STATE OF WISCONSIN PERSONNEL COMMISSION

CHRISTINE JAQUES,

Complainant,

v.

Secretary, DEPARTMENT OF CORRECTIONS,

Respondent.

Case No. 94-0124-PC-ER

DECISION AND ORDER

NATURE OF THE CASE

This case involves a complaint under the WFEA of sex discrimination with respect to probationary termination.

FINDINGS OF FACT

1. Complainant, who is female, began employment as a correctional officer (CO) at the Racine Correctional Institution (RCI), a medium security adult male institution, on December 26, 1993, on a six-month original probationary period.

2. Respondent has a policy of terminating the probationary employment of a CO who is involved in a work rule violation or violations that would be the basis of a suspension or greater penalty for a permanent employe.

3. Respondent's guidelines for discipline (Respondent's Exhibit 2) call for the suspension of a permanent employe who has been involved in four Category A rule violations (absenteeism, tardiness, etc.), within a 12-month period.

4. Complainant's record of Class A violations at RCI consisted of five incidents of tardiness, on February 17, February 23, April 9, May 5, and May 12, 1994.

5. Respondent terminated complainant's probationary employment effective May 18, 1994.

6. With respect to the first two incidents of tardiness on February 17 and 23, 1994, complainant testified at the hearing that she had just been reassigned from third shift to an escort officer assignment and had been

advised by a newly-assigned scheduling sergeant that the correct starting time was 8:30 a.m. The actual starting time was 8:00 a.m. However, complainant admitted at the hearing that the report of the March 1, 1994, predisciplinary hearing (Respondent's Exhibit 6) accurately reflects what she said at that time, and the Commission finds that she made essentially the statement attributed to her in the following report:

> Officer Jaques states that she thought that the start time for the Escort Off. #2 position was 0830 and not 0800 hrs. On the previous day (2-16-94) she states she came in at 0825 hrs. and nothing was said. She further states that when she was initially told by scheduling that she was going to be working the escort post, the staff member informing her of this was not sure of whether the start time was 0800 or 0830 hrs. and said he would get back to her and never did. Off. Jaques does not recall who she had talked to in scheduling. Off. Jaques said she then asked a number of staff what the start time was and again got contradictory information. She states she relied on the last staff member she talked to, who told her the start time was 0830. She could not recall who exactly that staff member was. Note: The start time for the escort post is posted clearly on the daily schedules in the squad room.

7. On April 18, 1994, complainant was 25 minutes late for work. At a predisciplinary hearing held on April 19, 1994, before Capt. Linda Milliren, complainant stated that while on her way to work she was in a minor auto accident that did not result in the police being called. Complainant offered to supply the name of the other driver in the accident, and Capt. Milliren gave her 24 hours to supply it. Complainant never provided this name. However, while the normal discipline for a third Category A violation would have been a written reprimand, complainant received only a verbal reprimand because management perceived that there were mitigating circumstances.

8. On May 4, 1994, complainant was four minutes late reporting for duty. A report of a predisciplinary hearing held by Capt. Milliren on May 6, 1994, (Respondent's Exhibit 13) reflects the following:

> Summary of Facts: On 05/04/94, Officer Jaques arrived at her post 4 minutes late. Officer Jaques stated that she recieved [sic] a speeding ticket that morning in the parking lot here at RCI. She arrived at 6:22 and got into the gatehouse at 6:28. Control sent her straight to the unit. When she arrived she was held up at the door because the officer was in the back. She then called Captain McAvoy as soon as she entered the unit. It was 6:34. I checked with Sgt. Linda Davis who was working the Jefferson unit that day with Officer Jaques. Sgt. Davis confirms that Officer Jaques did have to wait momentarily to gain entry into the unit but that it was about a minute, not four minutes.

> Officer Jaques is on original probation and was concerned over this write up as she should be since she has had several others. I reminded her that Category A had 2 built in "frebbies" for occasions such as this and she responded with, "I think I've already used those up." I had to agree with her.

The Commission finds that this "summary of facts" is essentially accurate.

9. On May 11, 1994, complainant was eight minutes late reporting for duty. At a predisciplinary hearing held by Lieutenant Daniel Johns, complainant stated she had been late because her alarm clock had gone off late.

10. Acting Warden Daniel A. Buchler made the decision to terminate complainant's probationary employment. This termination was consistent with respondent's policy in this area.

