STATE OF WISCONSIN PERSONNEL COMMISSION

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*
JOHN E. BERRYMAN, *
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Complainant, *
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v. *
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Secretary, DEPARTMENT OF *
HEALTH AND SOCIAL SERVICES, *
*
Respondent. *
*
Case No. 81-PC-ER-53 *
*
* * * * * * * * * * * * * * * * *

DECISION
AND
ORDER

NATURE OF THE CASE

On May 28, 1981 complainant filed a complaint with the Personnel Commission charging that he was discriminated against by the respondent on the basis of race and sex in his discharge from employment at respondent's Oak Hill Correctional Institute (OHCI). Following investigation, Robert E. Gregg, an Equal Rights Officer with the Commission, issued an Initial Determination dated October 16, 1981 on the charge. Gregg concluded that there was probable cause to believe that complainant had been discriminated against on the basis of sex, but no probable cause to believe that he had been discriminated against on the basis of race.

At a prehearing conference held on December 9, 1981, before Kurt M. Stege, Hearing Examiner, the parties agreed to the following issues for hearing:

1. Did the respondent discriminate against the complainant on the basis of sex as set out in the charge of discrimination?

2. Whether there is probable cause to believe that respondent discriminated against the complainant on the basis of race in terminating complainant's employment.

Hearing in this matter began on July 9 1982, before Hearing Examiner James Phillips. The hearing process was finally completed on November 12, 1982. On August 5, 1983, Dennis P. McGilligan, Commissioner, was designated as Hearing Examiner in the matter by the Commission to replace Commissioner Phillips who resigned his employment with the Commission on May 26, 1983. The parties completed their briefing schedule March 15, 1984. Based on the entire record (the substitute examiner has consulted with the original examiner regarding his impressions and conclusions in regard to the case, including the credibility of the witnesses), the Commission makes the following Findings of Fact, Conclusions of Law, Opinion and Order.

FINDINGS OF FACT

1. Complainant, John E. Berryman, a white male, began his employment with the respondent, Department of Health and Social Services, a state agency, on March 31, 1980. He was hired as a Correctional Officer 3 trainee at the OHCI. Officer 3 trainees are required to successfully complete a 6 month to 2½ year training period.

2. Complainant began his service with the respondent by spending about two weeks on each of the first and second shifts at OHCI. Complainant did not spend any time on the third shift during his initial training period. Complainant was assigned to the second shift after completing his initial training, and remained there for between four and five months. Officer Berryman's supervisor on the first shift was Neil Lange, and his training officer was Dale Hallman.

3. An incident report was written on complainant for being late to work on April 2, 1980. The complainant was given a verbal reprimand for this incident.

4. The policy at OHCI required corrections officers to be evaluated on a monthly basis. On or about May 19, 1980, complainant received a monthly evaluation for April, 1980. The evaluation stated that complainant had been "a very eager learner, and this eagerness to learn what is expected of him is commendable." However, Officer Berryman was marked "poor" in "ability to get along with others" and "judgment." Complainant was also marked "poor" in "work habits" and "communication" skills. The evaluation stated that other officers were unhappy with Officer Berryman giving them advice on how to do their job since he (complainant) had been employed only a short time.

5. In discussing this evaluation with Training Officer Hallman, complainant stated that he did not believe that the evaluation was accurate. Hallman responded in part by stating that it was necessary to have negative evaluations during the initial period of employment so that improvements could be shown in later periods. Hallman explained to complainant that the "poor" marking in "ability to get along with others" resulted from an incident in which Officer Berryman had been assigned to conduct a room search with two other officers. In that incident complainant incurred the displeasure of the other two officers when he properly questioned a procedure for writing up an incident report following the search.

6. On or about June 24, 1980, complainant received an evaluation for the month of May, 1980. The evaluation was signed by Training Officer Hallman and Supervisor Pat Arntz, and complainant discussed it with both officers. Complainant was told that he was marked "poor" in "punctuality due to an incident in which he made a request for sick leave in an untimely manner. Officer Berryman asked for an explanation of why he was marked "poor" in "judgment" and the meaning of the comment that he "should take

into account the ramifications of a quick decision," but was told that his supervisors had no obligation to explain their evaluations. Overall, complainant's job performance was rated as "average."

