

STATE OF WISCONSIN

PERSONNEL COMMISSION

FELICIA WILLIAMS,
Complainant,

v.

**Chancellor, UNIVERSITY OF
WISCONSIN - Madison,**
Respondent.

FINAL DECISION AND
ORDER

Case No. 97-0161-PC-ER

The Commission heard oral arguments on the above-noted case on April 21, 1999, as requested by complainant after issuance of a Proposed Decision and Order (PDO). Thereafter, an unofficial transcript of taped testimony was prepared on the following topics: 1) complainant's testimony as to why she signed the performance evaluation on February 5, 1997, and 2) all witness' testimony about the events of Memorial Day weekend. Some findings were changed for clarification, or to better reflect the hearing record or to add facts pertinent to the Commission's legal analysis. Changes are highlighted by alphabetic footnotes.

The statement of the hearing issue is noted below.¹ (See conference report dated February 20, 1998.)

Whether respondent discriminated against complainant on the basis of color or race when it terminated her employment in September of 1997.

FINDINGS OF FACT

1. Complainant describes her color as "Black" and her race as "African American."
2. Complainant began working for respondent on November 30, 1995, at the Memorial Union's catering service where John Prill supervised her. Her duties involved setting tables.

¹ Complainant withdrew her discrimination claims based on sex and sexual orientation by letter dated October 7, 1998.

3. Iris Tirado (White) was the Food Service Production Manager in the Memorial Union's kitchen. On June 20, 1996, Ms. Tirado told complainant about a first-line supervisory position open in the kitchen. Complainant applied for the position and was hired by Ms. Tirado effective June 23, 1996. Complainant's initial supervisor in this position was Ms. Tirado until she left sometime in 1995. Julie Vincent (White) acted as complainant's supervisor until Ms. Tirado's position was filled by Robert Page in December 1996.

4. Complainant's job in the kitchen initially was held as a limited term employee (LTE) for six months. Ms. Tirado told complainant during the LTE period that complainant was responsible for supervising other LTEs and students but not permanent employees. Prior to leaving her employment, Ms. Tirado recommended that complainant's position be converted to a project position and that complainant be retained in the project position. Ms. Tirado left her position prior to the conversion of complainant's position to a project position.

5. Respondent converted complainant's position to a project position and retained complainant with the understanding that she had to successfully serve a probationary period. Complainant's position and another held by Sherri Schroeder (White) were parallel in that they alternated weekend responsibility for supervising the kitchen.

6. A new position description (PD) was created for complainant's project position (Exh. R-114). The new PD was signed by acting supervisor, Julie Vincent on November 13, 1996, and by complainant on January 5, 1997. Goal A of the new PD accounted for 49% of the position's time performing tasks related to weekend supervision of the kitchen, including assuring the kitchen was open and staffed appropriately (A1), assuring accurate and timely delivery of food product to all customers (A2), directing full and part-time employees (A3), ensuring accuracy of assembled food carts for pick-up by units (A8), and supervising and assisting production staff as requested (A10). Goal B of the PD also accounted for 49% of the position's time performing tasks related to the direct supervision of 30-50 part-time students and LTEs. Complainant should have known from the new PD², that she now was responsible

² A Supervisory Analysis Form is attached to the PD which lists as complainant's subordinates all part time LTE and student workers, as well as food production assistants, a cook, food service workers, bakers and sandwich preparation.

for the direct supervision of students and LTEs (goal B), as well as for directing all kitchen staff over the weekend (goal A).

7. Respondent terminated complainant effective September 17, 1997, while she still was on probation. The termination letter was dated September 19, 1997, and contained the following pertinent information (Exh. C-1, p. 1):

This letter is to confirm our discussion on Wednesday, September 17, 1997, regarding your employment at the Wisconsin Union. At that time I indicated to you that we would be ending your Food Service Supervisor 1-Project appointment at the Wisconsin Union as of September 17, 1997, as is our right under Wisconsin Administrative Code, Department of Employment Relations, Division of Merit Recruitment and Selection, Chapter ER-MRS 34.08, project Appointments, "Employes on a project appointment may be terminated at any time."

