STATE OF WISCONSIN PERSONNEL COMMISSION

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ROBERT PETERS,

Appellant.

v.

Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondent.

Case No. 80-PC-ER-122

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DECISION
AND
ORDER

NATURE OF THE CASE

This matter involves a complaint of discrimination on the basis of conviction record with respect to the termination of complainant's probationary employment. A hearing was held following an initial determination that there was probable cause to believe that discrimination had occurred.

FINDINGS OF FACT

1. The complainant was convicted of larceny in Michigan in 1961 and served approximately 2½ years in that state's prison system.

2. In the spring of 1980, the complainant applied for employment in the classified civil service as an officer at the Wisconsin Correctional Institution - Green Bay (WCI-GB), a maximum security institution housing adult males.

3. As part of the selection process, the complainant was interviewed by a Lt. Young at the institution. The complainant disclosed his criminal record in response to a question by Lt. Young as to whether he had a prior criminal record.

4. Mr. Murphy, the Assistant Superintendent for Security, was aware of the complainant's criminal record, and recommended his hiring.

5. The complainant was hired and began employment on August 11, 1980, with a 6 month probationary period.

6. On August 27, 1980, the complainant was assigned to a post in the Maintenance Service Building as part of his on-the-job training. The complainant and another trainee were playing with a checker set when two supervisors walked past them and remarked to them about this. They did not stop playing, but continued to play with the checkers. Both trainees subsequently were counseled on this matter by management. Although one of the supervisors recommended termination of both trainees at this point, Lt. Murphy and Mr. Fromolz, the acting training officer, declined to take such action at that time.

7. While attending the Corrections Training Center at Oshkosh as part of his formal training, the complainant and several other trainees were observed on September 25, 1980, by Lt. Rudie of WCI-Green Bay, who was at the Center for certain management training, drinking in the dormitory in violation of Corrections Training Center rules. Lt. Rudie reported this to Mr. Murphy. This was the last night of their stay at the center and drinking in the dormitory on this occasion by the trainees had become somewhat of a "tradition," albeit unsanctioned by the center staff. However, this was the only situation in recent memory where such behavior had been observed and reported back to the institution. All of the WCI - Green Bay trainees who had been observed drinking were counseled by WCI - Green Bay management, including another trainee who, besides complainant, was the only other ex-offender in training at WCI - Green Bay at the time.

8. During the course of his on-the-job training, the complainant failed to complete several required written reports.

9. During the course of his employment, the training officer received a number of reports from complainant's co-employes (i.e., members of the bargaining unit) as to complainant's poor attitude and unwillingness to work.

10. The complainant received a "below average" evaluation report for the month of August 1980, and an unsatisfactory evaluation report for the month of September, 1980.

11. The respondent's probationary employment was terminated effective October 8, 1980.

12. The other ex-offender in the training program was told, around this time, that he wasn't doing well, and he voluntarily resigned.

13. The reasons for the termination of complainant's employment were performance-related, as set forth in findings 6-10, and did not include his conviction record.

CONCLUSIONS OF LAW

1. This case is properly before the Commission pursuant to §§230.45(1)(b) and 111.33(2), stats.

2. The respondent is an employer within the meaning of §111.32(3), stats.

3. The complainant has the burden of proving by a preponderance of the evidence that, with respect to the termination of his employment, the respondent discriminated against him on the basis of his conviction record.

4. The complainant has not satisfied his burden of proof.

5. The respondent did not discriminate against the complainant on the basis of his conviction record in terminating his employment at WCI-Green Bay.

OPINION

The general framework for decision of a charge of employment discrimination under Subchapter II of Chapter 111 is as set forth by the United States Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 5FEP Cases 965(1973), see Anderson v. DILHR, Wis. Pers. Commn. No. 79-PC-ER-173 (7/2/81).

In the McDonnel Douglas, the court held with respect to a Title VII claim of a black male that he was denied employment on the basis of his race that a prima facie case could be established as follows:

> "This may be done by showing (i) that he belongs to a racial minority, (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected, and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." 411 U.S. at 802, 5 FEP Cases at 969.

The court emphasized that this formulation was not intended to be inflexible and to cover all types of employment transactions:

> "The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from the respondent is not necessarily applicable in every respect to differing factual situations," 411 U.S. at 802, n. 13, 5 FEP Cases at 969. See also, Texas Dept. of Community Affairs v. Burdine, 405 U.S. -, 25 FEP Cases 113, 115 (1981), n. 6; Hagans v. Andrus, 25 EPD ¶31,585 (9th Cir. 1981).