7. An incident report was written on complainant for an incident that occurred at approximately 10:30 p.m. on June 7, 1980. The report states as follows:

> At approximately 10:30 on the above date CO III tr Berryman called me from Cottage #3 and said that about 20 minutes earlier he had smelled what he thought to be marijuana coming from one of the inmate's rooms. When asked if he had checked the room and inmate in question, he said no but he was calling now to suggest that the room of the inmate in question be searched tomorrow.
>
> I feel this man needs comprehensive training on a one-to-one level so that he realizes the importance of dealing with instances like the above as they occur and not pass them off until a future date.

8. On July 15, 1980, complainant discussed his June, 1980, evaluation with Training Officer Hallman and Supervisor Arntz. This evaluation also criticized complainant's work performance noting Officer Berryman "is below average in his rate of learning, quality of work and judgment for a new officer that has been on the job for 3 months." Although complainant asked for an explanation of the evaluation, he was again told that his supervisors were not obligated to explain their comments. Since he did not agree with this evaluation, complainant prepared a written response to it wherein he took issue with several aspects of his training and made suggestions for improvement.

9. Complainant's evaluation for July, 1980, reflected an "unsatisfactory" marking in the area of "judgment," and "poor" markings in numerous other categories. The evaluation contained an overall appraisal of complainant's job performance from point of hire as "average to poor" and called on Officer Berryman to make "vast improvement" in his work. In his discussion with his supervisors, complainant was told that this evaluation

largely reflected two incidents. On July 5, 1980, complainant had improperly allowed some inmates of a residential cottage to prepare hotdogs in the cottage kitchen. (He was told that these hotdogs were "leftovers" from a previous meal when the hotdogs actually belonged to an inmate Jaycee chapter). The second incident reflected in the evaluation occurred when complainant was sitting at his desk in a cottage while receiving verification on the whereabouts of inmates. Complainant failed to properly acknowledge Security Director Larry Alberts appearance in the cottage for which he immediately apologized upon learning of Security Director Albert's displeasure over same.

10. On September 3, 1980, complainant made a mistake in an inmate count by recording an inmate as present when the inmate was in fact off the institutional grounds. At the time, complainant was working in a new cottage and as a result was not familiar with the inmates. The procedure for taking inmate counts was to either visually identify the inmates or have the inmates verbally identify themselves. When an officer does not know the inmates by sight, his only method of taking the count is through inmate self-identification. During these counts inmates are free to move around between the first and second floors of the residential cottages. As complainant was conducting the count on the second floor, an inmate apparently came up from the first floor and answered on behalf of the missing inmate. Such mistakes in inmate counts did happen at OHCI but normally did not cause disciplinary action to be instituted against an officer making an error in a count. However, inmate counts were an integral part of security arrangements at OHCI and considered an important part of a correctional officer's job.

11. On September 5, 1980, an incident report was issued stating that complainant had remained on institutional grounds without authorization following the end of his shift at 11:00 p.m. Complainant had remained after his shift to ask questions of an officer who had conducted some of his training.

12. One of complainant's duties as an Officer 3 trainee was to make "Detex" rounds at various locations throughout the institution. This consisted of visiting various sites at a specified time and recording the visit on a time indicator in order to signify that the officer performed a security check at each location. Respondent maintains that on his November 4, 1980, rounds, complainant failed to lock the door of the mechanical room after inspecting this site. Complainant claims he locked the door after he left, but conceded in his testimony that he may have been at fault.

13. As an Officer 3 trainee, complainant was continually rotated from unit to unit. Complainant was very uncomfortable with this constant moving, as he never had the opportunity to become familiar with any particular group of inmates. Although complainant frequently requested a permanent assignment to a single unit, these requests were repeatedly denied. At the time that complainant's requests for permanent placement were being denied, the practice at OHCI was to allow permanent employes to bid first on posted vacancies. If no permanent employes wanted a particular position, then the post would be made available to the probationary officer or trainee with the most seniority. While complainant was being denied a permanent assignment as a CO 3 trainee or CO 1, other employes, both male and female, were given permanent residential positions during the period of time relevant herein. However, complainant was not treated differently than other employes similarly situated in terms of assignment. For

example, Cheryl Kimmins was permanently assigned to residential cottage 2A as a CO 3 trainee sometime during the winter of 1980-81. However, during said period of time it was not unusual for CO 3 trainees to be assigned to a single unit. Donna Shiel was assigned a permanent utility post while still on probation. Shiel was never a CO 3 trainee rather she was a CO 3 with 30 years of seniority. After completing her probation, Shiel successfully posted for a permanent assignment in cottage 7 in early May of 1981. Similarly, Ms. Everhardt was assigned a permanent utility post on the 3rd shift while still on probation. Ms. Everhardt was a CO 3 with seniority accumulated prior to becoming a CO. After probation, Ms. Everhardt successfully posted for a permanent position on the 1st shift which she got due to her seniority.

