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DENISE J. KRENZKE-MORACK,
 Complainant,

v.

Secretary, DEPARTMENT OF
 CORRECTIONS,
 Respondent.

Case No. 91-0020-PC-ER

* * * * *

DECISION
AND
ORDER

This matter is before the Commission on a complaint of sex discrimination against the respondent Department of Corrections (DOC) for terminating the employment of the complainant, Denise J. Krenzke-Morack, in violation of the Wisconsin Fair Employment Act (WFEA). To the extent any of the discussion constitutes a finding of fact, it is adopted as such.

FINDINGS OF FACT

1. Complainant, Denise J. Krenzke-Morack, was appointed to a Social Worker 1 position at the Oshkosh Correctional Institution (OCI), effective April 23, 1990.
2. OCI is a medium security correctional facility in respondent's Division of Adult Institutions.
3. Complainant Morack's appointment required service of a six-month probationary period. Morack's employment at OCI terminated on July 24, 1990.
4. During her employment with OCI, Morack's duties consisted of assessing and evaluating new clients'/inmates' problems, capacities and security needs; providing direct services to enhance clients'/inmates' social functioning; and coordinating services with staff and community resources regarding transfer and release planning services.
5. There are four living units at OCI: Open Center, Middle Center, Close Center, and the sex offender treatment unit.
6. Three of the four living units have been in existence since January 1, 1990; the fourth, a sex offender treatment unit, was started in the summer of 1990.

7. Brooks Feldman was unit manager for the Middle Center, Karl Brekke supervised the Open Center, and Leslie Mlsna supervised the Close Center.

8. From January 1990 to fall 1990, Close Center Director Mlsna also held two acting appointments. They were (1) Acting Program Director from February 1990 to July 1991 and (2) Acting Security Director from February 1990 to February 1991.

9. As Acting Program Director, Mlsna supervised the Word Processing Unit, consisting of three female members; the Chaplin's Office; the Records Office, which had a male Registrar and female Program Assistant; and the Intake Social Worker, a new vacancy. Morack filled this position in April 1990. Morack's office was located in the Close Center.

10. As Acting Security Director, Mlsna supervised the OCI security staff. For a short period during this stint, Mlsna was relieved by Dan Buckner.

11. Approximately forty-seven employees serviced the Close Center; three were Social Workers.

12. Because of his two acting positions, Mlsna relied heavily on feedback from staff in assessing the work performance of his personnel.

13. About July 1, 1990, Mlsna was directed by his supervisor, Deputy Warden Smith, to investigate a written report from Second-Shift Commander Captain Michael McNeil of improper behavior by complainant Morack with an inmate.

14. On July 3rd, Mlsna met with Morack and discussed with her every allegation of improper behavior in the report and the attached note from inmate Lawrence, and Morack responded to each allegation.

15. Mlsna submitted a written report of his Morack-Inmate investigation to Deputy Warden Smith in a memorandum dated July 5, 1990. In the report summary, Mlsna wrote that Morack's inexperience may have been the cause of her problems with inmates, that he believed inmate Johnson had an overly active imagination, that he would attempt to mentor her and provide training as it became available, and that he believed Morack handled the Lawrence incident appropriately.

16. During the July 3rd meeting with Morack, Mlsna informed Morack of the investigatory conclusions he had reached, which were later written up in the summary of his report to Smith.

17. In July, during this same period, Mlsna had several discussions with Brooks Feldman about Morack. These discussions concerned various reports from staff members about Morack's behavior with inmates and other staff. Allegedly, Morack was intruding into the inmates' personal affairs, involving herself with clients of other social workers, and denigrating certain types of social workers. Also, there was a claim that Morack's manner of dress was sexually provocative and upset the inmates.

18. Near July 15, 1990, Feldman told Mlsna of a report from security staff that Morack had left an inmate unattended in a room with an unrestricted phone. Subsequently, Feldman provided Mlsna with a written report of that incident.

19. Also, near July 15, 1990, Feldman reported to Mlsna, orally, and later in writing, that he had discussed with Morack allegations by an inmate that Morack had sworn at him and made discriminatory remarks to him.

20. After each contact by Feldman, Mlsna would advise Morack of Feldman's comments to him about her work performance. Mlsna specifically recalled discussing with Morack the report by Feldman that she chafed and offended both staff and inmates.