This decision is based primarily on the three evaluations conducted during the last 10 months in which you were rated less than satisfactory, as well as some attendance issues.

8. Complainant's work performance was first evaluated on February 5, 1997. Present at this meeting were complainant, her first-line supervisor Robert Page (White) (Food Production Manager) and her second-line supervisor Brandon Putney (White) (Director, Support Services). Complainant received a summary of her performance problems at the meeting. The summary was written by Director Putney (Exh. C-1, pp. 2-3). The text of the summary is shown below (with emphasis added):

Purpose of the Meeting:

To share with Felicia the areas that the Production Manager and Assistant Director feel she needs to work on to succeed in her current position. Both Bob Page and I would like to see improvement in the following areas. Without noted improvement Felicia will not retain her current position at the end of her probation.

I would also like to make it clear that it is Bob Page's and my preference that Felicia improve in these areas and retain her position. Felicia works well with the part time staff and has done a great job in scheduling. Bob and I will inquire as to how Felicia is doing and give Felicia feedback as often as possible.

Incident:

- Felicia was late to work Saturday a.m., she did not show up until 8:30 a.m.
- Felicia sent out an inaccurate cart for the lakefront café.
- Felicia had to leave early because of illness but she did not communicate that to any other staff that rely on her being in the kitchen. When Bob asked if everything is OK for the day, he was told yes.
- There were staffing shortages that Felicia did not communicate to her supervisor before the start of the weekend.
- Felicia did not use available resources to solve simple problem, ie . . . whipped cream for the pie.

Discussion:

Absenteeism and tardiness:

Felicia's loyalty, dependability and dedication are beginning to come into question. Felicia missed 1/30/97 (Thursday) without calling and letting anyone know. Felicia was then tardy on Saturday 2/1/97. Felicia is scheduled because we need staff in at the prescribed times in order to serve our customers. Felicia needs to finish her probation without tardiness or missing any more days in order to continue in this position.

Communication:

Felicia needs to communicate better between herself and the other supervisor, between herself and the food production manager, and between herself and the other units (our customers). Staffing shortages need to be addressed before they cause a big problem. Product shortages or delivery changes need to be discussed with receiving units before or during shipment, it shouldn't be their job to call and find something that was scheduled to be on the first shipment. Felicia needs to spend more time with the current staff in follow up and training to help with the overall cleanliness of this kitchen.

Initiative:

Felicia needs to look at other departments and make a decision as to whether or not they need assistants and help if needed. Felicia should not be waiting for someone to yell for help before she will jump in. I need to see more initiative. More willingness to go out of your way to help our customers receive what they've ordered.

9. Complainant signed the summary described in the prior paragraph and intended that her signature attested to the truth of the matters recited therein. She did not dispute any matters recited in the document at any time prior to her termination, nor did she tell respondent that extenuating circumstances existed. Supv. Page considered the criticisms as "major

problems.” He did not feel he could take his scheduled weekends off without receiving customer complainants about complainant’s weekend performance.

10. Complainant’s second evaluation occurred on March 8, 1997. Present at this meeting were complainant, Director Putney and Supv. Page. Mr. Putney wrote a summary of the meeting (Exh. C-1, pp. 4-5); however, the only items discussed with complainant at the March meeting are those with the dated “3/3/97,” which are printed in bold type below.[^] During the meeting, complainant did not voice any disagreement with what was said about her performance problems. Complainant did not receive a copy of Director Putney’s notes until June 11, 1997, the day of her third evaluation. The text of Director Putney’s summary is shown below.

We have noticed improvements since our conversations in early March. The following is an overview of your performance. Use this as a guideline to focus on areas of concern as a part on the back for a job well done.

Quality of Work:

- Accuracy/Thoroughness/Completeness: Inventory and prepared product sheets . . . more consistency needed. Too often inaccurate weights and products come from this kitchen.
- Level of Supervision: Needs improvement on weekends especially. Inaccurate information . . . ie . . . Pies for Rathskeller. Communication with other divisions/departments/peers needs improvement.
- Decision Making/Judgement: Felicia is showing interest in improving. Still needs improvement.