14. During this period of time, complainant's written evaluations continued to be negative. In this regard the August, September and October, 1980 evaluations noted complainant's inability to meet the criteria of his position because of continued inability to demonstrate good judgment, a proper rate of learning and implementing what he learned into his work situation. Complainant did show some improvement in his work performance particularly in the areas of accepting "assignments" and "supervision." By letter dated September 12, 1980, Security Director Alberts informed complainant that his performance was unsatisfactory; and unless he showed "a great deal of improvement" in his work in a short period of time he would not successfully complete his training period.

15. On or about November 5, 1980, a meeting was held which included complainant, Security Director Alberts, Union representative Michael Brown and Supervisor Pat Arntz. During the meeting, complainant's October, 1980, evaluation and his previous evaluations were discussed. Complainant was

told that he was being suspended with pay until a decision could be made whether he would remain employed at OHCI. Union representative Brown and complainant requested a change in Berryman's status to CO 1. Complainant told those attending that had he realized what an Officer 3 trainee job was like, he would have waited for an Officer 1 position. Security Director Alberts agreed to consider the request.

16. On or about November 11, 1980, a second meeting was held which included Security Director Alberts, Union representative Brown, complainant and Elizabeth Brashi, the personnel manager. At this meeting it was agreed that complainant's status as a CO 3 trainee would be terminated and Berryman would become a probationary Officer 1. Complainant was given a new original appointment effective November 16, 1980, and required to serve a six month probationary period. Complainant was not advised that he would be given a "clean slate." Nor was he told that his performance as an Officer 3 trainee would have no bearing on his probationary period as an Officer 1.

17. As a probationary CO 1, complainant was given training which was more systematic than the Officer 3 training which he had previously received. In this regard, Berryman first followed a specific schedule of training in his first month on the job as an Officer 1. Berryman also received a number of job instructions while a CO 1 ranging in length from a half hour to over an hour. For example, on December 19, 1980, Supervisor David Lemke instructed complainant in inmate release procedures and all 3rd shift utility post orders. On January 7, 1981, Supervisor Lemke gave complainant instructions regarding entering staff offices and the use of inmates to do legal research. On January 11, 1981, Supervisor Lemke gave complainant a thorough training involving a number of "problem areas"

related to vehicle patrol. On January 22, 1981, Supervisor Lemke reviewed with Berryman the proper procedure for filling out institution forms and reports. On February 17, 1981, Supervisor Lemke gave complainant job instructions covering contraband brought into OHCI by inmates from work or school release. Again on March 18, 1981, Supervisor Lemke reviewed "problem areas" involving vehicle patrol and foot patrol. Also on March 18th, complainant received job instructions from Lemke regarding the time at which third shift officers should take their meal break. Lemke indicated that third shift officers should not eat until after the 2:00 a.m. inmate count was taken for "security" purposes. On March 19, 1981, Supervisor Lemke instructed complainant to use the minimum amount of force necessary to restrain an inmate after Berryman approached Lemke and asked about the use of "judo flips" to restrain inmates. Early in 1981 complainant went to Oshkosh for some additional training in human and public relations. In summary, complainant received the same or more training as other CO 1's. Complainant may have received more one-on-one training than other CO 1's due to the problems he was experiencing. Despite these problems, Supervisor Lemke felt complainant wanted to be an Officer 1. Lemke also felt that complainant performed some tasks well such as "Detex" rounds (which complainant did frequently).

18. On or about January 12, 1981, complainant discussed his December, 1980, evaluation with Training Officer Richard Schmidt. Training Officer Schmidt stated that complainant was not "humble" enough and was too outspoken in offering suggestions to his fellow officers. Complainant's evaluation also stated that he had difficulties in working with his colleagues. Apparently it was felt that as a rookie complainant had a lot to learn (instead of offering suggestions) from more experienced officers.

For this reason, complainant was marked "poor" in "ability to get along with others." Overall, complainant was cited for good attitude in wanting to be a Correctional Officer but advised to improve his performance in specific areas especially those marked "poor" on the evaluation.

19. Complainant's January, 1981, evaluation indicated that Berryman was learning his job at an "average rate." It also noted that complainant had advanced his mark in the area of "dependability" from "poor" to "average." The evaluation further noted that "with the amount of time Officer Berryman has in corrections, he should strive to advance several of the above areas to good." Finally, the evaluation advised complainant "to continue working on his relationship with his peers." Under the section titled "Action Plans/Training To Bring Level to Required Standards," the evaluation noted that the complainant was scheduled for training at the academy in February 1981 and "the relationship with his peers will be discussed, when this evaluation is presented to him."

