STATE OF WISCONSIN PERSONNEL COMMISSION

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*
JUNE STONEWALL, *
*
Appellant, *
*
v. *
*
Secretary, DEPARTMENT OF INDUSTRY, * DECISION, ORDER
LABOR & HUMAN RELATIONS, * AND
* MEMORANDUM OPINION
Respondent. *
*
Case No. 79-PC-ER-19 *
*
* * * * * * * * * * * * * * * * * * *

The examiner in this matter issued a recommended decision on February 29, 1979. Respondent filed timely objections and oral argument was held before the Commission on April 24, 1980.

After review of the record and consultation with the examiner, the Commission enters the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. Complainant, a Black woman, was employed as a Job Service Assistant 3 (JSA 3) by the Job Service Division of DILHR in the Disabled Veterans' Outreach Program (DVOP) beginning June 12, 1977, first as an LTE, then as a project employe.

2. Her duties were to assist disabled veterans in finding jobs, to go to their homes and to veterans' or community organizations, to do whatever was necessary to help them obtain employment. She spent about 50% of her time in the field, always using a state vehicle, since she did not own a car.

3. Complainant was terminated on January 15, 1979, effective that

day, for failing to obey the oral directive of the Job Service supervisor not to keep a state vehicle out overnight unless specifically authorized to do so by management.

4. At the time complainant was terminated, the Operations Support memo to drivers of Job Service cars contained instructions as to where to park the respective cars on returning to the Milwaukee State Office Building (S.O.B.) followed by these directions:

> "Car keys, credit card, Trip Ticket properly completed, and with car location noted are to be returned promptly after the trip to the Operations Support Secretary.
> Failure to abide by the above points can result in loss of the privilege of driving State vehicles and other disciplinary measures being taken."

Lastly, there was an acknowledgement form which was to be signed, dated, and returned to the Operations Support Secretary after the driver had read the memo.

5. The DILHR Handbook, which sets forth work rules, prohibits the unauthorized use of state property or equipment, including vehicles, and the use of state property for private activities. It warns that an employe who commits any of the listed prohibited acts may be subject to disciplinary action ranging from reprimand to immediate discharge, depending on the seriousness of the offense and the number of infractions. (Resp. Exh. 7).

6. In late November or early December, 1978, a Job Service supervisor had reported to Robert Germain, the person responsible for Job Service cars, that the engine of the state car was warm the morning after the vehicle had been signed out by the complainant. Germain took no action in the absence of any direct evidence that complainant had retained the car overnight.

7. On December 27, 1978, complainant had signed out the Job Service

station wagon. At 7:15 a.m. on December 28, 1978, Germain observed the complainant driving the station wagon into the lot at the Milwaukee S.O.B., where it was parked when not in use. Germain reported this to Wilben Brooks, Job Service district manager, who, in the absence of complainant's supervisor, asked Otto Pettersen to speak to the complainant about overnight retention of state vehicles.

8. Later that morning Pettersen had a discussion with the complainant, lasting about five minutes. Pettersen advised complainant that a state car should never be kept out overnight without management approval, either by her own supervisor, Germain's office, or any other supervisor.

9. On Friday, January 5, 1979, complainant signed out a Job Service car for use from 10:00 a.m. until 4:00 p.m. She arranged to meet another Job Service employe, Robert Salmon, following her morning appointments. She permitted him to use the car for Job Service business for 1 1/2 - 2 hours while she made business phone calls to veterans from her grandmother's home.

10. After Salmon returned the car to her, complainant made her last stop of the day at the home of a veteran at 88th and Greenfield in West Allis, arriving there at about 3:15 p.m. She finished at 4:15 and then tried to phone Germain's office from the veteran's home to find out what to do about the car, since she would not be able to get back to the office by 4:30 p.m. Germain was not there and an unidentified woman who answered the phone was unable to give the complainant any instructions. It was not Germain's secretary, who could also authorize the use of state vehicles. The complainant did not attempt to call anyone else, including her immediate supervisor or her lead worker.

