STATE OF WISCONSIN PERSONNEL COMMISSION

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

STANLEY P. LABER,

Complainant,

v.

Chancellor, UNIVERSITY OF WISCONSIN - MILWAUKEE,

Respondent.

Case No. 81-PC-ER-143

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

ORDER

This matter is before the Commission on consideration of a proposed decision and order, a copy of which is attached hereto. The examiners who participated in the hearing of this matter have consulted with each other and with the Commission. The Commission has considered the objections and arguments of the parties. The Commission adopts as its final disposition of this matter the attached proposed decision and order, which is incorporated by reference, with the following changes:

1. Finding of Fact 21, line 6, should read, "... e.g., Mr. Lallie." The citation of Mr. Stalski's name instead of Mr. Lallie's was a transcription error.

2. Finding of Fact 22 is amended to read as follows:

22. Complainant testified that:

"And then they--then the university additionally takes on a motive for a legitimate act on my part. That motive could only come from within themselves, not from my actions, and that motive, that unarticulated reason for taking the action that they did, was because of my religion. It's not my

feeling that the individuals in the shop that made the statements abut my religion are anti-Semitic, hate Jews. I don't think that's the case. Except for Mr. Williams, most of the individuals, particularly Mr. Johnson, are liberally--liberal minded people, and they could care less about somebody else's religion. But if that religion manifests itself in differences on the job that are observable, then indeed it does become an issue, and I think the record here today has shown, and I have so testified, that these religiously motivated habits, dress and behavior, did occur, that employees did question them, did have concern about them, and that they were the source of ridicule.

Now I don't feel that it's my responsibility to inform the University beforehand of every religious habit that I have that might be misconstrued on their behalf. I'm not that familiar with equal rights, discrimination law, but I felt it was a fairly wise decision, except for the religious matter related to my days of absence, but in regard to my dress or anything else, I did not offer to--offer any explanations for my behavior, unless I was directly confronted with it, and I was never confronted with anything."

Complainant also felt that Mr. Johnson and Mr. Shepard did not make the decision to terminate him but that this termination decision was made by others at the University of Wisconsin - Milwaukee who were familiar with other discrimination complaints he had filed. Although complainant had filed discrimination complaints arising from his previous employment with

respondent, neither Mr. Johnson nor Mr. Shepard was aware of these complaints at the time the decision to terminate complainant was made.

The additional language was included to present complainant's testimony regarding the religious tolerance of his co-employees in its proper context.

3. The final full paragraph on page 16 is amended to read:

> Complainant has failed to prove that the reasons offered by respondent for his termination were a pretext for discrimination.

The final sentence in the paragraph was excised due to the fact that it appeared to imply that complainant acknowledged that he was not the victim of religious discrimination. A more reasonable implication from his testimony is that complainant felt that, regardless of his co-employees' motivations for their actions, their ridicule of him arose as a result of his religious beliefs and practices and affected his work environment.

4. Line 4 of the Order is amended as follows:

> "ordered to provide training for those employees who supervised complainant or who worked in the same unit as complainant...."

Dated: November 28, 1984 STATE PERSONNEL COMMISSION

Laurie R. McCallum
LAURIE R. McCALLUM, Commissioner

LRM:jmf
JPD04/1

Dennis P. McGilligan
DENNIS P. McGILLIGAN, Commissioner

Parties:

Mr. Stanley P. Laber
2938 N. Summit Avenue
Milwaukee, WI 53211

Mr. Robert O'Neil
President, UW System
1700 Van Hise Hall
1220 Linden Drive
Madison, WI 53706

STATE OF WISCONSIN PERSONNEL COMMISSION

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

STANLEY LABER,

Complainant,

v.

President, UNIVERSITY OF WISCONSIN SYSTEM (Milwaukee),

Respondent.