20. Complainant's February, 1981, evaluation showed substantial deterioration. Complainant was marked "poor" or "unsatisfactory" in numerous areas. The evaluation noted complainant was using an "unacceptable amount of sick leave." The evaluation also pointed out that complainant's relationship with his peers had not improved, and that he often made excuses for his problems in his work. The evaluation further pointed out that complainant must improve his overall performance as a CO 1, and noted some additional training that would be given to complainant to assist him in this improvement. Finally, the evaluation questioned whether complainant could make enough progress in learning CO 1 work in the time left in his probation.

21. In March, 1981, complainant was on vehicle patrol when he spotted a fleeing inmate being pursued by two other corrections officers. Officer Berryman left his vehicle and assisted the officers in stopping the inmate. After this incident, complainant was concerned about the fact that he had never received what he considered adequate training regarding the use of physical force in apprehending an inmate, should the inmate continue running. Based on his concerns, complainant spoke to Supervisor Lemke about his questions. Supervisor Lemke told complainant to use the minimum amount of force necessary to control the inmate, and that he would have to use good judgment in evaluating each situation as to how to handle it.

22. On March 30, 1981, Supervisor Lemke discovered that complainant failed to notice an unauthorized truck and its three occupants on the premises. Lemke observed the truck at 5:00 a.m., approached it, and was told by its occupants that they had arrived at 5:00 a.m., and were there to pick up an inmate who was to be released that day. Officer Berryman who was on vehicle patrol explained that he had made all routine security checks, and may have been in another part of the institution during the brief period in which the vehicle was present. Lemke wrote up a report on this incident.

23. On April 1, 1981, complainant was responsible for calling in the 5:30 a.m. count for Cottage 2. Officer Berryman was also assigned to walk around the institution to each cottage and pick up all of the count sheets. After making his count at Cottage 2 at the correct time, complainant attempted to call in his count but was unable to do so because of problems with the Cottage 2 telephone. Officer Berryman took the Cottage 2 count sheet with him and began his rounds picking up the other sheets, with the intention of calling in the Cottage 2 count from the telephone in another

cottage. Officer Berryman forgot to do this. At approximately 5:50 a.m. complainant received a call on his radio inquiring about the Cottage 2 count. Complainant provided the necessary information and then brought in all of the count sheets. It was not uncommon for officers at OHCI to be late in reporting counts; the standard procedure in such cases was for a desk officer to call the officer to obtain the information or for the officer to call in the count at his or her next opportunity. Correction Officer Schewe, for example, testified that he had been late in calling in counts and that the matter was "not a big deal." However, Supervisor Lemke wrote up an incident report on complainant's failure to make a timely count call.

24. Complainant's March, 1981, evaluation was "unsatisfactory." He received "poor" or "unsatisfactory" marks in many areas. The evaluation had a two page attachment which documented complainant's lack of progress in areas where he had previous problems. The attachment stated "CO 1 Berryman shows a very drastic slide backwards in effectiveness. His performance for an officer with 12 months experience at OHCI is unsatisfactory." The evaluation concluded by noting that complainant "does not seem to learn from his training experience, nor his past evaluations."

25. On or about April 6, 1981, complainant received a letter from Superintendent Andrew Basinas stating that his employment was to be terminated effective April 24 for failing to meet probationary standards. A termination hearing was held on April 9, 1981. At the meeting, which lasted several hours, complainant's employment and performance at OHCI was gone over in great detail. All of his monthly performance evaluations, his training, work assignments and incident reports were discussed with Officer Berryman. Particular attention was paid to his poor work performance as a

CO 3 trainee. Complainant was given an opportunity to respond. The respondent heard nothing which changed its mind regarding complainant's termination.

26. On or about April 10, 1981, complainant received a Notice of Termination. The Notice included an attached Probationary Service Report which set forth the reasons for his termination as follows:

> Berryman was originally appointed as an Officer 3 Trainee on March 31, 1980. He failed the job expectations of an Officer 3 Trainee and requested a change in status to Officer 1. Effective November 13, 1981, he was given an opportunity to demonstrate his ability to function as an Officer 1 but has also failed to meet the job expectations at this level. Despite intensive training -- both formal and on the job -- during the last 13 months, Mr. Berryman has failed to meet acceptable job performance standards. He has failed to follow correct security procedures; demonstrated inability to apply training into his assignments, and to meet the required levels of judgment, restraint, and responsibility in a correctional institution environment.