11. The following disciplinary matters were cited by complainant as examples of respondent allegedly not treating male and female employes in a comparable manner:

a. CO "E" (male) passed original probation. While his disciplinary log (Complainant's Exhibit 20) shows checks for four Category A offenses while on probation, his employment was not terminated because as to one of the incidents, the Category A box had been checked in error by his supervisor. This was with respect to CO "E" not having turned in his time sheet in a timely manner. Institutional policy at the time did not consider this as a class A rule violation.

b. Management also identified CO "E" as a sick leave abuser. However, at the time this conclusion was reached, there was not enough time left to administratively terminate his probation. He did achieve permanent status in class but was then placed on sick leave monitoring.

c. CO "D" is a male who passed his original probation. He had two Category A violations,[1] and one Category B violation. Respondent's policy was not to aggregate different category rule violations. A first Category B violation normally resulted in a written reprimand irrespective of the number of Category A violations.

d. CO "M", a female, was terminated while on original probation because she had left a key ring in a bathroom which was

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[1] Another potential Category A violation had resulted in a "no action" -- i.e., a management determination that no disciplinary action was warranted.

potentially accessible to inmates. These keys provided access to many areas of the institution, and also could unlock handcuffs. CO "C", a male with permanent status in class, was given a written reprimand for going home with a set of institutional keys in his pocket that provided access to a storage locker containing cleaning materials. Management considered the first incident to have been very serious and the second incident as less serious.

12. Capt. Milliren has counseled both male and female CO's concerning their body language as it relates to inmates. During the course of a performance evaluation review session with complainant, she advised complainant about the need to avoid doing certain things around inmates that could be interpreted as sexual in nature, such as touching her hair or sitting with her crotch exposed.

13. Lt. Johns initiated an employe investigation with respect to a report by a CO that complainant had left a tower door unsecured on February 8, 1994. Ultimately, Capt. Milliren recommended a letter of reprimand with respect to a Category B rule violation. Lt. Johns subsequently disagreed with this disposition because it had come to his attention that there had been a mechanical problem with the door in question, and on that basis no disciplinary action had been taken against another CO with respect to a similar situation. Complainant explained this to Mr. Cina, the RCI personnel manager, and as a result of his investigation and recommendation to the acting warden, the letter of reprimand was rescinded. Captain Milliren had not been aware of the aforesaid mitigating circumstances when she had recommended a letter of reprimand.

CONCLUSIONS OF LAW

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

2. Complainant has the burden of proof to establish by a preponderance of evidence the facts necessary for a claim of discrimination.

3. Complainant has not sustained her burden.

4. Respondent did not discriminate against complainant on the basis of sex in regard to the termination of her probationary employment.

OPINION

In a claim of discriminatory discharge on the basis of sex, the complainant can establish a prima facie case in the context of the principles set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668, 5 FEP Cases 965 (1973), by showing:

(1) She is a member of a class protected under the WFEA (Wisconsin Fair Employment Act):

(2) She was qualified to perform the duties and responsibilities of the position she held;

(3) She was discharged;

(4) After her discharge, her position was filled by a male, or there are other circumstances which give rise to an inference of discrimination.

See, e.g., Norris v. Hartmarx, 54 FEP Cases 1099, 1100 (5th Cir. 1990); Thornton v. Nieman Marcus, 64 FEP Cases 644, 647 (N.D. Texas 1994). Where the entire case has been tried on the merits, and the parties have fully tried the question of whether the employer's rationale for the discharge was a pretext for sex discrimination, whether a prima facie case was established "is no longer relevant," U.S. Postal Service Bd. of Govs. v. Aikens, 460 U.S. 711, 715, 75 L. Ed. 2d 403, 410, 103 S. Ct. 1478 (1983), and the question of whether the employer intentionally discriminated against the complainant should be directly addressed, id. Therefore, the Commission will proceed as if complainant has established a prima facie case of sex discrimination under McDonnell Douglas.

Respondent's asserted rationale for terminating complainant's probationary employment was very straightforward. DOC policy calls for the termination of any probationary employe who is involved in one or more work rule violations which would be the basis for a suspension without pay, or more severe disciplinary action, for a permanent employe. Respondent's "Guidelines for Employe Disciplinary Action" (Respondent's Exhibit 2) provides that if a permanent employe has four "Category A" work rule violations (absenteeism, tardiness, etc.), he or she is subject to a one-day suspension without pay. Complainant was late for work five times between the commencement of her employment on December 26, 1993, and May 11, 1994. Therefore, her probationary employment was terminated pursuant to DOC's policy. All these facts are undisputed. However, complainant attempts to show pretext in several ways.

