STATE OF WISCONSIN PERSONNEL COMMISSION

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AUDLEY McGHIE,

Complainant,

v.

Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondent.

Case No. 80-PC-ER-67

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DECISION
AND
ORDER

NATURE OF THE CASE

This matter involves a complaint of discrimination on the basis of race and retaliation. Following an initial determination that there was probable cause to believe that discrimination had occurred, a hearing was held and the parties filed post-hearing briefs with the hearing examiner.

FINDINGS OF FACT

1. Complainant, a black male, began employment at Central State Hospital/Dodge Correctional Institution (CSH/DCI), an institution contained within the respondent agency, on January 10, 1977, as an Officer 1. After six months employment he attained permanent status in class and was reclassified to Officer 2 effective January 14, 1979.

2. The complainant normally was employed on the night shift (10:00 p.m. to 6:00 a.m.), although he frequently worked overtime on other shifts.

3. The institutional policy on the night shift was to require that each officer on a ward call the central switchboard every 30 minutes to report the condition of the ward. Incidents of failure to call in were recorded in a logbook maintained at the central switchboard.

4. Institutional policy also required that in the event that a officer missed more than 4 such calls-ins without legitimate reason in a month, his or her supervisor was to submit a written "conduct report" with discipline as follows: 1st offense: verbal reprimand; 2nd: written reprimand; additional: suspensions and possible discharge.

5. Due to relatively wide-spread failure to adhere to the call-in policy, a memorandum reminding institutional staff of the importance of the policy and the requirement of a conduct report for more than 4 calls a month was disseminated on May 29, 1979, and again on November 19, 1979. See Complainant's Exhibit 13.

6. The record of missed call-ins for Officers McGhie, G.L. and R.L. from January 1979, through April 1980, is as follows (Officers G.L. and R.L. are white; G.L. transferred in August 1979 and was no longer subject to the call-in policy):

	1/79	2/79	3/79	4/79	5/79	6/79	7/79	8/79	9/79	10/79	11/79	12/79	1/80	2/80	3/80	4/80	5/8
Cmplnt.	5	4	3	2	12	13	7	5	15	10	5	2	13	1	5	5	NA
G.L.	8	4	7	3	9	12	16	15	NA	NA	NA	NA	NA	NA	NA	NA	NA
R.L.	NA	NA	4	6	11	6	8	7	5	1	10	2	2	1	3	3	5

(NA: not applicable)

7. Prior to November 1979, the aforesaid officers were given conduct reports for excessive missed call-ins, and officers McGhie and R.L. were counseled, but no formal disciplinary action was taken against any of them until November 15, 1979, when the complainant was given a formal written reprimand. Officer R.L. also received a written reprimand in November 1979.

8. Mr. Fredisdorf, an Officer 5, began on the night shift, where he would supervise the complainant and R.L., on November 12, 1979. However, he was not involved in the aforesaid written reprimand of the complainant, see Respondent's Exhibit 5.

9. In November, 1979, Mr. Fredisdorf observed the complainant sleeping on duty. He verbally reprimanded the complainant but did not at that time write up a conduct report.

10. In February, 1980, the complainant was suspended by the respondent for 5 days without pay following 13 missed call-ins for the month of January, 1980.

11. On March 7, 1980, Mr. Fredisdorf again observed the complainant sleeping on duty. Mr. Fredisdorf prepared a written conduct report on this incident in which he also mentioned the earlier incident referred to in Finding #9.

12. Partly as a result of this incident, the complainant was discharged, effective March 11, 1980. This discharge was based on his record of missed call-ins from August, 1979, including 5 incidents in March through March 8th, and the two instances of sleeping on duty. Mr. Fredisdorf had recommended against a discharge at that point.

13. This discharge was grieved through the contract grievance procedure, and as a result of a settlement reached with management, it was agreed to reinstate complainant effective April 10, 1980, with the intervening time to be considered as a suspension without pay.

14. Following this reinstatement, complainant began working on April 12, 1980, and thereafter missed 5 call-ins the remainder of that month.

15. On April 22, 1980, the complainant missed his 3:45 a.m. call-in. When the officer on the switchboard called the complainant's post shortly thereafter, the complainant asked him to give him credit for the call as it would have been his fourth missed call for the month. This request was refused.

16. At about 4:00 a.m., Mr. Fredisdorf made his routine round on complainant's ward and the complainant said nothing about the missed call or the circumstances thereof. Subsequently, that morning the complainant asked Mr. Fredisdorf to excuse the missed call-in because he had been ill and in the bathroom. When Mr. Fredisdorf inquired as to why he hadn't earlier informed the switchboard officer or him about this, the complainant stated that he had not wanted to mention it to the switchboard officer because of embarrassment and that he had forgotten to mention it to Mr. Fredisdorf earlier. Mr. Fredisdorf refused to accept his excuse. At a subsequent meeting on May 1, 1980 with management, the complainant stated he had not told the switchboard operator about his illness because the operator had not given him enough time to provide an explanation when he called the ward after the missed call-in. At this meeting the complainant indicated that he had seen a doctor on April 23, 1981, and produced a doctor's slip to the effect that he had had a case of the flu. Because of the circumstances set forth above, management refused to accept the explanation that illness had prevented the complainant from having made the call on April 22nd.

