STATE OF WISCONSIN PERSONNEL COMMISSION

CHARLES SIAS,
Complainant,

v.

Secretary, DEPARTMENT OF CORRECTIONS,
Respondent.

Case No. 98-0005-PC-ER

FINAL DECISION AND ORDER

NATURE OF THE CASE

This case involves a charge of discrimination alleging respondent, Department of Corrections (DOC), discriminated against complainant because of complainant's creed and color in connection with the termination of his probationary employment, and denied him a religious accommodation, in violation of the Fair Employment Act (FEA), Subchapter II, Ch. 111, Stats. This case is before the Commission following the issuance of a proposed decision by the hearing examiner pursuant to §227.46(2), Stats.

This case was heard on the following issues:

1. Whether there is probable cause to believe that complainant was discriminated against on the basis of his color or religion when he was discharged from his probationary employment in August of 1997.

2 Whether complainant was discriminated against on the basis of his religion when respondent allegedly failed to reasonably accommodate his religious practice while employed at PDCI. Conference report dated June 23, 1999.

Following consideration of the proposed decision and consultation with the hearing examiner, the Commission concludes it will adopt the proposed decision with regard to the second issue, but reject the proposed decision's conclusion of law with regard to the first issue that there is probable cause to believe complainant was discriminated against on the basis of color or religion when he was discharged from his probationary employment.

> The Commission agrees with the examiner's findings of fact, but does not believe the circumstances of this case provide sufficient support for a conclusion of probable cause. The examiner's proposed decision rests largely on the "extenuating circumstances" discussed in the proposed decision at pages 13-14. However, the proposed decision fails to give sufficient weight to a number of significant factors that are inconsistent with a conclusion of probable cause to believe respondent discriminated against complainant on the basis of color or religion.

To begin with, there is no evidence that there were any other employes similarly situated to complainant who were treated differently. Also, it is clear that respondent had a policy that a probationary employes who engaged in misconduct that would lead to the discipline of a permanent employe would be discharged from his probationary employment. Complainant engaged in very significant misconduct, including blatant insubordination. He undermined his superior officer's authority by his insubordination and open criticism of her competence. There is every reason to think that a permanent employe who behaved this way would receive at least a written reprimand. It follows from this that respondent would apply its policy of terminating a probationary employe for misconduct that would lead to the discipline of a permanent employe, and this provides a legitimate, nonpretextual basis for respondent's action of firing complainant. The thrust of respondent's concern with complainant's misconduct involved actions that complainant knew or should have known were improper, notwithstanding the fledgling status of the institution. Complainant engaged in flagrant insubordination and contumacious behavior that he certainly knew, or should have known, was improper regardless of any uncertainty about specific issues such as whether an inmate could return to the serving line once he had sat down. Also, he engaged in other specific actions which he knew or should have known were against policy—e. g, leaving another officer alone in a stairwell with a large group of rowdy inmates. In short, when the case for terminating complainant was so compelling, and there is no indication respondent treated any other similarly situated employe differently, a conclusion that there is probable

cause to believe that respondent discriminated against complainant on the basis of color or religion can not be sustained.

ORDER

1. The proposed decision and order, a copy of which is attached hereto, is adopted by the Commission as its final disposition of this case, with the following changes[1]:

a) For the reasons discussed above, Conclusions of Law #3 and #4 on pages 9-10 are amended to read:

3. Complainant has not sustained that burden.

4. There is no probable cause to believe complainant was discriminated against on the basis of color or religion when he was discharged from his probationary employment in August of 1997.

b) The third paragraph on page 14 is deleted for the reasons set forth in the foregoing discussion.

c) The ORDER on page 16 is amended to read:

This complaint of discrimination is dismissed.

[1]The Commission also makes some typographical and other minor changes in the proposed decision and order.

Dated: January 25, 2000.

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

AJT:980005dec1.1doc

Parties:

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Milwaukee, WI 53216

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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

STATE OF WISCONSIN PERSONNEL COMMISSION

CHARLES SIAS,
Complainant,

v.

Secretary, DEPARTMENT OF CORRECTIONS,
Respondent.

