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GENEVIEVE WILCZEWSKI, *

Complainant, *

v. *

Secretary, DEPARTMENT OF *

REVENUE, *

Respondent. *

Case No. 86-0113-PC-ER *

* * * * *

DECISION
AND
ORDER

This matter is before the Personnel Commission as a complaint of discrimination based on national origin. The complainant appealed an initial determination of no probable cause. The parties agreed to the following issue for hearing:

Whether there is probable cause to believe that respondent discriminated against complainant on the basis of national origin in regard to her termination as a probationary Data Entry Operator 1 in September of 1986.

After the hearing, the parties were provided an opportunity to submit written briefs.

FINDINGS OF FACT

1. Complainant came to the United States from Poland in 1962 at the age of 19. Her national origin is Polish. She received a high school diploma from Moraine Park Technical Institute in West Bend, Wisconsin.
2. Complainant speaks with a noticeable accent, but she is readily understood and can speak and read the English language well.
3. Prior to the commencement of her employment with respondent in July of 1986, the complainant had worked for the Department of Revenue (DOR) twice previously. She resigned after having working six months in a

Clerical Assistant 1 position in 1983. She also resigned after having worked one month in January of 1986.

4. Complainant was hired as a probationary employe in a Data Entry Operator 1 position, commencing July 7, 1986. The hiring panel which made the selection decision of the complainant included Ms. Barbara Bower.

5. The data entry operations of the respondent are carried out by approximately 50 data entry operators who have either permanent status in class or are on probation. These data entry operators are supervised in units of 10 employes by 5 Program Assistant 3's (PA 3's). One PA 3 is Barbara Bower. There are also 8 lead workers spread among the 50 data entry operators. During the height of the tax season, up to 200 limited term employes (LTEs) are hired by respondent to assist in the data entry work.

6. All of those employes described in Finding #5 work in one large room in respondent's University Avenue location. The employes work in very close proximity to each other. Each employe's desk area is large enough for a keyboard and a video display but very little else. The employe's desks are arranged in long rows so that the employes are effectively spaced shoulder-to-shoulder. There are no partitions between the employes' work stations and one row of operators faces a second row so that the fronts of each work station touches the front of the opposing row's work station.

7. Ms. Bower has two assistants for her work unit: LaVonne LaCross and Pat Williams. These two persons have functioned in these capacities for over 12 and 5 years, respectively. Ms. LaCross is deaf and also has difficulty talking. Ms. Bower, Ms. LaCross and Ms. Williams together are responsible for training the new probationary data entry operators.

Assistance for training also comes from the permanent Data Entry Operators 1's.

8. During the course of complainant's employment with respondent, she never informed her superiors that she was having any difficulty communicating with Ms. LaCross.

9. The duties of the Data Entry Operator 1 position are summarized in Respondent's Exhibit 1 as follows:

This position is responsible for entering/verifying alpha and/or numeric data from various types of source documents. Currently, we utilize Nixdorf key-to-disk systems and IBM 129's, as well as some terminals connected directly to our main computer. The operator hired may also perform some phases of error correction routines. During period of "low work" it may be necessary to perform work other than data entry i.e., typing, filing, etc. in various locations.

All work performed in our Section is geared towards meeting deadlines. Operators are constantly working under pressure. During February thru July we also process 2.3 million Income Tax returns. Some of our keying jobs are very repetitive and all require sitting for long periods of time. You must be able to get along with other people as our work area is very crowded. We work back-to-back and elbow-to-elbow. Due to this, smoking is not allowed in our room.

10. The first several weeks of complainant's training in her new position were spent at a special console working on practice materials only. During this period, her supervisor noted that complainant was asking questions of persons training her, even though the answers to complainant's questions were available in the complainant's own training materials. The supervisor noted the complainant was causing conflicts with her co-workers because complainant was staring at them when the co-worker was verifying the complainant's work product. Verification occurs when data is input by one Data Entry Operator 1, and the work is then given to a second Data Entry Operator 1 (the verifier). The verifier performs the same data entry work as done by the original operator. When the verifier is inputting the

information, there is a beep which sounds whenever there is a discrepancy between the entry made by the first operator and the entry made by the verifier. The verifier then determines which entry was correct and keeps track of the number of errors generated by the first operator.

11. Ms. Bower met with the complainant, discussed the above-mentioned concerns and directed the complainant to look for answers in her training manual before asking a supervisor/trainer for assistance. During this conference, the complainant indicated that she understood Ms. Bower's comments. However, the next day, she asked questions of an assistant supervisor on the same matters.

12. After this informal discussion between Ms. Bower and the complainant, the complainant continued to interact with her co-workers in the same manner as previously. On August 11, 1986, Ms. Bower and the complainant had a second meeting. Ms. Bower informed the complainant that her work volume and accuracy were satisfactory. However, Ms. Bower reiterated the same concerns raised at the prior meeting and placed those concerns in writing (Appellant's Exhibit #5). Ms. Bower concluded that it was necessary to memorialize this meeting because of the nature of the complainant's response to the initial meeting between Ms. Bower and the complainant.

