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ANTHONY SHERIDAN,
 Complainant,

v.
 Chancellor, UNIVERSITY OF
 WISCONSIN SYSTEM - MADISON,
 Respondent.

Case Nos. 86-0103-PC-ER
 & 87-0141-PC-ER

* * * * *

DECISION
 AND
 ORDER

NATURE OF THE CASE

This case involves two complaints of discrimination on the basis of race and retaliation. Following an initial determination of no probable cause by a Commission investigator, complainant appealed and the matter proceeded to hearing on the following issue:

Whether there is probable cause to believe complainant was discriminated against on the basis of race or retaliation in regard to the terms and conditions of his employment.

FINDINGS OF FACT

1. Complainant is black. Until his resignation effective September 15, 1987, he had been employed as a BMH 2 (Building Maintenance Helper II) at the University Hospital and Clinics, University of Wisconsin - Madison, for approximately four years.

2. During his employment, complainant alleges there were a number of derogatory comments made about him or to him that were racial in nature or racially-motivated. For the purpose of making a ruling on probable cause, the Commission will assume the validity of these allegations, which are summarized below with management's response where applicable:

a) At some point in June 1986, a wallet was missing from a nurses station. At least some of the nurses suspected complainant of having stolen the wallet. In discussing the matter among themselves on the nurses' station, at least one of the nurses used a racial slur which complainant overheard. Complainant confronted the nurses and words were exchanged. Shortly thereafter, complainant was complaining about this incident to his supervisor (Robert Gruber) when one of the nurses apologized. This incident subsequently was brought to the attention of the second-level supervisor (Peg Adamowicz) and the Affirmative Action Officer for the University Hospital and Clinics (Charles Elvord) who did not feel any further action was necessary.

b) From time to time during his employment, complainant heard other racial slurs directed towards him by patients, students, medical staff, and co-workers. Complainant did not report most of these to management. One incident he reported involved a comment by a co-worker (Theresa Youman) who was involved in a conversation with complainant about working conditions. She said (complainant's characterization): "They need to work you half to death because of your color." Complainant complained to Gruber later that day. Gruber told the employe that this had to stop and she apologized to complainant.

c) Another incident involved a report by complainant to Gruber that a co-worker (Laura Endres) had referred to complainant in a racially derogatory manner in a statement made to her daughter, also an employe. Gruber spoke to the two employes who denied that any such derogatory comment had been made. Gruber felt that under the circumstances, no action could be taken.

d) Another incident involved a complaint by complainant to Adamowicz that a co-worker (Carol McCann) had made a derogatory racial remark to him in a checkout or punchout line. Adamowicz spoke to McCann who denied having made such remarks and accused complainant of having made derogatory comments about her. Adamowicz concluded that the dispute was more personal in nature than work-related and told each of them to stay away from the other person.

e) On December 24, 1985, complainant observed a chalkboard in a room on which someone had written, "don't steal anything while we're gone, Merry Christmas." This room was not in complainant's cleaning area. He complained about this to Adamowicz. She investigated and ascertained that a unit was moving and had put certain nursing care items in boxes and had put up the message on the board because other units had taken their stuff in the past. She advised complainant that the message had not been directed at him.

f) Complainant was involved in verbal altercations with a non-state employe employed by a food concession on the hospital premises and with a co-employe who apparently suspected complainant of theft from a jar containing coffee fund money. There was no evidence that either of these incidents was racially-related.

g) Complainant complained to Adamowicz about an incident involving another employe (Andy Andres) running into him with a cart. She spoke to the employe who denied any wrongdoing. She took no action but told him to be careful not to provoke complainant in any way.

3. Complainant from time to time came across discarded used hypodermic needles when he cleaned, and was pricked on at least one occasion.

He made a number of complaints about these problems to Adamowicz, who followed the normal procedure of reporting this to the head nurse, and in the case of punctures, having the affected employe fill out an accident report and go to employe health. Due to the way the hospital operated, it was difficult to ascertain who was responsible for improperly discarding a used hypodermic needle.

4. The Affirmative Action Officer (Charles Elvord) interviewed the other black BMH's at the University Hospital and Clinics after he had heard from the UW Hospital and Clinics personnel director, Robert Pound, that there was an allegation that all the blacks in housekeeping were reporting racial slurs. Each of these employes denied there were any problems and they were upset at what they perceived as complainant trying to drag them into his problems.

