

STATE OF WISCONSIN

PERSONNEL COMMISSION

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YVONNE D. GRAY, *

Complainant, *

v. *

Secretary, DEPARTMENT OF *

HEALTH AND SOCIAL SERVICES, *

Respondent. *

Case No. 83-0132-PC-ER *

* * * * *

ORDER

After consulting with the Hearing Examiner and considering the record in this matter, the Commission adopts the Proposed Decision and Order in full, and adds the following language to the Opinion section of the decision in order to further explain the rationale for dismissing this complaint:

Although the evidentiary standard in a probable cause proceeding such as the one before us is not as rigorous as that applied in reaching a decision on the merits, it is nonetheless useful to use the McDonnell-Douglas format in analyzing the record before the Commission in this complaint. (This language shall be added to the beginning of the Opinion section)

Although the record supports a finding that complainant did not establish a prima facie case of discrimination, assuming arguendo that she did, complainant's case still must fail. As noted above respondent has demonstrated a non-discriminatory reason for terminating complainant -- failure to meet probationary standards based on excessive tardiness. Complainant may, in turn, attempt to

show this reason was in fact a pretext for discrimination.

Complainant, in fact, attempted to demonstrate this without success.

The record, contrary to complainant's assertions, indicated respondent did not discriminate against complainant on the basis of race in discharging her from the position of Institution Aid at the Southern Wisconsin Center.

Section 4.03(2), Wis. Adm. Code defines probable cause as follows:


(2) Probable Cause Defined. Probable cause exists when 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 probably has been or is being committed.

Based on the above definition, and all of the foregoing, the Commission finds it reasonable to conclude that there is No Probable Cause to believe that complainant was discharged from her employment on the basis of her race and the Initial Determination finding same is upheld. (This language shall be added to the end of the Opinion section)

Dated: October 23, 1985 STATE PERSONNEL COMMISSION


DENNIS P. MCGILLIGAN, Chairperson


DONALD R. MURPHY, Commissioner


LAURIE R. McCALLUM, Commissioner

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YVONNE D. GRAY,
 Complainant,
 v.
 Secretary, DEPARTMENT OF
 HEALTH AND SOCIAL SERVICES,
 Respondent.
 Case No. 83-0132-PC-ER
 * * * * *

PROPOSED
 DECISION
 AND
 ORDER

NATURE OF THE CASE

On December 2, 1983, complainant filed a charge of discrimination with the Personnel Commission alleging respondent discharged her because of her race in violation of the Fair Employment Act, Subch. II, Ch. 111, Wis. Stats. On November 21, 1984, the Commission issued an Initial Determination finding No Probable Cause to believe that complainant was discharged from her employment on the basis of race. Complainant filed a timely appeal from said Initial Determination. A prehearing conference was held on January 23, 1985, before Kurt M. Stege, Hearing Examiner, at which time the parties agreed to the following issue:

Whether there is probable cause to believe that respondent discriminated against the complainant based on race as to her probationary termination on July 1, 1983, as set forth in her complaint of discrimination and, accordingly, whether the initial determination of "no probable cause" should be affirmed or reversed.

Hearing in the matter was completed on May 2, 1985. The parties finished their briefing schedule on July 17, 1985.

FINDINGS OF FACT

1. The complainant, a black female, began her employment as an Institution Aid 1 with the respondent's Southern Wisconsin Center (hereinafter SWC) on January 6, 1983. As a new employe, complainant was required to complete a six month probationary period.

2. All new Aids go through several days of orientation and 10 days of Basic Aid Training. During this initial training, all Aids, including complainant, were given copies of the Department Work Rules and the SWC's Minimum Standards for training. The work rules indicate that tardiness is a work rule violation and that discipline may result from same. The Minimum Standards require that there be no tardiness and notify the employe that tardiness "will result in a recommendation for termination of employment." Dorla Kreft, the Nurse Supervisor who trains new employes, went over these rules and standards with every new Aid, including complainant, during the aforesaid training period. Dennis Janis, who was SWC's Personnel Manager, emphasized during the initial 2-day orientation which Gray attended that tardiness would not be tolerated.