First, complainant tries to show that she was not at fault with respect to some of the occasions she was late, but respondent nonetheless found her guilty of work rule violations. Second, she attempts to show that her supervisor, Capt. Linda Milliren, discriminated against female CO's by holding them to a different standard than male CO's. Third, she attempts to show that RCI as an institution engaged in a pattern or practices of disciplining more harshly with male CO's than with female CO's.

As to complainant's first two incidents of tardiness, she contends that she was given the incorrect starting time for her shift by a new scheduling sergeant, and therefore should not have been held responsible for having been late. However, at the predisciplinary hearing, her statement was not so specific:

> She states that when she was initially told by scheduling that she was going to be working the escort post, the staff member informing her of this was not sure of whether the start time was 0800 or 0830 hrs. and said he would get back to her and never did. Off. Jaques does not recall who she had talked to in scheduling. Off. Jaques said she then asked a number of staff what the start time was and again got contradictory information. She states she relied on the last staff member she talked to, who told her the start time was 0830. She could not recall who exactly that staff member was. Respondent's Exhibit 6.

If complainant had stated at the predisciplinary hearing that she had been given misinformation by the new scheduling sergeant, and if management had ignored this factor, this presumably would be probative of pretext. However, her actual statement was far more nebulous, and management's decision to discount her proffered excuse does not appear pretextual, particularly in light of Capt. McAvoy's additional comment in his report of the predisciplinary hearing that "[t]he start time for the escort post is posted clearly on the daily schedules in the squad room." Complainant contended that she was unable to rely on the schedule because it varied "as officers called in sick or were 'no shows.'" Posthearing brief, p. 2. However, there is nothing in the record to establish that the starting time of her post would have changed on this schedule.

Complainant further argues with respect to this point that the credibility of her account of what happened was reinforced by Capt. McAvoy's testimony that he did not know whether there was an 8:30 a.m. start time for an escort officer post because he was not assigned to the first shift. "If a

captain with many years of experience at this institution would be unaware of the actual start time of an escort officer on first shift, then Ms. Jaques' version of the events (a new scheduling sergeant, unaware of the correct time, gave her an 8:30 start time) is highly credible." Brief, p. 2. This conclusion simply does not follow. That a captain who was not assigned to first shift did not know the starting time for this assignment does not make it more likely that a new scheduling sergeant gave complainant misinformation about her starting time. Furthermore, Lt. Johns, who was on first shift, testified that all the escort officers were on an 8:00-4:00 shift, and that he was not aware of any shifts for any CO's that were 8:30-4:30.

In conclusion on this point, the record does not support a conclusion that the employer's explanation with respect to the first two instances of tardiness was a pretext for sex discrimination.

With respect to the fourth instance of tardiness, complainant asserts that she had been at the location of her post on time but had been prevented from actually getting to her post on time because the door had been locked. Capt. Milliren investigated this matter and noted as follows in her predisciplinary hearing report:

> I checked with Sgt. Linda Davis who was working the Jefferson unit that day with Officer Jaques. Sgt. Davis confirms that Officer Jaques did have to wait momentarily to gain entry to the unit but that it was about a minute, not four minutes. Respondent's Exhibit 13.

It appears Captain Milliren gave more credence to Sgt. Davis's account of this situation than she did to complainant's. There is nothing about the facts surrounding this situation which suggests that Capt. Milliren's decision that complainant had been late was a pretext for sex discrimination. The fact that Capt. Milliren and Sgt. Davis are both females certainly militates against a conclusion of pretext.

However, complainant attempts to show that Capt. Milliren was inclined to treat female CO's less favorably that male CO's. This contention is based primarily on Capt. Milliren's counseling complainant to avoid certain kinds of body language that could be construed by inmates as having sexual connotations.

Captain Milliren testified that she was very interested in supporting the cause of females' achievement in the correctional system, and that she

counseled both male and female officers on their body language. Obviously, the counseling males and females would receive under the circumstances at RCI would not be identical. There is nothing in this record that suggests that Capt. Milliren did not treat male and female CO's the same.

Complainant also suggests that Capt. Milliren's recommendation of a written reprimand with respect to the unlocked door incident (Finding 13) is probative of a tendency to be harsher with females. The record reflects, however, that Capt. Milliren was not aware of the handling of another disciplinary matter that led Mr. Cina to decide against disciplining complainant.

