

* * * * *

SHELIA MCKEE, REGINALD REED,
 BRENDA REED, DANA JOHNSON,
 & ELAINE WALKER,
 Complainants,

v.

Secretary, DEPARTMENT OF
 INDUSTRY, LABOR AND HUMAN
 RELATIONS,
 Respondent.

Case Nos. 80-PC-ER-92, 151,
 152, 153 and 154

* * * * *

DECISION
 AND
 ORDER

NATURE OF THE CASE

Complainants allege that they were discriminated against by respondent because of their race, with respect to their layoffs. Complainant McKee also separately alleges the failure to reinstate her to a permanent position with respondent was racially discriminatory. A hearing on the merits of all complaints was conducted by a hearing examiner appointed by the Commission.

FINDINGS OF FACT

1. All of the named complainants, Sheila McKee, Reginald Reed, Brenda Reed, Dana Johnson and Elaine Walker are black individuals who were employed as Limited Term Employees (LTE's) at the Milwaukee North Job Service Office of the Department of Industry, Labor and Human Relations, as of July 31, 1980.
2. On July 31, 1980 all of the complainants, were laid off from their LTE positions with the Milwaukee North Office.
3. Sue Ellen Browne, the manager of the Milwaukee North Office made the final decision designating which employes would be laid off. Ms. Browne is white.
4. It is undisputed that the layoffs were necessary due to cost overruns which had accumulated under the cost model of management employed by respondent; the amount of work produced by the Office was below the level expected to be produced by the number of employes in the office.

5. On the morning of July 31, 1980, Ms. Browne was informed initially that all LTE's were to be laid off; she was informed later in the morning that only some would have to be laid off. All laid-off LTE's were black.

6. LTE's are temporary employes without permanent civil service status, which means, among other things, that they do not accumulate any right to remain in a job based on seniority or length of service.

7. There were no written criteria or procedures issued by respondent for carrying out layoffs of LTE's; Ms. Browne decided on certain criteria to use in making such layoff decisions, since the LTE layoffs occurred from time to time.

8. The criteria considered by Ms. Browne in making LTE layoffs were: quality and quantity of work performed by an employe; reliability; the nature of the job performed and the skills of the employe; employe availability for overtime work; eligibility for unemployment compensation benefits; individual hardship situations.

9. Ms. Browne discussed the layoff decisions with Magdeline Glancy, acting supervisor of the LTE's and with Rhonda Simpson, a black lead worker in the processing department where all of the complainants were assigned.

10. Ms. Glancy and Ms. Simpson did not use all of Ms. Browne's criteria in making their recommendations of which LTE's to lay off. Ms. Glancy considered attendance and tardiness as the major criteria; Ms. Simpson considered seniority and length of time left to work the LTE hours allotted to each employe.

11. Both Ms. Glancy and Ms. Simpson recommended lay off of Reginald Reed, Brenda Reed, Dana Johnson; Reginald Reed and Dana Johnson had been

hired only for three weeks and were not doing essential work. Brenda Reed's allotted 1044 hours as an LTE would have expired within one month in any event.

12. Ms. Simpson also recommended for lay off Sherry Libbis (white) who was just hired; Beck Sailor (white) also recently hired; Sheny Anderson (white) who was a part-time employe; Essie Cotton (black) who was leaving within a few weeks to return to school. These recommendations were based on seniority and number of LTE hours remaining.

13. Ms. Simpson did not recommend lay off of Elaine Walker although she was aware that Ms. Walker had attendance problems. Ms. Simpson testified that attendance was especially important for LTE's. Ms. Walker had just begun her second LTE appointment with the Milwaukee North Office.

14. Prior to the need for layoffs there had been discussions between Ms. Glancy and Ms. Browne about terminating Sheila McKee due to attendance problems, and due to problems with Ms. McKee's cooperation with respect to taking regularly scheduled breaks.

15. Ms. McKee had attendance problems and did create additional problems due to not taking regular breaks, thereby disturbing the work of the processing employes who relieved her and whose jobs were carried out on a regular schedule; she would have been terminated if she had not been laid off.

