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 *
 KATHLEEN LINDAS, *
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 Complainant, *
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 v. *
 *
 Secretary, DEPARTMENT OF *
 HEALTH & SOCIAL SERVICES, *
 *
 Respondent. *
 *
 Case No. 80-PC-ER-96 *
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ORDER

This matter is before the Commission following the issuance of a proposed decision by the hearing examiner. The Commission heard oral arguments by the parties on December 19, 1984, and as its final disposition of this matter enters the following

ORDER

The proposed decision, a copy of which is attached hereto, is adopted as the Commission's final disposition of this matter, with the following changes:

1. Conclusion of Law #4 is deleted and the following is substituted in its place in order to more accurately reflect the issue for hearing:

The Complainant has the burden of showing that there is probable cause to believe respondent discriminated against her because of her sex with respect to her resignation.

2. In Conclusion of Law #4, the words "were for" are deleted and changed to read "was."

3. Conclusion of Law #5 is deleted and the following is substituted in its place:

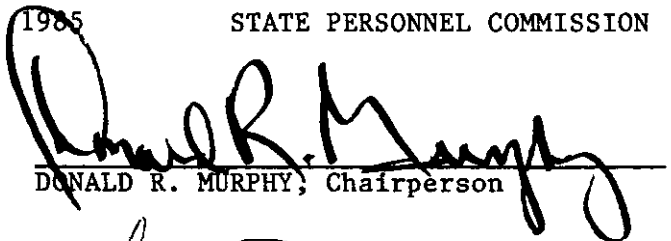
Complainant failed to produce sufficient evidence to show probable cause to believe respondent discriminated against her because of her sex with respect to her resignation.

4. So much of the opinion as discusses the legal aspects of the question of whether there is probable cause to believe that the complainant was sexually harassed, as set forth in §111.36(1)(b), Stats., is deleted, since this was not an issue in the case. Factual material concerning an alleged sexist work environment will remain because of its relevance to the noticed issue of whether there is probable cause to believe the respondent discriminated against the complainant on the basis of sex with respect to her resignation.

Dated: _____, 1985

Jan 3

STATE PERSONNEL COMMISSION


DONALD R. MURPHY, Chairperson


LAURIE R. McCALLUM, Commissioner


DENNIS P. MCGILLIGAN, Commissioner

AJT:ers

Parties

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Linda Reivitz
Secretary, DHSS
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PROPOSED
 DECISION
 AND
 ORDER

This matter is an appeal of a "no probable cause" finding in the initial determination pursuant to sections 111.31-111.37 and 230.45, Wis. Stats. A hearing was held on the question whether there was probable cause to believe that respondent discriminated against complainant on the basis of her sex with respect to her resignation. The parties filed post-hearing briefs. The following are the findings based upon the evidence adduced.

FINDINGS OF FACT

1. On August 15, 1979, complainant was appointed, with a probationary period of one year, to the position of Superintendent of Education, Bureau of Program Resources, Division of Corrections, Department of Health and Social Services.

2. Complainant's immediate supervisor was Robert Hable, Assistant Director of the Bureau of Program Resources, who reported to Mr. Thomas Bassett, Director of the Bureau of Program Resources. Mr. Bassett reported directly to Mr. Elmer Cady, the Division of Corrections Administrator, who

in turn reported to Mr. Donald E. Percy, administrative head of the respondent agency.

3. Prior to complainant's appointment, the position of Superintendent of Education had been filled by a Mr. Alan Harbot and afterwards on an "acting" basis, by Ms. Carol Mueller.

4. Complainant was appointed, after certification, as the result of an open civil service competitive examination and interview. Other certified applicants interviewed for the position included a number of males, who were Division of Corrections educational directors.

5. Complainant was interviewed by Mr. Hable and he recommended her appointment. She was appointed to the highest administrative position in the Bureau of Program Resource ever held by a woman.

6. As Superintendent of Education for the Division of Corrections, complainant was responsible for the development, maintenance, and modification of curriculum within the division's educational programs. She was also responsible for collaborating with institution education directors and Program Resources Bureau education directors and hiring program resources staff. Complainant had no supervisory authority over institution education directors, although it had been recommended by Mr. Hable prior to her appointment. Complainant also supervised a small professional staff.

7. When complainant began work she was taken by Mr. Hable on visits of various institutions and introduced to the education directors. She also was introduced to several staff members of the Division of Corrections' offices in Madison. Complainant's orientation and training was not significantly different from that provided other upper level administrative employes in Program Resources.

8. In December 1979, Mr. Hable began meeting with complainant to discuss her negative relationship with her staff. These meetings were precipitated by complaints about complainant from her staff to Mr. Hable.