27. Division of Corrections' policy with respect to the appropriateness of disciplining probationary employes changed in May of 1980. Prior to that date, all probationary employes were entitled to a progressive disciplinary process. Subsequent to May of 1980, employes serving an original probation would be terminated if they committed conduct that would result in discipline (written reprimand) for a permanent employe. Employes serving a permissive or promotional probation, on the other hand, were subject to the following disciplinary procedure:

> Violations of a work rule (Not arising from a job performance problem) committed by an employe on permissive or promotional probation are subject to the disciplinary procedure. They should be handled in the same manner as a rule violation by an employe with permanent standing in the classification. On the other hand, if an employe on permissive or promotional probation, after appropriate instruction and training, experiences job performance problems that indicate a lack of ability to perform at an acceptable level, the probation should be terminated and the employe returned to his/her previous position (See Ch. 212, Probationary Periods).

28. Complainant was compared with the following female officers in terms of performance and discipline:

a. Paula Berget. At all times material herein, Berget was a CO 1 holding permanent status in class. Barbara Downing represented Officer Berget on behalf of the union at several disciplinary hearings, including one regarding Berget's failure to make "Detex" rounds, at least two hearings concerning Berget's excessive use of sick leave, and one for tardiness. Complainant was on duty several times when Berget failed to appear or call in. Berget eventually quit her employment with respondent.

b. Mary Reed. Reed was a Correctional Officer on permissive probation (due to a transfer). Downing also represented Reed at separate hearings concerning Reed's tardiness and sleeping on duty. Although sleeping on duty was considered a work rule violation, Reed was not discharged. Reed ultimately terminated her employment as a CO and transferred back to her old position.

c. Cheryl Kimmins. Kimmins was a Correctional Officer 3 trainee during the winter of 1980-81. Sometime after the first of the year, Kimmins went on probation. She was involved in at least one meeting regarding falsification of inmate count records, a violation of OHCI work rules constituting grounds for dismissal. In spite of this alleged infraction, Kimmins received no discipline according to Downing.

d. Linda Kuska. Kuska was a CO 1 first employed at OHCI on December 1, 1980. Kuska was required to serve a six month probation which she successfully completed. Kuska was late five times in one year, received two verbal reprimands, one written reprimand, a one-day suspension and a five-day suspension, yet was not discharged. Only the first verbal reprimand occurred during Kuska's probationary period and that was for being two minute late due to a snowstorm. Kuska received the other disciplines noted above while she was a permanent employe and subject to progressive discipline procedures.

29. At no time material herein, did any female officers serving an original probation have work rule violations or performance problems as bad or worse than complainant's without being terminated.

CONCLUSIONS OF LAW

1. The Commission has authority to hear this matter in accordance with §230.45(1)(b) Wis. Stats.

2. Respondent is an employer within the meaning of §111.32(6), Wis. Stats.

3. Complainant has failed to prove by a preponderance of the evidence that there is probable cause to believe respondent discriminated against him on the basis of race by terminating him.

4. Complainant has failed to prove by a preponderance of the evidence that respondent discriminated against him on the basis of sex by terminating him.

5. Complainant has failed to prove by a preponderance of the evidence that respondent violated §111.32-111.37 Wis. Stats.

OPINION

The parties stipulated to the aforesaid issues. Prior to discussing the merits of the case, the Commission must first decide the following question raised by complainant:

> Whether the initial determination of the Personnel Commission's investigator should be admitted as probative evidence on the merits of this case?

THE ADMISSIBILITY OF THE INITIAL DETERMINATION

At the hearing in this matter, the original examiner refused to accept the initial determination in evidence for other than jurisdictional purposes. This ruling was correct and should not be disturbed.

Both the Commission and the Wisconsin courts have looked frequently for guidance to decisions of the federal judiciary in employment discrimination cases. A recent decision of the Eighth Circuit Court of Appeals, Johnson v. Yellow Freight System, 34 FEP Cases 507 (5/22/84), addressed in detail the question of the admissibility in such a case of the EEOC reasonable cause determination. The Court held that the admission of such a document "is to be left to the sound discretion of the trial court." While the court stressed the negative impact of a rule of per se admissibility on

jury proceedings, such as those under 42 U.S.C. 1981, its holding clearly applied as well to non-jury proceedings under Title VII, which are similar in many respects to proceedings before this Commission under the Wisconsin Fair Employment Act.