11. Germain and his secretary ordinarily worked from 7:45 a.m. to 4:30 p.m.; complainant's immediate supervisor, 7:00 a.m. to 3:30 p.m.; Pettersen, 7:30 a.m. to 4:00 p.m. Brooks was on vacation on January 5. 1979.

12. Complainant left the veteran's home at 4:30 p.m. The roads were slippery; there was drifting snow and traffic was heavy. Rather than return to the S.O.B. at 6th and Wells Streets, complainant drove the car through the downtown area at about 5:00 p.m. and continued to her home at 1855 Cambridge Avenue, about 2 1/4 miles beyond the parking lot where the state car was kept. Traveling on city streets, she was about 1 1/4 miles from the parking lot as she approached the downtown area; later, about a half mile away as she headed for her home.

13. The state car was rear-ended and pushed into another car while it was parked overnight in front of complainant's apartment building on Saturday evening, January 6, 1979. The complainant reported the incident to Germain promptly on Monday morning, January 8, 1979. Germain expressed concern that she had kept the car out over the weekend and told her to fill out an accident report.

14. The car registered 93 miles of use for the period it was retained by the complainant. Her itinerary on January 5, 1979, required her driving between 30-35 miles. Complainant does not know where Salmon went while he used the car and denies using it for personal business over the weekend.

15. Germain also reported the January incident and the events of December 28, 1978, to Ron San Felippo, Job Service Milwaukee Area Director. San Felippo did not know that the complainant had attempted to call in. He either initiated or concurred in the decision to terminate the complainant on the basis that there had been a prior infraction and warning

concerning overnight retention of a state car.

16. Complainant's immediate supervisor was not consulted regarding her discharge, nor was her work performance a factor.

17. The complainant had been critical of the DVOP programs in several meetings with Brooks and San Felippo, beginning in October-November, 1977. She filed a charge of discrimination early in December, 1978, alleging that Job Service managers were not allowing the DVOP program to function properly, namely to assist veterans only.

18. Brooks and San Felippo were aware of the complainant's criticisms of the DVOP program and that there was a discrimination complaint filed by several members of the DVOP unit, prior to the complainant's discharge.

19. Between December 31, 1976, and January 1, 1979, eight Milwaukee Job Service employes were discharged; 1 Hispanic, and 7 Black. As of June 18, 1977, 34.9% of the non-supervisory employes of the Milwaukee office were minorities; as of January 11, 1979, 29.1%. (These figures do not include the Waukesha office.) In at least four cases, less stringent disciplinary action was taken prior to discharge. One Black probationary employe received both a verbal and, one week later, a written reprimand for failure to obey directions; he was terminated subsequently for failure to meet performance standards.

20. As of April 4, 1979, as the result of the incident for which complainant was terminated, the memo concerning use of Job Service vehicles was revised and the following two paragraphs were added setting forth policy on the retention of cars:

> "When a car is returned after the S.O.B. is closed for the day, the keys, credit card, etc., are to be turned in to the S.O.B. guard by way of the loading dock entrance.

> Normally, cars are not assigned for overnight. Permission to have a car assigned overnight must be obtained in advance from the Program Coordination Secretary."

The new acknowledgement form was changed to include this statement:

> "I understand that failure to observe these procedures is a violation of work rules and subject to disciplinary action."

21. Complainant's ultimate separation from respondent's employment occurred for failure to abide a directive of her supervisor and did not constitute an act of racial discrimination or retaliation for past protected conduct.

CONCLUSIONS OF LAW

1. The respondent, DILHR, Job Service Division, is an employer within the meaning of §111.32(3), Stats.

2. The Personnel Commission has jurisdiction over this matter pursuant to §§111.33(2) and 230.45(1)(b), Stats.

3. The burden of proof is on the complainant to establish by the preponderance of credible evidence that she was discriminated against because of race and/or retaliation for having made a previous complaint, pursuant to §111.32(5), Stats.

4. The complainant has not met her burden of proving that she was discriminated against because of her race and in retaliation for her previous complaints under §111.32(5), Stats.