17. The complainant was discharged effective May 1, 1980, and this discharge also was grieved, and as a result of a settlement with management it was agreed to reinstate the complainant and transfer him to a position at the Fox Lake Correctional Institution, effective June 9, 1980, with the intervening time to be considered as a suspension without pay.

18. Officer R.L. was never suspended or discharged. He had been exposed to Agent Orange while in Vietnam. However, this exposure was not a causative factor in his missed call-ins, was never asserted by him to have been such a cause, and was not considered by management in determining his discipline

with respect to missed calls. Officer R.L. was never caught sleeping on duty by management. This latter factor was not considered by management in its disciplinary determination.

19. Prior to his second discharge, the complainant applied for a posted transfer opportunity that would have taken him off the third shift. The transfer ultimately was approved, but not until approximately 20 days had elapsed, and only after the decision had been made to terminate the complainant's employment.

20. The average time for processing similar transfer requests was approximately 21 days, although there had been cases where transfers were processed in less than 10 days.

21. The respondent's discipline of the complainant was motivated in part by race and hence was discriminatory.

22. The respondent's handling of complainant's transfer request was not retaliatory.

CONCLUSIONS OF LAW

1. This matter 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 respondent discriminated against him on the basis of race with respect to the disciplinary action taken against him and that respondent retaliated against him in delaying his transfer.

4. The complainant has established by the preponderance of the evidence that respondent discriminated against him on the basis of race with respect

to the disciplinary action taken against him, in violation of Subchapter II of Chapter 111, stats.

5. The complainant has failed to establish by the preponderance of the evidence that respondent retaliated against him with in delaying his transfer, in violation of Subchapter II of Chapter 111, stats.

OPINION

The general framework for decision of a charge of employment discrimination under Subchapter II of Chapter 111 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. Comm. No. 79-PC-ER-173 (7/2/81).

In the McDonnell 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, 450 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 challanged 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 which the inference of discrimination depends. Henry v. Ford Motor Co., 553 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 burdens 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 a discharge case, it is not always necessary that the complainant demonstrate as part of his or her prima facie case that he or she was not "guilty" of the offenses or derelictions cited by the employer as the reason for discharge. Certain kinds of disparate treatment still may give rise to the inference that the discharge was motivated by an improper animus. See, for example, Brown v. A. J. Gerrard Co., 25 FEP Cases 1089, 1091-1092, (5th Cir. 1981).

In that Title VII case, the plaintiff alleged that he had been discharged because of his race. He had been discharged for failing to be at work

without communicating his disability or his intention to return. The Court of Appeals discussed the question of a prima facie case as follows:

> "We think the lower court erred first of all in its evaluation of what was sufficient to make out a prima facie case. As we have noted, the lower court concluded that Brown never really made out a prima facie case because he failed to carry his burden of proving that he reported in. It was undisputed, however, that absences without prior warning by the employer were precisely the sort of violations of company rules that would not be met by discharge, absent counseling by management and warning of future disciplinary action. Much of plaintiff's evidence was to this effect, and the company never challenged this construction of its own policy. Uncontroverted evidence showed numerous instances in which white employes were given extensive warnings for precisely that: failing to show up for work, for extended periods, without prior notice by the employe. Brown should not, therefore, have been required to prove that he reported his absences on a continuing basis if he were to receive, on a nondiscriminatory basis, the benefit of the company's policy regarding unexcused absences.
>
> Under the facts of this case, therefore, Brown made out a prima facie case under Title VII when he offered proof sufficient to find the following: (1) he was a member of a protected group, (2) company policy was not to discharge employes for unexcused absences or absences without prior notice unless the employe had first been counseled and warned; (3) white employes had received the benefit of this lenient company policy; and (4) Brown had been discharged for allegedly unexcused absences without prior warning by the company that his allegedly unexcused absences were endangering his job."

As in the Jones case, it is not necessary for the complainant's prima facie case that he establish that he was not "guilty" of the offenses or derelictions alleged. It is sufficient if he estabishes that (1) he is a member of a protected class; (2) he was the subject of an adverse personnel action by the respondent/employer, and (3) facts from which a reasonable inference can be drawn that the adverse personnel action was caused by his membership in the protected class, such as certain kinds of unequal treatment of the complainant as compared to white officers.