The Commission agrees with the rationale set forth in the Johnson decision, and is of the opinion that it should follow a similar approach.

The Court in Johnson discussed the general principles involved as follows:

> Administrative findings made with respect to claims of racial discrimination are admissible under Fed. R. Evid. 803(8)(C) in a federal trial de novo. Chandler v. Roudebush, 425 U.S. 840, 863 n.39, 12 FEP Cases 1368 (1976). There is a split of authority among the circuits as to whether EEOC determinations are per se admissible in Title VII cases, see Bradshaw v. Zoological Society of San Diego, 569 F.2d 1066, 1069, 16 FEP Cases 828 (9th Cir. 1978), and Smith v. Universal Services, Inc., 454 F.2d 154, 156-158, 4 FEP Cases 541 (5th Cir. 1972), or are to be admitted or excluded in the exercise of the sound discretion of the trial court. See Walton v. Eaton Corp., 563 F.2d 66, 74-75, 15 FEP Cases 1735 (3d Cir. 1977), and Cox v. Babcock & Wilcox Co., 471 F.2d 13, 15, 5 FEP Cases 374 (4th Cir. 1972). These cases are Title VII cases only and thus, because they did not involve jury trials, do not speak directly to the issue now before us. The Ninth Circuit, however, has extended its Bradshaw rule of per se admissibility to jury-tried employment discrimination claims under § 1981. See Plummer v. Western International Hotels Co., Inc., 656, F.2d 502, 26 FEP Cases 1292 (9th Cir. 1981). The question is one of first impression for our Court.
>
> We agree with the approach taken in Walton and Cox. While EEOC reports may contain information that would be useful to the jury, their probative value may be outweighted by problems that would result from their admission. By holding such reports admissible under the hearsay exception provided in Fed. R. Evid. 803(8)(C), the Supreme Court in Chandler, supra, did not limit the discretion of the trial judge to exclude the report "if sufficient negative factors are present." Fed. R. Evid. 803(8)(C) (Notes of Advisory Committee on Proposed Rules). In our view, it would be ill-advised to shackle the discretion of trial judges with a rule of per se admissibility. EEOC determinations are not homogeneous products; they vary greatly in quality and factual detail. The trial judge correctly may perceive a danger of unfair prejudice to the defendant or properly may consider that time spent by the defendant in exposing the

> weaknesses of the EEOC report would add unduly to the length of the trial. Moreover, the trial judge properly may give weight to the hearsay nature of the EEOC report and to the inability of the defendant to cross-examine the report in the same way that a party can cross-examine an adverse witness. For these reasons, we hold that in an employment discrimination case the admission of administrative findings, such as an EEOC reasonable cause determination, is to be left to the sound discretion of the trial court. We believe that this is particularly important in cases, like the present one, in which an employment discrimination claim is tried to a jury. (emphasis supplied)

The Court went on to discuss the particular facts of the case before it. Many of these factors are very similar to the matter before the Commission:

> Because substantial evidence was presented to the jury on all matters summarized in the report, there is little probative value in the EEOC's conclusory statements regarding the same evidence. To admit the report under these circumstances would amount to admitting the opinion of an expert witness as to what conclusions the jury should draw, even though the jury had the opportunity to draw its own conclusions from the evidence presented regarding disparate treatment.

In the instant case, the matters covered in the initial determination were the subject of extensive evidence presented at a full-scale, de novo hearing, where the parties were represented by counsel and witnesses were sworn and subject to cross-examination. Both parties filed relatively extensive post-hearing briefs with the examiner. On the other hand, the initial determination was reached following a non-record, ex parte investigation. It contains hearsay, which, even if the document as a whole were admitted, could not be considered by the examiner since it appears to be hearsay within hearsay which is not subject to an independent exception to the hearsay rule. C.f., Boyer v. State, 91 Wis. 2d 647, 661-665, 284 N.W. 2d 30 (1979); §908.05, Stats. Since the initial determination covered the same ground as was covered in the hearing on the merits, but having did so

on the basis of a procedure having fewer safeguards and less reliability, there is little reason to receive it in evidence.

Furthermore, as the Court in Johnson noted:

> ... admission of the determination would have necessitated the taking of additional evidence to apprise the jury of the nature and extent of the EEOC investigation. To do so undoubtedly would have lengthened the trial. When the probative value of evidence is minimal, a court may weigh the value of that evidence against the fact that to admit it would prolong the trial. See Fed. R. Evid. 403.

