

including purging, setting up and cataloging of department files. The hiring decision was made by Richard Fox, Director of respondent's Bureau of Program Services. At the time he hired the complainant, Mr. Fox was unaware of complainant's arrest/conviction record.

3. During the entire period he worked for respondent, prior to his termination on March 17, 1986, complainant worked as an LTE in the respondent's central file room with one co-worker, Ms. Arloween Oyen. Ms. Oyen's desk is situated adjacent to the only entrance to the central file room and except for several, relatively brief, periods during the day, Ms. Oyen was usually working at her desk. The complainant had a habit of greeting Ms. Oyen when complainant arrived for the work day.

4. Because he was an LTE during the entire 2-year period he worked for the respondent, the complainant was required to fill out bi-weekly timesheets indicating the number of hours he had worked on each day. At the bottom of each sheet, there was a space for the employe to sign and date the timesheet, certifying that the information on the sheet was "true and just." Once the timesheet has been signed by the supervisor, the information is transferred for use by the payroll office for the purpose of issuing paychecks.

5. Mr. Fox was unaware that complainant had an arrest/conviction record until the spring of 1985 when the complainant was arrested for armed robbery. After he returned to work, the complainant voluntarily discussed his arrest with Mr. Fox.

6. Commencing in December of 1985, Ms. Evelyn Kois, Chief of General Services in the Bureau of Program Services, first assumed responsibilities over the records management unit.

The records management unit consisted of complainant, Ms. Oyen and Ms. Dorothy Rymer who was designated leadworker. Ms. Rymer's work site was in a location other than the central file room. At the time, Ms. Rymer had responsibilities for directing complainant's work and reviewing his time-sheets. Ms. Rymer informed Ms. Kois that Ms. Rymer was having difficulty directing complainant's work and that she had a feeling that complainant's timesheets were not accurate.

7. Ms. Kois decided to independently verify the information on subsequent timesheets submitted by the complainant. Verification was accomplished by having both Ms. Rymer and Ms. Kois maintain their own logs of contacts they had with the complainant, by checking (by telephone) with Ms. Oyen whether the complainant was in (or had been in) his office that day, by checking complainant's desk to see if he was there and by checking other places in the building to see if complainant was present. Ms. Kois directed Ms. Rymer to inform the complainant that he should be careful about reporting his work time and Ms. Kois directed complainant not to work on Saturdays or after 4:30 p.m.

8. Complainant had a habit of arriving to work late. He arrived "whenever [he] decided to come in." After working on February 26, 1986, complainant "left on a jaunt" and did not return to work until March 10, 1986.

9. Complainant was arrested again in December of 1985 or January of 1986 on an assault charge. At the request of complainant's attorney, Mr. Fox visited the complainant in jail. Mr. Fox advised the complainant that his position was being held open for him. Upon his release from jail, complainant returned to work for respondent.

10. On February 14, 1986, complainant filed a timesheet covering the period from February 2 through February 15, 1986. On the timesheet, complainant claimed a total of 80 hours worked, including 4 hours on Saturday, February 15. On February 27, 1986, complainant was issued a check at his normal hourly rate for the 80 hours of work claimed.

11. On or about February 26, 1986, complainant filed a timesheet covering the period from February 16 through March 1, 1986. On the timesheet, complainant claimed a total of 64 hours worked, including 4 hours on Sunday, February 16, 8 hours on Monday, February 17 and 8 hours on Friday, February 21. Once this timesheet was turned in, it was compared with the logs maintained by Ms. Kois and Ms. Rymer. They concluded that complainant had not been at work on February 17 or 21 and that there was no record that he had used an access card for entry to (an exit from) the building on February 16. Because complainant was away from work at the time of the review, Mr. Fox decided to have a paycheck issued to the complainant for those hours which could be verified. A paycheck was issued on March 13, 1986 for 48 hours.

12. On March 14, 1986, complainant filed a timesheet covering the period from March 2 through March 15. On the timesheet, complainant claimed a total of 35½ hours including 7½ hours on Monday, March 10. Ms. Kois and Ms. Rymer reviewed their logs and concluded that while complainant had met with Ms. Rymer in the afternoon, he had not been present in the morning.

