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R. W. [REDACTED]

Complainant,

v.

Secretary, DEPARTMENT OF HEALTH
AND SOCIAL SERVICES,

Respondent.

Case No. 89-0073-PC-ER

* * * * *

DECISION
AND
ORDER

Nature of the Case

This is a complaint of discrimination on the basis of race. A hearing was held on September 10 and 17 and October 31, 1991, before Laurie R. McCallum, Chairperson. The parties were permitted to file briefs and the briefing schedule was completed on January 10, 1992.

Findings of Fact

1. Complainant is a black female. She was first hired by respondent, as part of the Wisconsin Employment Opportunities Program (WEOP), in December of 1984 to fill a position classified at the Clerical Assistant 2 level. WEOP is an employment training program for persons eligible for Aid to Families with Dependent Children (AFDC). During the relevant time period, those hired under the WEOP program received project appointments to project positions until they passed a six-month probationary period. They were then required to take a civil service examination to compete for a permanent appointment to a position.

2. Pursuant to this process, complainant received a permanent appointment to a project Clerical Assistant 2 position in Milwaukee on August 25, 1986, after she took and passed a Clerical Assistant exam. Complainant was required to serve a six-month probationary period in this position. This project position was scheduled to end on September 13, 1986. Prior to September 13, 1986, complainant's supervisor advised complainant that the only vacant position into which she would be eligible to transfer was

a Word Processing Operator 1 position in Madison. The Word Processing Operator 1 (WPO 1) classification is in the same pay range as the Clerical Assistant 2 (CA 2) classification.

3. The Madison position was located in the word processing center (Center) of respondent's Division of Community Services and the supervisor of the position was Arlene Askew, a black female. Prior to September 13, 1986, complainant travelled to Madison to meet with Ms. Askew to discuss the vacant WPO 1 position. Complainant advised Ms. Askew that she had done light typing, including agendas, labels, and meeting minutes but had not done any word processing. Ms. Askew explained to complainant the operation and work product of the word processing center and advised her that she would be trained to do word processing. At the time, Ms. Askew anticipated that she would be training complainant herself on the IBM Displaywriter to do labels, memos, and letters and she so advised complainant.

4. Complainant accepted the Madison WPO 1 position and she was appointed to this position effective September 14, 1986. On September 17, 1986, complainant signed a position description for the WPO 1 position which stated that "[u]nder close supervision, this employe will train on the IBM Displaywriter and attain the proficiency required to select program and format options required to provide typing tasks for the Division of Community Services. These tasks include general correspondence and other documents with basic formats." Complainant was required to complete the six-month probationary period she had begun upon her permanent appointment to the CA 2 position. Respondent reimbursed complainant for moving expenses she incurred in relocating to Madison and granted her a temporary relocation housing allowance for a period of time not to exceed 45 days.

5. Prior to September 14, 1986, another WPO position became vacant in the Center. As a result, Ms. Askew decided to assign complainant to the DOSF system instead of the IBM Displaywriter. Since Ms. Askew did not do training on the DOSF system, complainant was assigned to lead worker Diann Winchester for training purposes.

6. At each word processing station, including the one to which complainant was assigned, there was a system manual which provided step-by-step instructions regarding creating, storing, and printing a document; a word processing center handbook created by Ms. Askew which contained detailed

information relating to proper procedures and formats for creating documents; and a red book which contained a summary of system commands. During complainant's first day at the Center, Ms. Winchester spent one half of the day with complainant going through the system manual and Center handbook and reviewing the system commands and the proper formats and procedures necessary to create the type of documents produced at the Center. Complainant was first assigned to do simple memos and letters. This was the same training procedure followed by Ms. Winchester in training 50 other WPOs at the center.

7. Each request for the production of a document by the Center was logged into the center and a green slip attached identifying, among other things, the author of the request, the date the request was received at the Center, the requested date of completion, any special instructions, etc. The WPOs were instructed to take the top document from the work basket and to enter their name and other information regarding the finished document on the green slip. Once the document was completed by the WPO, the proof readers noted on the green slip the number of errors they discovered prior to returning the document to a WPO for correction. Ms. Askew had specified error standards for the WPOs at the center and the WPOs were evaluated on their ability to meet such standards.

8. From the beginning of her employment at the center, complainant did not meet performance expectations and Ms. Askew brought this to her attention. Complainant never progressed beyond the beginning level of creating simple memos and letters and never performed these beginning assignments at an acceptable level. Complainant consistently did not follow the proper procedures for creating, storing, printing, or checking the spelling in a document. Many of her errors were spelling errors which would have been detected if she had performed a spell check once she had created a document. Ms. Askew brought these performance deficiencies to complainant's attention in a series of meetings over the period of complainant's employment in the Center.

