

**CHERYL J. KOSTELLO,**  
*Complainant,*

v.

**Secretary, DEPARTMENT OF HEALTH  
AND FAMILY SERVICES,**  
*Respondent.*

DECISION  
AND  
ORDER

Case No. 98-0177-PC-ER

This matter is before the Commission as a complaint of sex discrimination arising from the decision to terminate complainant's employment. A hearing was held<sup>1</sup> on the following issue:

Whether respondent discriminated against complainant based on her sex with respect to the decision to terminate her employment as a Psychiatric Care Technician 1 in September of 1998.

#### FINDINGS OF FACT

1. Complainant was appointed to a Psychiatric Care Technician (PCT) position at respondent's Wisconsin Resource Center (WRC) effective Monday, January 5, 1998. She was required to serve a 12-month original probationary period. (Exh. R-2)
2. The probationary period allows supervisors to review the employee's work performance and allows employees time to become familiar with the job responsibilities. The employee's performance during the probationary period determines whether the employee will attain permanent status in the job classification. (Exh. R-1)
3. WRC is a medium security prison. Its residents include both inmates and patients.

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<sup>1</sup> At the close of complainant's case, respondent moved to dismiss. The examiner denied respondent's motion and respondent presented his case

4. During the relevant time period, WRC employed approximately 270 PCTs, approximately one-third of whom are female.

5. Karla Souzek is the personnel manager at WRC.

6. During the relevant time period after she was hired, complainant was generally assigned to unit B-8.

7. Tom Schertz, Psychiatric Care Supervisor, served as complainant's immediate supervisor on unit 8. During the relevant time period, Shari Fassbender, Unit Manager, was Mr. Schertz' supervisor, and had responsibilities for units 5 and 8.

8. For a portion of the relevant time period, construction occurred on unit B-8 and staff were reassigned to unit A-3.

9. Respondent has various policies in force regarding WRC operations. One such policy relates to key control. The policy (Exh. R-3) includes the following language: "8. Whenever a staff member leaves the institution for any reason, all institution keys must be returned to the area that they were drawn from."

10. WRC also has a fraternization policy, the intent of which is to "forbid relationships that may create conflict of interest." (Exh. R-6) This policy prohibits WRC employes from giving residents "goods and/or services with or without remuneration" and from "sharing personal information." The policy also requires employes to report, to their supervisor, any such actions taken by other employes.

11. WRC trained complainant on these policies and provided complainant with copies of them.

12. Mr. Schertz' contemporaneous notes for April 1, 1998, show he spoke with complainant on that date:

about her interactions with Patient JLB he seems to be leading her in conversations and she is saying a lot nothing over the line but things she doesn't need to or he don't need to know. I explained to her how he is drawing her in and will use this to take advantage. When you're saying a lot sooner or later you'll say the wrong thing.

13. Respondent prepares written evaluations ("Performance Planning & Development Reports") for probationary employees every 3 months. Complainant's first evaluation, for the period ending April 5, 1998, indicated complainant had "satisfactory" job performance as to all listed expectations and standards.

14. On April 7, 1998, Mr. Schertz received a report from another PCT that complainant was "still very verbal and friendly with patients."

15. On April 17<sup>th</sup>, Mr. Schertz and Ms. Fassbender spoke with complainant about transferring her to a different work unit.

16. Complainant's second evaluation, for the three-month period ending July 5, 1998, indicated complainant had "satisfactory" job performance as to all listed expectations and standards.

17. After completing her work shift on August 6, 1998, complainant failed to return her set of keys to the proper location and took them out of the institution when she left at 10:00 p.m. Complainant later realized her error and returned to the institution with the keys at 11:15 p.m. After an investigative meeting on August 11<sup>th</sup>, respondent chose to discipline complainant. She was given an oral reprimand.

18. Respondent's policy for disciplining probationary employees is to either give them an oral reprimand or to terminate their employment. In other words, if the respondent concludes that the conduct in question would, for an employee with permanent status in class, result in a written reprimand, suspension, demotion or discharge, the probationary employee will be terminated.

19. On Friday, August 28, 1998, both Ms. Fassbender and Mr. Schertz spoke with complainant about spending too much time talking with patients. Mr. Schertz mentioned some patients by name, including patient RA.

20. On August 30<sup>th</sup>, complainant worked the second shift on unit A3. Sandra Franzen, a PCT working on unit B6, reported to unit A3 that one patient (TM) in the A3 courtyard was yelling at patients in the B6 courtyard, and that a second A3 patient (EW) was playing with the lock on the courtyard gate. Complainant was in A3 courtyard with patient TM at the time and made no effort to stop either patients' misconduct.

