STATE OF WISCONSIN PERSONNEL COMMISSION

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*
DWIGHT MASSENBERG, *
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Complainant, *
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v. * ORDER
*
President, UNIVERSITY OF *
WISCONSIN SYSTEM (Madison), *
*
*
Respondent. *
*
Case No. 81-PC-ER-44 *
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This matter is before the Commission following the promulgation of a proposed decision, the filing of objections thereto by the respondent, and oral arguments by the parties. The Commission has consulted with the examiner. The Commission adopts as its final disposition of this matter the attached proposed decision and order, which is incorporated by reference as if fully set forth, with the following change and addition:

1. On page 5, the following sentence "The complainant only was involved in buying and possessing a controlled substance on the job...", is changed to read "The complainant was involved in receiving and possessing a controlled substance on the job." The word "buying" is eliminated because there is no evidence in this record that the controlled substance was bought.

2. The Commission adds the following "Conclusions of Law":

1. This matter is properly before the Commission pursuant to §230.45(1)(b), stats., and §PC 4.03(3), Wis. Adm. Code.

2. The complainant has established that there is probable cause to believe that discrimination was committed against him.

Dated: September 14, 1984 STATE PERSONNEL COMMISSION

DONALD R. MURPHY, Chairperson

LAURIE R. McCALLUM, Commissioner

DENNIS P. McGILLIGAN, Commissioner

AJT:jab
ORDER

Parties

Dwight Massenberg
c/o Attorney William T. Platz
Suite 601
30 W. Mifflin St.
Madison, WI 53703

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

STATE OF WISCONSIN PERSONNEL COMMISSION

DWIGHT MASSENBERG,

Complainant,

v.

President, UNIVERSITY OF WISCONSIN SYSTEM (Madison),

Respondent.

Case No. 81-PC-ER-44

PROPOSED DECISION AND ORDER ON PROBABLE CAUSE

NATURE OF THE CASE

This matter is before the Commission pursuant to §230.45(1)(b), Stats., and involves a charge of discrimination on the basis of race, color, arrest/conviction record, and retaliation with respect to discharge. The Commission's investigator issued an initial determination that there was no probable cause to believe that discrimination had occurred, and the complainant appealed that ruling. A hearing has been held on the issue of probable cause, at which both parties were represented by counsel.

FINDINGS

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. His performance was rated "good" in all respects except dependability, which was rated "average." His ratings were as high as any of his co-employes.

2. During the course of his employment, the complainant pursued charges of racial discrimination with respect to conditions of employment, and his supervisor was aware of these charges.

3. On February 17, 1981, the complainant was observed by his supervisor receiving a quantity of what was later identified by the police as marijuana from an unidentified person while he was working at the ERB. His supervisor called the 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.

4. On February 27, 1981, the respondent discharged the complainant, 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.

5. 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.

6. There was another, white, BMH 2 employed at the ERB who was observed on at least two occasions 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 disciplinary action of any kind, not even of an informal nature, was taken against him.

7. The following incidents, which occurred between the complainant and his immediate supervisor, did not constitute instances of harassment or indications of feelings of ill-will toward the complainant:

a. On one occasion the complainant reported to his supervisor after the shift started that his dustpan and small broom were missing. The supervisor gave him a replacement set and then found another set that he felt might be the complainant's. He asked the complainant what the color of the wire around the broom was, since the employes generally use the same gear every night, and this information could help determine whether the equipment was the complainant's.

b. A typical assignment on the complainant's shift was to "pick papers" and sweep floors. On certain occasions during vacations when conditions were cleaner, employes with this assignment might also be given other work, such as mopping. The complainant was not treated any differently than other employes in connection with such additional assignments.

c. The policy on the complainant's shift with regard to asking for vacation was to make the request no later than the beginning of the shift immediately preceding the start of the shift for which vacation was being requested, so as to permit approximately 24 hours advance notice to facilitate working out coverage for the employe in question. On one occasion, the complainant requested at the end of a shift that he be given the next shift off as vacation. The supervisor approved this, but told the complainant to give more notice the next time. At approximately the same time, the supervisor approved some vacation time several weeks away for another employe.

d. On one occasion, the complainant had secured permission to take two hours of vacation at the beginning of a shift. However, he arrived at work an hour and a half later than he had arranged. He refused to provide an explanation for his late arrival but demanded that this additional 1½ hours also be handled as vacation time (as opposed to leave without pay). His supervisor refused to permit this, based on his policy that employes not be allowed to take vacation for unexcused tardiness, but indicated that he would raise the matter with higher level management. This was done, and the decision was made at that level to allow the complainant to use vacation for this time after it was ascertained that the complainant had a valid excuse for having been late.

DISCUSSION

In a case such as this, it is helpful to follow the analytical framework established in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 5 FEP Cases 965 (1973), and its progeny keeping in mind that at this stage of the proceedings, the only issue before the Commission is that of probable cause,[1] as opposed to a decision on the merits.

As was pointed out by this Commission in McGhie v. DHSS, 80-PC-ER-67 (3/19/82), for a complainant to establish a prima facie case in a discharge case:

> "... it is not necessary ... that he establish that he was not 'guilty' of the offenses or derelictions alleged. It is sufficient if he establishes that (1) he is a member of a protected class; (2) he was the subject of an adverse personnel action by the respondent/ employer; and (3) facts from which a reasonable inference can be drawn

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[1]For a definition of probable cause, see §PC 4.03(2), Wis. Adm. Code.

> 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 officers."

The main thrust of the complainant's case 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.[2]

The complainant clearly has a strong prima facie case. His 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 only was involved in buying and possessing a controlled substance on the job. While there is an undertone in the respondent's case that the complainant's infraction was akin to drug-trafficking, there really is nothing in the record to support this. The only inference of the degree of seriousness of the transaction that appears in this record is what can be derived from the fact that the authorities declined to prosecute.

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

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[2]The complainant also tried to establish a pattern of harassment probative of a discriminatory animus by his supervisors. See Finding #7, above. In the opinion of the Commission, this attempt was completely unpersuasive.

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 even receive informal discipline.

The respondent's primary argument is that formal disciplinary action was not taken against the white employe because it was felt it could not be sustained.[3] This was supported by the testimony both of management and the union, and has some force. However, the respondent never really directly addressed the question of why some less formal action was never taken with respect to the white employe. Under all the circumstances here present, including the records of the two employes, the Commission must conclude that probable cause is present.

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[3]The respondent also argues that the complainant was also guilty of refusing to admit the offense. However, this was also true of the white employe. See Complainant's Exhibits 5 and 6.

CONCLUSION

For the foregoing reasons, it is concluded that there is probable cause to believe that discrimination has been committed against the complainant.

Dated: _____,1984 STATE PERSONNEL COMMISSION

DONALD R. MURPHY, Chairperson

AJT:jat

LAURIE R. McCALLUM, Commissioner

DENNIS P. McGILLIGAN, Commissioner

Parties:

Dwight Massenberg
c/o Atty. William T. Platz
Suite 601
30 W. Mifflin St.
Madison, WI 53703

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