

STATE OF WISCONSIN

PERSONNEL COMMISSION

* * * * *

MERRY JANE ROSE,
 Complainant,

v.

Secretary, DEPARTMENT OF
 NATURAL RESOURCES,
 Respondent.

Case No. 83-0055-PC-ER
 84-0081-PC-ER

* * * * *

DECISION
AND
ORDER

The above captioned matter is before this Commission on an appeal of a "no probable cause" initial determination, regarding complainant's allegations respondent discriminated against her by denying employment on two separate occasions because of her sex and retaliated for filing a prior complaint of discrimination against respondent. A hearing was held on complainant's claims, testimony was given, exhibits were received into evidence and the parties submitted post hearing briefs. The following findings of fact, conclusions of law, opinion and order are based upon the record made at the above-mentioned hearing.

FINDINGS OF FACT

1. Complainant, Merry Rose, was a limited-term employee for respondent, Department of Natural Resources (DNR), from 1972 through 1982. A limited term employee is a person hired by the state to work on a provisional, non-project basis or for less than 1,044 hours per year with no claim to a future position.

2. Respondent is a state agency and is responsible for implementing the laws of the state and applicable laws of the federal government that protect and enhance the state's natural resources.

3. From 1972 until 1980 complainant worked on the building maintenance crew at respondent's Devil's Lake State Park facility. In 1980, the building maintenance crew and ground maintenance crew were merged and crew work responsibilities were rotated. Complainant worked in the newly formed crew with its dual rotating ground and building maintenance functions through 1982.

4. Devil's Lake State Park's season is from April through October. It has a permanent crew of year-round and seasonal employees. During each season a crew of LTE's are employed to do various jobs.

5. In 1983 and 1984 Rose applied for an LTE crew position but she was not rehired. She filed her first complaint alleging sex discrimination against DNR in 1983. After failing to be hired in 1984 Rose filed another complaint against DNR alleging sex discrimination and retaliation.

6. Rose's first complaint was investigated by the EEOC and dismissed. Her second complaint was investigated by this Commission and determined not to have sufficient merit. Both initial determinations were appealed to this Commission within the 30 day appeal limitation time frame.

7. Merry Rose and her friend Beverly Elliott were first hired at Devil's Lake State Park on the summer maintenance crew in 1972. The two women were assigned to the building maintenance crew and in subsequent years were hired to work only on that crew until 1980. During the intervening years other women were hired for the summer maintenance crew, but none for the ground crew. In 1980 Dave Meyer, recently appointed Assistant Superintendent, instituted a general maintenance crew, which was responsible for building and grounds work.

8. From 1977 to 1982 the buildings crew was supervised by Arnold Janecek. In 1980 John Allen supervised the ground maintenance crew and trained the entire maintenance crew in the operation of any park equipment.

9. In 1981 Allen was replaced by James Froelich as foreman of the maintenance crew. Later, in the fall Jeff Lepley took over from Froelich. In 1982 Lepley was formally appointed supervisor of the maintenance crew.

10. Janecek testified complainant's work was good until 1981 when it first began to deteriorate and get worse in 1982. He also testified complainant had a bad attitude and when things did not go her way caused trouble. This testimony reflects his written evaluations of complainant.

11. Allen, who supervised complainant in 1980, testified she was a good worker, had a good attitude, took orders well and knew how to operate all park equipment. Allen's supervisor testified Allen operated more like a co-worker than a supervisor.

12. James Froelich and Jeff Lepley who supervised complainant in 1981 and 1982 testified complainant's work performance deteriorated during their supervisory tenures. As a result of complainant's 1982 job performance evaluations, it was recommended in respondent's Southern District 1982 Job Performance Evaluation Summary that complainant not be hired in 1983.

13. In 1983 respondent, for the first time, conducted personal interviews of applicants for LTE positions at Devil's Lake State Park. Previously, jobs were posted, former employers were notified of the vacancies and rehired without being interviewed.

14. In 1983 Lepley and Janecek conducted the interviews for LTE positions at Devil's Lake State Park and recommended hiring decisions to their supervisor. At the interview the same eight questions were asked each applicant and the applicant's answer was scored individually by the

interviewers. The interviewers scores were combined and a composite score given each applicant. The total point score was the basic criterion for hire. Complainant was not hired.

