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JANE MARIE MONGOLD,
 Complainant,

v.

Chancellor, UNIVERSITY OF
 WISCONSIN-MADISON,
 Respondent.

Case No. 89-0052-PC-ER

* * * * *

DECISION
AND
ORDER

This matter is before the Commission as a complaint of sex discrimination. The parties agreed to the following issue for hearing:

Whether respondent discriminated against complainant on the basis of sex, in violation of the Fair Employment Act, in connection with the termination of complainant's probationary employment at UW-Madison Housing.

After the hearing, the parties filed briefs.

FINDINGS OF FACT

1. Prior to November of 1988, the complainant, who is female, had obtained permanent status in class as a Building Maintenance Helper 2 (BMH 2) at the University of Wisconsin-Madison Physical Plant.

2. Effective November 21, 1988, the complainant transferred to a BMH 2 position in respondent's Division of Housing. Complainant's work site was Witte Hall, a student dormitory. She was supervised by Ruth Hogan, a Housing Services Supervisor 1. Complainant was required to satisfactorily complete a six-month permissive probationary period.

3. Due to an error relating to seniority dates, Dale Frey had initially filled the vacancy on a transfer basis, but once the error was discovered, the complainant replaced Mr Frey in the position. At the time she started in the position, Ms. Hogan and the complainant had the following exchange:

Hogan. "You must have complained. You sent Dale back to nights."

Mongold: "What do you mean?"

Hogan: "Never mind."

4. Ms. Hogan has served as a Housing Services Supervisor for 23 years. At all relevant times, she has supervised 9 permanent positions. In addition to the complainant, two of the other BMH 2's under Ms. Hogan's supervision during 1988 and 1989 were women. Other employes sometimes referred to these two women, Una Wolff and Laverne Dawson, as "Gabby" and "Daffy." Both of these employes had been supervised by Ms. Hogan for all or nearly all of her 23 year tenure. In addition, prior to the time of the complainant's employment, a third woman, Lucille Olson, had been Ms. Hogan's subordinate for a 20 year period.

5. Complainant's first performance evaluation was completed on February 14, 1989. This evaluation, which was prepared by Ms. Hogan, identified four areas of specific performance expectations. The complainant's ratings were "satisfactory" with respect to two areas and "needs improvement" in the other two areas.

6. In a memo dated March 6, 1989, Ms. Hogan noted that complainant needed to change the shower curtains and use a floor scrubbing machine on one of complainant's assigned floors.

7. Complainant's second performance evaluation was completed on March 14, 1989. The complainant's ratings with respect to the four areas of specific expectations were identical to the first evaluation.

8. In a memo dated April 10, 1989, Ms Hogan noted that complainant needed to clean vents in bathroom doors and to clean under the sinks.

9. In a letter dated April 26, 1989 from John Kremm, Ms. Hogan's supervisor, the complainant was informed that her probationary employment with the Division of Housing was being terminated effective May 6, 1989, based upon her overall performance, as reflected in successive performance evaluations. Complainant's final performance evaluation included two "not satisfactory" ratings among the four specific performance expectations.

10. In a memo dated May 2, 1989, Ms. Hogan noted that complainant had failed to vacuum one wing and to pick up debris on the central stairs.

11. Ms. Hogan received at least six complaints about the complainant's work during the 5 months of her employment. While a certain level of complaints can be expected, the goal is no more than 2 per year.

12. The decision to terminate the complainant's employment as a BMH 2 in the Division of Housing was based upon Ms. Hogan's evaluations and on her observations of the complainant's performance.

13. Pursuant to her restoration rights with the UW Physical Plant, the complainant returned to a BMH 2 position in the Chemistry building on May 7, 1989.

14. On October 26, 1989, the complainant was promoted from BMH 2 to Housekeeping Services Supervisor 1, and was assigned to duty at Van Hise Hall. During the ensuing one-year probationary period, the complainant's evaluations were positive and her final probationary report reflected "good" or "excellent" in all 8 identified categories.

15. As of July of 1992, Ms. Hogan's work crew of permanent employees consisted of six men and three women. The women included Ms. Wolff and Ms. Dawson, as well as a third woman, Laura Reynolds, who transferred into a vacancy under the complainant's supervision soon after the departure of the complainant.

CONCLUSIONS OF LAW

1. This matter is within the Commission's jurisdiction pursuant to §230.45(1)(b), Stats.

2. The complainant has the burden to show that she was discriminated against by respondent on the basis of her sex with respect to the decision to terminate her employment as a BMH 2 in the Division of Housing.

