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PAUL GREEN,
 Complainant,

v.

Secretary, DEPARTMENT OF
 HEALTH AND SOCIAL SERVICES,
 Respondent.

Case No. 92-0237-PC-ER

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DECISION
 AND
 ORDER

This matter is before the Commission as complaint of discrimination and retaliation under the Fair Employment Act. The parties agreed to the following issue for hearing:

Whether respondent discriminated against complainant on the basis of race, color or creed; or retaliated against the complainant because of activities protected under the Fair Employment Act when it terminated his employment as a Resident Care Technician 1 in December of 1992.

FINDINGS OF FACT

1. Complainant is a Black male and is a member of the Apostolic Pentecostal Church.
2. For approximately 4 years prior to July of 1992, complainant worked as a Nursing Aide in the Rehabilitation Unit at Meriter Hospital.
3. On June 4, 1992, complainant filed a complaint of discrimination with the Personnel Commission alleging respondent's Central Wisconsin Center for the Developmentally Disabled violated the Fair Employment Act when it did not hire him. That complaint was assigned Case No. 92-0144-PC-ER and was subsequently dismissed.
4. Central Wisconsin Center (CWC) is an Intermediate Care Facility for the Mentally Retarded
5. Most of the residents at CWC are at a functioning age of 6 months to 1 year.

6. Resident Care Technicians (RCT) provide daily care needs for CWC residents, including dressing, hygiene and eating. RCTs also must implement goals to move the patient toward independence.

7. New RCTs are required to complete a probationary period.

8. CWC provides newly employed RCTs with formal training. There were 34 people in complainant's training class, including 2 who were Black. The complainant's training program began with approximately one month of predominantly classroom training, followed by orientation on one of the units.

9. The complainant satisfactorily completed the classroom work, although he required several attempts to pass certain of the required tests.

10. Barbara Loye serves as the CWC's Unit Coordinator and has responsibility for evaluating RCT's and serving as their second level supervisor. Complainant's immediate supervisor was Mary Krieger, Resident Care Supervisor. In addition, Sue Hughes, a Registered Nurse at CWC, also monitored and was responsible for RCTs employed in her assigned work units.

11. Ms. Loye provided the complainant with a three-month performance evaluation on October 13, 1992. In that evaluation, Ms. Loye assessed the complainant's performance in 6 major job objectives and rated his performance as unsatisfactory in 4 objectives and satisfactory in the remaining two. Each unsatisfactory rating was backed up with several specific instances which were the basis for the rating. The evaluation was thoroughly explained to the complainant.

12. After the issuance of the three-month evaluation, the complainant was provided significant assistance in an effort to improve his performance.

13. Complainant's performance did not significantly improve during the course of the next two months.

14. On December 8, 1992, the respondent notified complainant that his employment as a RCT was being terminated effectively immediately for "failure to meet probationary standards."

15. During the course of his probationary employment, the complainant showed that he was unfamiliar with roles and responsibilities of CWC staff, that he was unfamiliar with the different wards, that he was unfamiliar with the location of emergency buttons on each ward, and that he was unfamiliar with the treatment plans for the residents assigned to his care. In addi-

tion, the complainant exhibited inappropriate conduct, which included leaving a resident unattended in a hall, allowing another resident to bolt and improperly responding to seizures suffered by different patients.

16. At the time they effectively made the decision to terminate the complainant's employment, Ms. Loye, Ms. Hughes and Ms. Krieger were all aware that complainant was active in a church but were unaware of complainant's religious affiliation or specific beliefs. In addition, only Ms. Krieger was aware that complainant had previously filed a complaint with the Personnel Commission.

17. Four of the 34 members of the complainant's RCT training class have been discharged by the respondent. Two of the four are Black, the other two are white

CONCLUSIONS OF LAW

1. This matter is within the Commission's jurisdiction pursuant to §230.45(1)(b), Stats.
2. The complainant has the burden to show that he was discriminated against by respondent on the basis of his race, color or creed or was retaliated against because of activities protected under the Fair Employment Act, with respect to the decision to terminate his employment as a RCT.
3. The complainant has not sustained his burden.
4. The respondent did not discriminate or retaliate as alleged.