15. This same year respondent's Affirmative Action Officer investigated complainant's allegation that she had been discriminated against because she is female, when she applied for an LTE position at Devil's Lake State Park for the 1983 season. The Affirmative Action Officer concluded, complainant's over-all ten year work record warranted re-employment, but respondent had made affirmative action hires in other instances.

16. In 1984, complainant was one of forty-six applicants for LTE maintenance crew positions at Devils Lake State Park. The applicants were interviewed by Jeff Lepley, Arnold Janecek and David Bouche, the park's assistant superintendent.

17. All interviewees were asked the same set of questions. Their answers were scored and ranked on the basis of the interview.

18. Lepley and Janecek's evaluation of complainant had been read by Bouche prior to her interview. Lepley's evaluation recommended complainant not be rehired for 1983. Janecek's evaluation recommended rehire.

19. All three interviewers were aware complainant filed a sex discrimination complaint against respondent in 1983.

20. Complainant ranked eighteenth among applicants for LTE positions at Devil's Lake State Park in 1983.

21. Of the three interviewers, Bouche scored complainant the highest and Janecek scored her the lowest.

22. At least since 1972 women have been hired in various job classifications at Devil's Lake State Park. While no women were assigned to the ground crew on a daily basis before 1980, all lifeguards, male and female,

alternated days on the ground crew. In 1980, as previously stated, the park's building and ground crews were merged and job assignments were rotated.

23. The evidence of numerical imbalance between male and female employees at Devil's Lake State Park in various job classifications is not in itself sufficient for a finding of sexual discrimination in the hiring of LTE's at that facility.

24. Complainant was not hired as an LTE on the maintenance crew at Devil's Lake State Park in 1983 and 1984 because of the low scores she received on the interview which reflected the beliefs of her former supervisors that her work performance had deteriorated and she had become reticent to follow their supervision.

CONCLUSIONS OF LAW

1. This Commission has jurisdiction over complainant's claim of discrimination under §230.45(1)(b), 111.322(1) and 111.322(3), Wis. Stats.

2. Complainant has the burden of proving there is probable cause to believe respondent discriminated against her because she is female and/or retaliated against her for filing a discrimination complaint against respondent, by not employing her in 1983 and 1984.

3. Complainant has failed to show there is probable cause to believe respondent discriminated against her by not employing her in 1983 and 1984.

OPINION

The central question in this matter is whether there is probable cause to believe respondent discriminated against Merry Jane Rose. PC 4.03(2) Wis. Adm. Code, which defines probable cause, provides: Probable cause exists where there is reasonable ground for belief supported by facts or circumstances strong enough in themselves to warrant a prudent person in

the belief that discrimination probable has been or is being committed. To show a violation under this code Rose is required to prove "by facts or circumstances" there is reasonable ground for a prudent person to believe she was probably discriminated against by respondent because she is female or in retaliation for filing discrimination charges against it.

In order to show sex discrimination under sec. 111.321 and 111.322(1) Wis. Stats., Rose must prove that sex was a factor which contributed to her not being employed by respondent. Under the three-part analysis expressed in McDonnell-Douglas Corp v. Green, 411 U.S. 792, 93 S.Ct. 1817 (1973), Rose must establish a prima facie case, and, if rebutted by respondent, prove respondent's rebuttal was a pretext for discrimination.

To establish retaliation, Rose must prove, under the probable cause standard, there was a causal connection between her filing a sex discrimination charge against respondent and respondent's failure to employ her.

From the evidence presented at the hearing, it is clear Merry Rose established a prima facie case of discrimination under the three-step test in McDonnell. And again as required in McDonnell, respondent articulated a legitimate non-discriminatory reason for its action of not hiring complainant. In summary, this included both oral and written evidence of Rose's supervisor's increased dissatisfaction with her job performance between 1980 and 1982, which culminated in a decision not to rehire her.