21. Also, Mlsna recalled discussing with Morack an ethnic remark allegedly made by her to an inmate. Morack's response was that the inmate had frequently called her a "bitch." Mlsna suggested to Morack that on such occasions she should write up an inmate conduct report.

22. Mlsna also had conversations with Karl Brekke about Morack's work performance. The conversations with Brekke and Feldman arose because they assisted in the supervision of Mlsna's unit in his absence carrying out Program Director and Security Director functions.

23. By memorandum dated July 20, 1990, Feldman advised Mlsna of a conversation with social worker Joe Ortiz. Ortiz said that while he was interviewing an inmate, Morack interrupted him and advised the inmate of his need for therapy. She offered her own personal experience of "battering" and said she was still in therapy. Ortiz said that he had personally heard Morack denigrate other social workers and had heard reports of same.

24. Mlsna did not discuss the Ortiz incident with Morack, but did discuss with her Feldman's report of his conversation about Morack's leaving an inmate unattended in staff offices.

25. During this period, Ms. Judy Smith was the Deputy Warden of OCI. She reported to the OCI Warden, Donald Gudmanson, and was responsible for the daily operations of the institution. Other responsibilities of Smith included affirmative action (AA) functions, being involved in AA complaints and all employment appointments and terminations.

26. Deputy Warden Smith directly supervised the directors of the four living centers, Security and Segregation, Program Services and Education. At the time in issue, Center directors Mlsna and Feldman were on probation and more closely supervised by Smith.

27. OCI operated under the team management concept. Directors were team leaders and the team consisted of social workers, psychologists, recreation leaders, house service staff and others.

28. By memorandum dated July 20, 1990, Smith informed Mlsna that numerous staff had approached her "on a confidential basis" regarding Morack. Smith wrote about the comments of a social worker, several security supervisors, a security officer, and Dennis Danner, MESCC Superintendent. Mr. Danner commented that in his contacts with Morack in a security training class, she was very overbearing, wanted to control things, and volunteered inappropriate information about her personal life to the class. Smith wrote that Danner suggested Diane Fergat, Corrections Training Center, could provide more information.

29. The last two paragraphs of Smith's July 20th memorandum are:

One of the concerns that I have had with Denise is her constant bringing of problems to all staff. For example, she has often cornered me to ask something about an inmates PRC, which I am not aware of and isn't appropriate to discuss with me. Although I know that you have addressed this issue with her, she continues to do this. She does not seem to be able to talk and work with staff on a professional basis. I often see her around the institution discussing cases with other staff and I question her ability to handle issues confidentially as well.

In conclusion, I feel that Denise is having great difficulties adjusting to her position as a social worker at OSCI. More importantly, I feel that she is having difficulty adjusting to Corrections. She appears to be causing a lot of turmoil and dissent among both inmates and staff, and this is of great concern to me as it affects the total institution. I would like to meet with you as soon as possible regarding these issues.

As directed, Mlsna met with Smith and discussed the concerns expressed in her memorandum.

30. Later, Deputy Warden Smith called a meeting with the three center directors; Mlsna, Feldman and Brekke. They discussed their various concerns about Morack's job performance and possible means for solution. The four options they considered were: (1) (Feldman) move Morack to Middle Center to work with Feldman with a different type of caseload, (2) (Mlsna and Brekke) continue through the probationary period and if necessary consider extending the probation, and (3) (Smith) based on staff reports and no signs of improvement, they should pursue termination.

31. At the conclusion of the meeting, Smith directed Mlsna to prepare a final PPD for Morack and advised them she would be recommending to the Warden that Morack be terminated.

32. Smith gave Mlsna specific directions as to the content of the Morack PPD for the second two-month period.

33. After the meeting with Smith, Mlsna drafted the PPD for Morack as directed. The Results section of this PPD -- for the period June 22, 1990 to July 23, 1990 -- provides:

- A. Denise has been assigned to meet all new inmates during intake to assess their needs and respond to their needs.

When Denise gets a new inmate with an attitude or behavioral problem, because of her lack of experience and professional knowledge, she has trouble de-escalating confrontational situations. Because of this, the situation gets to the point where her interaction with the inmate is self-defeating and the inmate leaves with the objective of the meeting not being accomplished, thus not providing quality service in a timely manner.

