STATE OF WISCONSIN PERSONNEL COMMISSION

DWIGHT MASSENBERG,

Complainant,

v.

President, UNIVERSITY OF WISCONSIN SYSTEM (Madison),

Respondent.

Case No. 81-PC-ER-44

DECISION
AND
ORDER

NATURE OF THE CASE

At the prehearing conference held on December 4, 1984, before Anthony J. Theodore, General Counsel, the parties agreed to the following issue for hearing:

> Whether the respondent discriminated against the complainant on the basis of race with respect to his discharge, and, if so, what is the appropriate remedy.

Hearing in the matter was held on February 20 and March 4, 1985, before Dennis P. McGilligan, Chairperson. The parties completed their briefing schedule on November 6, 1985.

FINDINGS OF FACT

1. The complainant, a black person, was employed by the respondent as a Building Maintenance Helper 2 (BMH 2) assigned to the Engineering Research Building (ERB) from June 1, 1980, to February 17, 1981. In a probationary service report dated approximately three months before his discharge, complainant's performance was rated "good" in all respects except dependability, which was rated as "poor" due to tardiness. The report also characterized complainant's job performance as "very good" overall and stated that "The department would only benefit by further employment."

2. Complainant had no disciplinary history prior to his termination. However, during the course of his employment, the complainant pursued charges of racial discrimination with respect to conditions of employment (regarding extra work assigned, use of sick leave and vacation time), and his supervisors were aware of these charges.

3. Approximately three weeks prior to his discharge, complainant filed a written grievance claiming unequal treatment in work assignments and vacation time requests. On the day the grievance was filed, complainant had a confrontation with his immediate supervisor, Galen Malisch. During this incident, which involved a missing dustpan, complainant expressed resentment at being treated as though he was in Rhodesia or South Africa. In his answer to the grievance, Malisch made reference to complainant's mention of Africa indicating that he was aware of being accused of racial discrimination.

4. On February 17, 1981, the complainant was observed by Galen Malisch receiving a plastic bag of green leafy material from an unidentified person in a first floor restroom of the ERB. This incident occurred at 11:45 p.m. while complainant was on duty. The material was later identified by the police as marijuana. Malisch then called the University police who arrested the complainant after he attempted unsuccessfully to dispose of the marijuana. Shortly thereafter, the authorities declined to pursue the charges against the complainant.

5. On the morning of February 18, 1981, Frank Rice, Jr., the Director of respondent's Physical Plant, received a report written by Galen Malisch describing events of the previous night which culminated in the arrest of complainant for possession of marijuana accepted by him during work time. Rice called a meeting for that afternoon with the complainant; Robert Bender, the Housekeeping Services Supervisor 3 for Physical Plant; Donald Sprang,

Personnel Manager, and Lewis Ritcherson, Affirmative Action Officer for respondent, to discuss the supervisor's report and the University Police Department report on the matter. At the meeting Rice offered to postpone the meeting so that the complainant could obtain union representation. When the complainant requested such representation, the meeting was suspended until the following day. However, complainant was advised at said meeting that he was temporarily suspended from work pending a final determination on his case.

6. At some time prior to the second meeting, Lewis Ritcherson phoned the complainant and again explained to him that he would be present to make sure that the complainant got a fair hearing and that he would be able to say what he wanted. Ritcherson told the complainant to tell him anything that might help his case. Ritcherson explained that the Physical Plant was more lenient in cases where employes have personal problems. He discussed with the complainant that the respondent offered assistance for drug abuse, alcoholism, etc. The complainant denied the incident took place and told Ritcherson that he had no problems. Ritcherson had spoken with Frank Rice, Jr. prior to the first meeting; he asked what effect any possible personal problems of the complainant would have on his decision regarding discipline. Rice indicated that he would take such things into consideration.