Case No. 81-PC-ER-143

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

PROPOSED
DECISION
AND
ORDER

NATURE OF THE CASE

This matter was originally filed on October 2, 1979, as an appeal, pursuant to §230.45(1)(f), Stats., of the termination of probationary employment. Citing the decision of the Wisconsin Court of Appeals in Board of Regents v. Wisconsin Personnel Commission, 103 Wis. 2d 545, 309 N.W. 2d 366 (1981), the Commission dismissed this appeal on August 17, 1983, for lack of subject matter jurisdiction. On March 12, 1981, complainant had filed a complaint of discrimination alleging discrimination on the basis of religion, handicap, and retaliation in regard to promotion, conditions of employment, and discharge. By Interim Decision and Order dated August 6, 1981, the Commission ruled that the charge of religious discrimination filed on March 21, 1981, was in effect a perfection of the charge of religious discrimination contained in the appeal filed on October 2, 1979, and was thus timely filed. The charge of handicap discrimination was found to be untimely filed and was dismissed. In an Initial Determination issued on July 28, 1983, one of the Commission's equal rights officers found probable cause to believe that complainant was discriminated against

because of his religion in regard to conditions of employment and discharge and found no probable cause to believe complainant was retaliated against in regard to conditions of employment or discharge or was denied a promotion because of religious discrimination or retaliation. The complainant did not appeal the determinations of no probable cause. A hearing was conducted and post-hearing briefs filed. It was stipulated by the parties that the record in the appeal would become a part of the record in the equal rights complaint.

FINDINGS OF FACT

1. Complainant is Jewish. In the practice of his religious beliefs, complainant has an untrimmed beard, wears a skull cap and fringes, only eats certain foods, does not practice birth control, does not work on certain Jewish holidays, and conducts certain religious rituals each day.

2. Complainant was hired by respondent as a Facilities Repair Worker 3 on March 12, 1979. The position filled by complainant was responsible for the installation and repair of tile, terrazzo, concrete and masonry projects; installation and repair of parking meters; repair and replacement of hardware items; fabrication and installation of all campus signs; and repair and maintenance of heating and ventilating equipment. Complainant's position was not a trainee position, i.e., the position incumbent was expected to perform the duties of the position with little or no training. Complainant was required to serve a six-month probationary period. Complainant's hours were 7:00 a.m. - 3:30 p.m. Monday through Friday.

3. Complainant's supervisor was Clifford Johnson, the Maintenance Supervisor of respondent's Maintenance Shop. Mr. Johnson participated in the decision to hire complainant and was aware of complainant's religious beliefs at the time the hiring decision was made.

4. Mr. Johnson went on vacation sometime during the month of April, 1979. After complainant had been on the job for about two weeks, he asked Mr. Johnson how he was doing and Mr. Johnson said he had heard the complainant was a willing worker. This was the only evaluation of complainant's performance completed by Mr. Johnson prior to his leaving on vacation. Mr. Johnson left Art Williams, one of complainant's co-workers, in charge during his vacation. While Mr. Johnson was on vacation, Mr. Williams reported to James Shepard, Mr. Johnson's supervisor, that he felt the complainant had only a limited ability to work with tools.

5. During complainant's probationary period, Mr. Johnson received reports from complainant's co-workers regarding complainant's performance. These included:

a. Robert Lallie reported that he had observed complainant lying down in the back of a truck at a time other than break time or lunch time. Mr. Johnson subsequently confirmed this report with Richard Salske, who had been present at the time this "lying down" incident had occurred.

b. Mr. Lallie reported that complainant had not properly removed mortar which had dropped onto a floor in the process of building the second of two block walls. Complainant had properly removed the mortar which had dropped when the first wall was built. Removal of mortar dropped when the second wall was built was made more difficult by the fact that there was hardened concrete from a previous job on the floor.

c. Reports by several of complainant's co-workers that he lacked maintenance experience.

d. Henry Weden reported that the finish coat of plaster complainant applied in the Sanberg parking area was poorly done.

Mr. Johnson did not personally observe the "lying down" incident, did not personally inspect the floor from which the mortar had not been removed, and did not personally inspect the finish coat of plaster applied in the Sanberg parking area.

6. On July 13, 1979, Mr. Johnson did personally inspect signs which complainant had hung in the Mitchell Building and observed that they had been cracked in the process of hanging them and that the screws used to hang them protruded one-quarter inch to three-eighths inch. Mr. Johnson brought these signs to complainant's attention on July 16, 1979, and told complainant that screws should be tightened down.