- B. Denise needs to adhere to the professional objective of evaluating an inmate's needs and programs when personally interviewing them, and not involve, relate or talk about her own personal issues, attitude, needs or problems with inmates she is interacting with, as this makes her vulnerable to inmate manipulation. Denise is a good communicator, but needs to keep in mind her purpose for interacting with inmates and not be over familiar with the inmates she is providing services to.

Denise is having problems at times in providing services to inmates she is instructing in the "Goal Program" because of her inability to command respect and adherence to her directions during the Goal Orientation Program, which subsequently causes disruptions in the orientation process.

- C. Denise has been providing some direct social service counseling and assistance to inmates but on a couple occasions has brought

into the conversation her own personal issues or activities from outside the Institution which is very inappropriate. Thus, she needs to be more careful when she is dealing with inmate's personal issues that she doesn't bring hers into the conversation. Also, she has mentioned information gained in her conversation from one inmate to another inmate, which should not be done.

- D. Denise is having problems coordinating her services with other staff and team members. Because she is overbearing when talking with staff, she gives the appearance of not listening to advise [sic] asked for.

Denise is knowledgeable and at times this is perceived by her peers, because of her outwardness, aggressive, overbearing behavior and attitude, as someone whose [sic] has all the answers and can handle any situation. This is not the fact with Denise, as she has a lot to learn about working with inmates and staff so she can overcome some of the problems she is currently having. Example is her leaving an inmate alone in her office on the Close Center using the phone and going up to another area of the Institution, leaving the inmate unsupervised and other staff not being made aware of it.

- E. Denise does participate in team meetings, etc., but needs to be aware that she is a new Social Worker and has a lot to learn and doesn't have all the answers and should be receptive to help, direction and criticism when given in a professional manner.

Denise also has a problem in that she goes to a lot of different staff to ask how to deal with an issue or problem instead of to her immediate supervisor. Or, after an issue is resolved, still going around to different staff asking for input or advise [sic], thus getting a variety of opinions, but also getting staff talking about issues involving her interaction with inmates or personal issues which only leads to rumors and a bad working environment.

- F. I believe Denise wants to be a team player and would like to be able to interact with her peers on a professional basis, but because of her overbearing behavior and attitude it tends to make the interaction difficult, if not almost impossible.

Denise needs to slow down, stop trying so hard to impress anyone, listen to the advise [sic] her supervisor is giving her and follow it.

Education wise, Denise is a college graduate. Now she needs to put this book learning in the back of her mind and learn how to work, interact and be a team player in an institutional environment with peers that have years of experience. Be a learner, not a "show-off" or a "know-it-all", but a learner that is willing to listen, take advise [sic] and follow it.

At this time, Denise is not meeting the major objectives in the areas of concern mentioned throughout this PPD and will need to improve in those areas of concerns.

34. Mlsna discussed his draft of the second PPD with Smith, a few changes were made, and it was finalized with Smith's approval.

35. The final PPD was given to the Warden for review and discussed with him by Smith. Termination was recommended in the PPD. The Warden signed it.

36. Before submitting the PPD to the Warden for review, Smith had discussed it with Personnel Manager Oscar Reyes.

37. Termination of an employe after three months from original hire of a six-month probationary period is not a common occurrence at OCI.

38. In this instance Smith believed termination was appropriate, because she was not seeing signs that corrections given Morack were being taken and security concerns weighed against delay.

39. On July 24, 1990, Mlsna hand delivered an intent to terminate letter to Morack. This was a typical OCI pre-termination letter and included a provision for a hearing. The letter was signed by Smith for Warden Gudmanson.

40. The hearing was held that afternoon. Morack attended with Steve Schueller, a union steward. OCI was represented by Mlsna and Reyes. Morack responded to each item in the Results section of the PPD.

41. Later, Chief Steward Daniel Jensen arrived, and discussions about options other than termination ensued.

42. Reyes explained to Morack that if she decided to resign, OCI, if requested, would provide a reference indicating her dates of employment and that she had resigned. On the question of whether Morack was eligible for unemployment compensation, Reyes advised Morack to apply for such benefits and follow the established procedures.

43. In a letter dated July 24, 1990, to Warden Gudmanson, Morack resigned, effective that date, her employment at OCI, and it was accepted.

CONCLUSIONS OF LAW

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

2. Complainant has the burden to show that she was discriminated against by respondent on the basis of sex in violation of the Wisconsin Fair Employment Act.