9. When it became apparent that complainant was not meeting performance expectations, Ms. Askew assigned Ms. Winchester to spend a week with complainant conducting intensive one-on-one training. Complainant had been employed in the Center about two to three months at this time. Ms. Askew

had never provided such intensive training to any other WPO at the center. Ms. Winchester sat with complainant at her word processing terminal during this week and gave her detailed instruction as to the proper procedures to follow and observed and corrected complainant's work. Complainant's work did not improve significantly after this week of intensive training. As a result, Ms. Askew recommended to Mr. Robertson that complainant be terminated at the end of her probationary period.

10. In November of 1986, during one of the meetings to discuss complainant's continuing failure to meet performance expectations, Ms. Askew learned from complainant that she was [REDACTED] and advised her to obtain counseling from the Division of Vocational Rehabilitation. Ms. Askew also advised complainant that her performance would have to improve substantially in order for her to pass probation. Ms. Askew subsequently advised the three lead workers at the center, including Ms. Winchester; her supervisor David Robertson; and the DCS affirmative action officer Mabel Smith-Reed of complainant's [REDACTED]. One of the lead workers, Ms. Wolter, later told complainant that she, too, was [REDACTED]. Mr. Robertson recommended, in view of complainant's performance problems and the likelihood that she would not pass probation, and in view of her [REDACTED], that her probationary period be extended to enable respondent to find another position for complainant. To this end, respondent ascertained in late January of 1987 that there were two permanent positions available for which complainant would be eligible to compete. One was a Shipping and Mailing Clerk position in Madison and the other was a Clerical Assistant 2 position in Madison. Complainant indicated that she was not interested in either of these two positions. Complainant was terminated from her WPO 1 position effective May 1, 1987.

11. Respondent located and complainant accepted a half-time limited term employment (LTE) position in Milwaukee in which complainant remained employed from May 4, 1987, until the LTE hours for the position expired.

12. In mid-February of 1987, Ms. Askew underwent emergency surgery. On February 19, 1987, Mr. Robertson convened a meeting of the staff of the word processing center to discuss how the center would function during Ms. Askew's absence. During the course of the meeting, one or more staff members mentioned the problem of low staff morale and one or more staff

members related this in part to complainant's performance problems. Mr. Robertson did not discuss complainant's performance problems or her [REDACTED] at this meeting. The usual procedure when a meeting of the center's staff was called was to assign one of the staff members, on a rotating basis, to answer the phone. Mr. Robertson, aware at that time that complainant's probationary period was to expire February 25, 1987, and had not yet been extended, assigned complainant to answer the phone.

13. During Ms. Askew's absence, the center's three lead workers were assigned to monitor the performance of the WPO's in the center. They reported to Mr. Robertson that complainant's performance continued to be unsatisfactory and Mr. Robertson directed them to put their observations in a memo. In a memo dated February 20, 1987, the lead workers stated as follows, in pertinent part:

During the week of February 16, to February 19 we have compiled the following work performance as documented in the center's log sheets.

On Monday, February 16 your total work output for the day was 15 changes on three revisions. Total lines printed was 301, total work time logged was 25 minutes.

On Tuesday, February 17 your total output for the day was 142 new lines on two projects and 12 changes on four revisions. Total lines printed was 415, total work time logged was 60 minutes.

On Thursday, February 19, your total output for the day was 369 new lines on four projects, 46 changes on two revisions. Total lines printed was 264, total work time logged was 85 minutes.

According to the green slips that you submitted with your work, you have actually worked four hours in four days. While your position description has no set minimum line count, it is assumed that employes will work seven hours in a working day.

When calculating your error rate, we totalled all lines printed (1,187) and divided by an average of 50 lines per page (24 pages). You had 77 errors on 24 pages, this is calculated to an error rate of 3 errors per page.

You have been assigned morning deliveries this week. The minimum time you have spent out of the office on each delivery is 15 minutes. On February 19 you left the center at 11:00 a.m. with two pieces of work to be delivered. You did not return to the center until 11:30 a.m. You were observed in Room 527 talking with another operator during this time.

The center is responsible for large volumes of word processing. When one operator is unable or unwilling to perform his/her share of the work, it puts added stress on the other operators and contributes to low morale. We have noticed your repeated absences from your desk, as well as the amount of time you spend talking with other operators and keeping them from performing their work.