9. On January 28, 1980 and February 5, 1980, Mr. Hable sent complainant a memorandum stating that he was concerned about complainant's inability to effectively function with her staff, the education directors and other agencies.

10. Also in late January or early February 1980, Mr. Hable and Mr. Bassett spent several hours with complainant evaluating her work progress.

11. The method used to evaluate complainant's job performance was not different from evaluations provided other upper level administrative employees.

12. Complainant met with resistance from education directors from the beginning of her employment. Many of the directors had competed for the superintendent position obtained by complainant. Others resented her because she was an outsider.

13. Mr. Hable was aware of the initial resentment directed toward complainant. He encountered similar treatment when he first came to the agency.

14. In October, 1979, complainant was requested, by some female members of her staff, to discuss their concerns about the issue of profanity and remarks denigrating females with her supervisors. In response to the request, complainant complied with the request of the female staff, and Mr. Hable indicated he would address the matter.

15. At no time during the course of her employment with respondent did complainant inform Mr. Hable that a pervasive sexist atmosphere existed in the unit which affected her job performance.

16. By May 9, 1980, Mr. Hable determined that complainant had not made significant improvements in her job performance. He advised her that he no longer supported her retention as supervisor and recommended that she resign or be terminated.

17. Between May 9 and June 6, 1980, complainant presented respondents several methods of ending her employment as supervisor, including voluntary demotion. Each option was denied. On June 6, 1980, complainant submitted her resignation, effective July 4, 1980 to Mr. Cady. An acceptance letter dated June 10, 1980 was sent to complainant.

18. On July 6, 1980 complainant filed an appeal with the Commission of a "constructive discharge" pursuant to §230.44(d)(c), Stats.

19. On August 19, 1980, complainant filed a sex discrimination complaint against respondent with the Commission, which is the subject of this decision.

20. Subsequently, in Kathleen Lindas v. Department of Health and Social Services, Case No. 80-231-PC, October 2, 1981, the Commission held that complainant had not been the subject of a "constructive discharge" but had resigned. The appeal was dismissed for lack of subject matter jurisdiction.

21. Accordingly, the issue in the instant case was amended to consider the probable cause question of sex discrimination within the context of complainant's resignation.

CONCLUSIONS OF LAW

1. The Commission has authority to hear this matter pursuant to §230.45(1)(b), Wis. Stats.

2. The complainant has the burden of showing that there is probable cause to believe respondent discriminated against her because of her sex which resulted in her poor work performance and resignation.

3. The complainant has failed to sustain her burden of proof.

4. The basis for Mr. Hable's opinion of complainant's job performance, were for job related and did not involve gender considerations.

5. Complainant failed to present sufficient evidence to show probable cause to believe respondent created a sexually abusive working environment, knew of the sexual harassments and failed to take prompt remedial action.

OPINION

This matter is the second of two actions brought before the Commission by Dr. Kathleen Lindas^{FN}, the complainant, which developed from the same events. In the first appeal Lindas v. DHSS, Wis. Pers. Comm. Case No. 80-231-PC (10/2/81), Ms. Lindas alleged that she was "constructively discharged" by respondent and brought an action pursuant to §230.44(1)(c) Wis. Stats. In that case, the Commission held that Ms. Lindas had not been constructively discharged, but had resigned. The case was dismissed for lack of subject matter jurisdiction. In the instant case, Ms. Lindas alleges that she resigned her position with respondent as a consequence of being discriminated against because of her sex, in violation of the Wisconsin Fair Employment Act, Ch. 111, Subch. II, Wis. Stats.

The question before the Commission in this matter is as follows:

Is there probable cause to believe that the respondent discriminated against the complainant on the basis of sex with respect to her resignation.

^{FN} Appellant has Ph.D in Curriculum and Instruction.

The definition of probable cause as stated in P.C. 4.03(2), Wis. Adm. Code is as follows:

Probable cause exists when there is reasonable ground for belief supported by facts or circumstances strong enough in themselves to warrant a reasonable person in the belief that discrimination probably has been or is being committed.

While Mc-Donnell-Douglas^{FN} provides the method for analyzing discrimination cases, in this instance it is employed within the context of the articulated definition of probable cause and as modified by the facts of this case.

Ms. Lindas testified in detail about her employment with respondent, covering the period from her hire to her resignation. She did not dispute the charges of Mr. Hable, her supervisor, that she was unable to work effectively with the education directors and her immediate staff. Her explanation for the problems with the directors was that she had taken certain actions, at Mr. Hable's instruction or approval, which later caused tension, but Mr. Hable failed to assume the responsibility. She testified that as head of the regular education directors meeting, she, at Mr. Hable's direction, sent minutes to the directors and the corresponding union representatives. The directors were offended by this action. On one occasion, Ms. Lindas, with Mr. Hable's approval, requested certain documents describing the education programs at each institution. Again this caused indignation among the directors. With respect to her immediate staff, Ms. Lindas testified that Mr. Hable weakened her authority by permitting her staff to report directly to him. Mr. Hable testified, to the contrary, that the education director was upset because Ms. Lindas took

^{FN} McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1871 (1973).

certain actions without first allowing them to review or approve certain documents. Mr. Hable also testified that Ms. Lindas' staff never reported to him directly except when they complained to him about Ms. Lindas' supervision.

