the exam face up on her typing stand on one occasion when she left her post.

10. On another occasion, although she had been instructed that a notice of a meeting had to be sent out that day, she failed or refused to type it that day or to call it to her supervisor's attention that she had not or would not be able to do so.

11. Ms. Hubacher instructed the complainant that Ms. Greiber was to be in charge of the office in her absence. However, the complainant argued with Ms. Greiber and stated she would not and refused to take direction from her.

12.. Ms. Hubacher discussed with the complainant her work performance on October 28, November 2, and November 4, 1977. There was never any improvement in the complainant's performance and her probationary employment was terminated by Ms. Hubacher by letter dated November 8, 1977, (Respondent's Exhibit 11) with an effective date of November 23, 1977, and which was handed to complainant on November 10, 1977. (This termination was later re-effected by an appointing authority).

13. During the period of complainant's employment at the School of Pharmacy, smoking was not permitted and did not occur outside of the break room, the door to which usually was open.

14. Prior to her termination, the complainant never informed anyone in a supervisory relationship over her that the smoking that occurred in the break room bothered her, nor that she suffered from asthma, nor did she ever request that the door to the break room be kept closed.

15. The complainant was terminated because of deficiencies in her performance as set forth above and not because of her handicap.

16. The complainant was handicapped at the time of her employment at the School of Pharmacy due to an asthmatic condition which was aggravated by exposure to excessive cigarette smoke.

17. This handicap did not place restrictions on the complainant's ability adequately to undertake her job-related responsibilities.

18. The complainant never notified, prior to November 8, 1977, her supervisor, Ms. Billie Hubacher, of her handicap and its restrictions.

19. The complainant never requested, prior to November 8, 1977, any accommodation with respect to her handicap.

20. The respondent did not terminate the complainant because of a refusal to make any accommodation, in violation of sec. 111.31 - 111.37, stats.

21. Inasmuch as the complainant's termination was not improper it did not result in any loss of fringe benefits to which she otherwise would have been entitled.

22. The respondent did not terminate the complainant because of her complaints or other communications she may have made with respect to her handicap or its accommodation or lack of accommodation.

CONCLUSIONS OF LAW

1. This case is properly before the Commission pursuant to §230.45(1)(a), stats.

2. The complainant has the burden of proving that the respondent discriminated against her.

3. The complainant has not satisfied her burden of proof.

4. The respondent did not discriminate against complainant in connection with her employment at and termination from the School of Pharmacy.

OPINION

In a charge of discrimination, the general framework for making a 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. Pers. Comm. 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" or initial 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 (in 1979)). The burden then shifts to the employer to articulate a legitimate reason for the discharge, and the complainant then has the opportunity to show that this was not the real reason but rather a pretext for discrimination.

In this case, the complainant failed to establish a prima facie case. There was very substantial evidence that her performance was inadequate. Although there was evidence that the complainant suffered one asthma attack at work, there is no basis to conclude that this contributed to the inadequate performance. Furthermore, the complainant never requested an accommodation or informed her supervisor that she had a handicap which was exacerbated by conditions in the office.

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ORDER

Inasmuch as the Commission has found that the respondent did not discriminate against the complainant, this complaint of discrimination is dismissed.

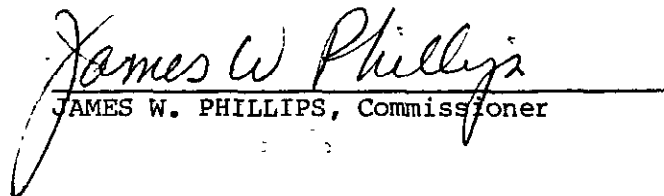
Dated: March 8, 1982 STATE PERSONNEL COMMISSION

AJT:jmf


LAURIE R. McCALLUM, Commissioner

Parties:

Tari Way
3214 Kingston Drive
Madison, WI 53713


JAMES W. PHILLIPS, Commissioner

Robert O'Neil, President
1700 Van Hise Hall
1220 Linden Drive
Madison, WI 53706

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.