ORDER

That the complaint of June Stonewall against the Secretary of the Department of Industry, Labor, and Human Relations be and the same is hereby dismissed.

Dated: May 30, 1980. STATE PERSONNEL COMMISSION

Donald R. Murphy
Commissioner

Gordon H. Brehm
Commissioner

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5/29/80

MEMORANDUM OPINION

The Examiner's proposed Findings of Fact with one exception are largely undisputed. Proposed Finding No 20 inaccurately summarizes the evidence in joint Exhibits 1 and 2 concerning ten not eight employes discharged from the Milwaukee Job Service Office, and fails to distinguish between limited term employes like the appellant and permanent or permanent--probationary employes. The statement that, "No employes were discharged for violation of work rules during this period," was deleted from the Commission's Findings because it was factually incorrect. Semantics aside, joint Exhibits 1 and 2 show that nine of the ten individuals were discharged for work rule violation activities. Finding of Fact No. 10 and portions of proposed Finding Nos. 4, 8, 14, and 15 were deleted for lack of relevancy.

The examiner in this matter concluded that race and retaliation were the real reasons for complainant's discharge. However, there is sparse evidence to support that position. There is no evidence that the complainant was treated differently than other employes of similar status.

The complainant relied on statistical evidence concerning discharges from the Milwaukee area Job Service Offices over a two-year period from December 31, 1976, to January 1, 1979, to support her claim of racial discrimination and retaliation. (Jt. Ex. 1, 2 stipulation) It is doubtful that such statistics, when coupled with a percentage of minority hires in excess of the percentages of the available minority work force, proved an atmosphere of racial discrimination (Jt. Ex. 3). Moreover, proof of a general atmosphere of discrimination is not the equivalant of proof of discrimination against an individual. Such evidence may be considered with other evidence to ascertain whether racial discrimination existed. Sweeney v. Board of Trustees of Keene State College, 20 EPD 30,221 (1979).

With the exception of the statistical evidence, complainant produced nothing suggesting pretext or retaliation by the respondent. While there was evidence that respondent's agents were aware that over the past two years discrimination complaints had been made by several members of the DVOP unit, no specific link was made showing that either San Felippo or Brooks were aware complainant had filed a discrimination complaint against the agency (Tr 113, 148).

It might be said that complainant's punishment was harsh and did not fit her action. However, there is no evidence that the complainant was treated differently from other LTE's or project employes or that the termination was occasioned by discrimination or her protected activities. The factual basis of respondent's reasons for termination were undisputed. The matters of race or retaliation were not factors in respondent's decision.

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DISSENTING OPINION

I do not concur with the Findings of Fact, Conclusions of Law, Order, and Memorandum Opinion overruling the Proposed Decision and Order (copy attached) of the Hearing Examiner in this case.

In order to reflect the Hearing Examiner's intent in making Finding of Fact #3, it should be modified to read as follows:

> "3. Complainant was terminated effective January 15, 1979, by letter of that date; the reason given for her discharge was her failure to obey the oral directive of a Job Service supervisor (Pettersen) not to keep a state vehicle out overnight unless specifically authorized to do so by management."

The termination letter enunciates the "legitimate, non-discriminatory reason" for discharge, as articulated by the respondent to rebut the prima facie case of racial discrimination and retaliation established by the complainant. (See page 8 of Opinion in Proposed Decision.)

The proposed Findings of Fact deleted as irrelevant by the majority Memorandum Opinion are, in fact, relevant to the ultimate finding of fact in the Proposed Decision. The majority concedes, even without the deleted facts, that the complainant's punishment was harsh and did not fit her action. Based on all the facts, the Hearing Examiner concluded

> ". . .but for her race and/or her earlier complaint of discrimination, Ms. Stonewall would not have been terminated."

(All majority deletions are noted in the attached copy of the Proposed Decision.)