Productivity:

- **Organized: Weekends need improvement. Scope of responsibilities sometimes needs to be reminded. Noted improvement since 3/3/97.**
- Timeliness: Will fall into place with organization.

Job Skills:

- General Knowledge: Felicia knows what her job is, she just needs to follow up with execution of duties.
- Takes Initiative: Needs to look ahead and foresee possible problems and suggest solutions.

Human Relations:

- **Cooperation from Others: By helping other departments when time is available, Felicia will see the rewards, in time, when she needs the**

[^] This fact was changed to accurately reflect the record.

help. Past impression is; Felecia won't just come out and help, she has to be asked and then it's half hearted. Noted improvement since 3/3/97. Keep it up.

- **Interaction:** Takes things too personal, too much to heart. Focus on job requirements and direct staff to follow/meet these rather than feeling personally involved/cheated if someone is not performing.
- **Team Player:** Noted improvement since 3/3/97.
- **Willing to Try New Approaches:** Noted improvement since 3/3/97.
- **Willing to try new approaches:** Excellent response to 3/3/97 meeting. ?Will it continue?

Customer Service:

- **Prompt/Effective:** Felecia seems quick with reason/excuses as to why she can't help someone rather than how a situation can be solved.
- **Customer Satisfaction:** Bad start. Needs to show consistent improvement and willingness to improve to overcome present impression. Needs to take a different approach in general. We (you and I, Bob) need to begin pounding the idea that we are supplying a service to our customers, the divisions. These customers are not a guaranteed sale, which we have been reminded of by the Rathskeller....

Supervision:

- **Priorities:** Improved since 3/3/97. Less focus on non-strenuous tasks/it's not my area and more focus on what can I do to help/solve the problem.
- **Organized:** Shared office space needs to be better kept. Employee files need to be in a file cabinet, too public where they are. General organization of space needs to improve. I realize Felicia and Sherri may have been thrown into this mess but it still needs work.
- **Employee Selection:** Needs improvement . . . checking existing employee files for previous employment history before hire.
- **Trains/Develops/Coaches:** Needs to work on flexibility/awareness of different personalities of staff. Recognize those differences and train accordingly.

Creativity:

- **Unique Solutions:** To staffing issues, to training issues, to follow up. I have not seen this to be a strong point with Felicia.
- **Anticipation of Needs:** Comes with organization and initiative.

Safety/Sanitation: [Items were noted here but were not intended as a criticism of complainant's performance.]

11. Complainant's third evaluation occurred on June 11, 1997, at which time complainant was given a formal written evaluation by Supv. Page (Exh. C-1, pp. 6-8), which she signed. Present at this meeting were complainant and Supv. Page. Supv. Page evaluated

complainant in the following eight categories: quality of work, productivity, job skills, human relations, customer service, supervision, creativity and safety/sanitation. Supv. Page rated complainant as “satisfactory” in three of the eight categories (job skills, creativity and safety/sanitation). Supv. Page rated complainant as “needs improvement” in five of the eight categories (quality of work, productivity, human relations, customer service and supervision). His specific comments are noted below. Complainant did not dispute the performance problems noted in this evaluation at any time prior to her termination.

Quality of Work: Much improved in many areas. Still need more work on accuracy on inventory and prepared product sheets. Need to know that weekends are going to be okay without management – that is improving. Need to work on problem solving communication between yourself, Sherry and John. Management is improving – still needs to get better – remember to use the log book!

Productivity: This area has improved dramatically. Be sure that you’re working in the area that needs the most help, though – don’t always assume that it’s the sandwich shop. Still spending a bit too much time on the telephone.

Human Relations-Customer Service: These areas go hand in hand. Even though her peers like Felicia, I’m not sure they’ve still totally respect her (sic). Outside units need to trust that you are doing everything you can to help them. We supply a service to the units and they may go elsewhere if their needs are not met.

Supervision: We still need to do a better job on hiring – no on-the-spot hiring – check references and on old employes check files. Need to keep up better on paperwork – more thorough on kronos³. Need to be more tactful when talking to employes.

