

Health and Social Services. Mr. Gary McCaughtry was the Superintendent of Waupun Correctional Institution and was designated as the appointing authority for the institution. Mr. McCaughtry's responsibilities included exercising final authority to hire and fire employees. Mr. McCaughtry became Superintendent of WCI in December, 1988.

3. At the time of complainant's hire, Mr. McCaughtry reported to the Director, Bureau of Adult Institutions (Gerald Berge), who reported to the Administrator, Division of Corrections (Stephen Bablitch), who in turn reported to the Secretary, Department of Health and Social Services (Patricia Goodrich).

4. In October, 1989, Mr. McCaughtry terminated the probationary period of a female correctional officer, Sharon Blackhall. Ms. Blackhall was terminated for excessive tardiness and absenteeism. Ms. Blackhall, through her union representative, Mr. McLinn, requested that she be allowed to resign. Mr. McCaughtry denied the request.

5. Ms. Blackhall contacted Ms. Tara Ayers, Affirmative Action Officer for the Division of Corrections, and discussed her termination. Ms. Blackhall subsequently filed an informal complaint which was reviewed by Ms. Ayers and legal staff for the Department of Health and Social Services (DHSS).

6. In reviewing Ms. Blackhall's case, Ms. Ayers and legal staff of DHSS had some concern about a black male staff member who had more tardiness and absenteeism incidents than Blackhall and remained employed.

7. DHSS legal staff advised Mr. McCaughtry to accept a resignation from Ms. Blackhall as a way to resolve her informal complaint. Mr. McCaughtry reluctantly accepted Ms. Blackhall's resignation, and she was shortly thereafter reinstated to the Kettle Moraine Correctional Institution (KMCI). Mr. McCaughtry was not asked by KMCI to provide any references for Ms. Blackhall.

8. Ms. Blackhall's union representative was not involved in her informal complaint and did not know why she was allowed to resign.

9. On January 1, 1990, the Legislature reorganized the Department of Health and Social Services by removing the Division of Corrections and creating a separate Department of Corrections (DOC). The new Secretary of the Department of Corrections was vested with the authority previously held by

the Secretary of DHSS as it related to the operation of the Waupun Correctional Institution.

10. Subsequent to the reorganization, Mr. McCaughtry reported to Mr. Berge (who was made Administrator, Division of Adult Institutions) who in turn reported to Mr. Bablitch (who was now Secretary, Department of Corrections). This reorganization removed one organizational level above Mr. McCaughtry and allowed him greater access to the Department Secretary and legal staff.

11. On March 14, 1990, Mr. McCaughtry terminated complainant's probationary period, after reviewing information that complainant was sleeping on his post. Complainant, through his union representative, Mr. McLinn, asked to be allowed to resign. Mr. McCaughtry denied the request.

12. Complainant called Ms. Ayers and discussed his situation but did not file an informal complaint. Complainant learned from his union representative that Ms. Blackhall had been allowed to resign.

13. Complainant filed a timely complaint with the Commission

14. One reason why Mr. McCaughtry refused to provide complainant the option of resigning in lieu of being terminated is because of an unwritten policy that security-related disciplinary matters are considered more serious than administrative-related disciplinary matters. As a corollary to this policy, an employe facing termination because of a security-related matter would not be offered the option of resignation in lieu of termination, because such an employe could be eligible for reinstatement at another institution, and such reinstatement presumably would be inconsistent with his or her termination for security-related reasons. Since complainant was charged with sleeping at his post, this was considered to be a security-related matter. Because of this factor, complainant's situation was different from that of Ms. Blackhall, who had been terminated for a non-security-related reason (excessive tardiness and absenteeism).

15. In conjunction with the transition from DHSS to DOC, effective January 1, 1990, departmental policy on settlement of disciplinary matters changed. Under DHSS, settlement practice had been more oriented to perceived interests at the departmental, divisional, and bureau levels, while under DOC, the approach to settlement was more oriented to the perceived interests of

the appointing authorities, i.e., at the institutional level. This change in policy was in effect at the time of complainant's termination.

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §230.45(1)(b), Stats.
2. Complainant has the burden of proof to establish by a preponderance of the evidence that respondent discriminated against him on the basis of sex when it terminated his probationary employment instead of allowing him to resign.
3. Complainant having failed to sustain his burden, it is concluded that respondent did not discriminate against complainant on the basis of sex when it terminated his probationary employment instead of allowing him to resign.