The evidence presented by Ms. Lindas did not contravene respondent's reasons for giving her the option of resigning or being terminated. Her claim is that she should not be held accountable for her failure to perform her duties effectively; that she failed because she was discriminated against by Mr. Hable. Whether or not Ms. Lindas was at fault for her poor job performance is material only within the context of the question of discrimination. Based upon the evidence presented, Ms. Lindas was treated the same as other bureau administrators.

Ms. Lindas' predecessor, a woman, also supervised by Mr. Hable, had performed the job, albeit in an acting capacity, for nine months, effectuating good rapport with the education directors. It would appear that Ms. Lindas' problems with her staff, some of whom were female, and the education directors were the outgrowth of events and circumstances not at issue in this case.

Ms. Lindas also testified that sexual slurs were made in the workplace, she observed magazines offensive to women on office desks and, on one occasion, an item of female under clothing was draped over an office partition. It is her belief that there was pervasive sexism in the division.

Complainant's position was also supported by the deposition of Dr. Judith Long,^{FN} Associate Professor of Sociology, Syracuse University.

^{FN} Ph.D in Social Psychology.

Prior to being deposed, Dr. Long was provided copies of the Initial Determination of the Commission's investigation, Mr. Hable's deposition and complainant's exhibits A through G, which she had reviewed. Dr. Long testified that studies in law and sex discrimination are focusing on institutional arrangements which have characteristics which cause inequality without anyone intentionally attempting to discriminate. Dr. Long believed that complainant faced the dynamics of being the first and only woman at her position level and prejudices, which are directed toward women in positions of authority. She said anyone placed in this type of job situation would suffer from self-consciousness and experience extraordinary performance pressure.

Gender discrimination can take many forms. In the present case, complainant's claim is that her supervisor and constituents created a work environment which was offensive and degrading to her as a female.

In cases of this kind, complainant must establish that she belonged to a protected group, the offensive behavior was based upon sex, the particular behavior must be sufficiently pervasive as to alter the conditions of employment and create an abusive working environment and the employer knew or should have known of the sexually abusive environment and failed to take remedial action. Henderson v. City of Dundee, 682 F. 2d. 897, 29 FEP 787 (11th Cir. 1982).

The evidence presented in this case confirms that Ms. Lindas was a member of a protected group under the Wisconsin Fair Employment Act. However, it is doubtful that she proved that she worked in a sexually abusive environment.

It is doubtful whether Ms. Lindas' testimony about sexual slurs and materials offensive to women would demonstrate a work environment sufficiently severe and persistent as to effect her psychological well being.

The U.S. Court of Appeals, 5th Cir., has held in Rogers v. EEOC 454 F.2d 234 (1971) that mere utterances of an ethnic or racial epithet which engenders offensive feelings in an employee is not sufficient to violate Title VII. While the instant matter does not involve Title VII, the principle set forth in Rogers is applicable and may be applied to isolated events, which are offensive to a particular employee.

If Ms. Lindas proved that she was subjected to a sexually abusive work environment intent can be inferred against respondent, Rogers v. EEOC, supra. However, on the basis of the evidence, Ms. Lindas clearly failed to show that respondent had actual or constructive notice of the existence of a sexually abusive work environment. Ms. Lindas made no specific complaints to her superiors that she found the work place sexually hostile. Ms. Lindas argues that respondent should have known of the work conditions and her argument with the deposition of Dr. Long.

The deposition of Dr. Long in summary was an exposition on institutional sexism and sex stereotyping based upon her study of the subject. Dr. Long referenced complainant's work conditions in very general terms but was reluctant to make specific connections. She testified that people are unaware of the enormous impact gender and related expectations have on our daily behavior and that most people are unaware of the various forms by sex discrimination in our society. Under such circumstances which may describe this case, a finding of constructive knowledge can not be reached.

In the opinion of the Commission, the facts in this case do not uphold the allegation of probable cause of sexual discrimination and the appeal should be dismissed.

ORDER

Based upon the findings of fact, conclusions of law and opinions set out above, this complaint is dismissed.

Dated: _____, 1984 STATE PERSONNEL COMMISSION

DONALD R. MURPHY, Chairperson

LAURIE R. McCALLUM, Commissioner

DRM:jab
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DENNIS P. McGILLIGAN, Commissioner

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