In order to establish a prima facie case, the complainant must do more than adduce sufficient evidence from which discriminatory animus may reasonably be inferred, he or she must prove these facts by a preponderance of the evidence. See Mosby v. Webster College, 16 FEP Cases

521, 522, 563, F 2d 901, 8th Cir. 1977), n. 2:

> " ... a 'prima facie case' consists of facts sufficient to sustain the inference that the challenged action of the employer was motivated by impermissible considerations. In determining whether a prima facie case has been made, the district court must look to the evidence of both parties relating to the existence of those facts upon when the inference of discrimination depends. Henry v. Ford Motor Co., 533 F. 2d 46, 48-49, 14 FEP Cases 1377, 1378-1379 (8th Cir. 1977).

See also, Texas Dept. of Community Affairs v. Burdine, supra, 25 FEP at 115: "First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination ...," and n. 7 at p. 116.

The employer may prevail in one of two ways, see Mosby v. Webster College, supra:

> "...the employer may prevail on either of two grounds. He may refute the existence of a prima facie case by showing to be nonexistent the facts upon which the inference of discrimination is sought to be sustained. Were this the case, the plaintiff would have failed to carry the initial burden and the employer need do no more. Henry v. Ford Motor Co., 553 F. 2d 46, 48-49, 14 FEP Cases 1377, 1878-1379 (8th Cir. 1977). Alternatively, the employer may proceed to his proof that his actions were taken for legitimate reasons, thereby rebutting the inference of discrimination created by the plaintiff's prima facie case.

In Texas Department of Community Affairs v. Burdine, 450 U.S. -, 25 FEP Cases 113 (1981), the Supreme Court clarified the nature of the burden on the employer following the establishment of a prima facie case by the employe:

> "The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons .... It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." 25 FEP Cases at 116.

If the respondent succeeds with this burden of proceeding, then the employe "...must be given the opportunity to respond by showing that the reasons tendered by the employe are a pretext." Mosby v. Webster College, supra.

Finally, it should be noted that:

> "McDonnell Douglas is to a large extent an analytical framework enunciated post hoc, in light of a given set of facts, to give judges a method of organizing evidence and assigning the burden of production and persuasion in a discrimination case." Loeb v. Textron, Inc., 20 FEP Cases 29, 38, 600 F. 2d 1003 (1 St. Cir. 1979).

It is not necessary that the proof be ordered in accordance with the shifting burdens set forth in McDonnel Douglas and subsequent cases. See Sime v. Trustees of Cal State University and Colleges, 526 F. 2d 1112 (9th Cir. 1975).

In the case of a discharge from employment, such as this, the complainant establishes a "prima facie" case by showing that he was a member of a protected class, that "he was doing his job well enough to rule out the possibility that he was fired for inadequate job performance, absolute or relative," and that his employer sought a replacement with similar qualifications. See, e.g., Loeb v. Textron, Inc., 20 FEP Cases 29, 36 (U.S. Court of Appeals, 1st Cir. 1979). The burden of proceeding 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, it is questionable whether the complainant established a prima facie case. However, assuming he did, it cannot be said that the reasons articulated by the respondent for termination were pretextual.

There was strong evidence on this record that the complainant's performance was not up to the employer's legitimate expectations. This includes the checkers and dormitory drinking incidents, the failure to prepare written assignments, and the reports of inadequate performance by co-workers.

The complainant placed much emphasis on the argument that drinking in the dormitory was common and in fact a "tradition" at the Corrections Training Center. While the Commission does not doubt this, it does not follow that WCI - Green Bay singled out the complainant in this regard. The record shows that this was the only incident of its kind to have been reported back to the institution, and all of the WCI - Green Bay trainees involved were counseled after their return there. This is a case of these trainees, including the complainant, having had the misfortune to have been caught in the act by a lieutenant from their own institution.

The case law in the Title VII area does provide that a complainant can establish a case, notwithstanding inadequate performance if it can be shown that other non-protected class employes similarly situated were not similarly disciplined. See, e.g., Brown v. A. J. Gerrard Co., 25 FEP Cases 1089, 1091-1092 (U.S. Court of Appeals, 5th Circuit 1981). In this case, the complainant did not make such a showing.

ORDER

This complaint of discrimination is dismissed.

Dated: March 19, 1982 STATE PERSONNEL COMMISSION

DONALD R. MURPHY, Chairperson

LAURIE R. McCALLUM, Commissioner

AJT:jmf

JAMES W. PHILLIPS, Commissioner

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