Although there was no "smoking gun" of overt discriminatory conduct on the part of the respondent, the record contains ample undisputed evidence from which the Hearing Examiner reasonably could infer, based on all the facts and circumstances, that the complainant was discharged because of race and/or retaliation. (See: Hamilton v. DILHR, Wis. Supreme Court, March 4, 1980, 22 EPD ¶30,

748 at p. 14, 849.)

It is unlawful to retaliate against any person who either opposes a practice reasonably believed to be unlawful or files a complaint. Berg v. La Crosse Cooler Co., 21 FEP Cases 1012 (7th Cir. Ct., 1980). The Hearing Examiner concluded, based on the testimony (TR 112-3, 148-9) that the respondents were aware of the complainant's allegation of discriminatory practices and that termination followed protected activities closely enough in time to justify the inference of retaliatory motive, citing Neidhardt v. D.H. Holmes, 21 FEP Cases 452, 472 (E.D., La., 1979).

The Findings of Fact should be amended in accordance with this opinion and the Proposed Decision and Order should be adopted.

Dated June 6 ,1980 STATE PERSONNEL COMMISSION

Charlotte M. Higbee

Charlotte M. Higbee
Commissioner

CMH:mgd

STATE OF WISCONSIN PERSONNEL COMMISSION

* * * * * * * * * * * * * * * * * * *

JUNE STONEWALL,

Appellant,

v.

Secretary, DEPARTMENT OF INDUSTRY, LABOR & HUMAN RELATIONS,

Respondent.

Case No. 79-PC-ER-19

* * * * * * * * * * * * * * * * * * *

PROPOSED
DECISION
AND
ORDER

NATURE OF THE CASE

This case arose out of a complaint of discrimination filed against the Department of Industry, Labor & Human Relations (DILHR) on February 9, 1979 in which complainant alleged that respondent terminated her employment because of discrimination based upon race and sex and in retaliation for a previous complaint. Following an investigation, the Equal Rights Officer issued an initial determination on February 19, 1979 concluding that there was probable cause to believe that the respondent discriminated against the complainant on the basis of race and retaliation. The case was heard on July 19, 1979, before Charlotte M. Higbee, Commissioner.

FINDINGS OF FACT

1. Complainant, a Black woman, was employed as a Job Service Assistant 3 (JSA 3) by the Job Service Division of DILHR in the Disabled Veterans' Outreach Program (DVOP) beginning June 12, 1977, first as an LTE, then as a project employe.

2. Her duties were to assist disabled veterans in finding jobs, to

go to their homes and to veterans' or community organizations, to do whatever was necessary to help them obtain employment. She spent about 50% of her time in the field, always using a state vehicle, since she did not own a car.

3. Complainant was terminated on January 15, 1979, effective that day, for failing to obey the oral directive of a Job Service supervisor not to keep a state vehicle out overnight unless specifically authorized to do so by management.

4. At the time complainant was terminated, the Operations Support memo to drivers of Job Service cars contained instructions as to where to park the respective cars on returning to the Milwaukee State Office Building (S.O.B.) followed by these directions:

> "Car keys, credit card, Trip Ticket properly completed, and with car location noted are to be returned promptly after the trip to the Operations Support Secretary.
> Failure to abide by the above points can result in loss of the privilege of driving State vehicles and other disciplinary measures being taken."

Lastly, there was an acknowledgement form which was to be signed, dated, and returned to the Operations Support Secretary after the driver had read the memo. (It included no instructions regarding emergencies or overnight retention of vehicles (Resp. Exh. 10). The Operations Support staff did not routinely give such instructions to new employees, nor was a copy of the memo provided them.)* eliminated

5. The DILHR Handbook, which sets forth work rules, prohibits the unauthorized use of state property or equipment, including vehicles, and the use of state property for private activities. It warns that an

employe who commits any of the listed prohibited acts may be subject to disciplinary action ranging from reprimand to immediate discharge, depending on the seriousness of the offense and the number of infractions. (Resp. Exh. 7).

6. In late November or early December, 1978, a Job Service supervisor had reported to Robert Germain, the person responsible for Job Service cars, that the engine of the state car was warm the morning after the vehicle had been signed out by the complainant. Germain took no action in the absence of any direct evidence that complainant had retained the car overnight.