3. Gray was tardy on five separate days of this initial 12-day training period.

4. Gray was counselled that punctuality is important after each instance of tardiness during the initial training. During these counselings, Gray stated that she was tardy because of car problems, ride problems and oversleeping. As a result of these counsellings, Gray was aware that tardiness was a serious offense which, if repeated, could result in discipline and termination.

5. Also during this training period, complainant was sent to talk to Hettie Dawes, a personnel assistant, to see if the problem of arriving at work on time could be resolved. During each of these discussions, Dawes

emphasized to Gray the importance of reporting to work on time and the adverse results that could occur if she failed to do so. Gray said that she understood and would try to do better.

6. On January 20, 1983, Kreft recommended that complainant be terminated because of excessive tardiness during her initial Basic Aid Training and orientation.

7. Between November, 1981, when the aforesaid Minimum Standards went into effect and the date of the hearing, eight employes had been tardy during initial training. Of these eight employes, only one employe (complainant) had been tardy on more than one occasion.

8. On January 20, 1983, after Kreft told complainant that she was recommending that she be terminated because of her excessive tardiness, complainant went to Janis and asked for one more chance.

9. On or about January 21, 1983, after the complainant completed initial training, she was put on the second shift in Richard Polansky's unit. Polansky, one of the shift supervisors, routinely told all Aids that were assigned to his unit, including complainant, that they were expected to arrive at work on time.

10. By letter dated January 25, 1983, Janis informed complainant of respondent's intent to terminate her for her "failure to meet probationary standards." At the same time Janis scheduled a pretermination hearing for complainant at which time she would have the opportunity to respond to the proposed reasons for her termination.

11. On February 4, 1983, Janis conducted the pretermination hearing. During this hearing, complainant stated that she understood SWC's attendance policy and attributed her past tardiness problems to mechanical problems with her car, relying upon an undependable resource for

transportation and oversleeping. Polansky asked for special consideration for complainant; he described complainant's dependability, work performance and attitude since being assigned to his work unit as "excellent;" and he felt complainant was already a valuable member of his work unit. During the time that complainant worked in Polansky's unit after her initial Aid training until the time of the pretermination hearing, she was not tardy.

12. Following the pretermination hearing, Janis called complainant's former employers to check on her past dependability record. Janis did this in an attempt to give complainant the benefit of the doubt. He was advised that there had been some dependability problems in the past but that they had been resolved. Janis had never checked with prior employers of probationary employes before with respect to tardiness or dependability problems.

13. By memo dated February 7, 1983, Janis submitted a summary of the pretermination hearing to John M. Garstecki, SWC's Superintendent. On the same date, Janis verbally recommended to Garstecki that complainant not be terminated because of Polansky's support, and because complainant recognized her tardiness problems and it appeared that she had resolved them.

14. Garstecki did not approve the complainant's termination because she had been an employe only a short time and he thought complainant could correct the tardiness problem. Garstecki also thought complainant had the potential to be a good Aid.

15. Janis then met with complainant after Garstecki's decision not to terminate her. Janis told complainant that she was being given one more chance, that no further tardiness would be tolerated and that her supervisors were being instructed to watch her attendance closely. At SWC an

employee demonstrating a pattern of tardiness problems receives closer scrutiny than a one-time abuser.

16. The second shift for the Aids at SWC begins at 2:45 p.m. The first shift ends at 3:15 p.m. During this half-hour overlap time, the shift supervisor reads a report to all the Aids. This report includes important information necessary for the Aid's care and treatment of the Center's residents such as medication changes, behavior modification programs, schedule changes, field trips and other activities to take place during that shift. This report also alerts Aids to what went on during the previous shifts that impact on the Aid's performance. The report time is the only time during a shift that the supervisors can talk to the employees as a group. This overlap time is also used as an opportunity for the Aid on a previous shift in each unit to give more detailed information to the oncoming second shift Aid regarding the medical and program needs of particular residents within their unit.