Case No. 98-0005-PC-ER

PROPOSED DECISION AND ORDER

NATURE OF THE CASE

This case involves a charge of discrimination alleging respondent, Department of Corrections (DOC), discriminated against complainant because of complainant's creed and color in connection with the termination of his probationary employment, and denied him a religious accommodation, in violation of the Fair Employment Act (FEA), Subchapter II, Ch. 111, Stats. This case is before the Commission on the following issues:

> 1. Whether there is probable cause to believe that complainant was discriminated against on the basis of his color or religion when he was discharged from his probationary employment in August of 1997.
>
> 2 Whether complainant was discriminated against on the basis of his religion when respondent allegedly failed to reasonably accommodate his religious practice while employed at PDCI. Conference report dated June 23, 1999.

FINDINGS OF FACT

1. Complainant practices Orthodox Judaism and is black.

2. Complainant began his employment at Prairie Du Chien Correctional Institution (PDCI) on May 11, 1997, as a Youth Counselor III (YC III), with a six-month probationary period.

3. PDCI is a medium security institution for youthful offenders—i. e., all the inmates have adult convictions.

4. As a YC III, complainant was a lead worker/quasi-supervisor.

5. Prior to his employment at PDCI, complainant had been employed by the Department of Health and Family Services (DHFS) at Mendota Mental Health Institute (MMHI) as a Psychiatric Care Technician 1 (PCT 1), which was a rank and file position, and his performance there had been satisfactory. At the time he left MMHI, complainant had completed 11 months of a 12 month probationary period. Several years prior to his employment at MMHI, complainant had been employed by DOC for a period of time.

6. As a new institution, PDCI was to some extent in a training and shakedown mode throughout complainant's tenure from May 11-August 12, 1997. During the initial training period prior to the arrival of the first inmates on July 2 or 3, 1997, complainant was once a few minutes late for work, and once violated institutional policy, which required the wearing of long pants, by wearing knickers.

7. The first inmates arrived at PDCI on July 2 or 3, 1997, and the first inmates arrived on complainant's housing unit on July 10, 1997. As of the latter date, many of the institution policies had not been issued in written form, and there were no written post orders for specific YC III housing unit posts, although generic post orders had been promulgated. Copies of the inmate handbook were available at various places throughout the institution, but complainant did not have a copy of his own. At the time of the July 12, 1997, incidents discussed below, complainant had only skimmed the inmate handbook.

8. Within one or two weeks of PDCI having been opened, complainant requested permission to switch shifts with another YC III, Lynn Siewert, to allow complainant to have Saturdays off which would allow him to attend synagogue. At first, complainant requested this arrangement with regard to the posted work schedule for the entire year. The second request was on a week-by-week basis. Both requests were denied. Respondent's reasons for the denial were that it did not want to allow what amounted to a permanent shift switch because it would in effect circumvent the post assignments that had been made and could create problems with an employe learning his assigned duties for a particular post. This consideration was particularly acute at the time the request was made because the institution had just been opened and all employes needed to be trained. Management was also concerned about employes

working double shifts. Also, since shift requests were prioritized on the basis of seniority, a long-term switch such as this could have created problems with regard to other employes' seniority interests. Another reason had to do with the fact that Ms. Siewert was experiencing performance problems (she ultimately resigned in lieu of probationary termination), and management wanted her on the first shift where she could be monitored more closely than on second shift, where she would be if she switched with complainant. The latter reason was why respondent also denied complainant's request for a switch for a shorter period. There is no reason to think respondent would not have granted requests for shorter shift trades between complainant and other employes.

9. Complainant spoke to Captain Paschke about being allowed to wear religious headwear. Captain Paschke allowed complainant to do so while he checked out whether this should be allowed on a permanent basis. Captain Paschke did not call complainant a liar in connection with this matter. Respondent never prohibited complainant from wearing his religious headwear.

10. At the time of the evening meal on July 12, 1997, complainant requested that two escort officers come to the unit to move the inmates to the cafeteria. He was informed that escort officers were not available and that he (complainant) and the other officer working with him would have to move the inmates. Under the circumstances, complainant believed that this prevented him from following the policies that required one officer to remain in the "bubble" area on each floor of the dormitory building while two escort officers performed the movement activity, and that only one unit be moved at a time. Complainant and YC 1 Heidi Bloyer escorted the inmates to the cafeteria without incident.