16. Ms. Walker's attendance problems were more serious than attendance problems of retained white LTE's.

17. The white LTE's who were retained were retained for the following reasons:

Becky Sailor (white)	good attendance
Karen Boser (white)	good attendance & performance
Karen Tanelt (white)	good attendance & performance
Sherry Anderson (white)	versatile job skills
Sherry Libbis (white)	hardship

18. Ms. Libbis was retained against the recommendations of Ms. Glancy and Ms. Simpson because she had gone directly to Ms. Browne and discussed her personal hardship situation--Ms. Libbis was looking for an apartment and feared she would not be able to rent one if she were unemployed.

19. Ms. Brown had made known to all employes that she was willing to try to accomodate to personal problems when they affected job performance.

20. At the time of the July, 1980 layoffs, Ms. McKee had been a close personal friend of Ms. Browne for approximately nine years; Ms. Browne left the recommendation and decision to terminate Ms. McKee to Ms. Glancy, her immediate supervisor, in order to avoid the appearance of favoritism.

21. Ms. Browne had personally recruited Elaine Walker into her first LTE position and, after the July, 1980 layoff, attempted to recruit her for the federal Internal Revenue Service (Ms. Browne's new employer).

22. Ms. Browne also recruited Brenda Reed, Reginald Reed and Dana Johnson for positions with the IRS. None were actually hired, due to either a federal hiring freeze or failure to fully pursue the application processes required for federal employment.

23. Ms. McKee, at the time she was employed as an LTE, had permissive reinstatement rights with DILHR Job Service, and was attempting to find a permanent position. On July 15, 1980, she resigned her LTE position to take a permanent state job (R. Ex. 1). The position did not come through, however, and Ms. McKee was given her LTE position back, until some other decision was made concerning her employment status.

24. Ms. McKee applied for reinstatement to Job Service Specialist positions in Job Service offices other than Milwaukee North Office; Sue Ellen Browne did not make any hiring decisions for those positions.

25. Sue Ellen Browne tried to hold open a permanent seasonal Job Service Specialist 2 position in the Milwaukee North unemployment compensation unit, and encouraged Ms. McKee to contact appropriate individuals concerning the opening; Ms. McKee did not get the job.

26. The layoffs of complainants were not motivated by racial consideration.

27. The failure to reinstate Ms. McKee was not motivated by racial considerations.

OPINION

The burden of persuasion to show that discrimination has occurred is always on the complainant. Texas Dept. of Community Affairs v. Burdine, 101S. Ct. 1089 (1980). The complainant must establish a prima facie case, in response to which the respondent, in order to prevent a finding of discrimination, must come forward with evidence of a legitimate non-discriminatory reason for its actions, the complainant may then still prevail if it is shown that the employer's stated reasons for its actions were pretextual. If the employer's actions are shown to be pretextual, it is then logical to infer that its actions were at least partly based on impermissible, discriminatory motivation(s). McDonnell Douglas v. Green, 411 U.S. 792 (1973)

In this case, complainants' prima facie cases, with respect to the layoffs, should include a showing that a) they were members of a protected group; b) they were as [qualified] as the employees who were retained and c) they were laid off while employees no more qualified than them were retained. See: McDonnell Douglas. The complainants introduced no evidence of the attendance records of the LTE's who were retained, so that the question of comparative attendance must be decided based exclusively on the testimony presented at the hearing. Complainants admitted that they did not actually know what type of attendance the other LTE's had, other than for impressions based on partial information and observation. Ms. Glancy, the acting supervisor, was credible in her assertions that, where attendance records were a factor in the layoff decisions, complainants' records were not as favorable as the records of others. Sherry Libbis' attendance record was questionable, but Sue Ellen Browne's testimony was credible that Ms. Libbis came to her with a personal hardship, to which Ms. Browne responded by retaining her as an LTE. No other LTE's approached Ms. Browne with similar problems. There was no testimony contradicting or casting doubt on respondent's witnesses' assertions that Sherry Anderson was retained because she had a variety of skills which others did not have and which would be helpful in both the processing and the adjudication units. There was no dispute concerning the good attendance records and performances of the three other white women who were retained.