If the initial determination were to be admitted, there is a substantial likelihood that the parties would introduce evidence and submit argument to undermine or buttress both the investigator's factual findings and legal conclusions. C.f., §904.03, Stats.:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion ot the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Under these circumstances, the initial hearing examiner properly excluded the initial determination.

RACE DISCRIMINATION

Complainant introduced no evidence into the record to establish that respondent discriminated against the complainant on the basis of race in terminating his employment. Nor did complainant argue the matter in his brief. Apparently, complainant concedes this claim. In any event, section PC 4.03(2) Wis. Adm. Code defines probable cause as follows:

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

Under this definition nothing in the record supports a finding of probable cause. Therefore, the answer to the aforesaid issue framed by the parties

is NO, there is not probable cause to believe that respondent discriminated against the complainant on the basis of race in terminating his employment.

SEX DISCRIMINATION

The Commission has used as a starting point in any inquiry into the burden of proof in an individual employment discrimination case the Supreme Court decision in McDonnel Douglas v. Green, 411 U.S. 792 (1973).

The essence of the McDonnel Douglas approach is the three-stage, shifting burden of going forward. The initial burden is on the complainant to establish a prima facie case of discrimination; that is, simply to present evidence to create an inference that unlawful discrimination occurred. What constitutes a prima facie case will vary from one type of employment transaction to another. Upon proof of a prima facie case, the burden shifts to the employer to state a legitimate, non-discriminatory reason for its action. Next, the complainant must show the employer's stated reasons are really only pretexts and the employer intentionally discriminated.

The Supreme Court in McDonnell Douglas suggested the elements of a prima facie case for discriminatory refusal to hire. The Court, however, noted that:

> The facts necessarily will vary in Title VII cases, and the specifications . . . required from the complainant in this case is not necessarily applicable in every respect to differing factual situations. 411 U.S. 792, 802, n.13.

In a discharge case, there are two primary ways of establishing a prima facie case. The complainant may attempt to establish that he or she was a member of a protected class and was discharged, and either that he or she did not commit the misconduct or substandard performance as alleged by

management, or that other non-minority employes who engaged in apparently similar misconduct or poor performance were not similarly disciplined. See Green v. Armstrong Rubber Co. 22 FEP Cases 125, 126, (5th Cir. 1980); Turner v. Texas Instruments, Inc., 15 FEP Cases 746, 748 (5th Cir. 1977). In many cases, such as this one, the complainant will pursue both avenues in the alternative.

With respect to the first alternative, it is questionable whether the complainant established a prima facie case. In any event, the respondent clearly articulated a legitimate, non-discriminatory rationale for the discharge, in the complainant's consistent record of poor performance, and this has not been shown to be pretextual.

The record indicates that complainant failed to meet the job expectations at the Officer 1 level despite being given every opportunity to function as an Officer 1. As noted in Finding of Fact #26, the Termination Notice found:

> Despite extensive training - both formal and on the job - during the last 13 months, Mr. Berryman failed to meet acceptable job performance standards. He has failed to follow correct security procedures; demonstrated inability to apply training into his assignments, and to meet the required levels of judgement, restraint, and responsibility in a correctional institution environment.

In addition, the factual basis for the conclusions noted above are contained in the numerous written monthly evaluations, incident reports and

the testimony of the training officers and supervisors contained in the Findings of Fact. [FN]

In the present case, the record clearly establishes that the respondent's stated reasons for discharging complainant are credible, since Berryman's conduct justified his termination. Contrary to complainant's assertions, the record discloses that the mistakes committed by Berryman were of a serious nature, and for the most part were the result of improper conduct by him. In this regard the Commission notes the complainant's years worth of below average monthly evaluations, the numerous incident reports, the complainant's failure to show any improvement or progress toward being able to satisfactorily perform correctional officer work and the Notice of Termination with attached Probationary Service Report which set forth the reasons for his discharge.

FN The respondent did not agree to only consider complainant's employment as a CO 1 in deciding whether he should be given permanent status. Contrary to complainant's assertion that he was given a "clean slate" at that November, 1980, meeting wherein he was hired as an Officer 1 the respondent made no such promise. It is true that complainant presented testimony to support this contention. Complainant himself testified emphatically that he was advised he would be given a "clean slate." However, complainant was not so clear or concise with respect to other parts of his testimony. In addition, union president Michael Brown did not corroborate complainant's testimony. Brown did state that complainant was being hired as a new employe and would have to serve a probationary period. Brown also stated that he "understood" complainant's performance as a CO 3 "would have no bearing whatsoever on his being able to pass the probation as a Correction Officer 1." However, Brown did not testify specifically that any representative of respondent (especially Larry Alberts) explicitly made this pledge or comment at the aforesaid meeting. Nor did Brown testify that any representative of respondent specifically stated at the November meeting that complainant's prior performance would not be considered in evaluating complainant's successful completion of his probation as an Officer 1. The respondent, on the other hand, presented better evidence that no such promise was ever made. Elizabeth Brashi, the personnel manager, stated unequivocally that no such pledge was made or intended at the November '80 meeting. This testimony is supported by comments made in written evaluations complainant received as a CO 1.