3. Complainant has failed to sustain her burden of proof.

4. Complainant was not discriminated against by respondent as alleged.

OPINION

The issue in this matter is whether the respondent discriminated against the complainant on the basis of sex in violation of the Wisconsin Fair Employment Act (WFEA) when her employment was terminated on July 23, 1990. This claim is one of disparate treatment, whether the complainant is a victim of intentional sex discrimination.

I. Burden of Proof

Complainant argues that under Wisconsin law once a complainant establishes a prima facie case of unlawful discrimination by an employer, the burden of proof, not just the burden of production, shifts to the employer to establish that the particular employment action was not discriminatory.

In support, complainant cites §903.01, Wis. Stats. (1975), which provides: "...[e]xcept as provided by statute, a presumption recognized at common law or created by statute, including statutory provisions that certain basic facts are prima facie evidence of other facts, imposes on the party relying on the presumption the burden of proving the basic facts, but once the basic facts are found to exist the presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence." Also in support, complainant cites Schweigert v. Profident Life Insurance Co., -- ND 2d --, 62 FEP Cases 443, 446 (No. 920350 July 1, 1993), where the North Dakota Supreme Court, applying Rule 301 of that state's Rules of Evidence -- which complainant asserts are "identical, in all relevant respects" to §903.01, Wis. Stats. -- held if the plaintiff establishes a prima facie case, the burden of persuasion shifts to the employer to rebut the presumption of discrimination.

Complainant acknowledges that this view about presumptions in discrimination cases has not been recognized by a Wisconsin court decision.

Also, complainant failed to point out a source in Wisconsin common law or statutory law, which meets the requirement for a presumption in §903.01.

In discrimination claims under the WFEA, the Wisconsin courts and the Commission have consistently followed guidelines expressed in Title VII cases. The United States Supreme Court, in McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 5 FEP Cases 965 (1975) provided a means for analyzing discrimination cases. Later in Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 25 FEP Cases 113 (1981), the Supreme Court made it clear that in claims of discrimination the ultimate burden of persuasion remains at all times with the plaintiff. More recently, in St. Mary's Honor Center v. Hicks, 509 U.S. --, 125 L. Ed. 407, 113 S. Ct. 2742, 62 FEP Cases 96 (1993), the court said "[t]he defendant need not persuade the court that it was actually motivated by the proffered reasons." Once the defendant offers a reason, the plaintiff must prove the defendant intentionally discriminated against the plaintiff as alleged. As an administrative body, the Commission sees no reasons to veer from existing state and federal case law.

Accordingly, following the analytical process initially established in McDonnell-Douglas and Burdine, the complainant must first establish a prima facie case of discrimination by showing: (1) she was a member of a protected class, (2) she suffered an adverse employment action, and (3) non-protected class employees were not treated similarly. Upon establishing a prima facie case, the burden of production shifts to the respondent to articulate a legitimate, non-discriminatory reason for its alleged unequal treatment. After this is established, the burden shifts back to the complainant to prove respondent's articulated reasons are a pretext for unlawful discrimination. Even though the burden of production shifts, the burden of persuasion remains continuously with the complainant.

II. Sex - Termination

To establish a prima facie case of sex discrimination, Morack must show: (1) that she is female, (2) that she was qualified for the job and performed it satisfactorily, and (3) that similarly situated male employees with similar work performance records were treated differently.

Complainant Morack argues that she established a prima facie case by showing she was terminated, but other male social workers on probation were not. This argument is not substantiated by the evidence in the record. The

evidence shows that in the spring of 1990, Morack was one of two people appointed by OCI as a social worker. The other person was a male, Larry Penha. Deputy Warden Smith testified that although Penha's circumstances were somewhat different, the evaluation process of his job performance was similar. Smith testified that Penha, like Morack, failed to complete his probationary period and was terminated on her recommendation.

B. Pretext - Preponderance of Evidence

The record shows that in the face of certain termination, Morack resigned her Social Worker I position at OCI. Assuming for purposes of argument that Morack established a prima facie case, then it is clear the respondent articulated a legitimate, non-discriminatory reason for its intent to terminate Morack: Smith recommended Morack's termination because she concluded Morack had serious job performance problems. This conclusion was based on Smith's personal knowledge; the reports of Mlsna, Morack's supervisor; Morack's second PPD; information provided her by other subordinate supervisory staff; and information from other employees.