Ms. Rose argues respondent's stated reasons for not hiring her in 1983 and 1984 are pretextual and lead to sex discrimination. To show respondent's discriminatory motive, she sought to prove: respondent's hiring and job assignments in 1983 and 1984 were discriminatory against her and women, generally; respondent's decision about her performance, abilities and experience were based on her sex; and respondent retaliated against her by

giving her a bad recommendation and not hiring her in 1984. These particularized alleged events of respondent's action, according to Rose, were evidence of respondent's true discriminatory motivation and supported her basic argument that she was not hired in 1983 and 1984 because, in 1981 and 1982 she expressed a preference for the ground crew and repeatedly requested to operate heavy equipment -- duties respondent believed to be "man's work".

The evidence does not support Rose's basic argument. When Rose received her poor performance evaluation in 1981 and 1982, she, like all LTE's, was rotating between the grounds crew -- the preferred crew -- and the building crew. Both men and women were rotated equally between the two crews. Also, she was not alone in her dissatisfaction of not being assigned heavy duty equipment tasks. Other women and a man testified they had requested increased assignments requiring the use of heavy equipment. Yet Rose offered no evidence that these other women received down-graded job performance evaluations or were not hired in any of the succeeding years. To the contrary, the evidence shows other women received satisfactory job performance evaluations during this same period. Moreover it was the policy of respondent to restrict use of heavy equipment by LTE's and give preference to more experienced permanent and seasonal employees. The evidence also shows, in 1983 and 1984, Rose applied for a position on either the grounds or building crew and she was not offered a position on either crew.

The plain evidence is that Rose was supervised by three different people and during this two year period these supervisors believed her job performance had deteriorated each year. Rose's last supervisor was the most critical and recommended she not be rehired. Clearly, the more

persuasive evidence suggests Rose's performance on the job did, in fact, deteriorate over the last two years of her employment with respondent.

The facts in this case point to the conclusion Rose's last three supervisors independently believed her attitude and work performance had deteriorated over the last two years below the level of a good employee. This belief of Rose's supervisors, whether correct or not, produced low interview scores and led to a decision, in some instances, to consider other marginal applicants rather than rehire her.

The evidence on the question of retaliation is sparse. Merry Rose directs attention to a letter written March 28, 1983 by David Meyer, Acting Devil's Lake State Park Superintendent to her job counsel as proof of retaliation. The body of that letter is as follows:

Merry has worked at Devil's Lake for the past 11 seasons (1972-1982). Each year she worked as a Limited Term Employee for approximately 6 months on the janitorial crew or general maintenance crew. Her duties encompassed all facets of the building and grounds maintenance program.

I have personally worked with Merry for five years. During that time I have made several observations concerning her working capabilities. Her strong points include: (1) Very punctual in reporting to work, (2) Seldom absent due to illness etc., (3) Knowledgeable about park rules and regulations.

Points that I feel Merry should work on include: (1) Less questioning of supervisor's decisions, (2) Willingness to work beyond the minimum required, (3) Improvement in physical ability to perform various tasks, and (4) Being less vocal about negative points of fellow workers.

Rose asserts the last paragraph quoted above from the letter is "devastating".

In the examiner's opinion it is open to question whether the particular paragraph referred to by Rose, when viewed in context, fairly describes the letter. The letter describes both positive and negative attributes of Rose. Also, the letter was written to a job counselor and not a prospective employer. Rose presented no evidence that respondent made negative

comments about her to any prospective employers. Finally, the written comments of respondent, characterized by Rose as devastating, were consistent with her supervisor's opinion of her in 1981 and 1982. The evidence does not support a finding that respondent treated Rose differently after she filed a discrimination claim against them in 1983.

ORDER

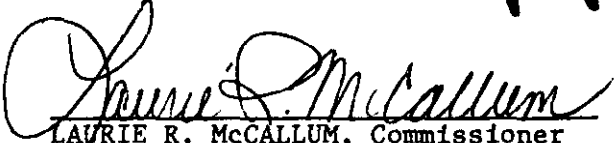
For the foregoing reasons and based on the record, complainant's claims of discrimination and retaliation against her by respondent are dismissed.

Dated: April 15, 1987 STATE PERSONNEL COMMISSION

ID11/2
DRM:baj


DENNIS P. MCGILLIGAN, Chairperson


DONALD R. MURPHY, Commissioner


LAURIE R. MCCALLUM, Commissioner

Parties:

Merry Jane Rose
127 Lynn Street
Baraboo, WI 53913

Carroll Besadny
Secretary, DNR
P. O. Box 7921
Madison, WI 53707