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ANN KAUFMAN, *

Complainant, *

v. *

Chancellor, UNIVERSITY OF *

WISCONSIN-MADISON, *

Respondent. *

Case No. 84-0065-PC-ER *

* * * * *

DECISION
AND
ORDER

NATURE OF THE CASE

On June 21, 1984, complainant filed a charge of discrimination with the Personnel Commission alleging respondent dismissed* her during her probationary period because of her handicap or a perceived handicap (alcoholism) in violation of the Fair Employment Act, Subch. II, Ch. 111, Wis. Stats. On April 26, 1985, the Commission issued an Initial Determination finding of No Probable Cause to believe that respondent discriminated against complainant on the basis of handicap or perceived handicap in regard to her dismissal in 1984. Complainant filed a timely appeal from said Initial Determination. A prehearing conference was held on July 1, 1985, before Judy M. Rogers, Equal Rights Officer, 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 handicap in regard to her termination, as set forth in her complaint of discrimination and, accordingly, whether the initial determination of "no probable cause" should be affirmed or reversed.

* Throughout this decision, the Commission has changed any reference in the proposed decision to complainant's "discharge" from employment with the Department of Medical Microbiology to "dismissal," since the record reflects that complainant's employment with that Department was terminated by dismissal pursuant to §ER-Pers 13.08, Wis. Adm. Code, prior to her achievement of permanent status in class.

Hearing in the matter was completed on December 17, 1985. The parties filed written arguments.

FINDINGS OF FACT

1. On September 12, 1983, complainant began her employment in the Department of Medical Microbiology at the UW-Madison as a Word Processing Operator 2 (WPO 2).

2. Complainant was previously employed in the Department of Surgery as a Program Assistant 1 (PA 1) where she experienced difficulty performing her job due to her drinking problem. By letter dated February 22, 1980, complainant was granted a medical leave of absence in order to give her time to get well so that she could return to employment at the Department.

3. Complainant was also previously employed in the School of Nursing as a PA 1. There she again experienced difficulty performing her job due to her drinking problem. By letter dated November 3, 1980, complainant was discharged due to her drinking problem "and specifically for consuming alcohol in your office on the morning of October 31, 1980, which rendered you unable to adequately perform your position responsibilities."

4. Prior to her aforesaid hire in September of 1983, Alice Stapp, complainant's supervisor, interviewed complainant for the position of WPO 2. During the interview complainant gave Stapp a resume which made no reference to her employment at the School of Nursing. Complainant told Stapp that she left the Department of Surgery for medical reasons.

5. Alice Stapp decided to hire the complainant and forwarded the information to the personnel office for processing. Stapp learned from Mary Ann Voots of that office that complainant had been discharged from the School of Nursing because of problems related to alcoholism. Stapp decided that complainant deserved another chance and reaffirmed her decision to hire complainant. Later, over coffee, Stapp informed complainant that she knew of

her alcoholism and that it would not be an issue unless her job performance was affected.

6. Complainant's position involved the operation of word processing equipment--preparation of manuscripts for publication; production of grant applications and other typed materials with an emphasis on classroom teaching materials; assisting in developing, advising and implementing policies and procedures for the word processor and maintenance of word processor storage discs (files), graduate school applications and other projects put on the word processor as well as miscellaneous office activities.

7. During approximately the first three months of complainant's employment, complainant generally got along well with her co-workers and her work performance was satisfactory.

8. On October 21, 1983, complainant told Alice Stapp that due to an appointment she would be in at 9:00 a.m. on October 24th instead of 7:45 a.m. When complainant failed to report for work on the 24th, Stapp called her at home sometime between 10:00 and 10:30 a.m. Complainant sounded incoherent and intoxicated to Stapp so she encouraged her to stay home. Complainant nevertheless come to work; fell while getting off the campus bus and broke her leg. The ambulance report and the emergency room records show that complainant was intoxicated with a blood alcohol level of .24. At complainant's request Stapp went to the emergency room to assist her in notifying her children and to provide support.

9. Respondent accommodated complainant at work after the accident as follows: Alice Stapp allowed complainant to arrive at work one hour later than the usual starting time and also allowed complainant to make up the time during her lunch hour; Carol Fritsch, the other WPO 2 in the office, lent complainant a wheelchair while Stapp rearranged complainant's work station to accommodate the wheelchair; the Department Chairman, Dr. Duard L. Walker, took complainant to the doctor for a check-up visit.