5. During his period of employment, complainant was the subject of a number of disciplinary or quasi-disciplinary actions, as follows:

a) Failure to report on time due to car trouble and failure to notify supervisor at least a half-hour before the start of the shift on February 5, 1986, resulting in formal counseling (Respondent's Exhibit 1 & 2);

b) Tardiness due to icy parking lot on February 10, 1986, resulting in formal counseling (Respondent's Exhibit 3);

c) Failure to report to work on April 21 and 22, 1986, due to illness and inability to produce verification of alleged medical appointments, and departure from work 3.3 hours before shift ended on April 23, 1986, due to illness, with no sick leave balance, resulting in a formal letter of reprimand (Respondent's Exhibit 4);

d) Failure to return from break (due back at 2:00 p.m.) until 2:55 p.m. on June 10, 1986, resulting in a formal letter of reprimand (Respondent's Exhibit 5);

e) Failure to be in assigned area from 8:15 a.m. to 8:45 a.m. and from 1:15 p.m. to 1:35 p.m. on July 6, 1986, resulting in a formal letter of reprimand (Respondent's Exhibit 6);

f) Failure to report to work on October 3, 1986, due to illness -- complainant alleged that he had seen a doctor that date. The doctor denied that he had seen complainant that date, resulting in a one day suspension effective October 26, 1986, imposed by letter dated October 24, 1986 (Respondent's Exhibit 11);

g) Tardiness of 50 minutes on April 5, 1987, due to forgetting about the time change, resulting in formal counseling (Respondent's Exhibit 9);

h) Absent from work on March 16-17, 1987. Complainant failed to notify his supervisor and then altered a doctor's excuse with white-out fluid to cover the two days he missed, resulting in a formal letter of reprimand dated March 26, 1987, which also reflected the following agreement between complainant and respondent:

Altering of official medical documents is considered a very serious offense by University of Wisconsin Hospital and Clinics. Conduct of this type will not be tolerated, and in most cases, results in immediate discharge. However, you were truthful in that you admitted you altered the document and you asked us to consider the situation of your children and mitigating circumstances to discharge. You further agreed that if we would not discharge you from employment for this infraction, you would agree to submit a resignation letter should you violate any of the University of Wisconsin System Classified Employee Work Rules. I asked your union representative if the union would agree to this as a condition of your continued employment, and they indicated that they would do so. (Respondent's Exhibit 12);

i) Returned from lunch 10 minutes late on June 4, 1987, resulting in a formal letter of reprimand dated June 12, 1987 (Respondent's Exhibit 15);

j) Failure to return from break at 5:15 a.m. Complainant was found in his car in the parking lot at 5:40 a.m. on September 3, 1987 (Respondent's Exhibit 13);

k) On September 15, 1987, complainant submitted a formal letter of resignation dated September 15, 1987 (Respondent's Exhibit 14).

6. Complainant filed his first charge of discrimination (No. 86-0103-PC-ER) on August 7, 1986, in which he alleged he had been discriminated against on the basis of race and in retaliation for having complained about discarded hypodermic needles, with respect to racial slurs and innuendo, reprimands and verbal harassment. This complaint was served on respondent shortly thereafter and became known to its management employees.

7. Complainant filed his second charge of discrimination (87-0141-PC-ER) on October 9, 1987, alleging that he was continually harassed and overworked because of his race and because he had filed his earlier complaint, and because of this mistreatment was forced to resign on September 15, 1987.

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §§230.45(1)(b) and (g), Wis. Stats; §PC 2.07(3), Wis. Adm. Code.

2. Complainant has the burden of proof to establish that there is probable cause to believe he was discriminated against on the basis of race or retaliation in regard to the terms and conditions of his employment.

3. Complainant having failed to sustain his burden, it must be concluded there is no probable cause to believe respondent discriminated against complainant on the basis of race or retaliation in regard to the terms and conditions of his employment.

DISCUSSION

This matter is before the Commission on a question of "probable cause," which is defined by §PC 1.02(16), Wis. Adm. Code, 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.

With regard to the alleged racial harassment by co-employees, there are two factors that must be present before respondent would be liable under the Fair Employment Act (FEA - Subchapter II, Ch. 111, Wis. Stats.), see EEOC v. Murphy Motor Freight Lines, 22 FEP Cases 892, 895-896 (D. Minn. 1980):

First, more than a few isolated incidents of harassment must have occurred....

* * *

Second, plaintiff must show that the employer failed to take reasonable steps to prevent racial harassment....

In this case, many of the incidents involving complainant did not occur under circumstances from which it would necessarily be inferred that they were racial in nature. For example, the altercation with the snack bar employe¹ and the employe who suspected complainant of stealing from a coffee fund jar. However, there was enough testimony concerning racial slurs by co-workers and others in the workplace to satisfy the first

¹ There is also a question concerning the extent of respondent's responsibility with regard to a non-state employe.

element for probable cause purposes, where complainant's burden of proof is less than it is at a hearing on the merits.