7. On February 19, 1981, Frank Rice, Jr. met again with complainant, Lewis Ritcherson, and the union representative to discuss Galen Malisch's report. Rice also read a police report to complainant and questioned him about its contents. At the meeting complainant denied being on the first floor during the evening in question; contended that his supervisor's report and the police report were false; argued that Malisch was "out to get him"; and stated that the police planted the marijuana on him. The complainant

made no reference to any personal, emotional, mental or drug abuse problems. Rice suspended the meeting in order to conduct an investigation based on complainant's allegations noted above.

8. On February 20, 1981, Frank Rice, Jr. met for the third time with complainant, a union steward and other representatives of respondent. Rice presented the results of his investigation and his conclusion that the police report and the supervisor's report were credible. Rice asked the complainant if he had anything to say or add. Complainant declined to respond. At the conclusion of said meeting Rice informed complainant that his employment as a BMH 2 was terminated effective on that date.

9. By letter dated February 27, 1981, the respondent informed the complainant of its reasons for discharging him citing violations of Work Rules I(B) (engaging in unauthorized personal business), I(E) (failure to provide accurate and complete information whenever such information is required by an authorized person), and II(A) (unauthorized or improper use of University property), as well as a violation of the Uniform Controlled Substances Act, §161.41, Stats.

10. This discharge subsequently was upheld in arbitration, and a denial of unemployment compensation on the basis of misconduct was upheld by the Labor and Industry Review Commission, and, on review, by Dane County Circuit Court. In none of these forums did the complainant litigate the allegations of discrimination raised by the instant complaint.

11. There was another, white, BMH 2 employed at the ERB who was observed on at least two occasions (December 14, 1981 and January 21, 1982) by the complainant's supervisor under conditions that strongly suggested to the supervisor that he was smoking marijuana on the job. Despite calling the police on one of these occasions, no physical evidence could be obtained.

Even though the supervisor entertained no doubts that this employe had in fact been smoking marijuana, and that he was known as a problem employe who had been characterized as "grossly insubordinate," no formal disciplinary action of any kind was taken against him due to a lack of physical evidence. Representatives of respondent did talk with this employe on these two occasions regarding the seriousness of using marijuana on the job and warned that, if it could be proven, disciplinary action would be taken up to and including suspension or termination.

12. Respondent's decision to terminate complainant was based on his unsatisfactory work performance, not his race.

CONCLUSIONS OF LAW

1. This case is properly before the Commission pursuant to §230.45(1)(b), Stats.

2. The respondent is an employer within the meaning of §111.32(3), Stats.

3. The complainant has the burden to prove that respondent discriminated against him on the basis of his race in terminating him.

4. The complainant has not sustained his burden.

OPINION

Under the Wisconsin Fair Employment Act, the initial burden of proof is on the complainant to show a prima facie case of discrimination. The employer then has the burden of demonstrating a non-discriminatory reason for the actions taken which the complainant may, in term, attempt to show was in fact a pretext for discrimination. See McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Dept. of Community Affairs v. Burdine, 540 U.S. 248 (1981).

In the case of a discharge, the elements of a prima facie case are that the complainant 1) is a member of a protected class, 2) 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 employes. McGhie v. DHSS, 80-PC-ER-67 (3/19/82).

The complainant's sole contention is that he was subjected to severe discipline while another, white employe who had a worse employment record was not disciplined at all for similar or worse misconduct.

The complainant clearly has a strong prima facie case. There is no doubt that complainant is a member of a protected class. Secondly, it is undisputed that respondent terminated complainant from his job.

The next element of complainant's prima facie case is to demonstrate that he was discharged under circumstances which give rise to an inference of discrimination. The record indicates that complainant's work record was good, while the white employe was considered a problem employe with a grossly insubordinate attitude. The white employe's infraction must be considered more serious because he was smoking on the job, and thus his work performance was subject to impairment. The complainant was involved in receiving and possessing a controlled substance on the job. Yet, despite the above, complainant was discharged while the white employe received no formal discipline. Under the circumstances the Commission finds it reasonable to conclude that complainant's termination gives rise to an inference of discrimination.