10. After her accident complainant felt tired often and was in a lot of pain. Complainant felt that the medication prescribed by her doctor was not sufficient to deal with her pain. Apparently her doctor would not prescribe any drug stronger than Tylenol III because complainant is a recovering alcoholic. Complainant began taking Terpin Hydrate and Codeine (THC) to relieve her pain. Alice Stapp verified complainant's expression of increased tiredness and pain. Stapp attributed forgetfulness, tiredness and some errors in complainant's performance during this period to the pain in her leg.

11. In late December of 1983 and early January of 1984, several incidents occurred which led Alice Stapp to pay closer attention to complainant's work performance. First, while Stapp was on a one-day vacation, complainant was unable to open the office correctly although she had the appropriate keys on her key ring. Secondly, in late December a manuscript which should have been mailed was found in complainant's desk. Complainant also began to ask more questions about basic procedures on the word processor; operations she had previously performed adequately. Through January, Stapp noticed a decline in complainant's performance through the day. The "forgetful" behavior included not following directions and typing errors. Stapp asked professors in the department for their evaluation of complainant's work and concerns were raised about her performance.

12. During this period of time, Carol Fritsch noted a bottle of THC in complainant's desk and in her vest. Fritsch informed Alice Stapp of what she observed, and Stapp informed Fritsch that complainant was a recovering alcoholic.

13. During January of 1984, both Carol Fritsch and Alice Stapp observed complainant taking THC at work.

14. In November of 1983, complainant had asked Alice Stapp to buy a bottle of THC. Thereafter complainant also asked Carol Fritsch to buy a bottle of THC for her. Fritsch later went to the drug store to buy THC for her husband and purchased a bottle of THC for complainant. While at the drug store Fritsch noticed that a number of other people had bought THC for complainant.

15. After the above series of events involving THC, Alice Stapp went to the pharmacist at Walgreen's on University Avenue and suggested to him that complainant might be using and abusing THC. Stapp asked him if there was any control over the dispensation of THC, aside from the requirement of signing for the THC. The pharmacist responded in the negative.

16. THC is an expectorant that contains a mixture of 43% alcohol and codeine. THC is a controlled substance, and must be signed for at the time of purchase. According to the label, THC may cause "drowsiness or dizziness" if more than the recommended dose (2 teaspoons every 4 hours) is taken. The label also indicates that exceeding the prescribed dosage "may impair the ability to drive or perform other tasks requiring alertness." The label warns against exceeding the recommended dose and indicates that the medicine should not be used for more than a few days without consulting a physician. The codeine contained in the THC potentiates the effects of the alcohol to some extent, and THC is not particularly effective for the purpose of relieving pain.

17. On January 31, 1984, Alice Stapp contacted Steve Lund from the University of Wisconsin Employees Assistance Program. Stapp was advised by Lund to confront complainant with the information she had regarding complainant's drinking problem and how it was affecting her work.

18. On February 2, 1984, Alice Stapp spoke to complainant and informed complainant that her work had deteriorated. Stapp indicated that complainant

would be evaluated more closely and that her work had to improve or she would not pass her six-month probation. Complainant admitted that THC was affecting her work and stated she had stopped using it. Stapp referred complainant to the Employee Assistance Program. Complainant refused the referral, stating she knew someone at Dane County Mental Health who could provide help if needed.

19. On or about February 16, 1984, Alice Stapp gave complainant a letter dated February 3, 1984 which summarized the aforesaid February 2nd meeting as follows:

This letter is to summarize the content of our talk yesterday afternoon regarding your work performance. As I stated, both the quality and quantity of your work have deteriorated in the last several weeks, with marked, rapid worsening in the last two to three weeks. You have made numerous, non-thinking errors, omissions and changes to work you have typed and you have been abnormally forgetful.

Your work will be monitored carefully throughout your probationary period. Unless your work shows significant and consistent improvement and high standards are maintained, you will not pass probation.

Since it appears that the change in your work performance could be related to a personal problem, I suggested that you may want to contact the Employee Assistance Program on campus. Although you indicated that you were not interested in doing so at this time, should you desire assistance in the future, the name of the person to contact in Employee Assistance is Stephen Lund at 263-2987. The Employee Assistance Program is designed to help employees with personal problems and is absolutely confidential; no records go into any personnel files and no information is given to an employee's supervisor without the consent of the employee.