12. Complainant should have known after the third evaluation that her job continued to be in jeopardy because her performance was rated as “needs improvement” (unsatisfactory) in five of the eight rated categories.

13. Supv. Page made up his mind that complainant should be terminated after she performed poorly over the Labor Day weekend (August 30-September 1, 1997). Specifically,

³ “Kronos” is an acronym used to describe respondent’s computerized attendance/leave system.

Supv. Page had met with complainant prior to the holiday and directed her to ensure the salad recipes were done, as opposed to cutting up vegetables, for example, because the recipes took the longest amount of time to prepare. Supv. Page returned to work on Tuesday, September 2, 1997, and found that the vegetables had been cut up but none of the required salads had been made. Supv. Page also heard from the manager of the catering department that items were missing from the catering cart, which was a “good part” of complainant’s weekend duties.^B

14. Complainant’s subordinates failed to appear for work as scheduled over the Labor Day weekend, leaving her as the only person in her work unit.^C On Labor Day, she worked from 7 a.m. until 5 p.m.^D

15. Director Putney kept notes on complainant’s performance for potential use in her next evaluation (Exh. C-7, p. 1). He began to prepare her 9-month evaluation (Exh. C-1, pp. 9-11) and noticed the same types of performance criticisms as existed before. He then conferred with Supv. Page and they both agreed that complainant should be terminated. Director Putney did not provide a copy of his notes or evaluation draft to complainant prior to her termination, nor did he provide complainant with an opportunity to respond to his listed concerns.

16. Director Putney’s notes for complainant’s 9-month evaluation (Exh: C-7, p. 1) included descriptions of the incidents listed below in chronological order.

- Friday, June 20, 1997: Listened to Felicia hire a gentleman that was sent down here to take the stewards position. She gave incorrect wage information, described the job, shortly, then asked if he still wanted the job. She never asked any information about what the individual wanted, hours he could work, phone number, never had him talk to any one else, never showed him the kitchen or talked to him about lifting heaving things and juggling multiple tasks . . . terrible interview (if you can call it that).

^B Some facts in this paragraph were changed for clarification.

^C The Commission and hearing examiner had an opportunity to review portions of the record testimony. The hearing examiner incorrectly thought that complainant’s testimony was inconsistent as to whether she was the only person at work over the Labor Day weekend because she, at various times, said she was “short-staffed” rather than “the only person at work.” Based upon a re-review of this testimony, the hearing examiner and Commission conclude that the terms were intended by complainant to have the same meaning and, accordingly, were not inconsistent.

^D This finding was added for clarification.

- Monday, June 23, 1997: Felicia did not put any carts together this weekend for Monday Business. She worked in Cooks area after Doug asked her to because she wasn't doing anything. Found out Felicia took the easy way out Sunday by not doing anything in Salads after she knew the person called in sick. Then she called in sick Monday morning. She also should have monitored the scrape room closer, the restaurant should not have known we were short.
- Thursday, July 3, 1997: Felicia was asked to come in Monday to help because we were short. Felicia helped in the salad department for less than an hour and helped in the cooks department prepping for the next day. She did not help in the sandwich department which was a higher priority or in salads for long enough to make a difference. She is reportedly using the phones much too regularly and spending a lot of time walking around and trying to look busy.
- Thursday, July 10, 1997: Found out from catering (Cindy) that Felicia made a recipe incorrectly (Fruit Salsa). When catering came back down asking her to cut the pieces smaller, she refused saying "I've already made it once."
- Tuesday, July 15, 1997: In the process of terminating and grieving Danny Hall's case, I discovered that Felicia had manually entered Danny H. time into the Kronos system on a day that he was a No Call/No Show; 5/9/97.
- Thursday, July 17, 1997: Had a request from Human resources to talk to Felicia about keeping her nose out of others business. She is not following the line of supervisor. She can't remain impartial.
- Monday, August 4, 1997: This last weekend; Deep Fried Croutons. Felicia dropped croutons in the fryer, found out the fryer wasn't working after some time. Then she started up another fryer and put the same croutons in that fryer. Packing U.S. Catering and Training Table Carts this weekend. Felicia created a great deal of work for Bob because the carts were not packed correctly.
- Monday, September 15, 1997: Saturday the 13th, Felicia did not show up until 7:15 a.m. which did not allow her the time needed to pack carts. Because of this, Rathskeller did not receive their cart in time to set up for lunch. When Felicia did have the cart packed, she packed an open container of Half and Half that spilled all over the cart, and she packed biscuits with something on top of them and they were flat. Felicia left her job incomplete on Sat. when she decided to leave at 1:00. The units still called down looking for missed items but she was nowhere to be found. Felicia also did not pack carts for Sunday. As a direct result of Felicia's laziness on Sunday in not packing carts for Monday, deliveries were late and incorrect. Products for Gr. Din. Were packed with Fred Center.

