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STATE OF WISCONSIN

PERSONNEL COMMISSION

* * * * *

GERHARDT PODEVELS, *

Complainant, *

v. *

Chancellor, UNIVERSITY OF *

WISCONSIN-Milwaukee, *

Respondent. *

Case No. 84-0204-PC-ER *

* * * * *

DECISION
AND
ORDER

NATURE OF THE CASE

On December 26, 1984, complainant filed a charge of discrimination with the Commission alleging respondent discriminated against him on the basis of age in regard to his termination from employment. In an initial determination dated August 27, 1985, two of the Commission's Equal Rights investigators found No Probable Cause to believe complainant was discriminated against on the basis of age when respondent terminated his employment. On September 16, 1985, complainant filed an appeal of this initial determination. A hearing was held before Laurie R. McCallum, Commissioner, on November 21, 1985, and the briefing schedule was completed on January 2, 1986.

FINDINGS OF FACT

1. Complainant was hired by respondent to fill a Laborer Special position on July 23, 1984, and was required to serve a six-month probationary period. Complainant was 59 years of age at the time of this hire. Respondent terminated complainant from this position on December 14, 1984, prior to the end of the probationary period.

2. During his period of employment by respondent as a Laborer Special, complainant was supervised by Dennis Greenwood, a Building and Grounds Supervisor 2.

3. On August 24, 1984, Mr. Greenwood observed complainant and a co-worker taking a break at 9:00 a.m. Scheduled break time was 8:30 to 8:45 a.m. and neither complainant nor the co-worker had advised Mr. Greenwood that it was not possible to take their break that day during scheduled break time. Mr. Greenwood had previously advised all of the employes he supervised that breaks must be taken at scheduled times, but, if this were not possible, they were to so notify Mr. Greenwood in advance. Mr. Greenwood was aware that complainant had no control over the time the break was taken that day since complainant was assigned to a moving truck and his co-worker, Larry Novy, was the driver of the truck and determined when they would stop for a break.

4. At 2:50 p.m. on September 4, 1984, Mr. Greenwood observed complainant pushing a hand mower on the sidewalk past several areas that needed mowing. Quitting time was at 3:30 p.m. but complainant and other employes on the buildings and grounds crew were allowed to return to the locker room at 3:20 to clean up. Complainant advised Mr. Greenwood that he was on his way to the North Woods to clean his mower before he put it away for the day. Complainant alleges that his watch was not working that day so he thought it was quitting time when he observed other members of the building and grounds crew leaving their duties. It is not clear from the record whether complainant so advised Mr. Greenwood at the time.

5. On November 1, 1984, Mr. Greenwood became aware that complainant had to re-wash windows he had washed the day before because they were streaked. Complainant alleges that this was due to the fact that the

window cleaning fluid he had been given to use the day before had left streaks on the window that he had washed that day. Complainant did not so advise Mr. Greenwood at the time.

6. On November 21, 1984, complainant and a groundskeeper (Bill Schrank) were assigned the task of planting daffodil bulbs in a particular area. Groundskeepers serve as lead workers for laborers. Mr. Schrank decided to start the planting in certain beds in the assigned area where the ground was hard-packed or frozen and decided to use the hand trowels which were immediately available instead of walking to the storage area which was a 10-minute walk from the assigned area to obtain shovels. Complainant did not question these decisions. Mr. Greenwood counseled both complainant and the groundskeeper in view of the fact they planted only 24 bulbs in the morning and Mr. Greenwood was advised that the ground was hard-packed or frozen. Mr. Greenwood was of the opinion that complainant and the groundskeeper exercised poor judgment and a lack of initiative in not going to other beds in the assigned area when it was apparent the ones they were working in were hard-packed or frozen and in not walking to the storage area to get shovels.

7. On November 28, 1984, Mr. Greenwood observed complainant stop work washing windows before the scheduled lunch break. Complainant explained to Mr. Greenwood that his gloves had gotten wet earlier in the morning and his hands had gotten cold. Mr. Greenwood counselled complainant about taking breaks only at scheduled times and was of the opinion that complainant exercised poor judgment in not getting a dry pair of gloves when his first became wet.

8. On December 7, 1984, complainant was assigned the task of "policing" or picking up litter. Mr. Greenwood observed that complainant failed

to pick up a significant amount of litter and debris in the areas he had policed.

9. Mr. Schrank complained to Mr. Greenwood about the quality of complainant's string trimming. String trimming is cutting grass and weeds with a string trimmer or "weed eater" in those areas where a lawn mower can't be used. A string trimmer is not a complicated machine and an operator should be proficient in its use after 15 or 20 minutes of practice.

10. Sheldon Fishman, a Grounds Supervisor 1, observed complainant policing an area and was of the opinion that complainant worked very slowly, took frequent unscheduled breaks, and left a significant amount of litter and debris in the areas he had policed. Mr. Fishman reported this to Mr. Greenwood.

11. Rick Kazmierski, the assistant superintendent of buildings and grounds, observed complainant working near Engelman Hall. Mr. Kazmierski observed complainant work for a short period of time, take an unscheduled break and lean on his tool for several minutes, and then repeat the same procedure. Mr. Kazmierski reported this to Mr. Greenwood.

12. Mr. Greenwood observed complainant, on more than one occasion, take an unscheduled break to smoke a cigarette and chat with passersby.