7. On December 27, 1978, complainant had signed out the Job Service station wagon. At 7:15 a.m. on December 28, 1978, Germain observed the complainant driving the station wagon into the lot at the Milwaukee S.O.B., where it was parked when not in use. Germain reported this to Wilben Brooks, Job Service district manager, who, in the absence of complainant's supervisor, asked Otto Pettersen to speak to the complainant about overnight retention of state vehicles.

8. Later that morning Pettersen had a discussion with the complainant, lasting about five minutes, (both about the use of holiday leave by DVOP employes and about retention of state cars. In response to his questions, complainant denied having kept the vehicle out the previous night.) * eliminated Pettersen advised complainant that car should never be kept out overnight without management approval, either by her own supervisor, Germain's office, or any other supervisor. The complainant asked what she should do if the car broke down out on the road. Pettersen gave her a series of instructions,

including, if she was able to bring the car back downtown, to turn the keys over to the guard at the S.O.B. Complainant did not ask and Pettersen did not advise her where to find a guard or where or how to get into the building after hours.

9. On Friday, January 5, 1979, complainant signed out a Job Service car for use from 10:00 a.m. until 4:00 p.m. She arranged to meet another Job Service employe, Robert Salmon, following her morning appointments. She permitted him to use the car for Job Service business for 1½-2 hours while she made business phone calls to veterans from her grandmother's home.

(10. The other Job Service vehicle was out of service on January 5, 1979.) * eliminated

11. After Salmon returned the car to her, complainant made her last stop of the day at the home of a veteran at 88th and Greenfield in West Allis, arriving there at about 3:15 p.m. She finished at 4:15 and then tried to phone Germain's office from the veteran's home to find out what to do about the car, since she would not be able to get back to the office by 4:30 p.m. Germain was not there and an unidentified woman who answered the phone was unable to give the complainant any instructions. It was not Germain's secretary, who could also authorize the use of state vehicles. The complainant did not attempt to call anyone else, including her immediate supervisor or her lead worker.

12. Germain and his secretary ordinarily worked from 7:45 a.m. to 4:30 p.m.; complainant's immediate supervisor, 7:00 a.m. to 3:30 p.m.; Pettersen, 7:30 a.m. to 4:00 p.m. Brooks was on vacation on January 5, 1979.

13. Complainant left the veteran's home at about 4:30 p.m. The roads were slippery; there was drifting snow and traffic was heavy. Rather than return to the S.O.B. at 6th and Wells Streets, complainant drove the car through the downtown area at about 5:00 p.m. and continued to her home at 1855 Cambridge Ave., about 2½ miles beyond the parking lot where the state car was kept. Traveling on city streets, she was about 1¼ miles from the parking lot as she approached the downtown area; later, about a half mile away as she headed for her home.

14. The state car was rear-ended and pushed into another car while it was parked overnight in front of complainant's apartment building on Saturday evening, January 6, 1979. The complainant reported the incident to Germain promptly on Monday morning, January 8, 1979. Germain expressed concern that she had kept the car out over the weekend and told her to fill out an accident report. (Neither he nor Brooks, who met with complainant a few days later, told her that she had violated a work rule or would be disciplined. Brooks also told her to file an accident report and asked her to provide him with her itinerary for January 5, 1979.)* eliminated

15. The car registered 93 miles of use for the period it was retained by the complainant. Her itinerary on January 5, 1979, required her driving between 30-35 miles. Complainant does not know where Salmon went while he used the car and denies using it for personal business over the weekend. (At no time prior to her discharge was the mileage report or her itinerary discussed with the complainant.)* eliminated

16. Germain also reported the January incident and the events of December 28, 1978 to Ron San Felippo, Job Service Milwaukee Area Director.

San Felippo did not know that the complainant had attempted to call in. He either initiated or concurred in the decision to terminate the complainant on the basis that there had been a prior infraction and warning concerning overnight retention of a state car.