7. At the time he was hired as a Facilities Repair Worker 3, complainant had a sick leave balance of 688 hours. Between March 22, 1979, and July 2, 1979, complainant used 56.3 hours of sick leave and 25 hours of leave without pay (LWOP). These absences included four hours of LWOP for taking civil service exams, 20 hours of LWOP for the observance of Jewish religious holidays, and 4.5 hours of sick leave for the observance of Jewish religious holidays. Complainant had received prior approval from Mr. Johnson for these absences for religious purposes.

8. On July 2, 1979, Mr. Johnson wrote a letter to complainant which stated:

> You have now completed your third month of probation, as such, I feel compelled to inform you that your working knowledge and experience in the maintenance field is insufficient for you to pass probation.
>
> As you know, a Facility Repair Worker 3 is not a trainee position where your working partner should explain each step of a routine job.
>
> With observing you while working, speaking to some of the people you have been working with, and with our discussion to this date, I have reached the conclusion that your performance and absenteeism will need to be improved. In line with that, I will closely endeavor to monitor your performance and evaluate the same on a bi-weekly basis during the next two months.

Complainant received this letter on or before July 5, 1979.

9. On or around July 9, 1979, complainant requested a meeting with Mr. Johnson and Mr. Shepard to discuss his dissatisfaction with his

July 2, 1979, performance evaluation. Complainant was advised that he would have to demonstrate to Mr. Johnson that he could satisfactorily perform the work assigned to him and that he should improve his work habits. Complainant's absenteeism was not specifically discussed. Complainant indicated that he felt he was being discriminated against on the basis of his religion but he was not specific as to the form such discrimination had taken. Mr. Shepard's investigation consisted of asking Mr. Johnson if he had any knowledge of this. When Mr. Johnson indicated he did not, Mr. Shepard did not pursue the matter further. During complainant's period of probation, complainant requested a meeting with William Rowe, Operations Manager at the University of Wisconsin - Milwaukee and Mr. Johnson's supervisor. At this meeting, complainant indicated that he felt he was being discriminated against because of his religion by those he worked with, Art Williams in particular. Mr. Rowe subsequently spoke to Mr. Williams and another of complainant's co-workers and Mr. Johnson. Mr. Williams and the other co-worker told Mr. Rowe that complainant was a little strange, didn't fit in well with his co-workers, and couldn't do the work his position required. The only comment related to religion was made by Art Williams who couldn't understand why complainant didn't believe in Jesus. Mr. Rowe did not report this comment to Mr. Johnson and didn't pursue the investigation further.

10. During complainant's period of probation, Mr. Johnson completed two evaluations of complainant's performance on one of respondent's Monthly Summary of Probationary Employee's Progress forms. The first evaluation was dated July 2, 1979, and was not signed by complainant. In response to the second evaluation, which was dated July 16, 1979, complainant indicated in writing on July 18, 1979, on the back of the form, that the evaluation had been discussed with him and that he disagreed with the ratings and the

events reported. Under the Comments section of the form, Mr. Johnson had summarized the "lying down" incident, the failure to properly remove the dropped mortar, and the cracking of and failure to tighten the screws of the signs hung in the Mitchell Building. These evaluations also indicated that, as of July 2, 1979, complainant had taken 25 hours of LWOP and 56.25 hours of sick leave and, from July 3, 1979 through July 16, 1979, complainant had taken 16 hours of sick leave. On both evaluations, complainant's quality of work and ability with equipment were rated poor; his quantity of work, dependability, initiative, work habits, and compatibility were rated as average; and his rate of learning was rated as good.

11. On July 16 and 17, 1979, complainant took a total of 16 hours of sick leave to look for other employment.

12. On or around Sunday, July 22, 1979, complainant suffered a non-work-related injury to his back. Complainant was examined by a physician at the Columbia Hospital Emergency Room soon after the injury. Complainant was advised that he had a back or muscle sprain, that it would take time to heal, and that he should "take it easy." Complainant subsequently contacted Dr. Gary Guten, an orthopedic specialist, but could not get an appointment with Dr. Guten until August 21, 1979. Complainant did not consult another physician because he had dealt with Dr. Guten previously and trusted him.

13. On the morning of July 23, 1979, complainant called Mr. Johnson to advise him that he would not be able to work because of his back injury.