13. On Monday, March 17, 1986, complainant met with Ms. Rymer, Ms. Kois and Mr. Fox. Complainant was advised that there were discrepancies between his timesheets and various other information as to Saturday, February 15; Sunday, February 16; Monday, February 17; Friday, February 21;

and Monday, March 10. Because complainant indicated that he had an access card for entry to the office building over the weekend and because he said that he could have entered the building on the 15th and 16th at the same time that someone else had opened a door using their access card, respondent accepted complainant's timesheets for the 15th and 16th and he was credited with having worked on those dates. Mr. Fox informed the complainant that his employment was being terminated. Mr. Fox invited the complainant to provide some documentation or witnesses to verify his presence on the remaining dates, which would cause him to rescind the termination. While complainant did state that he could provide such verification, he failed to do so other than later producing a calendar which had certain times pencilled in on the dates in question. Mr. Fox concluded that the calendar was not credible verification.

14. Until the hearing in this matter, held over 2 years after the termination decision, complainant never provided respondent with the identity of witnesses who could verify his presence on some of the dates in question, other than the name of Arloween Oyen, who had already been contacted by Ms. Kois or Ms. Rymer on each of the days in question.

15. Complainant was present at his work site on February 21, 1986 and during the morning of March 10, 1986.

16. During the March 17th meeting, none of the persons present used any words or phrases that were derogatory of complainant's race or made any reference to complainant's arrest/conviction record.

17. After the March 17th meeting had ended, complainant went to the respondent's affirmative action (AA) office and verbally complained about his termination. The AA officer, Dick Pomo, subsequently spoke with Mr. Fox to determine whether or not the termination raised an affirmative

action issue. Mr. Pomo did not find fault with the decision to terminate the complainant.

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to s. 230.45(1)(b), Stats.
2. Complainant has the burden of establishing probable cause to believe that illegal discrimination occurred.
3. Complainant has failed to sustain his burden.
4. There is no probable cause to believe respondent discriminated against the complainant on the basis of race and/or arrest/conviction record.

OPINION

Motion for Default Judgment

At the end of the second and final day of hearing in this matter, the complainant raised the contention that the failure of respondent to produce Ms. Rymer at the hearing was a flaw in the proceeding that should result in a decision favorable to the complainant or postponement to permit a subpoena to be issued for Ms. Rymer. The examiner ruled that the respondent had not been required to produce Ms. Rymer for the hearing, effectively denying the complainant's request.

The underlying complaint in this matter identifies Ms. Rymer as one of three persons (along with Ms. Kois and Mr. Fox) employed by the respondent who had allegedly discriminated against the complainant. Prior to the scheduled hearing, the complainant provided the Commission with a "list of witnesses whom are at the present time employed with respondent agency and need be subpoena." Among those listed was "Dorothy Rymer - Bureau of Program Services GEF-2, Madison, WI." On June 6, 1988, the Commission

issued a letter to Mr. Fox, Ms. Kois and Ms. Rymer at the Bureau of Program Services, requesting their attendance at the hearing pursuant to s. 230.44(4)(b), Stats., which provides in part:

An employe shall attend a hearing under this subsection and testify when requested to do so by the commission.

On the same date, the hearing examiner sent a letter to the complainant which read:

The Commission has issued letters requiring attendance by a total of eight persons (Zaug, Sims, Fox, Richards, Oyan, Kois, Rymer and Fischer) listed in your letters of May 16 and June 1, 1988, less the requested deletion of Mr. Besadny. Also, because Mr. Dan Oberg is no longer listed in the state directory as a state employe, I am providing you with a subpoena which you may choose to seek to have served on Mr. Oberg. We are unaware of his address.

By memo dated June 8, 1988, the complainant was informed that two of the persons sent letters were no longer state employes and had moved out of the state:

A representative of DNR's Bureau of Solid Waste called me on Tuesday, June 7th and informed me that Mr. Robert Fischer no longer works for the Department and has moved to Florida. Mr. Henneger advised me today that Ms. Rymer has retired from state service and has moved to California. If you wish to obtain Mr. Fischer's address in Florida, you may call Jenny, at 266-7524 in the Bureau of Solid Waste.

