STATE OF WISCONSIN PERSONNEL COMMISSION

GARY ROSE,

Complainant,

v.

Secretary, DEPARTMENT OF ADMINISTRATION,

Respondent.

Case No. 85-0169-PC-ER

DECISION
AND
ORDER

NATURE OF THE CASE

This case involves a charge of discrimination under the Wisconsin Fair Employment Act (Subchapter II, Chapter 111, Wis. Stats.). A Commission investigator issued a finding of "no probable cause" which complainant appealed pursuant to §PC 4.03(3), Wis. Adm. Code (1980). At a prehearing conference held August 5, 1987, the parties agreed to the following issue for hearing:

> "Whether there is probable cause to believe complainant (Gary L. Rose) was discriminated against on the basis of race, handicap and retaliation by DOA during his employment with them from early 1985 until and including his termination in 1986."

FINDINGS OF FACT

1. Complainant, who is black, began employment with respondent DOA in 1979 as a Building Maintenance Helper (BMH) 2, and ultimately was discharged effective December 26, 1985.

2. Complainant was promoted to BMH 3 in 1982. At that time he was assigned to the State Capitol building. Complainant transferred to the Hill Farms State Office Building in April, 1983, and then transferred back

to the capitol in June of that year. Subsequent to his promotion to BMH 3, he was never certified for promotion again during his employment with DOA.

3. The BMH 3 classification is basically a leadworker classification. His position description (Appellant's Exhibit 2) included the following activities:

"40% A. Leadworker for group (4-6) of BMH 2's.

* * *

50% B. Perform manual work of a heavy physical nature related to clearing and maintenance of state office buildings.

* * *

10% C. Training, keep records and make reports...."

4. Complainant's 1981 performance evaluation as a BMH 2 which was signed by his supervisor, Bernice Hefty on June 17, 1981, had an overall evaluation of "satisfactory."

5. Complainant's probationary service report as a BMH 3, which was signed by his supervisor Dale Dumbleton, on November 10, 1982, contained one "excellent," 3 "good" and 4 "average."

6. Complainant's 1983 evaluation, which was signed by Mr. Dumbleton on June 22, 1983, had an overall evaluation of "satisfactory."

7. Complainant's 1984 evaluation, which was signed by Mr. Dumbleton on June 20, 1984, had an overall rating of "commendable."

8. Complainant's July 1, 1985, evaluation, which was prepared by a new supervisor, Andrew M. Stewart, who had taken over from Mr. Dumbleton in December, 1984, had an overall evaluation of "improvement desired."

9. Mr. Stewart, who is white, had been employed by DOA in various custodial positions from January 1983, until his promotion to Custodial Supervisor 2 in December 1984, including assignments at the capitol. Prior

to his state employment, he had had custodial experience with the private sector from March 1974. This included experience as a supervisor.

10. On January 10, 1985, complainant called in sick to the security dispatcher a few minutes before his shift (second) was to start (4:30 p.m.). This action was in violation of the procedure prescribed by management, which required that employes call a custodial supervisor not later than 3:00 p.m. This procedure was posted on bulletin boards that were accessible to employes.

11. The next day, Mr. Stewart informed or reminded complainant of this policy. Complainant did not advise Mr. Stewart why he had called in late.

12. On January 22, 1985, complainant called in sick after the shift started, at about 5:15 p.m., and said he would come in later if he could. He came to work about 2 hours later.

13. Mr. Stewart again counseled complainant about the call-in procedure. Again, complainant offered no reason why he had called in late.

14. On January 31, 1985, complainant called the security dispatcher at about 4:20 p.m. and said he would not be able to work that day. Subsequently, complainant again was counseled by Mr. Stewart regarding the call-in procedure.

15. On February 14 and 15, 1985, complainant left work at 11:30 p.m. or 12:00 a.m. without seeking Mr. Stewart's permission, in each case leaving an AD-19 (leave slip) filled out for annual leave on his desk. This was in violation of management's policy, which required that vacation be requested at least 24 hours in advance.

16. On February 18, 1985, Mr. Stewart held a staff meeting in which he reviewed the call-in and leave procedures. Additionally, he met

personally with complainant after the meeting and informed him that in the future his time off would be charged as leave without pay if he failed to follow prescribed procedures.

17. On March 15, 1985, complainant called in properly. On March 18, 1985, he called in at 4:35 p.m. to say he had a nosebleed he couldn't get stopped and that he would not be in. The next day Mr. Stewart asked him why he hadn't called in earlier, and he said it was because he had had a nosebleed that he couldn't get stopped.