11. While in the cafeteria line, complainant overheard an inmate tell an inmate kitchen worker that he did not want any pudding on his tray because of his religious beliefs concerning diet. According to respondent, the kitchen worker replied that per instructions from the kitchen supervisor, he was to make all food trays the same. Complainant directed the kitchen worker not to put pudding on the tray because it would make it unholy if the pudding contained any pork products. Complainant's immediate supervisor, Lieutenant Sara Proffitt, who was also present, intervened and instructed the kitchen worker to go ahead and put the

pudding on the tray. Complainant told Lt. Proffitt that Muslims are not to have pork on their plates. He explained that pork is in many food bases and is sometimes in pudding. Lt. Proffitt stated that the pudding was to be put on the tray—if the inmate did not want it, he did not have to eat it. Complainant then stated something to the effect of: "Great then, I guess he can't eat, because once the pork has touched the tray, it's no good." The pudding was placed on the inmate's tray. Complainant directed the kitchen worker to make him (complainant) a food tray with no pudding on it. The worker made the tray and complainant sat down to eat. Complainant was later informed by the food service director that there was no pork in the pudding.

12. At the above-mentioned cafeteria meal, an inmate got up from his table and went to the serving line to request a glass of water. Lt. Proffitt told the inmate that he was not to leave his table after he had sat down to eat. The inmate stated that complainant had given him permission to return to the food line. Complainant stated that he did give the inmate permission to ask for the glass of water. Pursuant to an institutional policy of which complainant was unaware, inmates were not supposed to return to the serving line after they had been seated.

13. After the end of the meal period, complainant and YC 1 Bloyer escorted their inmates back to their housing unit. During this process, one of the inmates asked complainant why he (complainant) could walk on the grass and they (the inmates) could not. Complainant responded that he needed to walk on the grass in order to get a full view of the group. The inmate argued that this was not fair and stated that if complainant could walk on the grass, then all of the inmates should be able to walk on the grass. The argument became heated, and the inmate told complainant that he could not tell the inmate to "shut up." Complainant told Inmate W that he could and was telling him to shut up. The argument continued into the stairwell of the dormitory unit.

14. At the top of the stairwell, complainant realized that he had no keys for entry to the third floor and there was no guard on the floor to buzz the group through. Complainant left the front of the line, leaving YC I Bloyer alone in the stairwell with the inmates, some of whom were rowdy, and took the elevator to the third floor and buzzed the group through the

door. Leaving YC I Bloyer alone in the stairwell with this many inmates was contrary to training complainant had received.

15. After returning the inmates to their housing units, complainant contacted Lt. Proffitt to ask what complainant should do with the inmate who had argued with him. Lt. Proffitt told him that he could give the inmate a conduct report with the possible consequence of eating on the unit for a couple of days. Complainant again called Lt. Proffitt to advise her that when he had told the inmate about the conduct report, he had become loud and disorderly, and complainant wanted the inmate removed from the unit and placed in temporary lockup (TLU). Lt. Proffitt came up to the unit and spoke with the inmate in his room. She concluded that the inmate had become loud and disorderly because complainant had been loud and had told the inmate to shut up. She advised complainant that she saw no need for the inmate to be placed in TLU, but that if complainant felt that the inmate deserved a conduct report, he should write one. Complainant responded "Fuck the ticket [conduct report], I saw nothing," or words to this effect. During the ensuing discussion between Lt. Proffitt and complainant, he loudly disparaged her performance and criticized her qualifications to work with adults,[1] in a manner that could be overheard by the inmates. He also stated in this fashion that there would be no more rules, that the inmates could do what they want, or words to this effect. She then advised the inmates that this was not so.

16. Lt. Proffitt also spoke with complainant regarding the loud and disruptive nature of the majority of the inmates on the unit that she had observed when she had arrived. Complainant stated that due to the volatile nature of the unit, he had used a behavioral technique used at MMHI that allowed the inmates to vent their anger.

17. After Lt. Proffitt left the unit, the inmates in the dayroom again became disruptive and engaged in a heated exchange with complainant concerning the use of the TV set, cleaning the bathroom, and the issuance of towels.

18. Lt. Proffitt again returned to the unit, discussed matters, and generally de-escalated the situation. She determined that complainant had turned off the TV set because a sign he had posted stating that the channel was not to be changed by the inmates was missing.