With regard to the second element -- failure of the employer to take reasonable steps to prevent racial harassment -- the respondent obviously was not responsible for responding to alleged incidents of which it was unaware. The record shows that respondent did respond where it had a basis on which to respond. The supervisors to whom alleged incidents were reported did speak to the employees involved, when they were known. In some cases they were told not to engage in similar conduct in the future. The chalkboard message was investigated and found not to have been directed at complainant. When complainant complained to management that all of the black BMH's were being subjected to racial slurs, management interviewed all of them, each of whom denied that this was true. Management followed its normal procedures when complainant complained about improperly discarded hypodermic needles, which he alleged were being deliberately left in his areas. While the problem did not stop, it was undisputed on this record that it was inherently difficult to determine who had discarded the needles. One of complainant's witnesses (Mary Holiday), who was Japanese/Native American, testified that she and other Native American employees were harassed, but she said these allegations were never brought to the attention of management. In short, there is no basis for a conclusion that there is probable cause to believe management failed to take reasonable steps to prevent workplace harassment.

Complainant alleges that management not only failed to respond appropriately to racial harassment in the workplace, it also harassed him. However, there is no support in the record for these charges. While complainant was the subject of a good deal of formal disciplinary action,

none of the disciplinary action was grieved and complainant admitted most of the charges at the hearing. There is nothing in the record to suggest that the charges against complainant were pretextual or that complainant was harassed into resigning. Indeed, the record shows that respondent could easily have discharged complainant consistent with its normal disciplinary process at the time he altered the doctor's statement. However, because complainant admitted what he did and because of the extenuating circumstances of complainant's personal situation, respondent allowed complainant to continue in employment subject to the agreement that he would resign should he commit another work rule violation.


Complainant alleges that his third shift supervisor, Jeff Gustafson, was constantly on his back and rode him. Even if this contention were assumed, there is no evidence that such treatment was racially-motivated or retaliatory in nature. Complainant presented a co-worker (Mary Holiday) as a witness who testified that Gustafson went by the book and in her opinion found ways to pick on people. She agreed with complainant's theory that Gustafson always used to "ride" him on Thursdays, which was Gustafson's last day of the work week. She also testified about an incident involving Gustafson and Steve Trotter, a black employe who apparently worked in the security division. She testified she overheard a security guard ask Gustafson to observe whether or not Trotter was wearing a necktie. She subsequently spoke to Trotter who informed her that he had removed his necktie for a few minutes and that Gustafson had seen him as he walked by the office where Trotter was located. Ms. Holiday felt that this was a form of spying that was inappropriate. In the Commission's opinion, there is nothing in this testimony that reflects any mistreatment of Trotter or any inclination on Gustafson's part to pick on black employes.

With respect to retaliation, complainant's complaints about improperly discarded hypodermic needles are covered by the state Occupational Safety and Health Act (OSHA), §101.055(8)(a), Wis. Stats., and therefore complainant is protected against retaliation for having made those complaints. He is also protected against retaliation for having filed his first complaint of discrimination with this Commission, §111.322(3), Wis. Stats. These complaints were known to respondent's management employees, and there were disciplinary actions taken against complainant after that. While these facts create an inference of retaliation, respondent had a basis for each of its disciplinary actions, and there is no indication these were not valid, nonpretextual reasons. As discussed above, complainant admitted most of the charges against him, and complainant's disciplinary problems started substantially before he filed his first discrimination complaint. It is noted that if respondent had been intent on retaliating against complainant, it had a perfect opportunity to have discharged him in March 1987 when he was caught falsifying a medical excuse, but respondent gave him another chance and allowed him to continue in employment. Finally, management did not force complainant to resign, as he alleges. Rather, the resignation occurred after continued work rule violations by complainant after he agreed he would resign if there were any more problems.

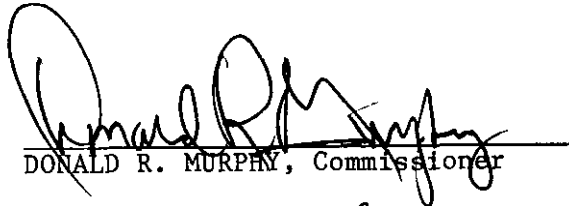
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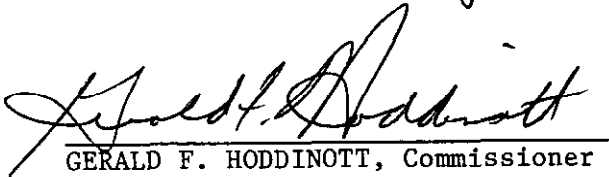
The Commission having found and concluded there is no probable cause to believe complainant was discriminated against on the basis of race or retaliation in regard to the terms and conditions of his employment, these complaints are dismissed.

Dated: February 22, 1989 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

AJT:jmf
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DONALD R. MURPHY, Commissioner


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