Because of the departure of Mr. Fischer and Ms. Rymer from state employment, the June 6th letters requesting their attendance at the June 21st hearing are ineffective.

Complainant made no request for a subpoena for Ms. Rymer and the hearing proceeded as scheduled on June 21, 1988. The hearing could not be concluded on that date and the parties agreed to complete the hearing on June 28. The parties agreed to a specific schedule for completing their examination of the remaining witnesses (Mr. Fox and the complainant).

Also, as noted by a letter dated June 24:

"The parties indicated that there will be no other witnesses [beyond Mr. Fox and the complainant] in this matter."

It was not until after the testimony of Mr. Fox and the complainant had been completed and the parties were making arguments regarding the admission of two of complainant's exhibits that complainant first mentioned the absence of Ms. Rymer from the proceedings.

Given the timing of the complainant's request for a postponement in order to subpoena Ms. Rymer and in light of his prior statement that there would be no other witnesses, the examiner properly denied the complainant's postponement request.

Several days after the conclusion of the hearing, including closing arguments, the complainant filed a motion for default judgment. In support of his motion, complainant cites ss. 801.09, 801.10 and 806.02, Stats. All of these provisions relate to civil proceedings rather than to administrative proceedings, as indicated by the titles to chapters 801 (Civil Procedure - Commencement of Action and Venue) and 806 (Civil Procedure - Judgment). Contrary to complainant's assertions, Ms. Rymer is not a named respondent in this matter. The sole respondent is the Secretary of the Department of Natural Resources, who has been represented by legal counsel. The complainant, rather than the respondent, has the burden of proof in this matter and the failure of the respondent to produce one of the three individuals employed by the agency that allegedly discriminated against the complainant does not entitle the complainant to a favorable judgment.

The sanctions available for the failure of a party or of a subpoenaed witness to appear at a hearing are established in s. PC 5.03(8), Wis. Adm. Code:

(a) Unless good cause can be shown, any party who fails to appear at a hearing after due notice is deemed to have admitted the accuracy of evidence adduced by the parties present and the hearing examiner and the commission may rely on the record as made. If the absent party has the burden of proof, the commission shall consider a motion

to dismiss by the parties present without requiring presentation of any evidence.

(b) If a witness fails to appear despite the issuance of a letter or subpoena as provided in s. PC 4.05, the commission may seek initiation of contempt proceedings.

Had respondent DNR not appeared, DNR would have been "deemed to have admitted the accuracy of the evidence adduced by" the complainant. However, the respondent did appear so the provisions of s. PC 5.03(8)(a), Wis. Adm. Code, are inapplicable. Complainant's motion for default judgment must be denied.

Issue of Probable Cause

The Commission utilizes the general method of analysis set forth in McDonnell Douglas v. Green, 411 U.S. 792 (1973) (and its progeny) in reviewing Fair Employment Act complaints.

In the case of a discharge from employment, such as this, the complainant establishes a "prima facie" case by showing that he was a member of a protected class, that "he was doing his job well enough to rule out the possibility that he was fired for inadequate job performance, absolute or relative," and that his employer sought a replacement with similar qualifications. See, e.g., Loeb v. Textron, Inc., 20 FEP Cases 29, 36 (U.S. Court of Appeals, 1st Cir. 1979). The burden of proceeding then shifts to the employer to articulate a legitimate reason for the discharge, and the complainant then has the opportunity to show that this was not the real reason, but rather a pretext for discrimination.

It is important to remember that this analysis is being applied in the context of an issue of probable cause, s. PC 1.02(16), Wis. Adm. Code, rather than on the merits of the complaint.

In this case, it is questionable whether the complainant established a prima facie case. There was no testimony as to whether someone else was

hired to perform the job assignments previously assigned to the complainant. However, assuming the complainant did establish a prima facie case, it cannot be said that the reasons articulated for termination were pretextual.

