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 *
 DAVID BRUMMOND, *
 *
 Complainant, *
 *
 v. *
 *
 President, UNIVERSITY OF *
 WISCONSIN SYSTEM (Parkside) *
 *
 Respondent. *
 *
 Case No. 83-0045-PC-ER *
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DECISION
 AND
 ORDER

This matter is an appeal of an Initial Determination finding no probable cause to believe complainant was discriminated against on the basis of his handicap or his arrest record in regard to his discharge by the respondent. A hearing was held on November 11, 1985, before Commissioner Donald R. Murphy. The posthearing brief schedule was completed February 21, 1986.

FINDINGS OF FACT

1. In April, 1982, the complainant, David Brummond, was verified by the Division of Vocational Rehabilitation, Department of Health and Social Services as being a person with a disability which caused a substantial vocational/occupational handicap, who was eligible for Expanded Certification pursuant to Pers. 27.04 of the administrative code.

2. In August, 1982, Brummond was interviewed for a Building Maintenance Helper 2 (BMH2) position in the student union at the University of Wisconsin-Parkside (UW-Parkside).

3. He was interviewed by Mr. William Niebur, the student union director and Mr. Jerry Hunt, the academic staff supervisor. During the interview, Brummond told the interviewers about his head injury. Although

Niebur noticed complainant's slow actions and speech patterns, he learned about complainant's handicap after the interview.

4. Both interviewers believed complainant was the best candidate for the position and agreed to offer it to him.

5. Brummond accepted the BMH2 position and on August 30, 1982, began working the day shift with the understanding that, after a period of training, he would be reassigned to the night shift.

6. On September 6, 1982, complainant was arrested on a felony charge and incarcerated. The following day, the first work day that week, complainant called Mr. Hunt, his supervisor, and told him about the arrest. Complainant also told Hunt that he was in jail and he did not know when he could provide the required security bond for his release.

7. Later that week, complainant again called Hunt. He told Hunt that he was still incarcerated and did not know when he could return to work.

8. Shortly after complainant's telephone calls Hunt reported to his supervisor Mr. Niebur and the personnel manager, Mr. LaMack; he advised them of his telephone conversations with the complainant. Later, Hunt, Niebur and LaMack met and discussed the effect of complainant's unavailability upon the maintenance needs in the student union.

9. The complainant's two supervisors, Hunt and Niebur with the personnel manager LaMack decided that maintenance needs during the night shift at the student union dictated filling the vacancy immediately.

10. Rather than hire a limited term employe to fill complainant's position, Mr. Niebur recommended severing complainant's employment and using the recently developed certification list to select a new permanent employe.

11. Mr. Niebur's recommendation was accepted and respondent informed Brummond, in a letter dated September 10, 1982, that his employment with the respondent was terminated on that date because of excessive absenteeism.

12. Complainant's employment with respondent was severed because: he was absent from work and he did not know when he would be available for work, there was an immediate need to fill the BMH2 vacancy on the night shift in the student union, and respondent had a recent list of certified and interviewed candidates available for immediate hire.

13. Complainant was incarcerated for 44 days on the charge of sexual assault. Subsequently, on or around January 11, 1983, he was acquitted.

14. Following his acquittal, complainant talked with Mr. Niebur and Mr. La Mack individually and in detail about the events which caused him to be absent from work. The complainant's position had been filled and there were no vacancies.

15. Between January and February, 1983, Mr. La Mack sent letters of recommendation to other state employing units to aid complainant in his search for employment. The letter included a statement that: complainant's employment was severed while a probationary employee, for inability to report to work after incarceration for an offense which he was later adjudged not guilty.

16. On April 18, 1983, complainant filed a charge of discrimination with the Commission alleging respondent discriminated against him, when it discharged him, because of his arrest record. In August, 1983, he amended these charges to include an allegation of handicap discrimination.

CONCLUSIONS OF LAW

1. The Commission has authority to hear this matter pursuant to §230.45(1)(b), Wis. Stats.
2. The burden of persuasion is on the complainant to show the existence of probable cause, as probable cause is defined in §PC 4.03(2), Wis. Admin. Code.
3. The complainant has failed to carry his burden of persuasion.
4. There is no probable cause to believe that complainant was discriminated against on the basis of his handicap or on the basis of his arrest record with respect to the subject hiring decisions.

OPINION

Applying the McDonnell-Douglas¹ format for establishing the assignment of burdens of proof and order of presentation in analyzing the evidence in this controversy, it is clear that complainant has established that he belongs to a protected group and was qualified for the job.²

This controversy, unlike McDonnell, which involved a hiring decision, centers upon a decision to sever employment relations. And, in this instance, the final step in establishing a case of discrimination is proof that the discharge was based upon complainant's handicap or his arrest record.

Witnesses for respondent testified that complainant was discharged because complainant, a probationary employe, missed four consecutive days of work, he could not say when he would be released from jail and return to

¹ McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 5 FEP Cases 965 (1973).

² Although the evidentiary standard in a probable cause proceeding, as this one, is not as rigorous as that applied in a decision on the merits, it is still useful to apply the McDonnell-Douglas format. The probable cause standard is defined in §4.03(2), Wis. Adm. Code.

work and there was an immediate need to have a BMH2 on the night shift in the student union.

Complainant attempted to rebut respondent's reasons for his discharge by questioning the time interval between his failure to report to work and respondent's decision to discharge him. But he failed to present evidence of disparate treatment. No evidence was presented by complainant showing that he was treated differently from other probationary employees who missed several work days. Also, although asked, complainant could not provide respondent with any answer as to when he would be available for work. So, while respondent's decision to release complainant was made within one week, it was based, in part, upon complainant's inability to project a return date. Complainant was, in fact, incarcerated for 44 days. And on the basis of information available at that time, it appears there was justification for respondent's decision.

Complainant also argues that letters of recommendation, written and sent to other state agencies by respondent, mention his prior incarceration and demonstrate an illegal discriminatory bias against him.

The Commission acknowledges that respondent's letter of recommendation mentioned complainant's incarceration. Upon review, this letter reveals that this comment was made while providing an explanation for complainant's absenteeism which resulted in his discharge. It would appear that this information did not constitute a deceitful act but was a necessary part of respondent's explanation for recommending an employee it had previously discharged. Other language in the letter described complainant as potentially an excellent employee and suggested respondent would re-hire him.

With the exception of this evidence, complainant produced nothing suggesting respondent's reasons for discharging him were not legitimate.

The matters of complainant's handicap or arrest record were not factors in respondent's decision.

ORDER

The initial determination of no probable cause is affirmed and this complaint is dismissed.

Dated: May 30, 1986 STATE PERSONNEL COMMISSION


DENNIS P. MCGILLIGAN, Chairperson


DONALD R. MURPHY, Commissioner

DRM:jmf
ID5/2

Parties:

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