14. On July 24, 1979, complainant began employment with the Jewish Vocational Service (JVS) supervising clients who were being socially rehabilitated or getting work experience in light manufacturing. Complainant was on layoff status from JVS during his employment with respondent as a Facilities Repair Worker 3. Complainant's hours at JVS were 7:30 a.m. -

3:00 p.m. Monday through Friday although for the first few weeks after his injury he left JVS at 1:00 or 2:00 p.m. each day.

15. In a letter to Mr. Johnson dated July 30, 1979, complainant stated the following:

> This is to inform you that I will not be able to work indefinitely because of a back injury (not related to work).
> If and when I will be able to work, I will notify you. If you need any documentation to support my sick pay benefits, please let me know.
>
> I regret the inconvenience for your shop, as I know it is already understaffed. I must however, protect my health.

In response to this letter, Mr. Johnson wrote a letter to complainant dated August 3, 1979, requesting a medical excuse. Complainant subsequently submitted to respondent an excuse from Dr. Guten. When Mr. Shepard contacted Dr. Guten on August 15, 1979, to confirm the complainant had been advised that he could perform light duty work and to question how such a diagnosis could have been made without examining complainant, Dr. Guten refused to give any additional information.

16. After August 3, 1979, Mr. Johnson attempted to contact complainant at home to inquire as to the progress of his recovery from the back injury but he was unable to reach complainant at home. Mr. Johnson was advised by an individual who answered the phone at complainant's home that complainant could be reached at JVS. On or around August 15, 1979, Mr. Johnson called complainant at JVS and complainant told Mr. Johnson that he was working at JVS because his doctor had said he could perform light duty work. Complainant never inquired as to whether light duty work would be available for him at the University of Wisconsin - Milwaukee. Complainant used 200 hours of sick leave between July 23 and August 24, 1979.

17. After Dr. Guten examined complainant on August 21, 1979, he notified respondent that "work - OK on September 17, 1979." The last day of complainant's period of probation was scheduled to be September 12, 1979.

18. On August 24, 1979, Mr. Johnson and Mr. Shepard went to see complainant at JVS. Complainant refused to talk to them because he felt they were harassing him.

19. In a letter to complainant dated August 27, 1979, Mr. Johnson stated:

> As per our conversation with you on August 24, 1979 at the JVS Warehouse, we are terminating your employment with the University.
>
> We have evaluated you during your probationary period and find both your performance and attendance to be poor.
>
> For these reasons we cannot extend your probation.

In addition to the stated reasons, Mr. Johnson felt that complainant's employment at JVS while on sick leave from the University of Wisconsin - Milwaukee showed that complainant was not really interested in his position with respondent.

20. Although he consulted others, Mr. Johnson made the decision to terminate complainant.

21. During complainant's period of probation, complainant's co-workers made derogatory comments about his beard, skull cap, fringes, the foods he ate, the number of children he had, and his use of break time to conduct religious rituals. Complainant was also questioned by his co-workers about his religious beliefs and derogatory comments were made to complainant about his religious beliefs and about Jews in general, e.g., Mr. Stalski made a comment to complainant about "Jewing someone down." These derogatory comments were numerous, they were continuous over complainant's period of employment as a Facilities Repair Worker, they were frequently directed at complainant, and they were sufficiently derogatory that they could not have been considered trivial or casual. Most of these comments were made and questions asked by Art Williams. Art Williams also made derogatory comments

about Mr. Lallie's beard and Mr. Weden's goatee. Mr. Johnson heard some of the derogatory comments directed at complainant but did not make such comments himself.

22. Complainant felt that, "Except for Mr. Williams, most of the individuals, particularly Mr. Johnson, are liberal-minded people, and they could,care less about somebody else's religion." Complainant also felt that Mr. Johnson and Mr. Shepard did not make the decision to terminate him but that this termination decision was made by others at the University of Wisconsin - Milwaukee who were familiar with other discrimination complaints he had filed. Although complainant had filed discrimination complaints arising from his previous employment with respondent, neither Mr. Johnson nor Mr. Shepard was aware of these complaints at the time the decision to terminate complainant was made.