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[1] Lt. Proffitt had come to PDCI from a juvenile institution.

The inmates also were upset because he had refused to issue towels. Complainant explained that he had made it clear the night before that the policy was that towels were issued at 9:20 p. m. and were supposed to be used all the next day. Several inmates claimed they were not aware of this. Lt. Proffitt decided that in light of all the friction on the unit that night, she would allow the TV set to be turned back on and would authorize towel distribution. She also solicited volunteers to clean the bathroom. Complainant responded by saying "Fuck the rules, I'll do whatever you want," or words to that effect, and began tossing towels out to the inmates. He also tore down and crumpled up another sign he had posted explaining the towel policy.

19. At some point during this situation, an inmate told her privately that complainant had been disparaging her competence in front of the inmates. She discussed this with complainant and he admitted that he had made some inappropriate comments.

20. An investigatory meeting was held on July 15, 1997. Present at the meeting were Rick Gutknecht, Lieutenant Maynard Cox, complainant, and his union representative Carol Beals. Complainant was asked about what had occurred on July 12, 1997, both in the cafeteria and in the dormitory unit. Complainant recounted the events that took place and denied any wrongdoing.

21. On July 22, 1997, a pre-disciplinary meeting was held. Present at the meeting were Rick Gutknecht, Lieutenant Maynard Cox, complainant, and his union representative Carol Beals. Complainant was informed that the investigation regarding the alleged violations of Work Rules had been completed and that it had been determined that he had violated those rules. Complainant was asked if he had any statements to make relevant to the violations. Complainant stated that he had adhered to all policies and that he had performed all duties expected of him.

22. Complainant's six month Performance Planning and Development Report (PPD) dated August 8, 1997, stated that complainant had performed unsatisfactorily. The PPD was marked "does not meet standards" in regard to the following:

a) **Alert to and responds appropriately to institutional environment.**
Enforces rules in a fair, firm, and consistent manner.

Awareness of inmate concerns and needs, and make appropriate referrals.

PPD Comments:

Mr. Sias has had problems communicating with other staff, and communicating with and directing inmates' behavior consistently, as has been reported to his immediate supervisor. Mr. Sias has been observed making inappropriate suggestions in regard to inmates expressing their anger.

Complainant's response:

Complainant denied that he has a problem communicating with others. The PPD, he explained, was possibly referring to an incident between himself and a co-worker in which the two were discussing the attitudes of the people of Prairie du Chien towards PDCI. Complainant stated that he had heard comments that people were fearful that blacks would move into the area because of the prison. He said he was not worried about the remarks and felt capable of performing his job. Complainant stated that his co-worker misinterpreted his remarks and told him that the job needed to be done the way the people of Prairie du Chien wanted it done and that if he did not want to be at PDCI, he should leave.

b) **Sensitivity to others and their problems, feelings, and rights.**
Courteous and tactful.
Responds positively to constructive criticism and supervision.

PPD Comments:

Mr. Sias has been involved in a verbal altercation with his immediate supervisor in the immediate vicinity of inmates and other staff members. On July 14, 1997, an investigation was conducted, and it was concluded that Mr. Sias had violated Work Rules A1, A4, and A7.

Complainant's response:

Complainant states that the discussions he had with his supervisor regarding inmate conduct and discipline occurred in the bubble and were not audible to the inmates.

c) **Ability to respond appropriately in emergency and disturbance situation.**
Complies with institution grooming standards.
Complies with rules.

PPD Comments:

Situation occurred involving Mr. Sias and his shift partner, where Mr. Sias left his partner alone in a secured stairwell, without notifying his partner that he was leaving her there with 20 inmates in order to obtain assistance. Failed to report for duty in proper attire: wore shorts - should wear long pants for shakedown. On July 15, 1997, an investigatory meeting was conducted regarding violation of Work Rule A2, and it was concluded Mr. Sias also violated this Work Rule.

Complainant's response:

Complainant denied that he left his partner alone in a secured stairwell. He stated that his partner was aware of the situation and knew that complainant was going to buzz them through the door. Complainant did this to prevent the situation in the stairwell from escalating and to ensure the safety of all concerned.