The examples of complainant's performance deficiencies cited in this memo were consistent with the level of complainant's performance during her employment by respondent as a WPO 1. When complainant saw a copy of this memo, she requested of Ms. Winchester that she be allowed to go to the office of Linda Dupont-Johnson, the Deputy Administrator of DCS, that day to discuss the matter with her. Complainant was reminded by Ms. Winchester that she had used her lunch and break times for that day and, as a result, she would have to meet with Ms. Dupont-Johnson on her own time. There was no physical contact between complainant and Ms. Winchester during this exchange.

14. During her employment in the WPO 1 position, complainant was under the impression that, if she did not pass probation, she would be able to return to her CA 2 position in Milwaukee. Complainant preferred to work in Milwaukee as opposed to Madison.

15. The DCS word processing center has successfully employed many former WEOP employees, including Ms. Winchester.

16. Ms. Askew has recommended the termination of one other employee for failure to meet performance expectations during her employment as a supervisor by respondent. That employee is a white female.

Conclusions of Law

1. This matter is appropriately before the Commission 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 race in regard to her termination from her WPO 1 position, in regard to the level of job training she was provided, or in regard to the alleged shoving incident.

3. The complainant has failed to sustain this burden.

4. Respondent did not discriminate against complainant on the basis of her race as alleged.

Opinion ✓

The parties agreed to the following issues:

1. Did the respondent discriminate against the complainant on the basis of race with respect to the decision to terminate her employment as a Word Processing Operator 1, effective May 1, 1987.
2. Did the respondent discriminate against the complainant on the basis of race with respect to the following terms and conditions of employment:
 - a) denial of proper job training
 - b) Ms. Winchester's shoving the complainant when complainant attempted to meet Linda Dupont-Johnson.

In analyzing a claim of disparate treatment such as the one under consideration 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, 5 FEP Cases 965 (1973), and its progeny, to determine the merits of the complainant's charge. Under this method, the initial burden is on the complainant to establish the existence of a prima facie case of discrimination. The employer may rebut this prima facie case by articulating legitimate, non-discriminatory reasons for the actions taken which the complainant may, in turn, attempt to show were in fact pretexts for discrimination.

In regard to the termination issue, the McDonnell-Douglas analysis requires that complainant establish the existence of a prima facie case of discrimination by showing that complainant is a member of a class protected by the Fair Employment Act; that complainant was qualified for the job and performed the job satisfactorily; and that, despite satisfactory performance, the complainant was discharged under circumstances which give rise to an inference of discrimination. Complainant has shown that she is a member of a protected class on the basis of her race (black) and that she was qualified for the job as the result of being certified for her previous CA 2 position and then appointed to a position in a counterpart pay range, i.e., the WPO 1 position. However, complainant has failed to establish that she performed the WPO 1 position satisfactorily or that she was discharged under circumstances which give rise to an inference of discrimination. Not only does complainant not

dispute the fact that her performance did not meet the standards established for WPO 1 positions at the DCS word processing center but the record clearly shows that her performance did not come close to meeting such standards at any point during her employment by respondent as a WPO 1. In addition, the record does not indicate the identity of the person hired to replace complainant in the word processing center but does indicate that respondent extended complainant's probationary period, located two other positions and encouraged complainant to compete for them and, when she declined to do so, located an LTE position for her in Milwaukee. These circumstances relating to complainant's termination do not give rise to an inference of discrimination.

If complainant had made out a prima facie case of discrimination in regard to her termination, the burden would then shift to respondent to articulate a legitimate, non-discriminatory reason for its action. The reason given by respondent for terminating complainant is her inadequate job performance as a WPO 1. On its face, this reason is both legitimate and non-discriminatory.

The burden then shifts to complainant to show that respondent's reasons for the termination were pretextual.

Complainant argues that respondent's appointment of complainant to a position which required extensive typing when respondent was aware that complainant had limited typing skills demonstrates pretext. The record shows that, although complainant had not done extensive typing in her previous positions with respondent, she had typed labels, agendas, and meeting minutes; that respondent was aware of the nature and extent of typing that complainant had done in these jobs but had successfully trained persons with similarly limited typing skills and experience to be Word Processing Operators; that complainant was fully aware of the duties and responsibilities she would be expected to perform when she accepted the WPO 1 position; and that the deficiencies in complainant's performance cited by respondent as the basis for her termination were primarily related to her failure to follow proper procedures in creating, storing, and printing documents and in her failure to use the system's spelling check mechanism on the documents she created, neither of which would be attributable to poor typing skills.