Director Putney included the following statement on the draft of complainant's 9-month evaluation (Exh. C-1, p. 11):

Deception: Felicia has stated that she gives every new employee a job description and a copy of the work rules, every employee. I know this is not a true statement, Felicia could not even find a copy of the work rules to show me. I suspect that I did not get the whole truth with regard to the incident with Pam Hopkins. Several other witnesses stated that Felicia spoke to Pam in a very inappropriate manner with very inappropriate language for anyone much less a supervisor. Felicia asked for a temporary LOA (leave of absence) to see her sick grandma in XXXX. Then I hear talk that she never left the state.

17. Complainant was absent from work as noted below (pp. 1-2, Exh. C-2, plus hearing testimony):

Friday	12/13/96	Sick
Sunday	1/5/97	Sick
Friday	1/17/97	Son sick
Thursday	1/30/97	Sick
Saturday	2/1/97	Late
Wednesday	3/5/97	Taking son to doctor
Wednesday	3/19/97	Sick
Monday	6/23/97	Sick
Wednesday	7/9/97	Sick
Monday	7/21/97	Sick
Tuesday	8/12/97	Son sick
Wednesday	9/3/97	Sick
Sunday	9/13/97	Late
Mon.-Wens.	9/14-16/97	Sick

She also was off work some time after June 1997, to visit her sick grandmother. Respondent did not contest that complainant, her son or her grandmother were sick on these occasions, but respondent was concerned about the number of absences. Respondent initially counted her absence on January 30, 1997, as a "No Call/No Show." Supv. Page changed this to a regular absence after complainant reported to work the following day and told him that her daughter had tried to phone in her absence but no one answered the telephone.

18. Pamela Hopkins (Black) was one of complainant's subordinates. Ms. Hopkins' absences are shown below (Exh. C-5):

2/13/97	No Call/No Show
2/16/97	No Call/No Show
3/5/97	Family Crisis
3/6/97	No Call/No Show
4/11/97	No Call/No Show
4/15/97	Excused
5/14/97	Sick
5/15/97	Sick
5/17/97	No Call/No Show – Arrived late

Respondent's Memorial union has a guideline (not a hard-and-fast rule) where an employe may be terminated upon the fifth incident of failing to call in or to show up for work. After Ms. Hopkins reported late for work on May 17, 1997, she and complainant engaged in a heated argument due to Ms. Hopkins' failure to follow complainant's instructions. Complainant ended the argument by firing Ms. Hopkins. Director Putney spoke to Ms. Hopkins who explained that she had a significant personal problem causing her absences. He also spoke with other employees who reported that complainant had used inappropriate language for a supervisor in her argument with Ms. Hopkins. He decided to give Ms. Hopkins some leeway under the circumstances and reversed complainant's decision to terminate Ms. Hopkins.

19. Mr. DeYoung (White) was a permanent employe supervised by Director Putney. Director Putney did not immediately terminate Mr. DeYoung for attendance problems because Mr. DeYoung indicated he was having personal problems. He eventually went on a leave without pay and, ultimately, was terminated.