Nor did complainant offer any specific evidence that a discriminatory reason likely motivated respondent's discharge of Berryman. To the contrary, the record indicates that respondent bent over backwards in its attempt to assist complainant in becoming a correctional officer. FN

With respect to the second approach, the question is whether female employes committed acts of comparable seriousness to complainant's acts, but were not discharged. The complainant cites McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 280 (1976) for the principle that laws forbidding discrimination on the basis of gender prohibit the disparate treatment of not only females but also males. In McDonald, two white employes were discharged for misappropriating cargo, but a black employe also involved was not. The United States Supreme Court found a violation of Title VII. Respondent agrees that the facts in McDonald could support a finding of a violation of the fair employment act. Consequently, the parties are in agreement over the basic proposition that the fair employment act generally prohibits the disparate treatment of males and females.

In its brief, complainant claims that respondent knowingly retained female employes who committed infractions which were far more serious than complainant's mistakes. In particular, complainant cites the work experiences of female employes Cheryl Kimmins, Paula Berget, Mary Reed and Linda Kuska in support of this position.

Respondent, on the other hand, feels that complainant has not proven by a preponderance of the evidence that similarly situated female employes

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FN See Findings of Fact #15, 16, 17, 25 and 26.

had more serious work rule violations or performance problems than complainant. In this regard respondent argues that complainant did not establish that Berryman was treated differently than other probationary employes. Respondent also argues that complainant did not offer any evidence relating to a female Officer 1 serving a probationary period as the result of an original appointment and having a similar poor work record as Berryman without being terminated.

The record supports the respondent's position and the conclusion that the complainant has not established a prima facie case with respect to this second alternative. In this regard, the Commission points out that at basically all times material herein employes serving an original probation were treated differently for discipline purposes than other employes. In order to form a fair comparison complainant would have to prove that female employes with similar or worse work records serving an original probation were retained while complainant was discharged. This complainant failed to do. None of the female employes relied upon by complainant in support of this contention were similarly situated to Berryman. Berget was not even on probation. Reed was on permissive probation. The record is not clear whether Kuska was serving an original probation. However, the record is clear that Kuska only received one verbal warning for a minor offense during her probationary period -- hardly comparable to complainant's poor work record during his trainee and probationary periods which led to his discharge. Finally, complainant makes his strongest argument regarding female officer Kimmins. However, again the record is not clear whether Kimmins had her difficulties as a trainee or probationary employe and,

indeed, what kind of probation she was on. Also, while Kimmins was suspected of several serious offenses the record does not support a finding that she accumulated as poor a work record as that of complainant. In conclusion, the record does not indicate any similarly situated female employes who were treated differently for discipline purposes than complainant.

In addition, contrary to complainant's assertion, the record does not support a finding that complainant was treated differently in his work conditions such as training or job assignment than female employes. To the contrary, the record indicates that although complainant generally received the same training as other employes he, in fact, may have received more one-on-one assistance than other officers, both male and female, due to his difficulties. The complainant made a big deal over the fact that he could never get a permanent assignment like some female officers which, in his opinion, would have made it easier to learn his work. However, complainant himself admitted that many of the mistakes he committed would have occurred regardless of the nature of his work assignment. Finally, the record indicates that complainant got a real break when he was given a second chance and hired as an Officer 1. The record also shows that complainant may have been treated more favorably at other points in the discipline process.[FN]

Based on all of the above, the Commission finds it reasonable to conclude that there were no female employes with comparable or worse work

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[FN] See testimony of David Lemke on Tapes 11 and 12.

records to complainant who were not discharged. Therefore, since respondent did not treat male and female officers disparately, the Commission finds no violation of the fair employment act.

ORDER

The complaint of John E. Berryman in its entirety is hereby dismissed.

Dated: Aug 1, 1984 STATE PERSONNEL COMMISSION

DONALD R. MURPHY, Chairperson

DPM:jmf
JPDO4

LAURIE R. McCALLUM, Commissioner

DENNIS P. McGILLIGAN, Commissioner

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