13. During the period of the complainant's employment with the respondent, several incidents occurred involving the complainant which caused complainant's co-workers to avoid the complainant.

a. The complainant objected to the banter engaged in by the person working directly opposite her, Kathy Gilding. The complainant understood that it would be inappropriate, as a probationary employe, to tell Ms. Gilding directly that she should not talk so much. As a consequence, the complainant simply stared at Ms. Gilding with the

intent of indicating that "it was about time she stopped talking and did some work for a change." The complainant's practice of staring at Ms. Gilding bothered Ms. Gilding and caused her to mention the situation to her supervisor.

b. Complainant consistently went to Ms. Williams with any questions she had regarding her work performance or work tasks rather than asking those questions of Ms. LaCross, regardless of whether or not Ms. LaCross was identified as the complainant's trainer for that particular date.

c. When a power outage occurred during the period that the complainant was employed with the respondent, the employees were directed not to turn their terminals on before they were specifically given the instructions to do so. However, the complainant turned her terminal on before those instructions were given.

d. The complainant was involved in at least two other conflicts with her co-workers. One related to a raffle ticket that the complainant wished to sell to a co-worker. The second conflict related to the use of a coupon for the purchase of a lunch.

14. Prior to the time of termination of her employment in August of 1986, the complainant performed her work as a Data Entry Operator 1 at a satisfactory rate and with a satisfactory error rate. She was punctual and was never absent. However, she failed to interact appropriately with both her co-workers and her supervisors, as evidenced by the above findings. By the time of her termination, the net effect of the complainant's presence on the work unit was that everyone in the unit worked in silence whereas previously there had been banter between the employees during the course of their work.

15. By memo dated August 29, 1986, Ms. Bower recommended that the complainant be terminated from her Data Entry Operator 1 position (Appellant's Exhibit #4).

16. The complainant was called in for a meeting on September 11, 1986 to discuss her performance. Complainant entered the meeting assuming that she "would get a reward" for being such a good employe. At the meeting, the complainant was presented with a trainee probationary performance evaluation report (Appellant's Exhibit #3). This report, prepared by Ms. Bower described the employes overall performance during the probationary period as follows:

Even though I have counseled her on numerous times, Genevieve continually questions the honesty of employes verifying her work and complains about being trained on too large of variety of projects. The problems have grown to the point to where my staff and I feel very uncomfortable for fear of having another conflict with her. Her conduct is disruptive to the organization. Due to her not following instructions or using the reference materials given to her, her overall performance is below our standards.

The complainant was told to read the evaluation report. The complainant understood the report to mean that her probationary period would simply not be extended rather than that she would be terminated, even though the supervisor's recommendation clearly indicates that the complainant should be terminated from her probationary position. As the consequence of her understanding, the complainant took the day off from her job and planned to return on the next morning.

17. By letter dated September 12, 1986, signed by the respondent's Director of Bureau of Personnel, the complainant was informed that her probationary appointment as a Data Entry Operator 1 was being terminated and that her last day of work was scheduled for September 12, 1986. The termination letter stated, in part:

You are being terminated for the following reasons.

1. You have not demonstrated a satisfactory rate of learning during the approximately 2 months you have been employed by the department. Your supervisor has explained keying procedures to you on numerous occasions and has responded to your questions about procedures and assignments. Instead of using the procedure and reference manuals given to you to obtain answers to questions you ask your supervisor. You subsequently question the answer given to you and continue to ask the same questions.
2. Your actions are disruptive to the work unit. You question the honesty of employees assigned to verify your work and make them nervous by openly staring at them while they are verifying your work. Additionally your comments and actions towards other employees in the work unit are disruptive to the units operation.

18. During the course of the complainant's employment, there were no comments or jokes made by either complainant's co-workers or her superiors relative to complainant's ethnic heritage or her national origin.

19. During the period that Ms. Bower has served as supervisor, only one other person did not pass probation as a data entry operator. That person was terminated for an insufficient number of key strokes.

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §230.45(1)(b), Stats.
2. The complainant has the burden of proof in this matter.
3. The complainant has failed to meet her burden of proof in this matter.
4. There is no probable cause to believe respondent discriminated against the complainant on the basis of national origin in regard to her termination as a probationary Data Entry Operator 1 in September of 1986.

OPINION

Since this matter is before the Commission on the question of probable cause, the complainant's burden of proof is less than it would be at a

hearing on the merits. The Commission discussed this point in Winters v. DOT, Nos. 84-0003-PC-ER, 84-0199-PC-ER (9/4/86), as follows:

'Probable cause is not synonymous with preponderance,' being somewhere between 'preponderance' and 'suspicion.' Young Oil Co. of La, Inc. v. Durbin, 412 So. 2d 620, 626 (La. App. 1982). The Commission agrees with this kind of characterization of the matter, as it is supported both by the language of §PC 4.03(2), Wis. Adm. Code, and the policy underlying the probable cause requirement. p. 17.

