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MIGUEL AMAYA, *

Complainant, *

v. *

Secretary, DEPARTMENT OF *

CORRECTIONS, *

Respondent. *

Case No. 93-0104-PC-ER *

* * * * *

DECISION
AND
ORDER

Nature of the Case

This is a complaint of discrimination on the basis of race. A hearing was held on May 9, 1994, before Laurie R. McCallum, Chairperson.

Findings of Fact

1. Complainant is Hispanic.
2. Some time in 1992, complainant was appointed by respondent to a correctional officer position. Complainant's initial assignment in this position was to the training academy where, among other things, he was informed of the work rules applicable to those serving as correctional officers in one of respondent's correctional institutions.
3. After completing his training period at the academy, complainant was assigned to Racine Correctional Institution (RCI) where he was required to serve a six-month probationary period. After beginning work at RCI, complainant participated in the new employee orientation program which included, among other things, information as to the work rules applicable to those serving as correctional officers in one of respondent's correctional institutions.
4. The work rules referenced in Findings of Fact 2 and 3, above, include a rule which states as follows:

All employees of the Department are prohibited from committing any of the following acts:

* * * * *

12. Reporting for work or while at work manifesting any evidence of having consumed alcoholic beverages or illegal drugs or having possession of such items while on duty.

5. On March 17, 1993, Dennis Janis, RCI Business Administrator, was in the same room with complainant and both were participating in inmate due process hearings. Mr. Janis noticed the smell of alcohol on complainant's breath and mentioned that fact to Captain Chavez.

6. On March 18, 1993, Mr. Janis and complainant were again together in a room participating in inmate due process hearings and Mr. Janis again noticed the smell of alcohol on complainant's breath and that complainant's eyes were red and his face flushed. Mr. Janis initiated an investigation of complainant's condition.

7. Captain Darwin Hintz conducted this investigation and prepared the following report which he signed on March 18, 1993:

At approximately 1500 hours on this date I was contacted by Captain M. Canziani and informed that Officer Amaya was noted to be manifesting evidence of having consumed alcoholic beverages. I reported directly to the hearing room in C-Link where I met with Officer Amaya and escorted him to the Capt's Office, along with his union Representative Ofc. Taylor. I asked Officer Amaya if he had consumed any alcohol prior to reporting for duty at 1430 hrs. He stated to me that he had drunk two (2) beers at approximately 11:30 a.m. on this date. Officer Amaya was escorted out of the Institution by myself, told he was on leave without pay, offered a ride home (which he declined) and instructed to report for an Investigatory Interview on 03/19/93 at 1430 hours.

8. Complainant had reported to work on March 18, 1993, at 2:30 p.m. (1430 hours). During Captain Hintz's discussion with complainant described in Finding of Fact 7, above, he asked complainant to direct his breath into Captain Hintz's face three times. The first two times, Captain Hintz noted only the smell of cigarettes and mint. The third time, Captain Hintz noted the smell of alcohol. Captain Hintz also observed at this time that complainant's eyes were red and watery and his face was flushed. Complainant volunteered to take a blood alcohol test or a breathalyzer test but, after consulting with central office staff, RCI staff did not carry out these procedures because complainant had acknowledged alcohol consumption prior to reporting for duty.

9. Captain Hintz conducted an investigatory interview regarding this incident on March 19, 1993, at 1430 hours. Complainant and his union representative were present at this interview. At this interview, complainant

acknowledged that he had drunk two cans of beer with lunch on March 18 at about 11:30 a.m. Complainant also stated that he had not understood the requirements of the applicable work rule.

10. On March 31, 1993, a pre-disciplinary hearing was held in regard to this incident. This hearing was conducted by Captain Canziani and complainant and his union representative were present. Captain Canziani's report of the hearing states that complainant indicated that Captain Hintz's account of the incident in his initial investigation report (See Finding of Fact 7, above) was accurate, and stated further as follows:

Having been directly involved in this incident and based on the facts brought to light during the investigatory hearing it is clear that Ofc. Amaya consumed two cans of beer at 1130 am on this date. He came to work at 1430 hours and at approx. 1500 hrs he was in the hearing room as an advocate. Both D. Janis, Bus. Admin., and myself noted that he smelled of alcohol, his face was flush, and his eyes were red. It is as clear now as it was then that Ofc. Amaya manifested the presence of alcohol on his person during his work hours and is therefore in violation of work rule #12. I ask that the Warden follow with the appropriate corrective action for a category B offense. I also wish that the Warden will take into consideration the negative impact that an Officer can bring upon the Department by manifesting alcohol as well as the security and liability issues that surround this sort of behavior. It is my recommendation that follow with something stronger than a written reprimand.