Complainant stated that he wore knickers—not shorts. He was told at the end of the day that he should not have worn them. Complainant objects to this appearing on his record because there was no formal complaint or counseling.

23. A document prepared by management titled **"Work Rule Violations Breakdown Summary"** reads as follows:

Staff: Sergeant Charles Sias

Incident Date: July 12, 1997

A1. Insubordination, disobedience, or failure to carry out assignments or instructions.
Demanding that an inmate kitchen server not put pudding on a tray contrary to policy. In front of inmates and staff, questioning superior's decision. Not checking first with the kitchen to verify that pork was not in the pudding prior to the above actions.

Allowing inmates to return to the servery line contrary to policy and procedure.

Stating to superior officer that they are inadequate to perform their duties.

A4. Negligence in performance of assigned duties.
Upon returning to the unit, escalating a group through use of elevated voice tones, and not requesting backup.

Escalating individual, and group by telling an inmate to shut up.

Announcing to inmates that there are no more rules, do what you want.

Tearing towel exchange memo off wall, crumbling it up, and throwing it on desk.

A7. Making false, inaccurate or malicious, statements about employees, inmates, offenders or the Department.

Stating that the unit was out of control due to superior officer's actions.

Telling inmates and staff that a superior officer did not know how to do their job, they would let inmates do anything, and that they were incapable of running a shift.

Stating to inmates that the decision to turn off the TV was the superior officer's when you turned off the TV due to a posted sign missing from the wall near the TV.

24. DOC policy is to terminate probationary employes who are involved in activity that would result in a written reprimand or greater penalty for an employe with permanent status in class.

25. In a letter dated August 11, 1997, respondent informed complainant that it was terminating his employment, effective the next day at 4:30 p.m.

26. As of the time of the termination of complainant's probationary employment, complainant was the only PDCI employe of the Orthodox Judaic creed, and one of only a few black employes. As of October 8, 1999, there were no black employes at PDCI.

CONCLUSIONS OF LAW

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

2. Complainant has the burden of establishing there is probable cause to believe, under the standard set forth in §PC 1.02(16), Wis. Adm. Code, that he was discriminated against on the basis of color or religion when he was discharged from his probationary employment in August of 1997.

3. Complainant has sustained that burden.

4. There is probable cause to believe that complainant was discriminated against on the basis of color or religion when he was discharged from his probationary employment in August of 1997.

5. Complainant has the burden of establishing by a preponderance of the evidence that respondent discriminated against him on the basis of his religion by denying his request for religious accommodation.

6. Complainant has not satisfied this burden.

7. Respondent did not discriminate against complainant on the basis of his religion by denying his request for religious accommodation.

DISCUSSION

Probationary termination

The issue of whether complainant was discriminated against on the basis of color or religion is before the Commission for a determination of whether there is probable cause to believe that discrimination occurred. In order to reach a conclusion of probable cause, facts and circumstances must exist that are strong enough in themselves to warrant a prudent person to believe that discrimination probably has occurred. § PC 1.02(16), Wis. Adm. Code. In a probable cause proceeding, the evidentiary standard applied is not as rigorous as that which is required at the hearing on the merits.

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).

A prima facie case of discrimination can be established by showing that 1) the complainant is a member of a protected group, 2) the complainant suffered an adverse employment action, and 3) there is evidence that the complainant's protected status was not

treated neutrally in the employer's decision. *See, e.g., Sprenger v. UW-Green Bay,* 85-0089-PC, 12/30/86.

Complainant alleges that respondent discriminated against him on the bases of his color and religion by discharging him from employment. Complainant, who is black and practices Orthodox Judaism, satisfies the first element of a prima facie case because color and religion are bases protected under the FEA. Complainant suffered an adverse employment action when his probationary employment was terminated. This satisfies the second element. As to whether complainant has established the third element that respondent did not treat his protected status neutrally, complainant's claim is based on the assertion that he performed his job satisfactorily, but was still discharged. Complainant's job performance is also relevant to the issue of pretext because respondent's non-discriminatory reason for its decision to terminate complainant is that his performance was unsatisfactory. The disagreement between the parties as to complainant's job performance will be analyzed under the heading of pretext. *See Aikens v. United States Postal Service Board of Governors,* 453 U. S. 902, 26 FEP Cases 62 (1981) (Once a case has been tried fully, there is no need to address further the question of whether the employe established a prima facie case, and the analysis should proceed to the question of discrimination per se.).