17. Complainant's immediate supervisor was not consulted regarding her discharge, nor was her work performance a factor.

18. The complainant had been critical of the DVOP programs in several meetings with Brooks and San Felippo, beginning in October-November, 1977. She filed a charge of discrimination early in December, 1978, alleging that Job Service managers were not allowing the DVOP program to function properly, namely to assist veterans only.

19. Brooks and San Felippo were aware of the complainant's criticisms of the DVOP program and that there was a discrimination complaint filed by several members of the DVOP unit, prior to the complainant's discharge.

20. Between December 31, 1976, and January 1, 1979, eight Milwaukee Job Service employes were discharged; 1 Hispanic, and 7 Black. As of June 18, 1977, 34.9% of the non-supervisory employes of the Milwaukee office were minorities; as of January 11, 1979, 29.1%. (These figures do not include the Waukesha office.) In at least four cases, less stringent disciplinary action was taken prior to discharge. (No employes were discharged for violation of work rules during this period.) One Black probationary employe received both a verbal and, one week later, a written reprimand for failure to obey directions; he was terminated subsequently for failure to meet performance standards.

21. As of April 4, 1979, as the result of the incident for which

complainant was terminated, the memo concerning use of Job Service vehicles was revised and the following two paragraphs were added setting forth policy on the retention of cars:

> "When a car is returned after the S.O.B. is closed for the day, the keys, credit card, etc. are to be turned in to the S.O.B. guard by way of the loading dock entrance.
>
> Normally, cars are not assigned for overnight. Permission to have a car assigned overnight must be obtained in advance from the Program Coordination Secretary."

The new acknowledgment form was changed to include this statement:

> "I understand that failure to observe these procedures is a violation of work rules and subject to disciplinary action."

CONCLUSIONS OF LAW

1. The respondent, DILHR, Job Service Division, is an employer within the meaning of Sec. 111.32(3), Stats.

2. The Personnel Commission has jurisdiction over this matter pursuant to ss. 111.33(2) and 230.45(1)(b), Stats.

3. The burden of proof is on the complainant to establish by the preponderance of credible evidence that she was discriminated against because of race and/or retaliation for having made a previous complaint, pursuant to Sec. 111.32(5), Stats.

4. The complainant has met her burden of proving that she was discriminated against because of her race and in retaliation for her previous complaints under Sec. 111.32(5), Stats.

OPINION

In a non-class action complaint alleging discriminatory treatment in employment, the complainant has the initial burden of establishing a prima facie case of discrimination.

> "As the Court stated in Furnco Construction Corp. v. Waters, 438 U.S. ___, 46 LW 4966, 4969, 17 FEP Cases 1062, 1066 (June 29, 1978, citing International Brotherhood of Teamsters v. United States, 432 U.S. 334 [sic 324] , 335 n.15, 14 FEP Cases 1514, 1519 (1977): 'The central focus of the inquiry. . .is always whether the employer is treating "some people less favorably than others because of their race, color, religion, sex or national origin."'
>
> The court in Furnco Construction then explained that a prima facie showing of discrimination is not the equivalent of a factual finding of discrimination. Rather, the court stated: '[I]t is simply proof of actions taken by the employer from which we infer discriminatory animus because experience has proved that in the absence of any other explanation it is more likely than not those actions were bottomed on impermissible considerations.' Id. at 4970. 17 FEP Cases at 1067.
>
> Once the plaintiff has established a prima facie case, the burden shifts to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection. McDonnell Douglas Corp. v. Green, supra at 802, 5 FEP Cases at 969. The burden which shifts to the employer is merely that of proving that he based his employment decision on a legitimate one such as sex or race. Furnco Construction v. Waters, supra; McDonnell Douglas Corp. v. Green, supra.
>
> If the employer meets this burden, the plaintiff must then be given an opportunity to introduce evidence that the proffered justification is merely a pretext for discrimination. Id."