23. During complainant's period of probation (3/12/79 through 8/24/79), he used 280.3 hours of sick leave and 25 hours of leave without pay. During the first 14 weeks of Robert Lallie's period of probation (4/26/77 through 7/30/77), he used 16 hours of sick leave and 81 hours of leave without pay. It appears from Mr. Lallie's leave records that he was suspended for five weeks (8/2/77 through 9/3/77). It then appears that Mr. Lallie served an additional 11 weeks as a probationary employee (9/6/77 through 11/19/77) and used 24 hours of sick leave and eight hours of leave without pay during this 11-week period. During the final seven weeks of this period, Clifford Johnson served as Mr. Lallie's supervisor. Mr. Lallie used 24 hours of sick leave during this period. Mr. Lallie passed probation. Mr. Johnson supervised Ed Ames during his probationary period in 1981. Mr. Ames used 42 hours of sick leave during that 28-week period and passed probation. Mr. Johnson supervised Steve Palmer during his

probationary period in 1980. Mr. Palmer used 76 hours of sick leave, 68.5 hours of vacation, and 16 hours of personal holiday during that 24-week period. Mr. Palmer passed probation.

24. The decision to terminate complainant was based on his unsatisfactory job performance, his absenteeism, and the fact that his acceptance of full-time employment with JVS demonstrated an apparent lack of interest in continuing in his position at the University of Wisconsin - Milwaukee. The decision to terminate complainant was not based on his religion.

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, with respect to his discharge and his conditions of employment, the respondent discriminated against him on the basis of his religion.

4. The complainant has not sustained his burden of proof that he was discriminated against on the basis of his religion with respect to his discharge.

5. The complainant has sustained his burden of proof that he was discriminated against on the basis of his religion with respect to his conditions of employment.

OPINION

Discharge

In McDonnell-Douglas v. Green, 411 U.S. 792 (1973) and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981), the United States Supreme Court developed a framework for analyzing complaints of employment discrimination.

In discharge cases, such as the instant case, the analysis requires that complainant establish the existence of a prima facie case of discrimination, i.e., there must be evidence that complainant is a member of a class protected by the Fair Employment Act; that complainant was qualified for the job and performed the job satisfactorily; and that, despite satisfactory performance, the complainant was discharged under circumstances which give rise to an inference of discrimination. The employer may rebut the prima facie case by articulating legitimate, non-discriminatory reasons for its actions. Finally, the complainant may then offer evidence that the employer's stated reasons are a pretext for discrimination. At all steps in this process, the complainant has the burden to prove, by a preponderance of the evidence, the requisite facts.

In this case, the evidence shows that complainant is Jewish, and, therefore, protected by the provisions of the Fair Employment Act. Since complainant was hired as a Facilities Repair Worker 3 after competing for the position, it is undisputed that he was qualified for the job at the time the decision to hire him was made.

The issue of whether complainant was satisfactorily performing his duties is one of the key factual issues in this case. The record indicates that complainant was observed lying down in the back of a truck at a time other than break time or lunch time, that he failed to properly remove

mortar which had dropped onto a floor, that he failed to satisfactorily apply a finish coat of plaster in a parking area, and that he hung certain signs in such a way that the signs cracked and the screws were not properly tightened. Complainant's performance, as it relates to the mortar, plaster, and sign incidents, could not be regarded as satisfactory performance for an employee classified as a Facilities Repair Worker 3, i.e., this was not a trainee position - the person employed in such a position was expected to have the skills necessary to perform these duties. Complainant's performance, as it relates to the "lying down" incident, could not be regarded as satisfactory performance for any employee. Respondent indicated to complainant its dissatisfaction with his performance at least as early as July 5, 1979, when complainant was advised in writing that his "working knowledge and experience in the maintenance field is insufficient for you to pass probation. As you know, a Facilities Repair Worker 3 is not a trainee position where your working partner should explain each step of a routine job." Respondent's dissatisfaction with certain aspects of complainant's performance is further confirmed by the Probationary Employee's Progress form completed by Mr. Johnson. This form indicates that complainant's quality of work and ability with equipment were regarded as poor. This form also summarizes the "lying down," mortar, and signs incidents.

Complainant's performance was unsatisfactory in another regard. During the 24 weeks of complainant's probationary period, he used 280.3 hours of sick leave and 25 hours of leave without pay. At least as early as July 5, 1979, complainant was on notice that "his absenteeism will need to be improved." Despite this warning, complainant used an additional 24 hours of sick leave on July 8, 16, and 17, 1979, 16 hours of which he used to seek other employment.