In a case of alleged discriminatory discharge, the issue is not whether there is just cause for the discharge, but whether the employer was motivated by unlawful discrimination in its discharge of the complainant. If the employer had a good faith belief in the reasons it proffered for the discharge, a subsequent determination that the employer's factual basis for the discharge was incorrect or lacking in a factual foundation does not compel a finding that the employer was motivated by considerations related to the complainant's protected status. *See, e.g. Moore v. Eli Lilly & Co.,* 61 FEP Cases 1445, 990 F.2d 812 (5th Cir. 1993). However, this does not mean that the question of the validity of the substantive basis for the discharge has no probative value. *See, e. g., Hawk v. DOCom,* 99-0047-PC-ER, 6/2/99:

> While the question of just cause *per se* is not at issue in such a proceeding, the question of whether respondent's rationale for termination is a pretext for a discriminatory motive may well be at issue. It is not uncommon that a complainant's pretext case involves the contention that the employer's claimed performance deficiencies are false, and merely a pretext for the underlying

> motivation to get rid of complainant because of his protected status. *See, e.g., Mitchell v. DOC*, 95-0048-PC-ER, 8/6/96:
>
> In a discrimination case involving a discharge, the employer/respondent is not required to show just cause for the discharge, as would be the case in an appeal of a discharge under §230.44(1)(c), Stats., or in a contractual grievance proceeding. Rather, complainant has the burden of proof and must establish a discriminatory motive for the discharge. In a case such as this, where the complainant denies much of the underlying misconduct, if she could establish that respondent had a weak case for discharge, it would be probative of pretext.
>
> *See also Starck v. DILHR*, 90-0143-PC-ER (9/9/94) (Where Respondent established there were significant problems with a probationary employe's performance, and complainant failed to show that these reasons were pretextual, it was concluded complainant's probation was not terminated for a discriminatory reason.), *Russell v. DOC*, 95-0175-PC-ER, 4/24/97 ("'Whether Paxton did in fact rape Sivolka or otherwise subject her to unwelcome sexual contact is not an issue that needs to be decided in this case. What matters is the question of what the employer's motivation *was*, not whether it was objectively correct. Notwithstanding this, there is some relevance in considering the question of whether Paxton was culpable, because the more reasonable such a conclusion appears on the basis of what the employer's investigation showed, the more reasonable is the conclusion that the employer's investigators came to genuinely believe, in good faith, that Paxton was culpable.'" [citation omitted]).

With regard to the July 12, 1997, incident concerning the food tray, the record establishes that complainant was insubordinate in the way he questioned Lt. Proffitt's direction, particularly in front of the inmates. The record also establishes that complainant violated institutional policy by allowing an inmate to return to the serving area after he had sat down. With respect to the subsequent incidents returning to and in the housing unit that day, the record establishes that complainant was guilty of poor judgment in the way he argued with the inmate with regard to the issue of walking on the grass. He also used poor judgment in failing to call for backup instead of leaving YC I Bloyer alone with a large number of agitated inmates in the stairwell leading to the housing unit, as well as in orchestrating a "venting" session with the inmates which became disruptive. His interactions with the inmates and Lt. Proffitt in connection with these incidents were insubordinate because he openly questioned her directives and disparaged her competence by his remarks in front of the inmates and by tearing down and crumpling up the towel sign.

On the other hand, there were a number of extenuating circumstances that raise questions about the decision to terminate complainant's probationary employment as abruptly as it occurred. At the time of the July 12, 1997, incidents, PDCI, a brand new institution, had only had inmates on the premises for nine or ten days. Complainant had only had inmates on his unit for two days. A lot of the institution's policies had not been reduced to writing. There were no written post orders for specific YC III housing unit posts, and the written post orders that were available were general in nature. There was a limited supply of inmate handbooks available. Under these circumstances, it would seem that some confusion about particular rules and policies--e. g., whether an inmate could return to the serving area for a glass of water after he had sat down—would not be unusual.