In evaluating whether probable cause is present, the Commission normally follows the method of analysis set forth in McDonnell-Douglas v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed. 2d 668, 5 FEP 965 (1973), and its progeny. However, since the parties tried this case completely, the Commission will proceed on the assumption that complainant has established a prima facie case as to each issue, and, looking at all the evidence presented, analyze each issue as to whether there is probable cause to believe discrimination occurred. See U.S. Postal Service Bd. of Govs. v. Aikens, 460 U.S. 711, 715, 75 L. Ed. 2d 403, 410, 103 S. Ct. 1478 (1983): "where the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant."

It is likely, that, given the complainant's imperfect ability to understand, speak and write the English language, certain misunderstandings occurred between the complainant and her co-workers and supervisors. Because communication is always inexact and subject to misinterpretation, it occurs as to all interpersonal relationships. Language difficulties will logically increase the number of misunderstandings between persons. Having concluded that certain of such misunderstandings did occur, there simply is no evidence the complainant was discriminated against by the respondent. There were no statements, nor jokes or actions by management

or by complainant's co-workers tending to establish discrimination based on national origin with respect to complainant's employment with respondent. The complainant did in fact engage in certain conduct which was inconsistent with respondent's goal of maintaining a cohesive work unit and which also undermined her relationship with her supervisors and trainers.¹

The complainant contended there were a number of contacts with her co-workers which were indicative of discrimination. One example was when all of the employees in the work unit were working on a special project that involved keying a series of numbers into the terminal. During the course of her training on the project, which was conducted at her work station, the complainant began to repeat the numbers verbally (in her normal speaking voice) at the same time she was keying them. The trainer told her to stop repeating the numbers out loud. Complainant contends this constituted discrimination because her co-workers were never told to stop talking while they were at their work stations. What complainant fails to understand is that by repeating numbers so that they could be overheard by her adjacent co-workers, she could easily cause those co-workers to make errors while they were trying to key in their own number series.

Another example of an incident identified by the complainant in supporting her claim was a conversation she alleged to have engaged in with a co-worker, Jenny Walker. According to the complainant's original testimony, Ms. Walker clearly implied that Ms. Bower's work group tended to discriminate against persons with accents or from other nations. However,

¹ It should be noted that Ms. Bower, complainant's supervisor also was on the interview panel at the time the complainant was hired for her Data Entry Operator 1 position. Ms. Bower testified that she was aware of complainant's accent during the course of the interview. Had Ms. Bower intended to discriminate against the complainant, presumably she would have done so by not hiring the complainant.

when the complainant was asked to state what Ms. Walker actually told her, the complainant merely testified that Ms. Walker stated that persons in that unit do not want to deal with people who are outsiders to that group. Yet when Ms. Walker was called as a witness, she testified that she did not tell the complainant that people in Ms. Bower's work unit did not like outsiders.

The respondent established that getting along with co-workers is an important element at the Data Entry Operator 1 position. Respondent also established that this point was clearly made known to the complainant at the time she was hired for the position. Yet the complainant did engage in a series of actions which could easily result in concern or discomfort on the part of her co-workers. For example, the complainant admitted that in response to the banter engaged in by Ms. Gilding, the complainant decided to stare at her. The complainant described this practice as "a nice way of telling her to stop it because it interfered with the complainant's work."

Complainant also did not deny that she regularly would go to Pat Williams for responses to questions regarding her work, rather than addressing those questions to LaVonne LaCross, even though Ms. LaCross was identified as her trainer on that specific date.

The complainant's testimony indicated on several occasions that she had her own way of carrying out her responsibilities and that she was unwilling to operate in a different manner. For instance she indicated that she wanted to see her errors after someone else had verified her work, noting that "that is my way of doing things." However, it is clear that seeking this information from the verifier might be interpreted by that person as indicating distrust of the accuracy or truthfulness of the verifier.

The complainant did testify that at some point someone she worked with mocked the complainant's accent. However, the complainant could not say that this occurred during the two month period in question in the instant proceeding. The complainant also could not identify the person who allegedly made this statement. Complainant admitted that she did not report this incident to her supervisor. Because of the vagueness of the allegations, the lack of any other testimony regarding either this incident or any other similar incidents, the Commission finds the complainant's testimony in this area to be not credible.

Ms. Bower testified that upon receiving various complaints by complainant's co-workers about the complainant's conduct, she did investigate those complaints and concluded upon that investigation that the co-workers were, in fact, dissatisfied with the complainant's work. Based on that investigation, Ms. Bower concluded that the complainant was disruptive to the work place.

The complainant was terminated approximately one-third the way the probationary period as a Data Entry Operator 1. The evidence presented at hearing supports the conclusion that the basis for the termination of the complainant's employment was that she did not adequately respond to direction from her supervisors and that she was a disquieting influence on the work place rather than that the motivation for the termination decision was the complainant's national origin. The complainant has failed to produce evidence necessary to sustain her burden of proof to cause a "prudent person to believe that discrimination... has been or is being committed" §PC 1.02(16), Wis. Adm. Code. Therefore, the Commission issues the following

ORDER

This matter is hereby dismissed.

Dated: July 27, 1988 STATE PERSONNEL COMMISSION

KMS:jmf
JMF09/2


DONALD R. MURPHY, Commissioner


LAURIE R. McCALLUM, Commissioner

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