The Commission accepts the layoff criteria given by Ms. Browne as reasonable factors to consider in determining whether the complainants stood on equal footings with the employees who were not laid off. The credible and uncontro-

verted testimony of respondent's witnesses showed that complainants were not as qualified as the employees who were retained, whether because of attendance, nature of jobs performed, length of time since hired, length of time left in the term, or personal hardship. It certainly appears questionable on its face that of a total force of twelve LTE's, five white and seven black, all those laid off were black. However, in view of the testimony presented both as to the individual employees' and as to Ms. Browne's personal involvement with Ms. Walker and Ms. McKee, it is not believable that racially discriminatory motives played any part at all in the layoff decisions. There is nothing in the record to suggest that the respondent's explanation of the layoffs was a pretext. The statistical evidence submitted does not contradict or outweigh the other evidence in the record which supports respondent's explanation of its legitimate, non-discriminatory reasons for laying off the five complainants.

The second issue presented is whether the failure to reinstate Ms. McKee as a Job Service Specialist was discriminatory. Complainant failed to introduce any evidence concerning any individual or individuals who were allegedly responsible for deciding not to interview her for open positions in various Job Service Offices other than the Milwaukee North Office. Different people were responsible for hiring in different offices, and no probative evidence was introduced as to any actions or motivations of named individuals.

The only evidence concerning the actions of Ms. Browne in the Milwaukee North Office show that she encouraged Ms. McKee to pursue reinstatement opportunities and that Ms. Browne did hold a particular permanent position open for a white employee before she held it open for Ms. McKee.

Ms. Browne first held the position for the white employe (who also had permissive reinstatement rights) because she had prior experience in the unemployment compensation area and that Ms. McKee's prior experience was in another area of Job Service. Nevertheless, Ms. Browne did encourage Ms. McKee to pursue other job opportunities. The record suggests that Ms. McKee did not pursue them as advised. Ms. McKee did not make out a prima facie case because she introduced no specific evidence concerning her qualifications or concerning the identify and actions of decision-makers whom she held accountable for the failures to reinstate her.

CONCLUSIONS OF LAW

1. The Personnel Commission has jurisdiction to decide these complaints pursuant to §111.31 - 111.37 and §230.45(1)(b), Wis. Stats.
2. The burden of persuasion is on complainants to show that the layoff of each of them was based partly on impermissible racially discriminatory considerations.
3. The complainants have failed to show individually and collectively that the decision to layoff each of them was in violation of §111.31 - 111.37, Wis. Stats.
4. The burden of persuasion is on complainant McKee to show that the failure to reinstate her as a Job Service Specialist was partially the result of impermissible racial discrimination.
5. Complainant has failed to show that the failure to reinstate her as a Job Service Specialist was in violation of §111.31 - 111.37, Wis. Stats.

ORDER

1. The decision of respondent in laying off the complainants is affirmed and the complaints are dismissed.

2. The complainant alleging racial discrimination in the failure to reinstate Ms. Sheila McKee as Job Service Specialist, is dismissed.

Dated: July 26, 1982 STATE PERSONNEL COMMISSION

AR:jmf

Parties:

Sheila McKee
P. O. Box 16828
Milwaukee, WI 53216

Reginald Reed
3528 N. 25th St.
Milwaukee, WI 53206

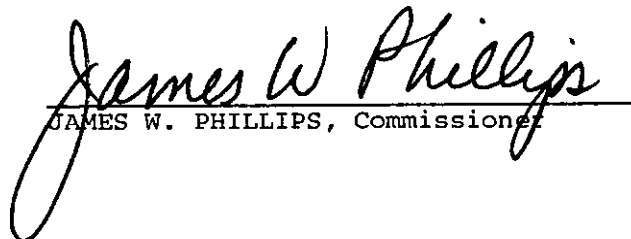
Brenda K. Reed
2419 W. Finn
Milwaukee, WI 53206

Dana T. Johnson
4255 N. 19th Street
Milwaukee, WI 53209

Elaine Walker
954 N. 37th Street
Milwaukee, WI 53208


DONALD R. MURPHY, Chairperson


LAURIE R. McCALLUM, Commissioner


JAMES W. PHILLIPS, Commissioner

Lowell Jackson, Secretary
DILHR
Rm. B120, 4802 Sheboygan Avenue
Madison, WI 53702