17. Some, but not all, of the aforesaid information exchanged during the first half-hour regarding patient care can be found in the many logs used to record information at SWC. The aforementioned report as well as the exchange of other information noted above directly effects the care and supervision of the residents at SWC.

18. Polansky and Fey Conley were second shift supervisors in complainant's building. Polansky and Conley start their shift by reading their report to all of the Aids at 2:45 p.m. If anyone is tardy, the supervisor will generally notice it when the employe walks in although it is possible to miss a late employe completely. There is no punch-in system or other formal means of keeping track of employees arriving and leaving work at SWC. Informal systems of monitoring employees' arrivals and

departures from work vary between shifts and within units. Both Polansky and Conley sometimes failed to record observed tardiness of employees (depending on the circumstances) or forgot about it all together.

19. Polansky completed Performance Planning and Development Reports for complainant on March 13, 1983, and May 17, 1983. The March Performance Planning and Development (PPD) Report indicated complainant's attendance was satisfactory while the May PPD Report included the notation "don't be arriving at the last minute." Both PPD Reports indicate complainant was performing her job in a generally satisfactory manner.

20. Both Conley and Polansky observed complainant arriving late on several occasions after complainant had gone through the aforesaid pre-termination hearing. Between the February 4th pretermination meeting and May 29, 1983, both Conley and Polansky counselled Gray about getting to work on time.

21. On May 29, 1983, complainant again came in late. Conley counselled complainant about being late and asked her if Polansky had talked to her in the past about being late. Gray replied that Polansky had counselled her. (At the hearing complainant stated that she lied about Polansky counselling her in order to protect him and because he had stood up for her at the aforesaid pretermination hearing) Conley then wrote a work rule violation report on complainant for her excessive tardiness and turned it into Personnel. Complainant had previously received an oral reprimand for being late to work.

22. Janis reviewed the work rule violation report that was submitted by Conley. Janis then discussed this with complainant's supervisor and Dr. Gerald Mauer, the Unit Director. Based on the report and these

discussions, Janis requested that a probationary evaluation recommending termination be done.

23. On June 20, 1983, a training qualification report was prepared regarding complainant's performance. This evaluation noted the five tardies for two hours and 46 minutes that occurred during the Basic Aid Training and also noted that complainant had been tardy on five additional dates: 3/17, 3/29, 4/27, 5/29 and 5/30. The evaluation recommended that complainant be terminated for continued tardiness. The evaluation was signed by Dr. Gerald Maurer, complainant's supervisor.

24. On June 21, 1983, after Janis received the probationary report, he notified complainant of the intent to terminate her effective July 1, 1983, for her failure to meet probationary standards and scheduled a pretermination hearing for complainant to respond to the proposed reasons for her termination.

25. On June 24, 1983, Janis conducted appellant's second pre-termination hearing. At said hearing, Janis listed the following episodes of complainant's tardiness (in addition to noting Gray's incidents of tardiness during Basic Training): March 17-3 minutes; March 29-3 minutes; April 27-3 minutes; May 29-8 minutes and May 30-3 minutes. Complainant admitted being tardy on three occasions. Complainant denied being tardy on March 17 and May 30. Complainant asked that she be given another chance. Janis decided that another meeting (on June 28th) would take place to review complainant's claim that she had been late only 3 times. Janis prepared a summary of the June 24, 1983, pretermination hearing in the form of a memo to Garstecki dated June 28, 1983.