If complainant's performance had been satisfactory and he had established a prima facie case of employment discrimination, respondent could have rebutted this prima facie case by articulating legitimate, non-discriminatory reasons for complainant's discharge. The reasons articulated by respondent in its termination letter to complainant of August 27, 1979, were that complainant's performance and attendance were poor. An employee's job performance and rate of absenteeism are clearly legitimate and non-discriminatory reasons for terminating an employee.

The final step in the McDonnell-Douglas analysis calls for the complainant to offer evidence that the employer's stated reasons are a pretext for discrimination.

Complainant argues that respondent's failure to accept the justifications he offered for the cited incidents of poor performance are proof of pretext. Complainant states that he did not remove the mortar dropped onto the floor when the second wall was built because there was hardened concrete on the floor which made removal difficult. There is very little evidence in the record from which to draw a conclusion as to whether this was adequate justification for complainant's actions or not, although both complainant's co-workers and supervisor regarded his performance in this regard as inadequate. Lack of notice as to the proper procedure is not an issue since complainant removed the mortar which had dropped onto the floor when the first wall was built. Complainant also alleges that the signs that Mr. Johnson observed to be cracked after complainant had hung them were cracked prior to being handled by complainant. Complainant offered no evidence to substantiate this allegation. The justifications for his poor performance and the evidence presented by complainant to support such justifications are insufficient to show pretext.

Complainant also contends that he was treated differently than other probationary employees whose performance had been unsatisfactory and that his performance, e.g., in hanging the signs, was similar to that of other employees. However, complainant introduced no evidence to support this contention. Complainant did not make a specific request for the performance evaluations of certain of respondent's employees until after the record in this matter had been closed and respondent declined to voluntarily supplement the record by making such evaluations available to complainant.

Complainant argues that his absenteeism was not excessive because many of his absences were excused. It is uncontroverted that 24.5 hours of leave were used by complainant for the purpose of observing Jewish holidays and that respondent had given prior approval for these absences. However, between March 12, 1979, the date of complainant's hire, and July 5, 1979, the date complainant was advised that his record of absenteeism would have to be improved if he were to pass probation, complainant had used 56.8 hours of leave not related to religious observances. Even after the July 5 warning, complainant used 24 hours of sick leave on July 8, 16, and 17, 16 hours of which he used to look for another job. On July 22, 1979, complainant suffered a non-work-related back injury and used 200 hours of sick leave between then and the date of his termination. Complainant alleges that such absences were unavoidable due to his injury. However, the only medical advice complainant was given prior to taking his extended sick leave was to "take it easy." Complainant, without discussing with respondent the possibility of working on a light-duty and/or reduced-hours basis, independently concluded that there was no work he would be physically able or allowed to do at the University of Wisconsin - Milwaukee and that "taking it easy" meant that he couldn't do the work at the University of

Wisconsin - Milwaukee but could do the work at JVS. Complainant admits that he didn't request a light-duty assignment from respondent but argues that respondent should have made him such an offer. However, respondent was not aware that complainant was capable of performing light-duty work until Mr. Johnson discovered, on August 15, 1979, that complainant was performing such work at JVS and such work had been approved by his physician. Moreover, if complainant had been sincerely interested in passing probation, he would certainly have made every effort to demonstrate to his supervisors his desire to continue in the position by exploring with them any alternatives to an extended absence from his job at the University of Wisconsin - Milwaukee. Respondent was justified in concluding that complainant's absenteeism was excessive and that he was not really interested in continuing in his position at the University of Wisconsin - Milwaukee. Such conclusions by respondent were not pretextual.

In this same regard, complainant also alleges that he was treated differently than other probationary employees with similar absenteeism records. The probationary absenteeism records he offered in support of this allegation were those of Robert Lallie, Ed Ames, and Steve Palmer. Mr. Lallie used 129 hours of leave during his probationary period, 32 hours of which were used in the final 11 weeks of his probationary period after he had been suspended for five weeks for unknown reasons. Mr. Ames used 42 hours of leave and Mr. Palmer 160.5 hours of leave during their probationary periods. None of these absenteeism records could be said to be "similar" to complainant's record of 305.3 hours of leave.