20. Following the February 2nd meeting noted above, the complainant's work performance improved somewhat but was not consistent.

21. By letter dated February 20, 1984, the complainant was dismissed as follows:

As we discussed on February 2, 1984, we have been concerned about the inconsistency of your work performance. At that time, we indicated that unless your work showed significant

and consistent improvement with maintenance of high standards, you would not pass probation.

Although your work has occasionally shown moderate improvement, the improvement has neither been marked enough nor consistent enough to warrant granting permanent status. In accordance with s. ER-Pers 13.08 (1)(a), Wis. Adm. Code, your last day of work as a Word Processing Operator 2 in the Department of Medical Microbiology will be March 7, 1984.

22. On February 24, 1984, Alice Stapp gave complainant her final probationary report. The report stated that, although complainant was capable of high quality work, her job performance was erratic, her quality/quantity of work, judgment, accuracy, etc., was inconsistent. The report also indicated that a personal problem interfered with complainant's job performance. Termination was recommended. Complainant refused to sign the report.

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 handicap in regard to her dismissal.
4. The complainant has not satisfied her burden.

OPINION

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.

In a probable cause proceeding such as the one before us, the evidentiary

standard applied is not as rigorous as that which is required at a hearing on the merits. Nonetheless, it is useful to use the McDonnell-Douglas format in analyzing the record before the Commission in this complaint. In this regard the Commission notes that 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 dismissal, 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 dismissed 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, at least during the first few months of her employment. That conclusion is supported by the fact respondent hired her in the first place and her supervisor's statements at hearing indicating that complainant's work was satisfactory during her first three months on the job. In addition, several other witnesses testified for complainant that her work was satisfactory during the entire period of her employment with respondent. (As discussed later the testimony of a number of witnesses and exhibits leads to an opposite conclusion.)

The next element of complainant's prima facie case is to demonstrate that she was dismissed under circumstances which give rise to an inference

of discrimination. In this particular instance, complainant was dismissed for failure to meet probationary standards. Specifically, respondent found complainant's job performance erratic, the quality/quantity of her work inconsistent and her judgment in the office questionable. However, complainant's final probationary report also indicated that a personal problem, interfered with complainant's job performance. There is testimony in the record that based on family history complainant's supervisor may have had a bias against alcoholics, and that based on same she acted adversely toward complainant. Based on this evidence and assuming arguendo that complainant performed her work somewhat satisfactorily, the Commission finds it reasonable to conclude that she was terminated under circumstances which give rise to an inference of discrimination.

Assuming arguendo that complainant established a prima facie case of discrimination, 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 poor work performance.¹ 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

¹The complainant contests this conclusion. However, the record contains better evidence supporting a finding that complainant's work performance was unsatisfactory. In this regard the Commission notes respondent's exhibits 9-12, 14-15, 19-21, 23-24, and 26. The Commission also relies on the testimony of complainant's supervisor Alice Stapp, her co-worker Carol Fritsch, and several witnesses called by the complainant herself including Dr. Richard A. Proctor, Dr. Albert Grover, Dr. Edward Bailish, Professor Donald Smith, as well as several other witnesses called by respondent.

the basis of handicap in dismissing her from the position of Word Processing Operator 2 at the UW-Madison.²

Based on the aforesaid definition of Probable Cause, and all of the foregoing, the Commission finds it reasonable to conclude that there is No Probable Cause to believe that complainant was dismissed from her employment on the basis of her handicap and the Initial Determination finding same is affirmed. Accordingly, this complaint of discrimination is dismissed.

Dated: August 6, 1986

STATE PERSONNEL COMMISSION


DENNIS P. MCGILLIGAN, Chairperson

DPM:vic
VIC03/2


LAURIE R. MCCALLUM, Commissioner

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²First, complainant's job performance was unsatisfactory. Secondly, Alice Stapp testified creditably that she did not have any bias and/or discriminatory attitudes toward complainant based on her alcoholism, nor did she act adversely toward complainant based on any such attitudes. To the contrary, the record supports a finding that Stapp and other representatives of respondent attempted to accommodate complainant's handicap and to give her another chance at retaining a job. Finally, complainant raises several issues regarding procedure and respondent's failure to promptly warn complainant that her work performance was unsatisfactory and could lead to termination. However, complainant failed to establish that there were discriminatory motives involved in any of these matters.