3. The complainant has not sustained her burden.

4. The respondent did not discriminate against the complainant on the basis of her sex as alleged.

OPINION

In analyzing a claim of disparate treatment as has been alleged here, the Commission generally uses the method of analysis set forth in McDonnell

Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973) and its progeny. Under McDonnell Douglas, the initial burden is on the complainant to establish the existence of a prima facie case of discrimination. The employer may rebut the prima facie case by articulating legitimate, non-discriminatory reasons for the actions taken which the complainant may, in turn, attempt to show were pretexts for discrimination. In the context of a termination/discharge claim, a prima facie case is established by showing that complainant is a member of a class protected by the Fair Employment Act and that complainant was performing the responsibilities of the job satisfactorily but was discharged under circumstances which give rise to an inference of discrimination.

Here, the complainant, who is female, is a member of a protected class. However, the complainant has failed to establish that she performed her work at Witte Hall satisfactorily or that males who performed their work in a similar manner were treated differently. The Commission notes that the burden of proof that is on the complainant in this matter is difficult to meet because both the complainant and Ms. Hogan, who effectively decided to terminate the complainant's employment, are female.¹

In Ruff v. Office of the Commissioner of Securities, 86-0141-PC-ER & 87-0005-PC-ER, 9/26/88, the Commission wrote:

[C]omplainant has failed to establish a prima facie case of discrimination on the basis of sex. While it is true that he was denied a DPA while the two female examiners in the division were granted DPA's, the Commission cannot ignore that fact that the appointing authority who made this decision was male. In a case such as this where there is no suggestion that the transaction in question (here, a DPA denial) involved an affirmative action component, it is inherently improbable, although not impossible, that a male would discriminate against another male because of the latter's gender.

The complainant, who appeared *pro se*, relied on the testimony of Florence Hasse, who was her supervisor during the period commencing in October of

¹The April 26, 1989 termination letter was signed by Ms. Hogan's superior, John A. Kremm, as Southeast Area Housekeeping Supervisor. Mr. Kremm testified that the letter was based upon Ms. Hogan's evaluations and observations of the complainant. Mr. Kremm testified that he rarely, if ever, observed the complainant's work.

1989, when the complainant began her probationary period as a Housekeeping Services Supervisor 1 at Van Hise Hall. This testimony had marginal relevance to the question of whether the complainant was adequately performing her duties as a BMH 2 in a different work unit during the 5 month period ending in May of 1989. Complainant did not call any witnesses to testify to the relative quality of the complainant's work at Witte Hall as compared to the work of the other custodians, permanent or probationary, male or female, under Ms. Hogan's supervision. While the complainant herself testified that no females passed probation under Ms. Hogan's supervision during the period of 1981 to 1989, there is nothing in the record which indicates how many persons were on probation during this time period, much less how many were males and how many were females. The complainant did not call Ms. Wolff, Ms. Dawson, Ms. Olson or Ms. Reynolds, four women who had worked under Ms. Hogan's supervision for an extended period, and who might have been in a position to either affirm or discount the complainant's claim that Ms. Hogan engaged in discrimination based on sex.²

What complainant is left with is her contentions that Ms. Hogan did not provide her enough training, that certain items mentioned in the various evaluations were not consistent, that on the first day of her employment, Ms. Hogan commented that complainant had taken action to replace Dale Frey in the position, that her co-workers avoided her and that her co-workers sometimes referred to Ms. Wolff and Ms. Dawson as "Gabby " and "Daffy." The record showed that, throughout the probationary period, the complainant's work was consistently rated by Ms. Hogan at a level below "satisfactory." The respondent submitted copies of Ms. Hogan's memos directing the complainant to perform certain job responsibilities, which, according to those memos, were not being adequately performed. There is no evidence suggesting that the complainant was provided any less training than any other new employe. Even if the Commission were to conclude from Ms. Hogan's comment that she did not like the complainant because the complainant had displaced Mr. Frey, there would still be no basis for concluding that Ms. Hogan's feelings (and actions) were, in

²Complainant did offer her own testimony recounting statements allegedly made to her by Ms. Dawson and Ms Wolff. However, respondent raised a hearsay objection to this testimony and the Commission does not accord it any weight.

fact, motivated by the complainant's sex. The record is inadequate to support a conclusion that the complainant actually performed her BMH 2 responsibilities in a manner that met the standards normally applied by Ms. Hogan or that different standards were applied to male probationary employes by Ms. Hogan. Ms. Hogan and Mr. Klemm testified that they did not recall hearing any employes using the nicknames "Gabby" or "Daffy." The complainant, who testified that these nicknames were used, did not testify that management was aware of or participated in their use. Again, there was no testimony from any other members of the work unit to support complainant's discrimination claim.

Even if it could be said that the complainant had established a prima facie case in this matter, the complainant has failed to show that her stated performance inadequacies as a BMH 2 were pretexts for sex discrimination.

ORDER

This complaint is dismissed.

Dated: December 17, 1992 STATE PERSONNEL COMMISSION


LAURIE R. MCCALLUM, Chairperson

KMS:kms


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner

Parties:

Jane Mongold
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Madison, WI 53714

Donna Shalala, Chancellor
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NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.