OPINION

When this case was heard on the issue of probable cause, the Commission outlined the analytical framework for matters of this nature:

In McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 5 FEP Cases 965 (1973), the Supreme Court established the basic analytical framework for cases alleging discriminatory treatment. The complainant must carry the initial burden of establishing a prima facie case. This may be accomplished by showing 1) that he belongs to a protected group; 2) that he suffered an adverse employment action; and 3) that this action occurred under circumstances which give rise to an inference of unlawful discrimination. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 25 FEP Cases 113 (1981). If the complainant succeeds in establishing a prima facie case, the burden of proceeding then shifts to the respondent employer to articulate "some legitimate, non-discriminatory reason" for their action. If this is accomplished, the complainant must be given a fair opportunity to show that the employer's stated reasons for the termination were in fact a pretext for a discriminatory decision. The ultimate burden of persuasion remains at all times with the complainant. Burdine, supra, at 1094.

The Commission found that complainant belonged to a protected group (male), that he had suffered an adverse employment action (not being allowed to resign in lieu of probationary termination), and that this had occurred under circumstances which give rise to an inference of unlawful discrimination (a

female probationary officer had been offered the resignation option). At that point respondent did not provide any reason to explain why Ms. Blackhall had been allowed to resign while complainant was not, other than that she had filed an internal complaint and the agency was concerned because there had been a "black male staff member who had more tardiness and absenteeism than Blackhall and remained employed." Finding #6. Although complainant had not filed an informal complaint, he had discussed his situation with the affirmative action officer who had been involved in Ms. Blackhall's case. Because of the apparent similarities between the situations of complainant and Ms. Blackhall, the Commission found "probable cause" to believe that discrimination had occurred.

At the hearing on the merits, respondent presented additional testimony on this subject that had not been presented, or augmented testimony given at the first hearing. There was testimony about a policy of taking security-related disciplinary matters more seriously than non-security-related disciplinary matters, as well as testimony about a change in policy so as to reorient departmental priorities with respect to settlement from more concern about departmental interests to more concerns about institutional interests. This testimony concerning these policies was not factually contradicted, and these policies provide a legitimate, non-discriminatory reason for Mr. McCaughtry's different treatment of Ms. Blackhall and complainant — complainant was involved in a security-related disciplinary situation (sleeping on his post) while Ms. Blackhall was not (she had been terminated for excessive absenteeism and tardiness). There is nothing in the record that would tend to show that this rationale for the differential treatment of complainant did not have a basis in fact or otherwise was a pretext to mask an intent to discriminate against complainant because of his sex. Therefore, complainant did not sustain his burden of establishing that he was treated differently because of his sex.

Complainant obviously feels he did not get a fair hearing on the charge of sleeping at his post before his employment was terminated. However, this is not relevant to his charge of sex discrimination. As was noted in the initial decision on probable cause, the Commission does not have jurisdiction over an appeal of a probationary termination. Board of Regents v. Wisconsin Personnel Commission, 103 Wis. 2d 545, 309 N.W. 2d 366 (Ct. App 1981).

Complainant has not alleged or shown that his predisciplinary procedure was

handled any differently from the procedure that was used with respect to any female officers.

In conclusion, because respondent articulated a legitimate, non-discriminatory rationale for its failure or refusal to have offered complainant the option of resignation in lieu of probationary termination, and complainant failed to show that this rationale was a pretext to mask an intent to discrimination against him because of his sex, it must be concluded that he was not discriminated against on the basis of sex in this regard, and this complaint must be dismissed.

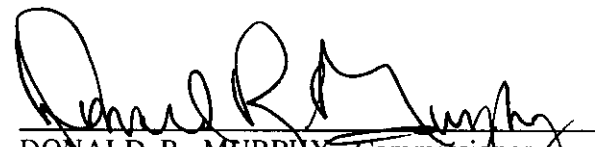
ORDER

This complaint is dismissed.

Dated: January 24, 1992 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

AJT/gdt/2


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner

Parties:

Mark Bender
226 Sixth St
Fond du Lac WI 54935

Patrick Fiedler
Secretary DOC
149 East Wilson Street
P O Box 7925
Madison WI 53707