18. After a pre-disciplinary meeting held on March 25, 1988, Mr. Stewart issued a letter of reprimand to complainant dated March 25, 1985 (Respondent's Exhibit 5) for failing to utilize proper call-in procedure on March 18, 1985.

19. After Mr. Stewart began as a Custodial Supervisor 2, he spent about 2 or 3 months observing the custodial operation at the capitol. In addition to his observations on complainant's use of leave, Mr. Stewart reached the conclusion that there were significant deficiencies in the work performed by complainant's crew, and in complainant's leadership and work performance. All of complainant's crew members were all complaining to Mr. Stewart that complainant was not doing sufficient work himself, as well as complaining about his poor organization and communication. Mr. Stewart attempted to work with complainant to improve things but these efforts were unsuccessful. Complainant reacted defensively and began to ask questions about simple procedures that should have been well-known to him. Also, Mr. Stewart had informed DOA personnel that he intended to mark complainant down on his next performance evaluation, and they advised him that he should first ensure that complainant was aware of what was expected of him. Therefore, Mr. Stewart began a program of "retraining" for complainant,

where management instructed complainant in various techniques and procedures. Mr. Stewart relieved complainant of lead work responsibilities during this retraining. These eventually were restored on July 16, 1985, except that he was instructed not to use the autoscrubber any more due to complainant's continuing improper usage of the machine.

20. Complainant strongly disagreed with Mr. Stewart's assessment of his performance, as well as with much of Mr. Stewart's approach to personnel supervision and custodial techniques and methods. Complainant believed that Mr. Stewart played favorites with his "cronies" and that he singled out complainant for harassment. However, it is apparent from the record, and the Commission finds, that Mr. Stewart had higher expectations of his subordinates than his predecessors, that he believed, with substantial justification, that complainant's performance and attendance were deteriorating, and that it was because of these concerns and the fact that complainant was a lead worker that he seemed to focus more on complainant than on some of the other workers. One of Mr. Stewart's friends or "cronies" who allegedly received favorable treatment was black, and Mr. Stewart also disciplined white employes during the period in question. In 1985, in addition to his dealings with complainant concerning failure to call in properly, he counseled or reprimanded (one written and one verbal) four other employes (all white) on a total of 11 occasions. No other employe failed to call in until after the start of a shift.

21. During the period of April - August, 1985, complainant called in sick 13 times. These were frequently immediately after the retraining sessions. For example, on May 6, 1985, they talked for about a half hour, after which complainant said he was sick and was going home.

22. During this period, Mr. Stewart utilized a contractual provision to impose a requirement that complainant produce medical verification in connection with his sick leave. Complainant had used in excess of 160 hours of sick leave in 1987 and had less than 50 hours balance in July 1988. During 1985, Mr. Stewart imposed medical verification requirements on three other employes (all white).

23. In June or July 1985, someone posted a newspaper article on a bulletin board in the men's locker room at the worksite. This was an Associated Press article with the headline: "White males are work-force minority." It described statistics published by the Federal Bureau of Labor Statistics which showed that the percentage of white males in the work force had declined while the percentages of females and minorities increased. It also included comments from a Bureau Official and from professors at Cornell University and Drexel University. Complainant removed this article from the bulletin board.

24. On August 29, 1985, complainant dropped off in Mr. Stewart's office an AD-19 for 4 hours of vacation for August 30th. The next day, Mr. Stewart advised complainant that because there already were 6½ employes off that date, his vacation would not be allowed. Complainant responded that this was an unfair exercise of supervisory discretion. Mr. Stewart told him he should work the shift and then file a grievance. At about 9:15 p.m. the same day, Mr. Stewart found complainant's keys on the table where he usually took his break, and learned that he had left work without telling anyone.

25. As a result of this incident, Mr. Stewart caused complainant to be suspended for one day without pay, see Respondent's Exhibit 7. This suspension was preceded by a predisciplinary meeting on September 4th at

which complainant appeared without union representation. Mr. Stewart had refused to postpone the predisciplinary meeting after complainant's union representative had said he would not be available for at least 10 days, because Mr. Stewart felt that this was unreasonable. There were no other cases in Mr. Stewart's tenure in his position where an employe under his supervision had walked off the job without permission.