21. On August 30<sup>th</sup>, complainant also distributed home grown garden vegetables to some of the patients on her unit, including at least one patient in seclusion. Complainant had made no effort to obtain permission before she gave away the vegetables.

22. Also on August 30<sup>th</sup>, complainant had a lengthy conversation with patient RA extending 50 minutes after his curfew. Patient EW was also present. The conversation continued 20 minutes after another PCT reminded RA and complainant of the curfew.

23. Respondent conducted an investigatory meeting on September 3<sup>rd</sup> regarding complainant's conduct on August 30<sup>th</sup>. (Exh. R11) During the meeting, complainant acknowledged she had distributed vegetables to A3 patients, including patients in seclusion. Later that day, complainant was notified she was being suspended with pay. (Exh. R14)

24. Once respondent concluded complainant's conduct warranted discipline beyond an oral reprimand, respondent scheduled a termination meeting on September 4, 1998. Termination notice was issued on September 4<sup>th</sup> (Exh. R17).

#### CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to §230.45(1)(b), Stats.
2. Complainant has the burden of proof.
3. Complainant has failed to sustain her burden.
4. Respondent did not discriminate against complainant based on her sex when it terminated her probationary employment as a Psychiatric Care Technician in September of 1998.

#### 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 Wisconsin Fair Employment Act; 2) she was qualified to perform the duties and responsibilities of the position she held; 3) she was discharged; and 4) after her discharge, her position was filled by a male, or there are other circumstances which give rise to an inference of discrimination.

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, 103 S. Ct 1478 (1983), and the question of whether the employer intentionally discriminated against the complainant should be directly addressed. Therefore, the Commission will proceed as if complainant has established a prima facie case of sex discrimination under *McDonnell Douglas*.

Respondent's rationale for terminating complainant's probationary employment as a PCT is straightforward. Wisconsin Resource Center policy calls for the termination of any probationary employee who is involved in one or more work rule violations that would be the basis for a written reprimand or more severe disciplinary action for a permanent employee. Complainant violated the fraternization policy on August 30<sup>th</sup> when she distributed vegetables to patients on August 30<sup>th</sup>. She engaged in other inappropriate conduct on August 30<sup>th</sup>, and had previously received an oral reprimand for violating the institution's key policy. Complainant's employment was terminated pursuant to respondent's policy.

Complainant's theory appears to be that there was "no just cause" for the decision to terminate her employment as a Psychiatric Care Technician. If complainant had permanent status in class as a PCT, and if complainant had been able to show that male PCTs had not been discharged for conduct comparable to her own, complainant would have had strong evidence of sex discrimination. However, as was pointed out during the hearing, complainant did not have permanent status in class. Respondent need not

go through the same disciplinary steps for a probationary employe as for a permanent employe. Respondent did not need to go through a concentrated PPD or apply progressive discipline.

Complainant did not present any evidence suggesting that she was treated differently than similarly situated male PCTs. A male probationary employe was orally reprimanded for violation of the fraternization policy. However, that discipline was the employe's first. Complainant offered no evidence tying the respondent's decision to her sex. About the only evidence in the record that has some conceivable relationship to a sex discrimination claim is that the complainant is female and about one-third of the PCTs on staff at WRC are females.

The rest of the evidence showed that complainant repeatedly failed to follow the policies established by the respondent. Complainant did not dispute that she had violated policy when she failed to turn in her keys at the end of her work shift on August 6<sup>th</sup>. Complainant also admitted she had distributed home grown produce to certain patients on August 30<sup>th</sup>, in violation of the fraternization policy. Although she didn't as clearly admit to it, complainant also engaged in lengthy conversations with certain patients at WRC, to the extent that in one instance, the conversation lasted 50 minutes after the patient's curfew. She also failed to maintain order in her unit's courtyard when she was there.

Complainant also argues that because she had had problems with one of the two male PCTs who wrote memos to management after the events of August 30<sup>th</sup>, the incidents described by those employes are questionable. However, the record indicates the two memos accurately describe the events of August 30<sup>th</sup> and the testimony of two females, Ms. Franzen and Ms. Fassbender, do not support complainant's claim.

Complainant's suggestions that the employe handbook be changed and that the classification title be changed from PCT to better describe the duties actually assigned do not relate to her claim of discrimination.

ORDER

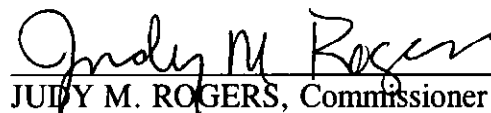
This complaint is dismissed.

Dated: December 3, 1999 STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

KMS:980177Cdec1

  
DONALD R. MURPHY, Commissioner

  
JUDY M. ROGERS, Commissioner

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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.

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