

**JAMES C. HENEERY,**  
*Complainant,*

v.

**Secretary, DEPARTMENT OF HEALTH  
AND SOCIAL SERVICES [Secretary,  
DEPARTMENT OF HEALTH AND  
FAMILY SERVICES]<sup>1</sup>,**  
*Respondent.*

**FINAL  
DECISION  
AND ORDER**

Case No. 96-0023-PC-ER

#### NATURE OF CASE

This matter is before the Commission on a complaint by complainant James C. Heneery alleging respondent, Department of Health and Social Services [DHFS], discriminated against him because of his sex, and retaliated against him for engaging in fair employment activities, in violation of the Fair Employment Act, Subchapter II, Ch. 111, Wis. Stats.

#### FINDINGS OF FACT

1. Complainant was employed by respondent at Winnebago Mental Health Institute (WMHI) as a Resident Care Technician (RCT) from November 1988 until February 9, 1996, when he was discharged by respondent.

2. By letter dated February 9, 1996, respondent informed complainant that he was being terminated for violating DHSS work rules 1 and 2 which prohibit the following acts: disobedience; insubordination; inattentiveness; negligence; refusal to

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<sup>1</sup> Pursuant to the provisions of the 1995 Wisconsin Act 27, which created the Department of Health and Family Services, effective July 1, 1996, the authority previously held by the Secretary of the Department of Health and Social Services with respect to the position that is the subject of this proceeding is now held by the Secretary of the Department of Health and Family Services.

carry out written or verbal assignments, directions, or instructions; abusing, striking, or deliberately causing mental anguish or injury to patients, inmates, or others.

3. This letter of termination was the culmination of an investigation of complainant's alleged behavior beginning in late November, 1995. Prior to that time complainant had not been the subject of any discipline.

4. In November and December 1995, Kathleen Bellaire, WMHI Director of Nursing, received complaints from several nursing staff employees regarding complainant's behavior, including patient abuse and intimidation of co-workers.

5. One of the complaints was in a memorandum from Registered Nurse (RN) Jennifer Behm, dated November 27, 1995, complaining that complainant had sat in the shower reading a newspaper when assigned to supervise patients, gone out on a cigarette break leaving the day room unattended, questioned her decision and belittled her in front of other staff.

6. On November 29, 1995, before going to work complainant obtained an appointment to meet with WMHI assistant Human Resources Director Peggy Cox to ask her about filing harassment charges against his unit supervisor, Nurse Manager Cheryl Klemmer.

7. After receiving the Behm complaint, Bellaire began an investigation and in three memoranda dated November 28, 1995, directed complainant to pre-disciplinary meetings on November 29, 1995, to address allegations against him of three work rule violations.

8. Complainant received the memoranda from Bellaire on November 29, 1995, when he arrived for work at 2:30 p.m. and, consequently, had to cancel his 2:45 p.m. appointment with Cox.

9. By letter dated December 1, 1995, from WMHI Director Stanley York, complainant was relieved of duty with pay, effective December 2, 1995, pending investigations of allegations of work rule violations. Also, complainant's work schedule was changed to Monday-Friday, 7:00 a.m. to 3:30 p.m., and he was required to remain available during that period.

10. Shortly thereafter, Bellaire and Klemmer individually interviewed each employe in the unit<sup>2</sup> with his/her union representative regarding the allegations against complainant in a series of "fact finding" meetings.

11. On December 11, 1995, complainant signed an Employee Discrimination Complaint against Klemmer. The complaint was received by respondent's Office of Affirmative Action/Civil Rights Compliance on December 14, 1995.

12. In the complaint, the complainant alleged that on October 18, 1995, he was presented with a memorandum from Klemmer ordering him to appear for a pre-disciplinary meeting later that same day to respond to a charge of insubordination. The insubordination charge involved an incident on September 21, 1995, when Klemmer pulled (assigned) complainant to another location, out of turn. Complainant also alleged that during the predisciplinary meeting Klemmer told him, "If you don't like the way I run the unit, why don't you transfer off?"

13. On January 4, 1996, a pre-termination meeting was held with complainant; his union representative, Larry Lautenshlager; Bellaire and Kathy Karkula, Director of Human Resources.

14. The termination letter to complainant from DHFS Deputy Director Richard W. Lorang dated February 9, 1996, cited eight specific acts which were the basis of the discharge. They are as follows:

11-20-95      Abusing a patient by kneeling on a patient's leg while the patient was already lying down on the floor restrained by 2 other employes and also kneeling on the hand of one of the employes that was restraining the patient, causing an injury.

11-20-95      Creating mental anguish and abusing an employe when he grabbed the employe's wrist and bent her hand so far back, with such force, that it caused a cracking sound.

11-21-95      Abusing a patient by pushing the patient with excessive force in the back causing the patient to fall to the mat with you on top of her back.

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<sup>2</sup> WMHI Kempster Hall 1 West

11-27-95 Reading a newspaper at a time when you were assigned to supervise patients.

