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DAVID ROMERO,
 Complainant,

v.

Director, WISCONSIN
STATE FAIR PARK,
 Respondent.

Case No. 90-0075-PC-ER

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DECISION
AND
ORDER

This matter is before the Commission on a complaint of discrimination on the basis of national origin or ancestry in violating the Wisconsin Fair Employment Act. Complainant, David Romero, charges that the Wisconsin State Fair Park, respondent, discriminated against him for reason of national origin or ancestry when they terminated his employment with them as a Police Officer in November 1989. To the extent any of the discussion constitutes a finding of fact, it is adopted as such.

FINDINGS OF FACT

1. Complainant David Romero, a Mexican-American, was employed as a limited term employee (LTE) from 1986 to 1989 by the respondent Wisconsin State Fair Park, a state agency.
2. Respondent terminated complainant's employment with them on November 8, 1989, and complainant made a timely claim of discrimination with the Commission.
3. Complainant was born in Milwaukee, Wisconsin, and attended school there. He did not graduate from high school, but obtained a General Education Development (GED) diploma.
4. Complainant first applied for a position with respondent in 1985, and was hired a year later as a Buildings and Grounds Security Officer.
5. During the first year of employment with respondent complainant only worked during the state fair, approximately 10 days.
6. The following year complainant worked various events held on the fair grounds, usually the first or second shift. Complainant worked alone. Mr. Kinney was the supervisor for security officers.

7. After about 2 years as a Security Officer, complainant requested and was accepted by respondent as a police officer candidate for the park.

8. As a police officer candidate for respondent, complainant began a police recruit training program at the Milwaukee Area Technical College on February 1, 1988.

9. Complainant was promoted to Police Officer by respondent on January 19, 1988, received a police badge on March 19, 1988, and completed the police recruit training program on March 25, 1988.

10. Police recruit Shaun Hammerer and others were observed in training class wearing badges prior to March 19, 1988.

11. After complainant completed police training, he worked for respondent as a police officer. Frequently, complainant worked the 4 P.M. to midnight shift.

12. After complainant became a police officer, he signed up for fair ground events on a regular basis and worked various events. His partner for fairs in 1988 and 1989 was Michael Simmons. The shift began at 12 noon and ended at midnight. Complainant did not have a partner when he worked horse shows.

13. Once while parking his vehicle during the state fair, complainant had a controversy with a traffic officer, Lt. Smith, about parking. Later, at another time in the police station, Lt. Smith suggested to complainant to "get more sun -- that way we got a nigger and spic at the same time," thereby increasing minority hires.

14. On another occasion an officer identified as "Lumpy" told complainant a derogatory joke comparing a Mexican with a cue ball. Sergeant Dahlke, the supervisor, was present during the incident and he immediately reprimanded the offending officer.

15. Complainant socialized with several co-employees. Sometimes after work they would go out for beers. At work he engaged in banter including ethnic jokes with these officers and staff. Often, using a Spanish accent, he initiated jokes about Hispanics and made self-deprecatory remarks about his ethnicity. They did not know he was uncomfortable with this humor.

16. Complainant's duties as a police officer included writing narratives of citations on a narrative report form. Frequently these reports were returned by the shift supervisor, duty officer, court officer or

department secretary indicating the need to correct deficiencies and requesting resubmittal. Complainant was nicknamed "Rewrite."

17. Complainant received very favorable employee evaluations as a Security Officer and later as a Patrol Officer for respondent.

18. While on the night shift, August 28, 1989, police officer Martin Duenhorfer, Milwaukee Police Department, with two other officers went to the home of complainant shortly after 4:12 A.M. in response to a theft complaint. Complainant told the officers that he was a state fair police officer and that his handgun had been stolen.

19. After talking with complainant, the officers determined that complainant, who appeared intoxicated, no longer had his gun, but the officers knew little more about the particular circumstances of the handgun.

20. Based on statements made by complainant and a woman in the house, Duenhorfer went to a neighborhood bar, Sabina's Place, which was closed and talked with someone who lived in an apartment above the bar. This person speaking through a closed door said that a friend of complainant had taken the gun and would return it to complainant.

21. That same morning at 5:10 A.M. a District 2, Milwaukee Police shift commander telephoned respondent and advised them that his officers had a "run-in" with complainant earlier that morning at complainant's home in response to his complaint of a theft. The shift commander stated that it had been reported that complainant seemed intoxicated, had been abusive, and had pushed a female officer, but no charges were filed against him.

22. In response, respondent decided to conduct an internal investigation of the incident. The investigation was made by Captain Wayne Schattschneider and Detective Michael Koszuta.

23. During the investigation, Schattschneider and Koszuta talked with Marcella Ortiz, a bartender at Sabina's Place, and with complainant and Gerald Boyle, his attorney.

24. From their meeting with Ortiz, Schattschneider and Koszuta concluded that complainant on August 28, 1989, shortly after midnight entered Sabina's, wearing WSF police uniform trousers and T-shirt, armed with a handgun, and consumed intoxicating beverages after bar closing hours.