Complainant alleges that he was subjected to harassment from his co-workers because of his religious beliefs and habits and that this harassment and his supervisor's failure to put a stop to it were evidence

of the discriminatory animus which motivated respondent's discharge of complainant. As discussed below, the Commission has concluded that such harassment and inaction on the part of respondent did occur and did constitute religious discrimination with respect to conditions of employment. However, the Commission does not find a causal connection between such harassment and inaction and complainant's discharge. Complainant was discharged because of poor work performance and excessive absenteeism which has been convincingly documented by respondent. The mere existence of a work environment in which such religion-based harassment is practiced and tolerated is not sufficient, in and of itself, to force a conclusion that the discharge of the harassed employee was motivated by religious discrimination and that the reasons offered by the employer for the discharge were a pretext for such discrimination.

Complainant further alleges that respondent's reliance on the reports of harassing co-workers as to his job performance is evidence that his discharge was based on religious discrimination. However, the sign incident was personally observed by Mr. Johnson; the finish coat of plaster incident was reported by Henry Weden who was not regarded by complainant as one of the harassing co-workers; and the lying down incident was independently confirmed by two co-workers. The decision to terminate complainant was made by Mr. Johnson on the basis of reports from several sources, his own observations, and complainant's absenteeism record. The decision was not made by any of complainant's co-workers and was not coerced by any of complainant's co-workers.

Complainant has failed to prove that the reasons offered by respondent for his termination were a pretext for discrimination. It is interesting to note in this regard that complainant testified under oath that "Except

for Mr. Williams, most of the individuals, particularly Mr. Johnson, are liberal-minded people, and they could care less about somebody else's religion."

Conditions of Employment

Section 111.322, Stats., provides in pertinent part that "... it is an act of employment discrimination to do any of the following: (1) ... to discriminate against any individual in ... terms, conditions or privileges of employment ... because of any basis enumerates in §111.321." One of the bases enumerated in §111.321, Stats., is creed and, therefore, respondent is prohibited from discriminating against complainant on the basis of his religion in regard to his "conditions of employment." This prohibition has been interpreted to require an employer to maintain a working environment free of religious harassment and to take positive action where necessary to redress or eliminate employee intimidation. In EEOC v. Murphy Motor Freight Lines, 22 FEP Cases 892 (D.C. Minn. 1980), the court stated that an analysis of the applicable case law revealed two primary conditions for a finding that the prohibition against discrimination in conditions of employment had been violated:

> "First, more than a few isolated incidents of harassment must have occurred. Comments that are merely part of casual conversation, Cariddi v. Kansas City Chiefs Football Club, Inc., 568 F. 2d 87, 88, 16 FEP Cases 462, 463 (8th Cir. 1977), are accidential, or are sporadic do not trigger Title VII's sanctions. Winfrey v. Metropolitan Utilities Dist., 467 F. Supp. 361, 382-3, 18 FEP Cases 1030, 1048 (E.D. Vir. 1977); Croker v. Boeing Co. (Vertol Div.), 437 F. Supp. 1138, 1191, 15 FEP Cases 165, 209 (E.D. Pa. 1977); Fekete v. U.S. Steel Corp., 353 F. Supp. 1177, 1186, 5 FEP Cases 639, 647-648 (W.D. Pa. 1973)."

The record indicates that derogatory comments were made by certain of complainant's co-workers about his beard, skull cap, fringes, eating habits, the number of children he had, and his use of break time to conduct

religious rituals, and that complainant had an untrimmed beard, wore a skull cap and fringes, ate certain foods and avoided others, and did not practice birth control as a result of his religious beliefs, and that complainant's co-workers and supervisors were aware of the religious basis for these aspects of complainant's dress and personal habits. Complainant was also asked questions about his religious beliefs by certain of his co-workers and derogatory comments were made by his co-workers about these religious beliefs and about Jews in general, e.g., Mr. Stalski's comment about "Jewing someone down." Were these comments merely part of casual conversation or accidental or sporadic or were they "sustained and non-trivial" [Katz v. Dole, 31 FEP Cases 1521 (4th Cir. 1983)], the "regular rather than the usual practice" [Pouncy v. Prudential Insurance Co., 499 F. Supp. 427, 438, 23 FEP Cases 1319 (S.D. Tex. 1980), aff'd 668 F. 2d 795, 28 FEP Cases 121 (5th Cir. 1982)], or part of a "steady barrage of opprobrious comment?" In the instant case, the comments were numerous, they were continuous over complainant's period of employment as a Facilities Repair Worker 3, they were directed at complainant, and they were sufficiently derogatory as to be considered non-trivial and at times opprobrious.