Complainant also argues that respondent's failure to provide adequate training to her in her WPO 1 position demonstrates pretext. However, the

record shows that complainant had the same written materials available to her as each of the other WPOs in the Center; that she was provided with the same initial training as each of the other WPOs in the Center; that Ms. Askew met with her frequently to discuss her performance and how it should be improved; and that she was provided training not provided to any other WPO when Ms. Winchester spent a week of intensive one-on-one training with her. Not only has complainant failed to show that she was provided less training than the other WPOs, but the record actually shows that she was provided with more training than that provided to other WPOs at the Center.

Complainant also argues that the fact that her supervisor and lead workers monitored her work product more closely than that of the other WPOs demonstrates pretext. The record shows, however, that error standards were applied to the work product of each of the WPOs in the Center and that each WPO was evaluated on the basis of the error standard and other performance standards for his or her classification. In addition, complainant has failed to show that the performance of any of the other WPOs was marked by the deficiencies she demonstrated and thus merited the level of monitoring that her performance merited.

Complainant also argues that her assignment to answer the Center's phones during a staff meeting at which her performance problems and [REDACTED] were discussed demonstrates pretext. The record shows, however, that the phone assignment was a rotating assignment and complainant was chosen on this occasion because she had not had a turn before, and because Mr. Robertson was aware that she would not probably be employed in the Center much longer and would not need the information which he intended to communicate at the meeting as much as the other WPOs. In addition, the record does not show that any supervisor brought up the subject of complainant's performance problems at the meeting or pursued the subject once it was brought up, or mentioned or discussed complainant's [REDACTED].

Finally, complainant argues that the fact that she was the only WPO ever terminated from the Center for poor performance demonstrates pretext. However, complainant failed to show that the performance of any other WPO ever demonstrated the deficiencies that her performance demonstrated or that the performance of any other WPO every merited termination. It is also interesting to note in this regard that Ms. Askew had previously recommended the

termination of an employee (not a WPO in the Center) and this employee is a white female.

Complainant has failed to demonstrate pretext and has failed to show that she was discriminated against on the basis of her race in regard to her termination from the Center.

In regard to complainant's allegations of discrimination in regard to the terms and conditions of her employment, complainant argues that respondent's failure to provide job training comparable to that provided other WPOs at the Center and that the incident during which Ms. Winchester shoved her are direct evidence of discrimination.

As concluded above, complainant has failed to show that the job training she was provided at the Center was not comparable to that provided other WPOs and that the record actually shows that she was provided more training than that provided to other WPOs. Complainant's argument in this regard fails.

In addition, the record fails to sustain complainant's version of the shoving incident. Not only did Ms. Winchester and Ms. Wolter testify that the incident did not involve any physical contact between Ms. Winchester and complainant but complainant's version of the incident was not corroborated by that of any other witness. The record does not show that the incident, as related by complainant in her testimony, was the subject of a report to a supervisor or even an office discussion or rumor. In addition, complainant's testimony was rife with internal inconsistencies and, in regard to the alleged shoving incident, changed several times in relation to where she was standing in relation to Ms. Wolter and Ms. Winchester and what her reaction was when she allegedly felt Ms. Winchester's fist in her back. In addition, certain of her testimony in regard to this alleged incident is simply not believable. For example, although she testified that Ms. Winchester shoved her when she placed her fist on her back, she also testified that, when this happened, she actually stepped back instead of being thrust forward. The Commission does not find complainant's testimony in relation to the alleged shoving incident credible and concludes that the record does not sustain complainant's allegations in regard to this incident.

Complainant has failed to show that she was discriminated against in regard to the terms and conditions of her employment.

It appears from the record that one of complainant's overriding goals was to be employed in Milwaukee, not Madison. Complainant's testimony indicates that she was under the impression that, if she failed to pass probation in the WPO 1 position in Madison, she would be placed back in her previous CA 2 position in Milwaukee. The record shows that complainant made little effort to be successful in the WPO 1 position. The respondent not only provided extraordinary training for complainant in the WPO 1 position but, when it became apparent that complainant was not going to be successful in the WPO 1 position, located two other permanent positions for complainant (which she rejected) and a part-time LTE position in Milwaukee. This does not appear to the Commission to be a scenario from which a conclusion of discrimination could or should be gleaned.

Order

This complaint is dismissed.

Dated: April 17, 1992 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

LRM/lrm/gdt/2


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner

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