The respondent was able to satisfy its burden of proceeding by articulating a legitimate, nondiscriminatory reason for the difference in treatment--the belief that disciplinary action against the white employe could not have been sustained because of the absence of physical evidence.

The next stage of the proceeding is to evaluate whether the respondent's articulated rationale constitutes a pretext. The complainant's case rests primarily on the facts that his overall employment record was substantially better than the white employe's, that his offense was less deleterious to his work performance since it did not involve actual use, and that he was punished by the most severe form of discipline while the white employe did not receive any discipline. Complainant argues that discharge of an employee is illegal race discrimination where the same action was not taken as to a person of another race in the same or similar circumstances citing the rule enunciated in McDonald v. Santa Fe Transportation Co., 96 S. Ct. 2574, 49 L. Ed. 2d 493 (1976). As noted above, complainant concludes that the "record is rife with instances of disparate treatment between" complainant and the white employe in question.

The respondent's main argument is that the complainant and white employe were not similarly situated. Respondent also maintains that in a disparate treatment case the complainant has the burden of showing that he is a victim of intentional discrimination. "He cannot prevail by showing merely a difference in treatment." Smith v. Honeywell, Inc., 735 F. 2d 1067, 34 F.E.P. Cases 1561 (8th Cir. 1984).

It is true that complainant's overall employment record was substantially better than the white employe's. However, the record is also clear that complainant received and possessed a quantity of marijuana on the job and was discharged while, in contrast, a white employe was not discharged

for being suspected of smoking marijuana on the job and where a police and supervisor search did not support the suspicion. Respondent argues that the white employe was not treated harshly because "there was no high degree of evidence for suspected use of marijuana." This contention was supported by the testimony of both management and the union, and is persuasive.

More troubling is the question of why some less severe disciplinary action was not taken with respect to the white employe. The respondent never really adequately addressed this question at the probable cause hearing. However, respondent introduced a number of exhibits and testimony on the subject in the instant proceeding. In this regard the record indicates that respondent verbally warned the white employe that if he were caught with marijuana he would be disciplined up to and including termination. The record also indicates, as noted above, that respondent felt it did not have legitimate basis upon which to formally discipline the white employe due to a lack of physical evidence. Based on the foregoing, respondent makes a good case that any difference in treatment resulted from different facts, not from discrimination.

As noted above this case can be distinguished from McDonald v. Santa Fe Transportation Co., supra, which complainant relies upon in support of his position. In McDonald two white employes and one black employe were involved in the theft of sixty cans of antifreeze. All three employes had been involved simultaneously in the incident that led to discharge of the white employes. Where employes are not involved in the same transaction and the circumstances of the conduct can be differentiated as in the instant case, the rule of McDonald does not apply. For example, where there is better evidence to proceed against a black employe than there would have been

against a white employe, no discrimination was found. Leonard v. Walsh Construction Co., 37 F.E.P. Cases 61 (S.D. Ga. 1985). In that case differing treatment was supported by the different circumstances. Where supervisors behaved in good faith and each disciplinary step was a proper response to employe's work conduct no discrimination is found. Felton v. Septa, 37 F.E.P. Cases 687 (E.D. Pa. 1984).

Based on the above, the Commission finds it reasonable to conclude that complainant has not satisfied his burden of proving that respondent's reasons for terminating him were in fact a pretext for discrimination. Therefore, in view of all of the foregoing, the Commission finds that the answer to the issue as stipulated to be the parties is NO, respondent did not discriminate against complainant on the basis of race with respect to his discharge.

ORDER

The instant complaint is hereby denied and this case is dismissed.

Dated: February 6, 1985 STATE PERSONNEL COMMISSION

DENNIS P. McGILLIGAN, Chairperson

DONALD R. MURPHY, Commissioner

LAURIE R. McCALLUM, Commissioner

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