20. Respondent, beginning in April 1990, hired Frank Howery (White) in a permanent full time position as Production Manager. Julie Vincent supervised him. Ms. Vincent passed him off probation because she felt he was learning his job slowly but surely. His performance problems continued after probation ended. Ms. Vincent attempted to correct the continued problems by identifying specific areas of deficiency with a time period by which the deficiency had to be resolved. Ms. Vincent understood that such additional efforts were

required for employees who have passed probation. Ultimately, he was terminated some time prior to Director Putney's hire.

21. Polly Brockert (White) supervised the deli shop in respondent's union. One of her subordinates, Mark Thomas (White), testified at hearing that she had a number of performance problems yet was not terminated. Ms. Brockert was supervised by Paul Algiers (White). Mr. Algiers acknowledged that Mr. Thomas complained about her. Mr. Algiers, however, knew that Ms. Brockert had been given certain directives to which Mr. Thomas was not privy (such as to continue with a computerized level of ordering for a trial period despite the amount of waste generated). Mr. Algiers also felt Mr. Thomas' complaints were based on his disagreement with Ms. Brockert's management style, as well as a personality conflict.

22. Angel Penure (White) was a supervisor at the grill in respondent's union. One of her subordinates, Donna Braun, testified at hearing that Ms. Penure had a lot of performance problems which she brought to the attention of Ms. Penure's first-line supervisor, Jim Long (White) and second-line supervisor, Mike Hirsch (White). Ms. Penure's supervisors, however, disagreed with Ms. Braun's assessment of Ms. Penure's performance (see, Exh. C-9) and, accordingly, she was not terminated.

23. Supv. Page and Director Putney did not go looking for complainant's performance problems. Rather, many of the problems were reported to them once by e-mail (Exh. C-3) from Mike Hirsch and at other times verbally from supervisors in the Rathskeller and in Catering and from cooks. Similar complaints were not raised after weekends when Sherri Schroeder supervised instead of complainant.

OPINION

Under the Wisconsin Fair Employment Act (FEA), the initial burden of proof 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. *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).

Complainant's race and color are bases protected under the FEA. To establish a prima facie case of discrimination the record also must show that she was discharged despite her qualifications for the job and that the discharge occurred under circumstances giving rise to an inference of discrimination. It is presumed for purposes of this discussion that complainant established a prima facie case of discrimination on the bases of race and color. The burden then shifts to respondent to articulate a legitimate reason for terminating complainant. Respondent met this burden by saying complainant was terminated due to performance problems. The burden shifts back to complainant to show that respondent's stated reason is a pretext for discrimination. Complainant failed to meet this burden.

Complainant attempted to establish pretext by disputing that her performance was poor.^E Her credibility on this issue was damaged severely when she testified as noted below. ("CR" is used to indicate that complainant's representative is the speaker. "HE" is used to indicate that the hearing examiner is the speaker.^F)

CR: Once again, ah this performance conference, you were not present at this performance conference?

A: I never saw the performance conference until 2/5/97 when Bob Page called. I was in the office and he showed me the paper work. He told me to read the paper work over. After I read the paper work over, I signed. He told me I did not have to sign it if I did not want to but I signed it

^E The discussion of complainant's work performance as a pretext argument was changed to clarify the Commission's rationale.

^F In arguments submitted to the full Commission after the proposed decision was issued, complainant's representative objected to the hearing examiner asking these questions. Complainant's representative did not object at hearing to the examiner asking questions. In fact, it was the examiner who asked complainant questions to elicit her race and color (an essential element of the prima facie case) after complainant's representative had finished questioning complainant. Complainant's case would have failed without this information in the record. Section 227.46(1)(e), Stats., gives the hearing examiner the responsibility to "[r]egulate the course of the hearing." This responsibility includes asking questions so the record is complete and so the examiner understands the nature of testimony elicited from other sources. See, for example, *Dairy Equipment Co. v. ILHR Department*, 95 Wis.2d 319, 290 N.W.2d 330 (191980), wherein the court affirmed a hearing examiner's finding where the underlying testimony was elicited from the hearing examiner.

anyway. I signed it. He signed it and later sometime later Dave Brandon signed it.