These circumstances also provide a context for complainant's insubordination. Obviously, complainant knew that his insubordinate statements and actions were out of line, regardless of the status of the institution and the uncertainty about specific rules and policies. However, a certain level of frustration would not be unexpected given the confusion about the new institution's policies and rules. With regard to Lt. Proffitt's handling of the incidents on the housing unit, it must be kept in mind that she countermanded complainant's actions of turning off the TV set and refusing the inmates' request for towels, and denied his request to have an inmate placed in TLU. Complainant had turned the TV set off because he believed someone had removed the sign he had posted instructing that the inmates were not to change channels without his permission. He had denied the towel request because he understood it was against the policy on towel distribution. When Lt. Proffitt decided that the TV set should be turned back on and the towels should be distributed, she did so to try to de-escalate a volatile situation, not because she had determined that complainant had violated any particular policies in taking these two actions. While her handling of these matters by no means justified complainant's insubordination, under all the circumstances, which included her refusal of complainant's request to place the inmate in TLU, there were extenuating circumstances with regard to complainant's reaction.

There were other extenuating circumstances as well. Complainant had transferred from MMHI to PDCI after 11 months of satisfactory service at the former institution. He had not

had any problems at PDCI during the first two months of training prior to July 12, 1997, except for minor matters involving wearing knickers instead of trousers on one occasion and being a few minutes late on another occasion. While DOC policy was to terminate a probationary employe who was engaged in activity that would result in a written reprimand or greater penalty for a permanent employe, respondent had the discretion to have decided how to characterize complainant's misconduct on July 12th, and it raises suspicions about respondent's motivation that it did not provide any counseling or warning when complainant's prior performance had basically been satisfactory and he was making a transition from a non-corrections position, but rather terminated his employment after the one day of performance problems which occurred two days after inmates first arrived on complainant's housing unit..

Another factor relating to the question of probable cause is that complainant was the only person of his creed at PDCI at the time of his termination, was one of only a few minorities, and there were no minorities at the institution 14 months later.[2] These factors supply at least some additional evidence probative of pretext.

In light of all of these factors, and in the context of the reduced level of proof required at the probable cause stage, the Commission concludes that there is probable cause to believe that complainant's color and/or creed was at least a partial reason[3] for the termination of his probationary employment, notwithstanding that there was a non-discriminatory reason for terminating complainant on the basis of his actions on July 12, 1997.

Denial of request for religious accommodation

Complainant adheres to the creed of Orthodox Judaism. He requested a shift trade as a religious accommodation which would permit him to worship on Saturday, the Jewish holy day. Respondent denied this request, framing the issue of whether respondent discriminated against complainant by refusing his request for religious accommodation.

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[2] While complainant's statistical case was strictly anecdotal—e. g., complainant presented no evidence of the available work pool, etc.—this must be viewed in the context of a probable cause determination where the level of proof is less than at a hearing on the merits.

[3] An unlawful act occurs when an impermissible motivating factor enters into an employment decision, but if the employer can demonstrate it would have taken the same action in the absence of the impermissible factor, a complainant can not be awarded monetary damages or reinstatement. *Hoell v.*

The WFEA requires the accommodation of an employe's "religious observance or practice unless the employer can demonstrate that the accommodation would pose an undue hardship on the employer's program." §111.337(1), Stats. The record establishes that respondent denied complainant's accommodation request because it had significant legitimate concerns about allowing complainant to trade shifts on a long term basis because such a trade would have been inconsistent with the way that posts were awarded, and could have engendered contractual seniority disputes. Respondent also had significant legitimate concerns about allowing complainant even a short term trade with YC III Siewert because of performance problems she had been experiencing, and the related need to keep her under closer supervision than would be available on second shift. However, the record also establishes that complainant could have worked out short term trades with other employes if he had needed to.[4] On this record there was no denial of accommodation.

LIRC, 186 Wis 2d 603, 522 N. W. 2d 234 (Ct. App. 1994). The instant case is not at the remedy stage.

[4] Complainant located an Orthodox synagogue in Iowa that effectively resolved his need for an accommodation.

ORDER

So much of this case as relates to the charge of religious discrimination with respect to accommodation is dismissed. Further proceedings are to be scheduled on the remaining claim.

Dated: _____, 2000.

STATE PERSONNEL COMMISSION

_____
LAURIE R. McCALLUM, Chairperson

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DONALD R. MURPHY, Commissioner

_____
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