In this case, the complainant clearly has established the first two elements. As to the third element, while the complainant failed to carry his burden of proving that the alleged misconduct (i.e., the missed calls and the sleeping on duty) did not occur, he did establish that he was treated more harshly than white officers. This is based both on the record of missed calls and the testimony of a number of witnesses that, based on their experience at the institution, the handling of complainant's case seemed a rather harsh over-reaction. The respondent satisfied its burden of proceeding as set forth in the Burdine case by producing evidence that the complainant had missed call-ins and had been caught sleeping on the job, and that officer R.L. was not more severely disciplined because of a handicap related to exposure to the chemical "Agent Orange" while in military service in Vietnam.

As to the question of pretext, comparing disciplinary actions as to different employes frequently is difficult because employes' records are almost always different in various respects. The missed calls do provide a quantitative measure of one facet of performance. As to a comparison between complainant and G.L., neither employe had been disciplined as of the end of August 1979 when G.L. transferred off the night shift. As to R.L., both he and the complainant were first disciplined in November 1979, when both received written reprimands. Thereafter, the complainant was suspended the next time he missed more than the specified number of call-ins, and discharged for the second and third months he missed more than 4 calls (however, as set forth in the findings, these discharges were in both cases reduced to suspensions). Officer R.L. missed more than the specified number of calls in May 1980, but received no further discipline.

The only reason advanced at the hearing by the institution for failure to have taken further action against officer R.L. was mitigating circumstances in connection with an alleged handicapping condition caused by exposure to Agent Orange. However, officer R.L. testified that although he had been exposed to Agent Orange, the resulting condition had nothing to do with his missed calls, that he never had asserted otherwise, and that as far as he knew this exposure or condition had not been considered by the institution in connection with the missed calls.

Now, it is true that, on this record, there are other differences between complainant and officer R.L., including the fact that although the latter testified that he had slept on duty a number of times, he had never been caught in the act. However, such distinctions were not relied on in the explanation of the actions advanced during the hearing by the respondent, through the security director who had effective authority for discipline. Since the witness was given the opportunity to explain why the different actions were taken and he failed to mention these distinctions, it must be inferred that they had not been relied on. If the respondent did not rely on them at the time that the decisions were made and the discipline imposed, the Commission cannot consider them after the fact.

Based on the entire record, the Commission concludes that the respondent's asserted rationale for its disparate treatment of the complainant was pretextual, and that the complainant has satisfied his burden of proof.

With respect to the question of the transfer, the complainant failed to satisfy his burden of proof. The complainant's application was processed within a "normal" or average time range. Although a union official testified that in his experience, certain unspecified transfers had been expedited, there is not a sufficient basis on this record for a finding that the respon-

dent's failure to handle the complainant's application more expeditiously was discriminatory.

As to the matter of remedy, §111.36(3)(c), stats., provides, where discrimination has been found, for an order of "... such action by the respondent as will effectuate the purpose of this subchapter, with or without back pay." This vests a broad discretion in the Commission to determine an appropriate remedy.

In this case, the complainant attempted and failed to establish that he had been falsely reported on with respect to much of his record of missed calls and sleeping. Although the Commission has determined that the complainant was subjected to disparate treatment by the respondent, the derelictions that were found certainly would support some discipline, and the discharges of complainant were reduced to suspensions in the contract grievance process at the third step.[FN] As a result of the second grievance, the complainant was transferred to another institution and does not now seek reinstatement at DCI/CSH.

The determination of a remedy in a case of this nature does not admit of anything approaching mathematical precision. However, the 5 day suspension imposed February 11, 1980, for missed calls, see Respondent's Exhibit 7, is inconsistent with the handling of officer R.L.'s case, who was not suspended for missed calls the first month he exceeded the limit following his written reprimand. Therefore, this suspension should be rescinded.

There is some question whether the terms of what essentially were settlements should be considered by the Commission. However, there was no objection raised to this evidence at the hearing.

The second disciplinary action taken by respondent was a discharge effective March 11, 1980, for both sleeping and missed calls. This later was reduced in the grievance procedure to, in effect, a 30 day suspension without pay. If the complainant had not previously been suspended, it can be inferred that the discipline imposed on this occasion would have been less severe. Therefore, this action should be reduced to a 15 day suspension.

The third disciplinary action taken by respondent was a discharge effective May 1, 1980. This action also subsequently was reduced to a suspension. It cannot be said that this suspension was unlikely to have occurred had the complainant been treated in a non-discriminatory manner with respect to prior discipline, and will not be modified.

ORDER

It is ordered that the respondent rescind 20 days of the suspensions heretofore imposed on the complainant, and reimburse the complainant for all lost pay and benefits in connection therewith, including night differential and overtime pay based on the average amount of overtime worked by the complainant as reflected in the pay documents included in this record.

Dated: March 19, 1982 STATE PERSONNEL COMMISSION

AJT:jmf

Parties:

Mr. Audley McGhie
208 Taylor Street
Waupun, WI 53963

DONALD R. MURPHY, Chairperson

LAURIE R. McCALLUM, Commissioner

JAMES W. PHILLIPS, Commissioner

Donald Percy, Secretary
DHSS
Rm. 663, 1 W. Wilson Street
Madison, WI 53702