26. On or about June 26, 1983, Polansky wrote a work rule violation report on complainant for what he considered patient abuse. Complainant

apparently grabbed a resident in order to restrain him from hitting another patient. Polansky thought complainant had hit said resident. This report was sent to Personnel. When Janis received this report, he decided that since complainant had already been notified that she was to be terminated effective July 1, 1983 for excessive tardiness, there was no time or need to schedule a separate meeting on the abuse issue. Janis decided, however, that complainant should have an opportunity to respond to the work rule violation report and that this issue would be discussed during the June 28th meeting.

27. The pretermination hearing was reconvened on June 28, 1983. Complainant again stated that she had not been tardy on March 17 and May 30. Janis stated that he would present this information to Garstecki but also stated that three instances of tardiness versus five instances was not as significant as the fact that she had a reoccurring problem with reporting for duty on time. The alleged patient abuse incident was then raised and complainant was given an opportunity to tell her version of the incident which differed from Polansky's version in at least one significant way as noted in Finding of Fact 26. Both of the above subjects -- excessive tardiness and the alleged patient abuse -- were covered in an "Addendum to the Summary of Ms. Yvonne Gray's Pre-Termination Hearing" sent by Janis to Garstecki on June 29, 1983.

28. Janis recommended to Garstecki that complainant be terminated based on excessive tardiness. By letter dated June 29, 1983 from Garstecki to complainant, Gray was terminated effective July 1, 1983. Although the alleged incident of patient abuse did not play any direct role in complainant's termination if respondent had had any inclination to give Gray another chance this incident did not enhance that possibility.

29. LuAnn Baumgart, a white female Institution Aid 1, had been tardy once during her initial training due to car problems. Kreft counselled Baumgart on this tardy, and she was never tardy again during the initial training period.

30. Baumgart was tardy only two more times during her six-month probationary period. A work rule violation report was written up on Baumgart on the second occasion that she was tardy while she was in her unit (a different unit than complainant's), and Baumgart was never tardy again. Baumgart was tardy for a total of 80 minutes on the aforesaid three occasions.

31. Mike Duncan, a white male Institution Aid, was also charged with patient abuse while on probation and was suspended for three days without pay as a result thereto. At least one white male employe had been terminated for patient abuse.

32. There does not seem to be a systematic, institution-wide patient-abuse policy at SWC which is applied on a uniform basis. However, patient abuse cases are handled differently with respect to the amount of discipline given an employe for same based on the circumstances and the severity of the abuse.

33. During the period 1981 though 1983, one black Aid (complainant) was terminated and 6-7 white Aids were terminated during their probationary period.

34. When complainant originally applied for the position of Institution Aid at SWC, she was certified under a Minority Expanded Certification. All of the minorities listed on that certification who were hired except complainant are still working there (2 of 3 hired still working).

35. The record does not support a finding that Conley and Polansky treated white employes and minority employes differently.

CONCLUSIONS OF LAW

1. The Personnel Commission has jurisdiction over this discrimination complaint pursuant to §230.45(1)(b), Stats. and §PC 4.03(3), Wis. Adm. Code.,

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

3. The complainant has the burden of proving that there is probable cause to believe that respondent discriminated against her on the basis of race in discharging her from the position of Institution Aid at the Southern Wisconsin Center.

4. The complainant has not satisfied her 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 turn, 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 class protected by the Fair Employment Act, 2) was qualified for the job and performed the job satisfactorily, and 3) despite satisfactory performance, the complainant was discharged under circumstances which give rise to an inference of discrimination.

In the instant case, there is no doubt that complainant is a member of a protected class. Secondly, the evidence shows that complainant was qualified for the job and performed in a generally satisfactory manner. That conclusion is supported by supervisors' statements at hearing indicating that complainant's work was well regarded in the work unit. In addition, various exhibits and in particular the aforesaid March and May PPD Reports indicate that complainant's work was largely satisfactory.