Another assertion by complainant in this area relates to the first two times she was late to work:

> With respect to the first tardy, she [Capt. Milliren] had the opportunity of advising Ms. Jaques that the reason she was being summoned to her office was because she was late (and thereby avoiding the second tardy). Instead she merely said "Ok, Jaques, I see you." In actual fact this borders on harassment. While, Captain Milliren denies ever requesting Ms. Jaques presence, one must question the Captain's recollection since she did not state to Ms. Jaques at the time of the incident that she did not ask to see her. Complainant's brief, pp. 2-3.

Assuming, for the sake of discussion, that Capt. Milliren had called complainant to her office in connection with her tardiness, it is total speculation to suggest that Capt. Milliren had any idea at the time that counseling complainant at that point would have set her straight about the schedule, because there is nothing to suggest that Capt. Milliren then had any knowledge about complainant's excuse about the schedule.[2]

Complainant has attempted to show a pattern or practice of uneven disciplinary action by RCI management with respect to male and female CO's. This effort has been unsuccessful because of the lack of comparability with respect to the personnel transactions in question.

As to CO "E", who passed original probation with four Category A rule violations checked off on his disciplinary record, it is undisputed that his supervisor mistakenly characterized "E"'s failure to have submitted a timely time sheet as a Category A rule violation. Management's actual policy at the

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[2] This excuse did not come up until March 1, 1994, when complainant had her predisciplinary hearing regarding the first two incidents of tardiness.

time was not to treat this as a rule violation. There is no evidence that this policy was not applied uniformly.

Complainant also asserts that CO "E" had not been terminated notwithstanding that he had been identified as a sick leave abuser. This provides no evidence of preferential treatment of male officers, because it is undisputed that the only reason "E" was not terminated was because the recommendation regarding sick leave abuse was not given until it was too late administratively to have terminated him.[3]

CO "D" was not terminated with two class A and one Class B violations because it was undisputed that different categories of rule violations were not aggregated for determining discipline. Again, there is not evidence that this policy was not uniformly applied.

The attempt to compare CO's "M" and "C"[4] is unavailing because of the substantial difference in the potential seriousness of their negligence, and because "C" was a permanent employe.

Complainant also cited the case of a male CO ("D") who was given a written reprimand for inattentiveness in a guard tower. This is in keeping with respondent's progressive discipline schedule for a first offense Category B violation.[5] CO "M" did not receive a written reprimand for a first time Category B rule violation because management deemed the negligence involved to be so serious. Complainant contends that the incident involving "D" was far more serious than apparently perceived by management and at least as serious as CO "M"'s lost keys. On this record, this amounts to at best a difference of opinion, for the reasons discussed above concerning the potential harm to the institution that could result from the keys falling into the hands of inmates.

The fact that a male sergeant recommended a lesser penalty for "M" is of very little significance because he was acting as her union representative at

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[3] He was placed on sick leave monitoring upon achieving permanent status.

[4] "M" (female) left her key ring in a bathroom and was terminated while on original probation. "C", a permanent status in class male employe, was given a written reprimand after having left the institution with some keys in his pocket.

[5] Respondent's disciplinary guidelines (Respondent's Exhibit 2) provide, however: "Violations which seriously jeopardize or disrupt the security ... of the institution may be exempted from this disciplinary sequence and subject to disciplinary action up to and including discharge."

the predisciplinary hearing, and in such a role could be expected to advocate on her behalf.

Finally, complainant points out that she was never given a written warning, after her first three incidents of tardiness, that another such violation would lead to termination.[6]

She specifically compares her case of Officer "E", who received a written reprimand after his third Category A rule violation. However, "E"'s case is not comparable because of the absence of mitigating circumstances. Also, E's written reprimand (Complainant's Exhibit 26), which is more severe discipline than a verbal reprimand, does not warn him that he will be discharged for another Class A rule violation while on probation. Rather, it states: "Further violations of Category 'A' work rules may lead to more severe corrective action, up to and including discharge." (emphasis added).

ORDER

This complaint is dismissed.

Dated: March 7, 1996 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

AJT:rcr

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

Parties:

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[6] Normally a third Class A violation would result in a written reprimand. However, respondent reduced the penalty to a verbal reprimand because of mitigating circumstances (the auto accident).

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 (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