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JEAN L. SHILTS,  
 Complainant,

v.

Secretary, DEPARTMENT OF  
 HEALTH AND SOCIAL SERVICES,  
 Respondent.

Case No. 81-PC-ER-16

\* \* \* \* \*

DECISION  
 AND  
 ORDER

NATURE OF THE CASE

This is an appeal pursuant to §PC 4.03(3), Wis. Adm. Code, and §230.45 (1) (b), stats., of an initial determination of no probable cause to believe that discrimination occurred, with respect to a complaint of discrimination on the basis of sex and race. The issue for hearing as set forth in the prehearing conference report was:

Whether there is probable cause to believe that the respondent department discriminated against the complainant on the basis of sex and/or race in terminating her probationary employment.

FINDINGS OF FACT

1. The complainant, a white female, was employed by the respondent at the Southern Wisconsin Center as an Institution Aid 1 from May 1, 1980, until her termination, prior to the completion of her probationary period, effective October 24, 1980.
2. Following the commencement of her employment, the complainant was involved in a two week training program.
3. This training program was administered by Marilyn Kotz, Nursing

Instructor 2, and Dorla Kreft, Aide 4, white females.

4. During the period of her training, the complainant was inattentive, lacked a serious approach to her training activities, made irrelevant comments in class, and wore inappropriately revealing clothing, and her performance generally was unsatisfactory.

5. At the end of the two week period, Ms. Kreft evaluated her performance as unsatisfactory in all areas and recommended termination of her probationary employment. See Respondent's Exhibit 2.

6. The institutional administration did not then terminate complainant's employment, and she was assigned to a houseparent position at Garner Hall, Unit A, where she came under the immediate supervision of George Yarber, an Aide 4 and a black male.

7. Just before the complainant began work at Garner Hall, Mr. Yarber warned two of the male aides there that the complainant had exhibited somewhat questionable behaviors while in training, and in essence indicated that they should be careful not to be overly social with her on the job.

8. During her period of employment at Garner Hall, the complainant's performance was unsatisfactory. On occasion, she failed to properly control the residents, was absent from the unit without notice to her co-employees, wore inappropriately revealing apparel, argued excessively with residents, suggested to a co-worker when they were short of towels that they omit bathing the residents and report that they had given baths, took excessive amounts of time to give baths, spent excessive amounts of time on the phone, failed to cooperate with co-workers regarding meal breaks, failed to change a resident's soiled clothes after bathing her, failed to familiarize herself with resident charts, training folders, or program folders, and failed to seek direction with respect to areas

where she lacked understanding or was having problems.

9. Mr. Yarber on a number of occasions counseled the complainant regarding her poor performance.

10. On one occasion, the complainant came to work with a burn on her thigh. Mr. Yarber suggested that it be bandaged and did so, without objection from the complainant. This was after the institution nurse had finished her shift.

11. On or about October 1, 1980, Mr. Yarber discussed with the complainant her "Performance Planning and Development Report," Respondent's Exhibit 6. This report indicated that the complainant had satisfactorily accomplished some of the "major objectives" and "performance expectations" there listed, and was unsatisfactory with respect to others.

12. On this occasion, Mr. Yarber indicated to her that she was performing at a level that she should have been months before and that it was a negative evaluation.

13. On this occasion, in the context of a discussion about how she "came across" to people and what Mr. Yarber perceived as her forwardness, he said "you make me want to touch you" or similar words.

14. On another occasion, Mr. Yarber entered the unit where the complainant was stationed, and there was a movie on the television set. In a joking manner he said something to the effect that they (meaning he and the complainant) ought to go to the movies, but that of course they couldn't since they both were on duty.

15. Prior to the completion of the complainant's probationary period, the institutional managerial staff discussed whether to terminate her. Mr. Yarber's recommendation was for termination. The decision was made to terminate her employment effective October 24, 1980, and this was conveyed to her by letter dated October 14, 1980 (Respondent's Exhibit 9).

16. The aforesaid decision to terminate her employment was based solely on her entire employment record at the institution, including unfavorable comments or reports by co-workers.

17. The aforesaid decision to terminate her employment was not caused in whole or in part by her race or sex, or her refusal to accommodate or submit to sexual advances.

#### CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §PC 4.03(3), Wis. Adm. Code, and §230.44(1)(b), Wis. Stats.

2. The complainant has the burden of showing that there is probable cause to believe that the respondent department discriminated against her on the basis of sex and/or race in terminating her probationary employment.

3. The complainant has not met that burden.

4. There is not probable cause to believe that the respondent department discriminated against the complainant on the basis of sex and/or race in terminating her probationary employment.

#### OPINION

The complainant's position on this matter is summarized in her post-hearing brief:

Complainant contends that Mr. Yarber's evaluations and recommendation [for termination] were deliberately slanted against her because of her repeated refusals to consent to Mr. Yarber's repeated requests for social and sexual contact with the complainant." p. 1.

"Probable cause" is defined as a:

"...reasonable ground for belief supported by facts or circumstances strong enough in themselves to warrant a person in the belief that discrimination probably has been or is being committed." §PC 4.03(2), Wis. Adm. Code.

This record does not support a determination that there is probable cause to believe that discrimination on the basis of the complainant's race or sex contributed in any degree to the complainant's failure to have passed probation. In the Commission's view, the record is clear that the complainant was not performing satisfactorily.

The two employes responsible for aide training, both white females, testified that during her training period she was very inattentive and exhibited a very poor attitude towards her work. Ms. Kreft formally recommended her for termination after only two weeks, a very unusual step.

There was testimony from a number of witnesses concerning the complainant's performance at Garner Hall. It is noteworthy that the co-workers who had the most contact with the complainant on the job were quite critical of her performance. This included Mr. Greinke, a white male, and Ms. Burch, Ms. Bender, and Ms. Rodenberg, all white females. While it was noted in the complainant's Performance Planning and Development Report (Respondent's Exhibit 6) that she had met certain objectives, this factor is overshadowed by the strong evidence regarding her consistently unsatisfactory day-to-day job performance.

The most that can be said on this record is that the facts set forth in finding #13 might possibly provide a basis for a probable cause determination as to the occurrence of general sexual harassment not linked to the probationary termination. Compare, e.g., Clark v. World Airways, 24 FEP Cases 305 (D. C. 1980). However, the issue before the Commission is restricted to the question of whether there is probable cause to believe that the respondent discriminated against her in terminating her probationary employment, and not with respect to conditions of employment generally.

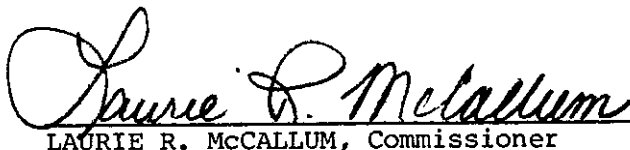
ORDER

The Commission having determined that there is no probable cause to believe that the respondent discriminated against the complainant on the basis of sex and/or race in terminating her probationary employment, this complaint of discrimination is dismissed.

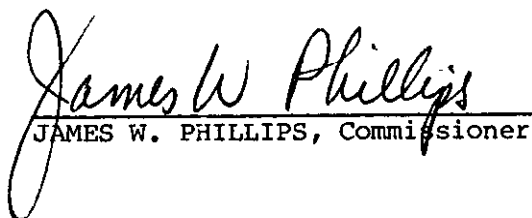
Dated: February 9, 1983

STATE PERSONNEL COMMISSION

  
DONALD R. MURPHY, Chairperson

  
LAURIE R. McCALLUM, Commissioner

AJT:jmf

  
JAMES W. PHILLIPS, Commissioner

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