Reilly v. Bd. of Ed. of New Berlin, Wis., 458 F. Supp. 992, 996-7, 18 FEP Cases 973, 975-6 (E.D. Wis., 1978). See also, Sweeney v. Board of Trustees of Keene State College, 438 U.S. 567 (1978); on remand, ___ F2d___, 20 EPD ¶30,221(1st Cir., 1979).

The respondent employer's burden is merely a burden of production; the burden of persuasion at all times remains with the complainant. Sweeney, supra, 20 EPD at p. 12188.

The sole issue of fact in this case is whether or not the complainant would have been discharged but for her race and/or the fact that she had previously complained about discrimination in the implementation of the DVOP program, both in meetings with Job Service management and via filing of a prior complaint.

Most of the underlying facts are undisputed. For the two years *immediately preceding complainant's discharge, only minorities* (7 Blacks and 1 Hispanic) were terminated by the Milwaukee (excluding Waukesha) Job Service office. (Joint Exh. 1) The non-supervisory minority employes in Milwaukee decreased from 34.9% to 29.1% during this same period. (App. Exh. 1) On its face this data establishes a pattern of disparate treatment of Blacks as regards terminations. Although the sample is small, it supports an inference of discrimination under all the circumstances of this case.

> "Statistical evidence is merely a form of circumstantial evidence from which an inference of discrimination may be drawn. The invocation of statistical data works no magical incantation. As with any circumstantial evidence, the usefulness of statistical evidence 'depends on all of the surrounding facts and circumstances.' Teamsters, supra, at 340."

Davis v. Califano, 21 EPD ¶30, 363 at p. 12, 980 (D. of C. Circuit, 1979).

In the instant case, absent discriminatory discharge practices, similar termination rates for non-minorities would be expected, when in fact there were none. (See Davis, supra, p. 12982.) The statistical evidence, when considered along with all the facts and circumstances surrounding the complainant's discharge, establishes a prima facie case of discrimination based on race.

Joint Exh. 2 also demonstrates that the complainant was treated

differently from other employes discharged for violation of work rules and/or disregard of a supervisor's instructions. In four of those cases lesser disciplinary action was imposed prior to termination. This is consistent with the provisions of the DILHR Handbook (Resp. Exh. 7), which provides that disciplinary action may range from reprimand to immediate discharge, depending upon the seriousness of the offense and (emphasis provided) the number of infractions.

The complainant was neither reprimanded nor otherwise disciplined prior to discharge for violation of a work rule or order of a supervisor. Based on Germain's observing her driving the Job Service station wagon into the S.O.B. parking lot at 7:15 a.m., she was counseled by Pettersen regarding overnight retention of a state vehicle but she was not reprimanded, orally or in writing, at that time. The focus of that conversation was two-fold: first, to advise complainant of holiday pay status of DVOP employes and, second, to tell her what to do if she got back late or if the car broke down on the road. Apparently no explanation was sought regarding the incident which had precipitated the discussion. Similarly, no action was taken on the alleged earlier incident, not even a discussion concerning overnight retention. (See Resp.'s Brief, p. 2)

Even after the complainant's retention of the car on the weekend of January 5, 1979, the major concern expressed to her by Job Service management was that she file the necessary accident report. Brooks asked her to provide him with her itinerary for January 5th, but he did not discuss with her the reason for his request, nor did anyone tell her she had violated a

work rule or would be disciplined. Brooks and San Fellipo talked with each other and with Germain, and they ascertained that Pettersen had spoken to the complainant about the need for prior approval of overnight retention (by Pettersen's testimony, a five-minute conversation covering several other subjects); then they made the decision to terminate the complainant.