The second primary condition enunciated in EEOC v. Murphy Motor Freight Lines, supra, is that:

> "Plaintiff must show that the employer failed 'to take reasonable steps to prevent racial harassment ...' Croker v. Boeing Co. (Vertol Div.), 437 F. Supp. 1138, 1191, 15 FEP Cases 165, 209 (E.D. Pa. 1977)."

There is no question that respondent was aware that complainant was being harassed due to his religion. Complainant brought the harassment to the attention of Mr. Johnson, Mr. Shepard, and Mr. Rowe and requested that it be investigated and stopped and Mr. Johnson actually observed incidents of harassment. The investigations conducted in response to complainant's

request were perfunctory at best and no effort was made by these supervisors to counsel the individuals who were harassing complainant or to take any other action to prevent further harassment.

The Commission concludes that the religious harassment of complainant by his co-workers and respondent's failure to take reasonable steps to prevent such harassment constitutes religious discrimination in regard to conditions of employment.

Remedy

In fashioning a suitable remedy, the Commission concludes that a general injunction which in essence would order respondent to obey the law would not be appropriate. [Meyer v. Brown and Root Construction Co., 27 FEP Cases 448, 661 F. 2d 369, (U.S. Ct. of App., 5th Cir. (1981)); Ivey v. Western Electric Co., 23 FEP Cases 1028 (U.S. Dist. Ct., N.D. Ga. (1978))]. This is so because respondent already has an affirmative duty to obey the law and the sole effect of such an order would be to transform any complaint of discrimination against respondent into a contempt proceeding.

In view of the fact that the Commission did not find that respondent discriminated against complainant in regard to his discharge, an award of back pay or an order to reinstate complainant would be inconsistent with the Commission's finding.

The Commission has broad remedial authority to order such action as will effectuate the purposes of the Fair Employment Act. (See §§230.45(1)(b) and 111.39(4)(c), Wis. Stats.) As discussed above, one of such purposes is to provide a working environment free of the type of discrimination respondent practiced against complainant. The Commission, in fashioning a remedy, is not necessarily restricted to ordering action which only benefits complainant for "whether in name or not, the suit is perforce a sort

of class action for fellow employees similarly situated." [Jenkins v. United Gas Corp., 400 F. 2d 28, 1 FEP Cases 304 (5th Cir. 1968).] "Injunctive relief which benefits non-parties may sometimes be proper ...." (Gregory v. Litton Systems, Inc., 472 F. 2d 631, 5 FEP Cases 267 (9th Cir. 1972); Meyer v. Brown and Root Construction Co., supra.) The Commission deems it proper in the instant action to order such relief in the form of requiring respondent to provide training for those employees who supervised complainant during his probationary period. The objective of such training shall be to provide these supervisors with the tools necessary to recognize and take steps to prevent discrimination such as that practiced against complainant.

ORDER

So much of this complaint as relates to the complainant's discharge from employment is dismissed. With respect to so much of this complaint as relates to the complainant's conditions of employment, the respondent is ordered to provide training for those employees who supervised complainant during his probationary period for the purpose of providing such supervisors with the tools necessary to recognize and take steps to prevent discrimination such as that practiced against complainant. Respondent is given 60 days from this date to comply with this order and to report its action to the Commission, and the Commission will retain jurisdiction until such time as respondent has fully complied with this order.

Dated: _____,1984 STATE PERSONNEL COMMISSION

_____
DONALD R. MURPHY, Chairperson

LRM:jat

_____
LAURIE R. McCALLUM, Commissioner

_____
DENNIS P. McGILLIGAN, Commissioner

Parties:

Mr. Stanley P. Laber
2938 N. Summit Ave.
Milwaukee, WI 53211

Mr. Robert O'Neil
President, UW System
1700 Van Hise Hall
1220 Linden Drive
Madison, WI 53706