The next element of complainant's prima facie case is to demonstrate that she was discharged under circumstances which give rise to an inference of discrimination. In this particular instance, complainant was discharged for failure to meet probationary standards. Circumstances which would give rise to an inference of discrimination in such a case would be demonstrated by a showing that complainant met the probationary standards, or that if she didn't, white employees who also did not meet probationary standards were treated differently. See Green v. Armstrong Rubber Co., 22 FEP 125 (5th Circuit, 1980). Inherent in such an approach is the requirement that the complainant and the white employee be similarly situated.

Complainant argues that the present case involves two charges of discrimination. The first is that complainant was terminated for tardiness, but that other employees were not disciplined or terminated for similar or more serious offenses involving tardiness. Complainant maintains that the second charge of discrimination concerns patient abuse. In this regard, complainant likewise argues that other probationary employees, also involved in allegations of patient abuse, were not terminated.

Complainant admitted to being tardy on three occasions following her initial training for a total of 14 minutes. Complainant also did not challenge the allegation that she was late on five separate days during her

initial training for a total of almost three hours. Assuming arguendo that these were the only incidents of complainant's tardiness during her probation, complainant was still chronically late on a more frequent basis (for a larger period of time) than other employes during their probation. Complainant argues to the contrary and cites the case of a white Institution Aid, LuAnn Baumgart, in support thereof. However, the record indicates that Baumgart was late on only three occasions while on probation for a total of 80 minutes -- far less frequently than complainant. The record also indicates that Baumgart generally improved her tardiness record after counseling and discipline in contrast to complainant's chronic lateness behavior.

Complainant maintains that respondent's failure to keep a systematic record of the time employes arrived to work had a discriminatory impact on Gray. However, the record contains no persuasive evidence in support of same. To the contrary, all employes operated under the same system which admittedly was loose and unstructured. Consequently, some employes on occasion, including complainant, were not held accountable for their tardiness either because the supervisor forgot or the tardy did not merit attention.

Complainant also maintains that she was more closely monitored for tardiness than other employes, especially white employes. Again, however, the record also does not support such a claim. In this regard the record indicates that employes who were tardy often were more closely monitored. As noted above, no one was more tardy than complainant on a continuing basis. Nor was complainant, like other employes, written up every time that she was late.

Complainant also raises a second issue of discrimination involving patient abuse. In this regard, the record indicates that if respondent had any thoughts about giving complainant another chance the allegation of patient abuse eliminated that possibility. The record, however, also indicates that respondent had made up its mind prior to the allegation of complainant abusing a patient to terminate Gray based on her tardiness problem. There is no persuasive evidence in the record to support a finding that the aforesaid allegation of patient abuse played any direct or meaningful role in complainant's termination.

Finally, complainant alleges that respondent treated white employees and minority employees differently. In particular, complainant attacks Polansky's relationship with black employees. However, there is no persuasive evidence in the record that respondent treated white employees in a different manner than minority employees. It is true that several black employees testified that they had some difficulties in getting along with Polansky. On the other hand, Polansky's intervention on behalf of complainant at the February 4th pretermination hearing played an important role in her not being terminated at that time and being given a second chance at retaining her job.

The record supports a finding that complainant had the potential to be a good Aid but for her problem with excessive tardiness. However, complainant has not demonstrated that she was discharged under circumstances which give rise to an inference of discrimination. Instead, the facts show the complainant had developed an attendance problem during her probationary period that led to the termination of her employment. In addition, any differences in the treatment of white and black employees regarding tardiness was due to the discretion each supervisor had in handling such cases

as well as different circumstances. Generally, in this case, the record evidence supports a finding that respondent treated his employees alike. Therefore, based on all of the foregoing, her complaint must be dismissed.

ORDER

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

Dated: _____, 1985 STATE PERSONNEL COMMISSION

DENNIS P. MCGILLIGAN, Chairperson

DPM:jmf
ID5/2

DONALD R. MURPHY, Commissioner

LAURIE R. MCCALLUM, Commissioner

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