Since both Brooks and San Fellipo were aware of the prior complaint of discrimination in the DVOP program and complainant's criticisms, all the facts and circumstances also establish a prima facie case of discrimination based on retaliation. Respondent argues that there is "no clear evidence" that Brooks or San Fellipo knew that Stonewall had filed a complaint and "no persuasive evidence" from which such knowledge reasonably could be inferred. The testimony of respondent's witnesses was somewhat vague on this issue. However, given Brooks's testimony that he was aware of a prior discrimination complaint and had been interviewed by the Commission's Equal Rights Officer, plus the complainant's outspoken criticism of the DVOP program, the Commission concludes under all the circumstances that the respondents were aware of the complainant's allegation of discriminatory practices and that termination followed protected activitites closely enough in time to justify the inference of retaliatory motive. (See Neidhardt v. D.H. Holmes, 21 FEP Cases 452, 472 (E.D., La., 1979)

The respondent articulated as the legitimate, non-discriminatory reason for discharging the complainant her failure to obey Pettersen's directive not to keep a state vehicle out overnight unless specifically authorized by management. (Resp. Exh. 1) However, complainant established by a

preponderance of credible evidence that the proffered justification was merely a pretext for a discriminatory decision. The Commission is unpersuaded by the respondent's rationale; it questions the extent to which the respondents were committed to the policy of terminating employes for disregard of a supervisor's directive regarding overnight retention of a state vehicle, apparently irrespective of extenuating circumstances. No consideration was given to the unusual weather conditions on January 5, 1979, nor to the fact that the complainant tried to phone in for approval when she saw she was running late. No attempt was made to identify the woman who answered the phone nor to obtain an explanation of the mileage registered on the car at the time it was returned. (See Reilly, supra, p. 999.)

It is not the Commission's position that the complainant used the best possible judgement under all the circumstances in her conduct on January 5th. Even though the Job Service car she was using was the only one in service that day, she was responsible for its use and its prompt return at 4:00 p.m. In view of the weather conditions, she might well have tried to call in earlier or even cancelled her last appointment. The route she travelled to her home took her through as congested an area of traffic as if she had returned the car to the parking ramp, and she would have driven 2-3 fewer miles in doing so. She could also have tried calling another supervisor, although their schedules were such that it is unlikely that she would have been able to reach anyone else at 4:15 p.m.

The memo concerning use of Job Service vehicles which had been signed by the complainant did not set forth policy regarding overnight retention of

vehicles. Repondent's witnesses all had slightly different interpretations of who, specifically, could authorize overnight retention. The policy was changed on April 4, 1979, as a result of the incident out of which this complaint arose. The very person whom complainant attempted to call on January 5th is the one specified to authorize retention under the new policy. Although Brooks testified that the new policy is satisfactory, it still does not encompass the situation the complainant encountered and lends credence to the Commission's conclusion that the reason for complainant's discharge was pretextual.

One of the earmarks of retaliation is disparate treatment or discipline of equivalent acts of culpability. Neidhardt, supra, p. 472 citing McDonnell Douglas, supra, and McDonald v. Santa Fe Trail Trans. Co., 472 U.S. 273, 283-85, 96 S.Ct. 2574, 2580-81, 12 FEP Cases 1577, 1581 (1976). Statistical evidence is especially relevant to a showing of a pretextual reason for discharge, such as evidence that white employes involved in acts of comparable seriousness were nevertheless treated differently. The employer's criterion for discharge must be applied alike to members of all races. McDonnell Douglas, supra, p. 804.

In Turner v. Texas Instruments, Inc., 55 F.2d 1251 (5th Cir. 1977), the plaintiff, in order to show pretext, relied solely on the fact that two out of eight persons discharged were minorities while minorities were only 8.6% of the work force. In the instant case, no non-minorities were discharged for violation of work rules or disregard of a supervisor's directive, in a work force that was from 65 to 71 percent white. The Commission agrees

with the complainant that, absent discrimination, at least some non-minorities would have been severely disciplined over a two year period. We conclude that but for her race and/or her earlier complaint of discrimination, Ms. Stonewall would not have been terminated.

ORDER

It is hereby ordered that the respondent pay Ms. Stonewall back pay from the date of discharge, January 15, 1979, through such date as her limited term project employment would have been terminated, less income tax withholding, her F.I.C.A. contribution, and unemployment compensation benefits, if any.

Dated_____,1980 STATE PERSONNEL COMMISSION

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Charlotte M. Higbee
Commissioner

CMH:mgd