Limited term employes are not entitled to the same just cause protection that is applicable to employes with permanent status in class. S. 230.34(1)(a), Stats. Complainant's superiors were concerned that the complainant was falsifying his hours so they developed a procedure for checking on his presence at various times during the day. The procedure was reasonable but not foolproof. The situation was complicated by the fact that the complainant worked in a location that was distant from the work location of his supervisor. The complainant was told to be careful about his hours. Once the complainant prepared his timesheet, Ms. Rymer and Ms. Kois compared it to their own records of complainant's attendance. The complainant's payroll records were adjusted to conform with the records of Ms. Kois and Ms. Rymer except as to weekend hours. The complainant, who was away on a "jaunt" during the time his timesheet was being revised, was paid for the reduced hours. Approximately a week after his return to work and after he had submitted another timesheet, complainant was called in to Mr. Fox's office. He was presented with the discrepancy, was told he was being terminated but was specifically advised to bring in any documents or identify any witnesses who could verify complainant's presence on the disputed dates.

Complainant contends that during the meeting in Mr. Fox's office, Mr. Fox called the complainant a "thief" and said he had not been the "right boy" for the job. These allegations, if found to be true, would be sufficient to establish probable cause. However, the allegations were disputed

by both Mr. Fox and Ms. Kois and their testimony was found to be more credible than the complainant's.

During the hearing in this matter, complainant was able to establish via the testimony of Mr. Simms and Ms. Richards, that he was in fact at the work site on two of the three days on which the termination decision was based. He did not provide any evidence corroborating his presence on the third disputed date. Had this information provided at hearing been made available to Mr. Fox on or soon after March 17, 1986, the decision to terminate the complainant's employment might have been inappropriate. However, the Commission finds that it was not until over 2 years after the termination that the complainant brought forth the identity of these witnesses. The Commission does not accept as credible the complainant's testimony that he identified these witnesses to Mr. Fox at the time of the discharge.

As to the complainant's arrest/conviction claim, it should be noted that the termination decision occurred after complainant had returned to work after his second arrest while employed by the respondent. The fact that complainant returned to employment after his first arrest tends to undermine complainant's contention that the termination decision, occurring after his second arrest, was motivated in part by that arrest or by his conviction which had occurred several years earlier.

The second issue for hearing related to the activities of the affirmative action office which was staffed by Dick Pomo, a white male, who was assisted by Candace Richards, a black female. The record shows that the complainant contacted Ms. Richards after the March 17th meeting with Mr. Fox. Based on the verbal complaint, Mr. Pomo subsequently spoke, at a minimum, with Mr. Fox to determine whether or not the termination raised an

affirmative action issue. Mr. Pomo did not find fault with the decision to terminate the complainant and there was no evidence offered to indicate that the procedure used by Mr. Pomo (who did not testify) to follow up on the complaint was inconsistent with AA policies or with Mr. Pomo's standard procedures.

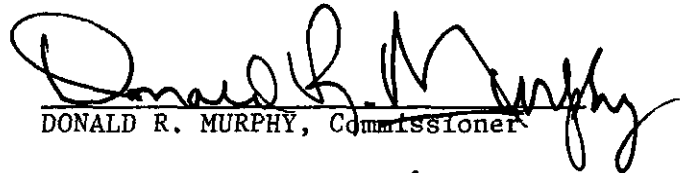
For the above reasons and in the context of the probable cause standard, that the reason offered by the respondent for justifying the termination of the complainant's employment was not pretextual.

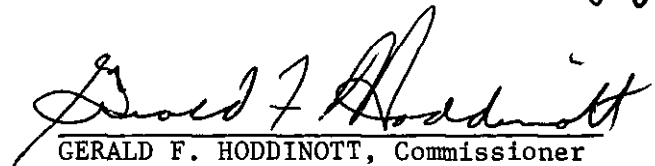
ORDER

Complainant's motion is denied and this matter is dismissed.

Dated: Sept 26, 1988 STATE PERSONNEL COMMISSION

KMS:rcr
JGF002/2


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner

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