26. On October 9, 1985, complainant failed to appear for work or call in. He then requested a medical leave of absence which management agreed to at a grievance meeting concerning the suspension. This leave of absence was officially approved on October 22, 1985. Complainant was advised as follows by letter dated October 22, 1985 (Respondent's Exhibit 11):

> "Your request for a leave of absence for medical reasons has been approved. The effective date of this leave is October 9, 1985 with a scheduled return date of December 1, 1985. You are to report to your supervisor Andrew Stewart at the start of your shift, 4:30 p.m. on December 2, 1985."

27. By letter dated October 11, 1985, (Respondent's Exhibit 10), Dr. Priest (internal medicine) had advised respondent as follows:

> Mr. Gary Rose is a patient of mine and currently is in need of a medical leave of absence for approximately thirty days. He has some health problems which, if attended to now, should result in substantial improvement in his current status. We would expect he would be able to return to his normal work in approximately one month.
>
> If there are any questions, do not hesitate to contact me.

28. By letter dated October 17, 1985, (Complainant's Exhibit 17), Dr. Salinger (psychiatry) had advised respondent as follows:

> I have evaluated Mr. Geary [sic] Rose today and he is currently unable to continue working. He will be entering alcohol treatment in the very near future and I am recommending that he take the next thirty days off work. This will enable him to fully commit himself to the stabilization and beginning recovery from his alcohol problems. In addition, he is currently experiencing significant stress related to some conflicts at work which would significantly hinder his recovery. He will be in treatment at NewStart.
>
> Please contact me I can be of further assistance.

29. Complainant failed either to appear at work or to call in on December 2, 1985, when he was supposed to have resumed work.

30. An employe in the DOA personnel office called complainant at home on December 3, 1985, and complainant said he would bring in medical documentation for an extension of his leave of absence on December 4, 1985. However, he did not do so.

31. On December 5, 1985, respondent sent complainant a letter (Respondent's Exhibit 12), which directed him to clarify his employment status by December 10, 1985, and which included the following:

> "... I will expect to receive your response by December 10, 1985. If you are seeking an extension of the leave without pay for medical reasons, you will need to complete the enclosed extension request form, as well as provide me with detailed medical documentation stating the following...This information will be used in considering your extension request. At the present time, you are currently on unauthorized leave without pay. I want to stress to you the importance of this matter and expect to hear from you no later than Tuesday, December 10, 1985."

32. As of December 11, 1985, complainant had neither reported to work nor contacted respondent. On December 11, 1985, Mr. Stewart sent him a memo (Respondent's Exhibit 14) scheduling an investigatory meeting for December 13, 1985, at 5:00 p.m.

33. At about 3:45 p.m. on December 13, 1985, complainant called Lloyd Buskager, Superintendent of Buildings and Grounds, to advise that he could not make the 5:00 o'clock meeting, but that he could probably make it on December 23rd if he could make arrangements with a union representative.

34. The meeting was rescheduled for December 20, 1985. Complainant again failed to appear. He had called Mr. Buskager at 2:45 p.m. to advise he could not make it, and he was told at that time his employment would be in jeopardy if he did not appear.

35. Thereafter, complainant's employment was terminated effective December 26, 1985. Complainant was informed of the termination by a letter signed by the DOA deputy administrator and dated December 26, 1985 (Respondent's Exhibit 18). This letter stated, in part, that the termination was for "failure to return to work or giving proper notice to your supervisor of unscheduled absences." Mr. Stewart had recommended discharge in writing on December 13, 1985, and again on December 20, 1985.

36. Complainant filed his initial charge of discrimination on December 20, 1985. (It subsequently was amended on August 11, 1986, to add a charge of handicap discrimination in connection with his discharge.) Prior to filing this charge on December 20, 1985, complainant had not engaged in any protected activities under the Fair Employment Act as covered by §111.322(3), Stats.

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §230.45(1)(b), Stats.

2. Complainant has the burden of proof.

3. Complainant has failed to sustain his burden.

4. There is no probable cause to believe respondent discriminated against complainant on the basis of race, handicap, or retaliation during his employment with them from early 1985 until his termination effective December 26, 1985.

DISCUSSION

This is a probable cause proceeding. Section PC 1.02(16), Wis. Adm. Code, defines probable cause as " a reasonable ground for belief, supported by facts and circumstances strong enough in themselves to warrant a prudent person to believe, that discrimination, retaliation, or unfair honesty

testing probably has been or is being committed." The standard is less than that prevailing at the hearing on the merits. In Winters v. DOT, Nos. 84-0003-PC-ER, 84-0199-PC-ER (9/4/86), the Commission held that probable cause could be characterized as less than a preponderance but more than a suspicion.