11. In a letter dated April 7, 1993, from Oscar Shade, RCI Warden, complainant was notified that his employment as a Correctional Officer 1 at RCI was terminated effective immediately. This letter stated further as follows, in pertinent part:

Specifically on 3-18-93 you reported for 2:30 pm to 10:30 pm shift while manifesting evidence of having consumed alcoholic beverages. When questioned, you admitted to having consumed beer before coming to work.

On April 1, 1993 in a pre-disciplinary hearing you again admitted having consumed two (2) cans of beer at approx. 11:30 am.

The decisions which you made contrary to your training, direction, and performance expectations in this area placed a serious liability on the Division and Department. Your actions also endangered the safety of your co-workers, inmates, and in my judgment, unnecessarily compromised the security of the Institution.

12. Other than in regard to the subject incident, complainant's work performance had been satisfactory.

13. Other correctional officers present during Captain Hintz's questioning of complainant on March 18, 1993, did not notice the smell of alcohol on complainant's breath.

Conclusions of Law

1. This matter is properly before the Commission pursuant to §230.45(1)(b), Stats.

2. The complainant has the burden to prove that he was discriminated against on the basis of his race in regard to his termination from employment in April of 1993.

3. The complainant has failed to sustain this burden.

Opinion

Under the Wisconsin Fair Employment Act (FEA), the initial burden is on the complainant to show a prima facie case of discrimination. If complainant meets this burden, the employer then has the burden of articulating a non-discriminatory reason for the actions taken which the complainant may, in turn, attempt to show was a pretext for discrimination. See McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 5 FEP Cases 965 (1973); and Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 25 FEP Cases 113 (1981).

The complainant alleges that the respondent's decision to terminate his probationary employment was motivated by his race. In the case of a discharge, the elements of a prima facie case are that the complainant (1) is a member of a class protected by the Fair Employment Act, (2) was qualified for the job and performed the job satisfactorily, and (3) was discharged, despite satisfactory performance, under circumstances which give rise to an inference of discrimination.

The complainant has failed to establish a prima facie case of race discrimination. Complainant not only acknowledges engaging in behavior which clearly violated applicable work rules, but he also has failed to show that he was treated in a different manner than any other employee under similar circumstances. As a result, complainant has failed to show that he had performed his job satisfactorily or that he was discharged under circumstances which give rise to an inference of discrimination.


If complainant had established a prima facie case of race discrimination, the burden would then shift to respondent to articulate a legitimate, non-discriminatory reason for its discharge of complainant. Respondent has articulated that complainant was discharged for a work rule violation which presented serious institution liability issues and which jeopardized the security of the institution. These reasons are legitimate and non-discriminatory on their face.

The burden would then shift to complainant to demonstrate pretext. Complainant's arguments in this case center around his contention that he was not aware of the work rule relating to consumption of alcoholic beverages, and his belief that the discharge was too harsh a penalty for his actions. However, the record shows that work rule training was a routine part of both academy training for new recruits and of RCI training for newly assigned correctional officers. The Commission concludes on this basis that complainant was aware or should have been aware of the requirements of the relevant work rule. In addition, in the context of a discrimination case such as this one, the Commission would not be examining whether there was just cause for the discharge or whether the discharge was excessively punitive, but whether complainant was treated in a disparate manner because he is Hispanic and, as a result, discriminated against on the basis of his race. Complainant has acknowledged engaging in the action which formed the basis for his termination and has failed to provide any evidence that he was treated in a different manner in this regard than any other employee. Complainant has failed to demonstrate pretext and has failed to show that he was discriminated against on the basis of his race.

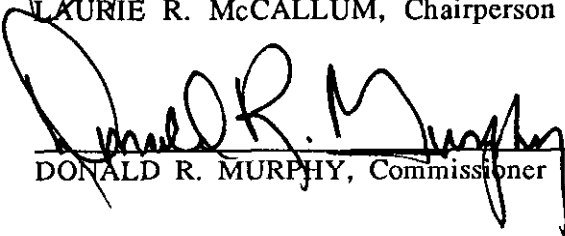
Order

This complaint is dismissed.

Dated: July 7, 1994 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

LRM:lrn


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

Parties:

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Racine, WI 53403

Michael Sullivan
Secretary, DOC
PO Box 7925
Madison, WI 53707-7925

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.)