Morack argues that Mlsna's charges against her, described in his second PPD, with few exceptions, are unsubstantiated. Morack admits that she did leave an inmate unattended in a room with a telephone, but claims she never repeated that mistake; admits that she did talk with inmates about her own personal issues, attitudes or problems, but after Mlsna told her not to, as far as the record shows, never did that again; admits she has mentioned information gained in conversation from one inmate to another inmate, but claims she had stopped; and admits she seeks different staff for getting input or advice rather than her immediate supervisor, but claims he is not always available and she was directed to do so. Morack argues that these few mistakes should have been expected of a new employee and did not warrant her termination.

Morack claims there is no evidence to support the charge that she had trouble de-escalating confrontational situations, but she testified to such an incident. She stated that she went to Mlsna for assistance and he instructed her on social control. Morack also claimed the charge that she was unable to "command" respect of the inmates was unsupported by the evidence, but acknowledged that Mlsna had observed an incident, which may have caused him to come to that conclusion. Similarly, Morack claims no evidence was presented that she wrote an excessive number of inmate conduct reports. But

Morack never presented evidence corroborating her claim that these charges were invalid.

Also, Morack argues that, but for the charges by Mlsna that she was "overbearing," a "know-it-all" and "aggressive," she would not have been terminated. Morack claims that Mlsna had no direct knowledge to support his charge, but he based it on the accusations of male staff members, and more than likely based it on a male bias against assertive females.

Two security guards, Sgt. Hazin and Sgt. Jensen, the union's Chief Steward, were presented as witnesses for Morack in response to testimony by Mlsna that some security guards were critical of her. Hazin testified that he never observed Morack have any problems with inmates as he looked through her office window on shift "rounds." Jensen testified that he worked at Morack's unit two days a week on relief duty, that he had no problems with Morack and none were reported to him by other employees. Hazin testified there were other guards on that unit. Also the record shows that Smith received feedback on Morack's behavior with inmates from security supervisors, including at least one female.

Morack claims that Mlsna recommended her discharge on the basis of sexual bias. She cites two incidents: (1) An inmate reported that a Sgt. De Hann had asked him if he "had a new puppy dog," referring to Morack following him around. The incident was investigated and De Hann admitted he made the remark. Other officers discussed Morack's behavior with this inmate. When Mlsna discussed the incident with Morack, he did not view De Hann's comment as sexual harassment. (2) On July 20, 1990, Morack had a heated argument with social worker Robert Humphreys about an inmate assigned to him. Afterwards, Morack said she went to Mlsna, explained what had occurred, said she had feared bodily harm and wanted to file a sexual harassment complaint. Morack said that Mlsna supported Humphreys' position, but said he would discuss the incident with him. Morack claims that Mlsna pushed her termination rather than advising Smith about her charges.

In Humphreys' testimony, he said he never screamed or shouted obscenities at Morack as she claimed and that the confrontation was of a very short duration. Humphreys said he had had prior disagreements with Morack about caseload distinction, but did not believe it merited intervention by a supervisor. Humphreys stated that Mlsna did discuss the incident with him and advised him always to adhere to proper conduct in the unit. Mlsna

testified that Morack never at any time complained to him about sexual harassment by Robert Humphreys, officers, staff, inmates or anyone. Mlsna testified that Morack never told him that Humphreys screamed or shouted obscenities at her. Mlsna said that if Morack had made any claim of sexual harassment to him, he would have asked her to document it in writing, then he would have given it to his supervisor.

Finally, Morack claims that Smith perjured herself in an attempt to shield Mlsna and his sexual bias, by testifying that she was responsible for Morack's discharge. The record does not support this charge.

Morack presented no evidence in support of her claims, except the testimony of two security guards, who substantively said they had observed no problems with Morack's job performance.

Based on this record, it is clear that complainant Morack has failed to sustain her burden of persuasion that she was discriminated on the basis of sex when she left her position at OCI.

ORDER

Complainant's claim of sex discrimination against respondent with respect to the termination of her employment at OCI is dismissed.

Dated: March 22, 1996

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

DRM:rcr


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

Parties:

Denise Krenzke-Morack
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New London, WI 54961

Michael Sullivan
Secretary, DOC
P.O. Box 7925
Madison, WI 53707

OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) 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.)

2/3/95