In analyzing cases of this nature, the Commission usually uses the approach set forth in McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 5 FEP Cases 965 (1973). The first step is to decide whether there is a prima facie case of discrimination. If so, the respondent must articulate a legitimate, non-discriminatory reason for its action or course of conduct. If this is done, the last step is to determine whether the reasons given are merely a pretext for discrimination.

Stated most generally, a prima facie case consists of the following elements:

(1) The complainant is a member of a protected group.

(2) The complainant suffered an adverse term or condition of employment.

(3) There are circumstances in connection with the adverse action which give rise to an inference of discrimination.

As to complainant's discharge, it is unclear whether he is contending that this was discriminatory on the bases of race and retaliation, as well as handicap. However, we will address the termination with respect to all 3 bases.

Complainant satisfies the first element of a prima facie case as to all 3 bases of discrimination -- he is black (race), he filed a discrimination complaint prior to his discharge (retaliation), and he was being

treated for alcohol problems (handicap).[1]

The second element of a prima facie is present because complainant suffered an adverse employment action -- his employment was terminated.

However, the third element is not present, even in the context of a probable cause determination. Complainant failed to return from his leave of absence and failed, despite repeated opportunities, to produce the medical verification requested by management to justify an extension of his leave of absence, or to appear at meetings concerning his status. For management to have terminated his employment under such circumstances does not give rise to an inference of discrimination. Even if we assume there is a prima facie case, these factors constitute a legitimate, non-discriminatory reason for termination, and there is nothing to suggest pretext.

Looking specifically at the issue of retaliation, even if it is assumed that management was aware of his complaint that had been filed on December 20, 1985, prior to the December 26, 1985, letter of termination, it is clear from this record, including discharge recommendations on December 13 and 20, 1985, that complainant's fate was all but sealed when he failed to appear at the December 20, 1985, meeting, and there is nothing to suggest that his having filed the complaint had any bearing with regard to the effectuation of the termination on December 26, 1985, again, assuming management was aware of the complaint by then.

Looking specifically at the issue of handicap, and assuming in the context of a probable cause determination that complainant had been unable

---

[1] While there is inadequate detail in the letters from complainant's physicians to determine the exact nature and severity of his alcohol problem, there is enough evidence at the probable cause stage to infer that the problem was severe enough to meet the definition of a handicap.

to report to work December 2, 1985, because of an alcohol-abuse handicapping condition, under the Fair Employment Act in this state such a termination is not improper. See Squires v. Labor & Industry Review Commn., 97 Wis. 2d 648, 652, 294 N.W. 2d 48 (Court Appeals 1980):

> "Nothing ... prevents an employer from discharging an employee who is an alcoholic and who because of his alcoholism is physically or otherwise unable to efficiently perform the duties required in his job."

Complainant implies that respondent should have contacted his doctor in December after he had failed to report back to work to ascertain his status. This point is really immaterial given the foregoing authority, because under the Squires case respondent apparently would not have had an obligation under the Fair Employment Act to have extended complainant's leave of absence if it had ascertained he was unable to work because of alcoholism. Furthermore, respondent had a legitimate basis not to have taken this unilateral action.

This was not a situation where complainant had dropped out of sight or was unable to communicate at all. He had several telephone conversations with DOA employes after he failed to report on December 2nd. He was asked specifically more than once to provide medical verification of his status, and on one occasion he had said he would provide it. DOA did not have a real medical release document on file. It could have inferred from the letters from complainant's doctors that he had provided them with some kind of release, and attempted to confirm whether that indeed were the case. However, under the circumstances that included respondent's request for specific documentation, and complainant's reply that he would provide it, unilateral contact by DOA with complainant's doctors might have resulted in an accusation of attempting to invade complainant's privacy.

With respect to the suspension, assuming a prima facie case, there was no evidence that the reasons given by management were a pretext for race discrimination. There was no evidence that any other employe had left work without permission in this manner. There is no question but that Mr. Stewart had the authority to have denied complainant the use of the vacation on the date in question, and complainant should have worked the shift and then grieved the issue rather than have left work.