OPINION

In analyzing a claim of disparate treatment, 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 (1973) and its progeny. Under McDonnell Douglas, the initial burden is on the complainant to establish the existence of a prima facie case of discrimination. The employer may rebut the prima facie case by articulating legitimate, non-discriminatory reasons for the actions taken which the complainant may, in turn, attempt to show were pretexts for discrimination. In the context of a termination/discharge claim, a prima facie case is established by showing that complainant is a member of a class protected by the Fair Employment Act and that complainant was performing the

responsibilities of the job satisfactorily but was discharged under circumstances which give rise to an inference of discrimination.

The complainant has shown that he is a member of a protected class in terms of his race and his color. However, the complainant has not shown that any of the decision-makers involved, Ms. Loye, Ms. Hughes and Ms. Krieger, were aware of his particular religious affiliation or specific beliefs, although they were aware that he attended a church. The complainant has failed to establish a prima facie case because he did not establish that he performed his job satisfactorily.

The record in this matter includes many pages of notes of observations by a number of persons employed at CWC about specific incidents of unsatisfactory performance by the complainant. The documents include references to the following conduct/performance problems:

- a. Did not know names of residents, or their treatment plans.
- b. Did not clean up puddle of urine in hall.
- c. Unaware of locations of emergency buttons.
- d. Allowed a resident to escape from unit.
- e. Did not do any charting for target resident.
- f. Inaccurate charting
- g. Put shoes of residents on wrong feet.
- h. Yelled at residents.
- i. Ignored directions of nurse not to stand up a resident having a seizure.
- j. Inadequate bathing of a resident.
- k. Incorrectly identifying Ms. Loye as a nurse.
- l. Went to ward other than the one to which he was assigned.

Complainant's conduct created a risk of physical injury to patients and staff at CWC.

The documents also reference many other incidents and witnesses testified that there were numerous other performance problems by complainant which were not mentioned in the documents. In cross-examining respondent's witnesses, the complainant suggested alternative explanations for a few of these items, but he did not provide any evidence which supported his apparent contentions other than his own very general testimony to the effect that he was a good employee who worked hard. The Commission rejects com-


plainant's suggestion that because his on-the-job performance did not include any illegal activities, he should have been retained. A probationary period is not simply an opportunity to terminate employees who are acting illegally. It provides the employer with an opportunity to assess a new employee's ability to meet job objectives and perform required activities. The fact that the only two Black members of the complainant's training class were terminated during their probationary period is noted. However this case turns on the obvious conclusion that the complainant's performance during this period clearly did not meet the standards for the RCT position.

The complainant also alleges that the termination decision constituted retaliation for having previously filed a complaint of discrimination against CWC. Only one of the three decision-makers involved had knowledge of the prior protected activity. Ms. Krieger specifically denied retaliating against the complainant and her notes and actions relating to the complainant's performance as a RCT are comparable to those of other persons who had no knowledge of complainant's protected activity. Finally, the decision to terminate the complainant's employment was based on the legitimate objective of retaining only those RCTs who were performing adequately.

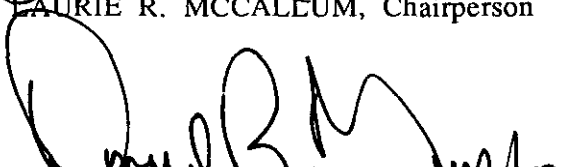
ORDER

This complaint is dismissed.

Dated: December 13, 1993 STATE PERSONNEL COMMISSION


LAURIE R. MCCALLUM, Chairperson

KMS:kms
K:D:Merits-ER (Green)


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

Parties:

Paul Green
1480 Ivory Drive
Sun Prairie, WI 53590

Gerald Whitcomb
Secretary, DHSS
P.O. Box 7850
Madison, WI 53707-7850

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.)