11-27-95 Demonstrating an undermining attitude when you were talking to other peers, stating that "the nurse used poor judgment and should be doing something different; and continued to argue carrying out the argument into the nurse's station.

11-27-95 Leaving the unit for a smoke break without permission from the RN.

11-28-95 Shoving another RCT out of a restraint and seclusion episode with a patient and began screaming at another RCT, "Get that f----- chair; God damn don't these f----- new people know a God damn anything; weren't these f----- people trained? Where the F--- is she with that God damn chair?" While you were screaming, you were twisting the arm and wrist of the patient you were restraining.

11-29-95 Leaving the unit for an extended break without permission from the RN.

15. The summation paragraph of Lorang's letter provides:

It is our conclusion that you did abuse patients on a number of occasions and that you did create an unsafe and hostile work environment for your co-workers. Your co-workers are fearful that you may return to WMHI. Your return, therefore, would disrupt the efficient performance of work and interfere with the rights of co-workers to be free from an atmosphere of fear and intimidation and hostility.

16. Complainant filed a timely charge of discrimination against respondent.

#### CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §230.45(1)(b), Stats.
2. Complainant has the burden to show there is probable cause to believe he was discriminated against by respondent on the basis of sex in 1995-1996, or was retaliated against for engaging in protected fair employment activities in 1996, as alleged.

3. Complainant has failed to sustain his burden of proof in these charges of sex discrimination or retaliation.

4. There is no probable cause to believe respondent discriminated against complainant on the basis of sex in 1995-1995, or retaliated against him for engaging in fair employment activities in 1996, as alleged.

#### OPINION

The issues in this case are:

1. Whether there is probable cause to believe complainant was discriminated against by responded on the basis of sex in 1995-1996.
2. Whether there is probable cause to believe complainant was retaliated against by respondent for engaging in fair employment activities in 1996.

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

#### I. Sex Discrimination - harassment.

Complainant makes no specific assertions regarding sex discrimination, but the evidence establishes that on December 11, 1995, he filed a charge of sexual harassment against Cheryl Klemmer. Section 111.36(1)(br) Stats., identifies gender based harassment as :

Unwelcome verbal or physical conduct directed at another individual because of that individual's gender, . . . , and that has the purpose or effect of creating an intimidating, hostile, or offensive work

environment, or has the purpose or effect of substantially interfering with that individual's work performance.

Complainant failed to present any evidence showing the incidents described in the Findings of Fact (FOF) section of this decision are linked to gender bias. While complainant's arguments address FOF 13-14, they center on the basic assertion that his termination was unjustified. Complainant denies all the particular charges in his termination letter, arguing that they were based on exaggeration, misrepresentation and untruthfulness. Complainant presented witnesses who testified that other co-workers took unauthorized smoke breaks and read papers, books or magazines in unauthorized areas. But complainant failed to show these incidents were seen by or reported to the supervisors. Thus while complainant is a member of a protected group, he failed to establish a prima facie case of discrimination by presenting evidence which would show sex harassment.

## II. Fair Employment Retaliation

To establish a prima facie case of retaliation, complainant must show he engaged in a protected activity, he was subsequently subjected to an adverse employment action by his employer and there is a causal tie between the protected activity and subsequent adverse employment action. *Klein v. DATCP*, 95-0014-PC-ER, 5/21/97, citing *Chandler v. UW-La Crosse*, 87-0124-PC-ER, 8/24/89.

Complainant argues that after he said he was going to file harassment charges against Cheryl Klemmer, Kathleen Bellaire and management singled him out as a target. However, this argument is not supported by the evidence. When Bellaire began her investigation and directed complainant to a pre-disciplinary meeting on November 29, 1995, she was unaware that complainant was considering filing charges against Klemmer. Later, during this same period Klemmer was placed on administrative leave, while complaints against Klemmer were being investigated. These circumstances do not lend themselves to a claim of retaliation. Still, the evidence presented does establish a prima facie case of retaliation. On December 14, 1995, respondent's affirmative action office received a complaint from complainant, charging Klemmer

with sexual harassment. Complainant was discharged February 9, 1996. The termination is an adverse employment action.

Respondent's non-retaliatory reasons for terminating complainant's employment were expressed in its letter of termination (FOF 14-15). Complainant denies the charges, but testimony of several witnesses called by complainant support a conclusion that all incidents cited in the discharge letter occurred as described in the letter of termination.

Complainant's remaining arguments and assertions of pretext, as in the gender discrimination, focus on the issue of "just cause" for termination. That question is not before the Commission, but respondent presented evidence, through the testimony of several co-workers called by both parties, supporting its decision to terminate complainant, despite his prior clean disciplinary record.

Clearly the evidence presented does not support a conclusion that respondent probably retaliated against complainant for engaging in WFEA protected activities in 1996.

ORDER

This complaint is dismissed.

Dated: July 29, 1998.

DRM:rjb:960023Cdec2

STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

  
DONALD R. MURPHY, Commissioner

  
JUDY M. ROGERS, Commissioner

Parties:

James C. Henebry  
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Joe Leann  
Secretary, DHFS  
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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