CR: Thank you.

HE: What did you believe it meant to sign the document?

A: Stated to the effect that the above things that they said was true to my knowledge.

She provided no persuasive reason at hearing as to why she would sign the evaluation as truthful if she disagreed with the content.

Similar credibility problems exist with respect to at least the third evaluation (see ¶11, FOF). Complainant signed the evaluation and did not contest the noted problems at the time of the evaluation. Complainant provided no persuasive reason at hearing as to why she failed to contest the noted problems at the time of the evaluation if she disagreed with them.

Complainant also disputed that she could have met her supervisor's directive to place priority on having the salads made on Labor Day weekend. The record only mentions salads which would have required complainant to cook either potatoes or rice. Complainant testified as shown below:

CR: Go back to page 1 of this document you got there – the termination letter. Did Bob or Brandon discuss with you the events that Bob alleged happened on the Labor Day weekend at that termination meeting? Did they discuss – did they tell you about the problems they had on Labor Day weekend at the termination meeting?

A: Bob had – had brought to my attention that, uhm, he had asked me why a different variety from the salad department like the rice and the potatoes was not done. I told him I could not do the recipe for the simple fact that ah, for the simple fact that it takes time to do that. You have to place that in the cooler and then do it – let it cool down but I did not know how to work the kettles. I did not know how to make the rice because that was not in my job description and I didn't know how to do it. So those – those that he brought up to me, I could not do it. But furthermore, me doing anything over the Labor Day weekend (sic) is cutting fruits, doing, ah, carrots, broccoli, and all of that stuff had to be done. I did that. I was there that day from 7 a.m. that morning until 5 p.m. that afternoon.

HE: I don't understand what you mean that you don't know how to use kettles?

A: It wasn't no kettles, ma'am. It was – we had different type of steamers and equipment that had to be used that I was not trained on in the cook's area. We had a different type of steamers.

* * *

HE: Do you cook rice at home?

A: Yes. It's different.

HE: How's it different?

A: Because if you cook rice at home you can cook it on top of the stove. Here at the University that you cook it in, ah, perforated pans? They use perforated pans and they used different type of rice that had to be cooked different length of time. Which I know how to do it while I was not trained in using the equipment in the cook's area. The only equipment that I used in the cook's area was I used the stove on the other side. There's different type of rice that they use for – African wild rice, it takes a blend some types of rice that they use in – they have to be placed in – they use it – they pour it out – whatever the cooks do. I don't know what they do. They do all that type of thing.

HE: Okay. Uhm, couldn't you have made rice the way you do at home to meet the need – the customer's need?

A: Not if I was supposed to have follow a recipe specifically the way they wanted it done. Because every thing that they had was followed by a recipe.

The Commission is unsure whether complainant failed to make the salads because they took time (which had been her supervisor's point in directing that the salads be given priority) or because she did not know how to use the kettles. Even if it were true that complainant did not know how to use the kettles, she has not shown that discrimination played a part in her termination.

Mr. Page's hearing testimony persuasively demonstrated that complainant's problems over the Labor Day weekend were the "last straw" in light of her prior numerous performance problems. In this regard, it is important to note that complainant never contested any of the prior problems shared with her when her performance was evaluated. As far as her supervisors knew, she had agreed with the criticisms. Furthermore, she never indicated to her supervisors that she needed additional training to perform her job. The following testimony of

Mr. Page was persuasive and demonstrates that complainant was terminated for non-discriminatory reasons. (The acronym HE means hearing examiner.)

HE: Okay. Then if you would please answer the question why you felt complainant should be terminated without first having a final conference or warning.

A: Uhm, because of the fact that we felt totally exasperated with her performance and the fact that we felt like we had done everything to try and help her to improve to the point of what we needed. I think, again, as I stated earlier, if there was a weekend that I was off and Felicia was the supervisor working, uhm, I could expect phone calls from her or other employees saying she wasn't there doing her job or on Monday morning we would get complaints and e-mails, like the one from the one exhibit earlier and that - that I personally didn't feel like it was worth going on. That we were kind of just spinning our wheels.