As to the other formal discipline (written reprimand), again assuming a prima facie case, there was no evidence management's rationale was pretextual. There was no evidence any similarly situated white employes were treated differently. There is nothing in the circumstances surrounding the matter to suggest that discrimination was involved. While it could be argued that Mr. Stewart took a somewhat hard line on this occasion, this was in the context of a number of recent problems he had experienced with complainant not calling in properly, and there is nothing to suggest that he would have reacted any differently to a comparable white employe under similar circumstances, and in fact he disciplined a number of white employes for failing to call in properly.

With regard to conditions of employment, complainant has alleged that after Mr. Stewart took over as his supervisor, he was subjected to constant mistreatment and harassment because of race. The record reflects that Mr. Stewart had higher expectations of his subordinates than his predecessors, and he had his own ideas as a new supervisor about how things should be done. In many cases, these were substantially different from complainant's ideas. Obviously, he and complainant saw things differently in terms of the quality of complainant's performance. However, there is nothing to

suggest that these differences, and Mr. Stewart's treatment of complainant, including the lower performance evaluation completed by Mr. Stewart on July 1, 1985, were based on race.

While complainant and some of his crew contended he was "singled out" by Mr. Stewart, it is only logical that Mr. Stewart would focus more of his attention on complainant because he was the lead worker. As to the retraining program, this may have seemed like harassment to complainant's co-employes, because they knew complainant knew how to perform the basic elements of the job. However, this was motivated not only by Mr. Stewart's dissatisfaction with complainant's work, but also by the DOA personnel office's advice and by complainant's repeated questions about fundamental matters with which he should have been completely familiar.

Complainant testified at length about various situations which allegedly involved Mr. Stewart's unfair treatment of him, favorable treatment of his (Stewart's) "cronies," and dereliction of duty on the part of Mr. Stewart. For example, in Mr. Stewart's June 17, 1985, memo to complainant regarding retraining (Appellant's Exhibit 8), it indicates that on May 8, 1985, the 4 hours of retraining included several activities including marble cleaning. Complainant testified that there was only an 8-minute demonstration of marble cleaning. The memo also indicated that on May 14, 1985, 2½ hours was spent on wetmopping. Complainant testified that there was only a 15-minute demonstration that covered an area approximately 3 feet by 5 feet. As another example, complainant testified that on certain dates, Mr. Stewart and various of his "cronies" overextended their breaktimes.

In the Commission's opinion, it is not necessary to recite and make findings on each of the many such incidents alleged by complainant. In

most instances, what is involved is a different characterization of events. For example, what Mr. Stewart called counseling or retraining, complainant called harassment. While Mr. Stewart testified that complainant was running the floor scrubber improperly, complainant denied it. Furthermore, even if it could be concluded that Mr. Stewart (or any of the other supervisors) treated complainant unfairly on occasion, that does not mean that it is probable that such treatment was motivated by race. It is undisputed on this record that Mr. Stewart was friendly with a black employe (Mr. Rogers), who was one of the employes who complainant alleged was a "crony" of, and recipient of favorable treatment by Mr. Stewart. It also is undisputed on this record that Mr. Stewart took disciplinary action against a number of white employes during the period in question. Also, as has already been discussed, Mr. Stewart was dissatisfied with the work of complainant's team generally, and obviously looked primarily to complainant as lead worker. Based on the entire record before the Commission, it must conclude that even if it felt that Mr. Stewart had been incorrect or unfair in some aspects of his treatment of complainant, there would be nothing to infer that this was based on racial animus as opposed to some other reason such as union activity or that complainant was not one of his alleged "cronies."

As to other conditions of employment, complainant was never certified for promotion after his BMH 3 promotion, so there is no way respondent could have discriminated against him with respect to denial of promotion. Complainant submitted a copy of a newspaper article (Appellant's Exhibit 5) that had been posted on a bulletin board at the worksite in July 1985. This was an Associated Press story with the headline "White males are work-force minority," and described certain changes in the nation's

workforce reflected by government statistics which showed that over the years, the percentage of white males in the workforce had declined, while the percentage of women and minorities had increased. It is not apparent who posted the article. There is nothing with respect to this article that could be considered to constitute racial harassment.

ORDER

The Commission having found and concluded that there is no probable cause to believe that respondent discriminated against complainant, this charge is dismissed.

Dated: July 27, 1988 STATE PERSONNEL COMMISSION

AJT:rcr
DPM/3

DONALD R. MURPHY, Commissioner

LAURIE R. McCALLUM, Commissioner

Parties:

Gary Rose
23 N. Ingersoll Street
Madison, WI 53703

James Klauser
Secretary, DOA
P.O. Box 7864
Madison, WI 53707