13. During complainant's period of employment with respondent which is the subject of this action, his performance was evaluated four times by Mr. Greenwood. Mr. Greenwood consistently rated complainant's performance as average or poor and consistently cited complainant's lack of initiative and his failure to take breaks at scheduled times. Mr. Greenwood discussed each of these evaluations with complainant at the time the evaluation was completed.

14. Mr. Greenwood is a very demanding supervisor who sets very high work performance standards and who strictly enforces all work rules. The witnesses at the hearing who had been supervised by Mr. Greenwood acknowledged this and testified that he treated all the employees he supervised in the same manner. Mr. Greenwood has formerly disciplined some of the employees he has supervised, including some under the age of 40 and some over the age 40 and including some of the witnesses who testified at the hearing.

15. Mr. Greenwood has hired three employees besides complainant for full-time permanent positions since he became the Buildings and Grounds Supervisor 2. One, who was in his late 40's or early 50's, has passed probation and become a permanent employee; one resigned; and one is still on probation.

16. The person selected for complainant's position after complainant was terminated is 7 years younger than complainant.

17. Complainant was terminated by respondent as the result of his failure to meet performance expectations, not as the result of his age.

CONCLUSIONS OF LAW

1. The Commission has the authority to hear and decide this matter pursuant to §230.45(1)(b), 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. Adm. 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 age with respect to the subject termination.

OPINION

In McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 5 FEP Cases 965 (1973), the Supreme Court established the basic allocation of burdens and order of presentation of proof in cases alleging discriminatory treatment. The complainant must carry the initial burden of establishing a prima facie case by a preponderance of the evidence. In a case alleging age discrimination, this may be accomplished by showing: 1) that complainant was within the age group protected by the Wisconsin Fair Employment Act; 2) that complainant was adversely affected by the employer's action which is the subject of the complaint; and 3) there is evidence age was not treated neutrally in the employer's decision. If the complainant succeeds in establishing a prima facie case, the burden of production then shifts to the defendant employer to articulate some legitimate, nondiscriminatory reason for the employer's action. Once this is accomplished, the complainant must then be given a fair opportunity to show by a preponderance of the evidence that the employer's stated reasons for the action were in fact a pretext for a discriminatory decision. The ultimate burden of persuading the trier of fact that the respondent employer intentionally discriminated against the complainant remains at all times with the complainant, Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 25 FEP Cases 113 (1981).

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.

Complainant did make out a prima facie case. As a person over the age of 40, complainant is a member of a protected group under the Wisconsin Fair Employment Act (FEA); complainant was adversely affected by respondent employer's decision to terminate him; and, since a younger person was hired to replace complainant, an inference of unlawful discrimination could be drawn:

Respondent did offer a legitimate, non-discriminatory reason for complainant's termination, i.e., complainant's unsatisfactory work performance. This reason is neutral as to age on its face and is an obviously legitimate reason for terminating an employe.

The remaining question then is whether the reason stated by respondent for complainant's termination was in fact a pretext for a discriminatory decision. There is no question that Mr. Greenwood set high work performance standards for complainant. There is also no question on the basis of the record before the Commission that Mr. Greenwood set high work performance standards for all the employes he supervised. There is no question that complainant's work performance failed to meet Mr. Greenwood's standards. Findings of Fact #3 through 12 above, summarize the incidents offered by respondent as examples of complainant's failure to meet his supervisor's work performance standards. These incidents were observed and reported not only by Mr. Greenwood but by one of complainant's co-workers, (see Finding of Fact #9) and by other supervisory employes (see Findings of Fact #10 and 11). Complainant argues that, in regard to two of the incidents (see Finding of Fact #3 and 6) cited by respondent as examples of his unsatisfactory work performance, complainant relied on the leadership of other employes. However, it was not without a rational basis and it was not shown to be inconsistent with Mr. Greenwood's manner of supervising

employees, for Mr. Greenwood, in evaluating complainant's initiative and judgment in regard to these two incidents, to take into account complainant's failure to offer a suggestion or reminder of a work rule to the lead employe. Finally, there is no question that the record fails to show that complainant was treated in a different manner than any other employe supervised by Mr. Greenwood or that employes over the age of 40 were treated differently by Mr. Greenwood than employes under the age of 40. This was acknowledged even by those employes who had been supervised by Mr. Greenwood and who took strong exception to the manner in which he supervised employes.

The essence of complainant's position in this matter appears to be that Mr. Greenwood's manner of supervising employes impairs rather than improves the functioning of the buildings and grounds work unit he supervises and that the examples of complainant's unsatisfactory work performance cited by respondent to justify the action taken in regard to complainant aren't significant enough to support a termination. First of all, the Commission doesn't have the authority to substitute its judgment for that of an agency in regard to the manner in which a work unit is being managed in the context of its review of a discrimination complaint unless the complainant can show that such management has a discriminatory intent or impact. Complainant has not shown such discriminatory intent or impact in this case. Second, the issue in a complaint of discrimination such as this is not whether there was just cause for the termination, in which case the significance of the examples of unsatisfactory work performance cited by the respondent could be an issue.

The Commission concludes, on the basis of the record before it, that complainant was terminated as a result of his unsatisfactory work performance, not his age.

ORDER


This complaint is dismissed

Dated: March 13, 1986 STATE PERSONNEL COMMISSION


DENNIS P. MCGILLIGAN, Chairperson

LRM:jmf
JANE/1


DONALD R. MURPHY, Commissioner


LAURIE R. MCCALLUM, Commissioner

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