Complainant at hearing contested all of Director Putney's concerns for the 9-month evaluation (see ¶15, FOF). None of these concerns were shared with complainant before she was discharged. It is complainant's burden to persuade the Commission that her version of events is correct. This she met to some extent. Complainant's testimony contesting the incidents of 7/10/97, 7/15/97 and 8/4/97 was found not to be credible because she did not contest them in her initial written response (Exh. C-7) which suggests that she previously had agreed with the allegation.^G The problems noted by Director Putney for September 13-15, 1997 were based upon customer complaints which provided verification from someone unconnected to the termination decision.^H Accordingly, his version of events was found more credible than complainant's. Complainant's version of events on July 3, 1997 was found more credible than Director Putney's because he acknowledged at hearing that he had no basis to question her story. Complainant's explanation of her visit to her sick grandmother in another state was found more credible than Director Putney's version that was based solely on hearsay. It was not possible to determine whether the remaining allegations occurred as claimed by respondent or as claimed by complainant and since it was complainant's burden of persuasion, these remaining allegations are resolved in respondent's favor.

^G This change was made to clarify the Commission's reasoning.

Complainant attempted to show pretext by the fact that she was not shown Director Putney's list of incidents for the 9-month evaluation. The Commission agrees that it is the better practice to make employees aware of the allegations against them so they may have an opportunity to correct any misunderstandings. Respondent's failure in this regard, however, is insufficient by itself to show pretext for at least four reasons. First, the main impetus for termination was complainant's poor performance over the Labor Day weekend, a reason discussed at the termination meeting. Second, many of the incidents listed by Director Putney for the 9-month evaluation were based on the neutral source of customer complaints. Third, complainant had not disputed the context of customer complaints in the prior evaluations. Fourth, Director Putney kept a list of incidents as they occurred and kept such list for complainant's next evaluation from which it can be strongly inferred that his recollection of events is more accurate than complainant's later attempt to reconstruct events in the context of litigation.⁴

Complainant attempted to show pretext by arguing that some employees had as bad or worse absenteeism records yet were not terminated (see ¶¶17-19, FOF). The examples she referenced, however, were not sufficiently similar to her own situation to establish pretext. Complainant contended that respondent treated Ms. Hopkins more favorably than complainant in regard to attendance records. Her argument is that complainant was justified in terminating Ms. Hopkins because she had reached her fifth no call/no show when she was late for work. The example fails to demonstrate pretext because Ms. Hopkins is of the same race as complainant. Complainant's situation also was different from Mr. DeYoung's because she was on probation when terminated whereas he was not. All examples offered by complainant differ substantially from her own situation because she had performance and attendance problems whereas the other employees had absence problems without performance problems.

^H This change was made to clarify the Commission's reasoning.

⁴ As to the third reason, the Commission notes that it does not share complainant's view that a supervisor keeping a list of incidents for a future probationary evaluation is objectionable and suspect. Keeping a record of events is a reasonable way to ensure that evaluations are complete. The record did not establish that complainant's supervisors only kept such lists for complainant's probationary period.

Complainant attempted to show pretext by arguing that some employees had performance problems and yet were not terminated (see ¶¶20-22, FOF). Her comparison to Frank Howery is unpersuasive because he had passed probation and, accordingly, respondent was required to provide him with an additional opportunity to correct his behavior. Her comparison to Ms. Brockert and Ms. Penure are unpersuasive because they each had a different supervisor than complainant. A few examples of how other supervisors treat employees differently than complainant's supervisor is not probative of whether complainant's own supervisor was motivated to any degree by complainant's race or color. The comparison to Ms. Brockert and Ms. Penure is faulty also because their performance was satisfactory.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to §§230.45(1)(b) and 111.375, Stats.
2. The Complainant has the burden to show by a preponderance of the evidence that respondent terminated her employment because of her race and/or color. The complainant failed to meet this burden.

ORDER

This case is dismissed.

Dated: May 12, 1999.

STATE PERSONNEL COMMISSION


LAURIE R. McCALEUM, Chairperson


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

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Parties:

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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