

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 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 new 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.

CONCLUSIONS OF LAW

1. The Commission has authority to hear this matter pursuant to §230.45(1)(b), Wis. Stats.

2. The burden of persuasion is on the complainant to show the existence of probable cause, as probable cause is defined in §PC 1.02(16), Wis. Adm. Code.

3. The complainant has met his burden of persuasion.

4. There is probable cause to believe that complainant was discriminated against on the basis of his sex when he was terminated from his probationary period instead of being allowed to resign.

DISCUSSION

The following issue was agreed to by the parties:

"Whether there is probable cause to believe that respondent discriminated against complainant on the basis of sex when they terminated complainant's probationary period instead of allowing him to resign."

To the extent that complainant raised issues about the process used in and the incident that led to his termination, these matters are outside of the scope of the Commission's jurisdiction, are outside the issue for hearing, or both. Specifically, complainant raised concerns about whether there was just cause for his termination or whether the charges were made up by someone in order to get rid of him. The Court of Appeals in Board of Regents v. Wisconsin Personnel Commission, 103 Wis. 2d 545, 309 N. W. 2d 366 (1981) held that the Commission lacks subject matter jurisdiction over an appeal of a probationary

termination where it is alleged that respondent did not have just cause to take the action.

While the complainant could have filed a discrimination complaint where he alleged that his sex played a role in his probationary termination, that is not the basis for his complaint and is outside the scope of the issue set for hearing. The only specific discriminatory action that has been identified is the fact that a female officer was allowed to resign after being terminated on probation and that the complainant was not allowed to resign when his probation was terminated. There are no allegations that the termination itself was a discriminatory action or showed animus toward him based on his sex, but only that he was not allowed to resign.

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.

In a probable cause proceeding, a similar analysis is appropriate, although the ultimate burden on the complainant is less. The complainant need not establish that discrimination occurred, but rather, that there are "reasonable grounds for belief, supported by facts and circumstances strong enough in themselves to warrant a prudent person to believe that discrimination . . . probably has been or is being committed." §PC 1.02(16), Wis. Adm. Code. In this case, the complainant is a member of a protected class (male) and suffered an adverse employment action (termination of his probationary period). The complainant has established the third part of his prima facie case

(the action gives rise to an inference of unlawful discrimination) by showing that a female officer (Ms. Blackhall) from the same correctional institution was allowed to resign.

Once a complainant establishes a prima facie case, the burden of proceeding shifts to respondent to articulate a legitimate, non-discriminatory reason for its action. Respondent's reasons for not allowing complainant to resign are based upon Mr. McCaughtry's management practice to not allow an employe who is being terminated on probation to resign, and the differences in complainant's circumstance as compared to Ms. Blackhall's.

The focus here is on the third step of the analytical framework, i.e. whether the respondent's articulated reasons for allowing Officer Blackhall and not the complainant to resign were pretextual. Both Ms. Blackhall and the complainant engaged in conduct which, at least at one point, was felt by Mr. McCaughtry as justifying termination. Upon review of the record, the only reason articulated by respondent for the difference in treatment was the fact that Ms. Blackhall had filed an informal complaint of discrimination with the agency's affirmative action officer.¹ The resulting investigation revealed that a third Corrections employe, a black male, had been retained in employment despite having a worse record of absenteeism and tardiness than Ms. Blackhall. Apparently concerned by this discrepancy, legal counsel advised Mr. McCaughtry to accept a resignation from Ms. Blackhall as a means to resolve her informal complaint. Mr. McCaughtry accepted this advice and permitted Ms. Blackhall to resign.

On the question of pretext, the record shows that complainant also contacted the affirmative action officer but did not actually file an informal complaint. There is no evidence that respondent's legal counsel was contacted or made any sort of a recommendation to Mr. McCaughtry in terms of whether to accept the complainant's request to resign.² One potential issue raised by this matter is whether the consent to resign which was provided to Ms.

¹The respondent made no attempt to differentiate the two employes on the basis of the nature, duration or severity of their misconduct.

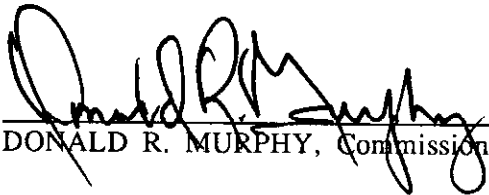
²Mr. McCaughtry testified that his policy was not to allow employes to change a probationary termination into a resignation because to do so would entitle the employe to reinstatement eligibility. Mr. McCaughtry was concerned that, in the event the employe reinstated into state employment, the employe could end up back in the security setting in WCI or another institution through the transfer process.

Blackhall in an effort to resolve an informal discrimination complaint forces the employer to make identical offers to any employees terminated while on probation. Such a conclusion should not necessarily be drawn here particularly in view of respondent's failure in this record to attempt to distinguish between the nature or consequences of the activities engaged in by complainant and by Ms. Blackhall which formed the bases for their probationary terminations. This record provides no real basis to distinguish between Ms. Blackhall and complainant other than the settlement of an informal complaint. Given the posture of this matter at the probable cause stage, the evidence that the complainant contacted the affirmative action office, Mr. McCaughtry's familiarity with resignation permitted for Ms. Blackhall, and his refusal to permit the complainant to likewise resign, the Commission finds probable cause to believe that discrimination occurred with respect to the respondent's decision to terminate the complainant's employment rather than to permit him to resign.

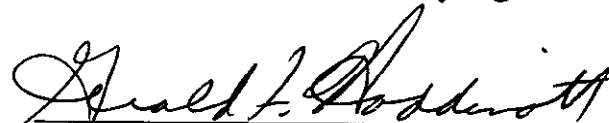
ORDER

Pursuant to §PC 2.07(2), Wis. Adm. Code, the Commission will contact the parties for the purpose of scheduling a conciliation/prehearing conference.

Dated: August 8, 1991 STATE PERSONNEL COMMISSION


DONALD R. MURPHY, Commissioner

GFH/gdt/2


GERALD F. HODDINOTT, Commissioner

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