25. As a part of the investigation assignment, Schattschneider reviewed the report written by a department officer about his telephone conversation with a Milwaukee police officer regarding the August 28, 1989,

incident and reviewed complainant's personnel (P) file. Also Schattschneider contacted the reporting Milwaukee police officer for additional information regarding the August 28, 1989, incident and was told of a recent sexual assault complaint against complainant causing the Milwaukee Police Department to issue complainant a citation for disorderly conduct.

26. Complainant's P file include an Unsatisfactory Performance Notice, dated 6-26-88, regarding a second complaint about complainant's attitude, described as "gruff and unbecoming an officer."

27. Schattschneider and Koszuta's investigation report was submitted to WSF, Chief of Police Ronald Joers for final disposition.

28. On November 8, 1989, Joers wrote complainant advising him that his appointment as a LTE police officer was terminated and that he was to return all department-issued equipment.

29. Joers' termination letter to complainant included the following:

It is my opinion that you used incredibly poor judgment throughout the entire incident. I am still amazed that you were not arrested for your unruly conduct in your contact with the Milwaukee Police Officers that morning. I have never been involved with an Internal Affairs case in which so many rules and procedures have been violated in such a short period of time, to-wit: 5.01-Violation of Rules, 5.02-Unbecoming Conduct (for your unruly conduct with the Milwaukee Police Officers), 5.04-Conformance to Laws (for remaining in a tavern past legal closing time after repeatedly being asked to leave), 5.14-Use of Alcohol on Duty, or in uniform, 5.45-Use of Weapon (for improper carrying of a firearm in your waistband, displaying it in a tavern, and while using intoxicants), 506.02(11)-Firearms Procedure (for going armed while off duty without authorization).

30. Respondent provides its LTE Security employees with copies of its policies and procedures, rules and regulations and administrative code provisions.

CONCLUSIONS OF LAW

1. This matter is before the Commission under §230.45(1)(b), Wis. Stats.

2. Complainant has the burden of proving that he was discriminated against by respondent on the basis of his national origin or ancestry in regards to conditions of employment and termination in violation of the Wisconsin Fair Employment Act, §§111.31 - 111.37, Wis. Stats.

3. Complainant has failed to sustain this burden of proof.
4. Complainant has failed to prove respondent discriminated against him as alleged.

OPINION

The Commission has consistently used the analytic framework contained in McDonnell-Douglas v. Green, 411 U.S. 792, 93 S. Ct. 1817, 5 FEP Cases 965 (1973) and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 25 FEP Cases 113 (1981) in determining discrimination cases under the Wisconsin Fair Employment Act (WFEA). Complainant claims that he was harassed, subjected to disparate treatment and finally terminated from employment by respondent, because he is Mexican-American.

The issues in this case are:

1. Whether respondent discriminated against complainant on the basis of national origin or ancestry in violation of the Wisconsin Fair Employment Act in the terms and conditions of his employment due to the harassment to which the complainant was subjected or the disparate treatment complainant received in the issuance of equipment and review of his work while employed by respondent as a police officer from 1986 to 1989.
2. Whether respondent discriminated against complainant on the basis of national origin or ancestry in violation of the Wisconsin Fair Employment Act when they terminated complainant's employment as a Police Officer in November, 1989.

Regarding the first issue, complainant alleges that he was harassed by co-workers and supervisors because he is Mexican-American, and that he was treated differently than non-Hispanic employees in the issuance of equipment and review of his work by supervisors.

Complainant testified that on many occasions he was subjected to racial slurs or comments by his fellow officers and supervisors. Complainant specifically testified to three incidents involving three different officers: Lt. Smith, Officer "Lumpy" Hoffman, and Lt. Kopecky. On cross-examination, complainant acknowledged that Officer Hoffman was immediately verbally reprimanded for such comments by the duty supervisor. Kopecky testified that he and complainant joked about the "Frito Bandito," but stated that he did not know complainant was offended by it, because he believed they had established a certain rapport as peer officers. Kopecky testified that he and

complainant on at least three occasions had socialized together after duty hours. Other officers and staff testified that complainant enjoyed being the center of attention and initiated Hispanic jokes. Program Assistant, Esther Glowacki, secretary to the WSFP Chief of Police, testified that she heard complainant refer to himself as the "Frito Bandito," that he wanted to be "the life of the party," frequently told ethnic jokes, she believed denigrated his nationality, and that even she would laugh, despite her practice of not tolerating ethnic and religious jokes. Officer Constance Frey, who worked downstairs in the police department booking room, testified that complainant would come to the top of the stairs and ask in a heavy Spanish accent whether his sister was down there and that she was available for "puca, puca."¹

Complainant never complained of any harassment to WSFP Police Chief Joers, Captain Harrington, the second in command, or any of his supervisors so they could be held responsible for such behavior.

Complainant asserts that he was treated differently than other officers in the issuance of a badge, ammunition and the use of police vehicles, but the record does not support these contentions. For instance, complainant testified that unlike his police academy trainee, Shaun Hammerer, he did not receive his badge until the end of police training. The record shows that Hammerer, unlike complainant, received her badge before a 1988 policy change requiring recruits to attend the academy prior to going to work and receiving their badges.

Concerning the ammunition, complainant testified Captain Harrington refused his request for 50 rounds of silver-top ammunition and told him to come back later because he was "too busy" while another officer had just returned from Harrington's office with the same requested ammunition. Having been initially refused, complainant said that he never asked Harrington again. Harrington testified that he did not recall the incident, but said no officer would be sent out on duty without ammunition. And complainant never made that allegation. Also complainant testified that he was refused by Harrington the use of a particular vehicle, he believed more suitable for working a horse show. Harrington testified that squads (police vehicles) were assigned by shifts, the day shift was assigned the newest squad,

¹ puca [sic] puta - means prostitute in Spanish.

the next shift (4 P.M. to midnight) was assigned the next and the late shift was assigned the oldest squad. No evidence was introduced to the contrary.

Complainant also asserts that he was required to rewrite narratives of citations more than other officers because of his nationality. In support, he testified that he and his partner, Officer Simmons, who he believed wrote excellent reports, wrote and submitted a report under complainant's name and it was returned for a rewrite. Complainant testified that he was nicknamed "Rewrite." Sergeant Boos, one of complainant's supervisors, testified that complainant had problems writing reports and he returned some of complainant's reports, but complainant showed improvement. Boos testified that he assisted complainant in writing reports and complainant was not the only officer required to frequently rewrite his reports. The department secretary, Esther Glowacki, testified that she sometimes on her own returned deficient reports to officers for rewrite and that 90 percent of the officers had to rewrite reports.

It is clear that complainant as Mexican-American is in a protected class under the WFEA and that he was subjected to some harassment based on his nationality. However, to prevail in this issue, complainant must establish that ethnic slurs directed towards him were pervasive, regular and interfered with his work performance, and respondent knew or should have known of the harassment and failed to take prompt and appropriate action. Taylor v. Jones, 653 F. 2d 1193, 28 FEP Cases 1024 (8th Cir. 1981). With respect to the one comment attributed to a lieutenant, management is responsible for this even without a complaint from the employe, but, under the circumstances as discussed below, what occurred does not amount to national origin harassment.

Evidence in the record shows that complainant participated in self-deprecating ethnic banter with many of his co-workers and never confronted them or informed any of his supervisors of these acts and his intolerance for such behavior. Also the evidence establishes only three isolated incidents of hostile racial epithets directed towards him. And on one of these occasions, the supervisor overheard it and immediately reprimanded the offender. Consequently, this record is insufficient to conclude that there was a pervasive, regular, discriminatory work atmosphere against persons of complainant's national origin at WSFP.

Similarly, complainant's claims of disparate treatment regarding the issuance of equipment is not substantiated by the evidence. The evidence shows that Hammerer received her badge before complainant for two reasons: Hammerer, unlike complainant, was working as a police officer and a policy change occurred requiring police recruits to attend police academy before going to work as a police officer. With respect to the van incident, no evidence was presented disputing Captain Harrington's testimony that a specific vehicle was assigned each shift. And as to the ammunition incident, complainant imputes a bias not supported by other evidence.

Regarding the second issue, to prevail, complainant, in addition to proving that he is a member of a group against which discrimination is suspected under the WFEA, must prove that he was treated differently than others in like circumstances because of his national origin. E.E.O.C. v. Brown & Root, Inc., 688 F. 2d 338, 30 FEP Cases 11 (1982), Moore v. N & W. Rt. Co., 731 F. Supp. 1015, 55 FEP Cases 226 (1990).

The Commission reaches the same conclusion, with respect to the second issue. Although complainant has established that he is within a protected group under the WFEA and that an adverse action was taken against him, he has failed to prove his termination was based on his national origin. Respondent's reasons for discharging complainant were based on alleged department rule violations stemming from an incident on August 28, 1989, which included the Milwaukee police.

Complainant argues that he had a good employment record, the incident investigation report of respondent included unsubstantiated information based on hearsay, and he did not violate the uniform regulation rule. Respondent stipulated complainant was a good security officer and police officer. The record is unclear whether Chief Joers' September 1989, directive regarding off-duty wear of uniforms was clarification of existing policy or new policy. Even with this, complainant failed to establish that he was treated differently from co-employees outside his protective group, who committed similar acts and the proffered reasons given for termination were pretextual.

Regarding complainant's post-hearing motions to disregard evidence provided by respondent in Exhibits B, P, Q and X, the hearing examiner ruled on these same motions at the hearing and these rulings are of record.

ORDER


In accordance with the Findings of Fact, Conclusions of Law, and Opinion set forth above, the complaint in Case No. 90-0075-PC-ER is dismissed.

Dated: June 23, 1994

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

DRM:rcr


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

Parties:

David Romero
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Milwaukee, WI 53021

James Greiner
Director, Wis. State Fair Park
Administration Building
West Allis, WI 53214-0990

**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.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.)