

STATE OF WISCONSIN

PERSONNEL COMMISSION

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WILLIAM NORWOOD,
Appellant,

DECISION
AND
ORDER

v.

UNIVERSITY OF WISCONSIN-
PARKSIDE,
Respondent.

Case No. 78-PC-ER-62

* * * * *

NATURE OF THE CASE

The subject matter of this case involves a complaint of race discrimination with respect to the complainant's discharge from employment by the respondent.

FINDINGS OF FACT

1. The complainant, who is Black, was employed by the respondent in the classified civil service as a Building Maintenance Helper 2 (BMH 2), from October 11, 1972, through the effective date of his discharge, August 18, 1978.

2. The University of Wisconsin System work rules for classified employees (Respondent's Exhibit 5) includes under "Prohibited Conduct", II. B., "Unexcused or excessive absenteeism."

3. The respondent subscribes in a general sense to the concept of progressive discipline, i.e., that progressively more severe punishment is utilized prior to discharge for successive acts of misconduct.

4. During his employment complainant's leave record was poor:

	<u>Sick Leave</u>	<u>LWOP</u>
1972 (partial	22.0 hours	16.0 hours
, 1973	65.0 hours	424.5 hours
1974	79.0 hours	275.0 hours
1975	98.0 hours	188.0 hours
1976	84.2 hours	228.4 hours
1977	79.0 hours	185.9 hours
1978	60.9 hours	57.0 hours

5. For his absenteeism, he received 13 oral reprimands, 3 written reprimands, and 2 suspensions.

6. On August 16, 1978, he telephoned the campus, prior to his 7 a.m. starting time, and advised another BMH that he would be unable to come to work because of storm damage his house had suffered the previous evening.

7. The complainant's supervisor at the time was Martin Holzman, (Caucasian), Acting Assistant Director of the Physical Plant. He had held the job since July 1978.

8. Mr. Holzman did not receive the August 16th message referred to in finding #6.

9. On August 17, 1978, Mr. Holzman called the complainant and a union steward into his office and requested an explanation of the complainant's absence the previous day. The complainant stated that he stayed home because of storm damage. The union steward confirmed that the complainant indeed had called in the previous day.

10. Following this meeting, Mr. Holzman proceeded to inspect the exterior of the complainant's home, which at the most had sustained a broken window.

11. Later that day, Mr. Holzman met with the complainant and a union steward. He showed the complainant "Polaroid" pictures of his house taken that afternoon and asked him to point out the storm damage. The complainant was unable to provide an explanation that was satisfactory to Mr. Holzman.

12. Thereafter, Mr. Holzman determined to discharge the complainant. This decision was based on the complainant's record of absenteeism since 1973 and included the fact that the appellant had taken an entire day off on August 16, 1978 for what was apparently minor damage to his house.

13. In September 1978, two non-Black employees with extensive leave records were absent. Mr. Holzman attempted to verify their excuse but could find no record of the hospitalized relative. When confronted with this, the employees stated their excuse was true and they could present proof. They were given five days and when they failed to do so, Holzman suspended them for five days without pay.

14. Prior to this suspension, these employees' attendance records were:

<u>Anthony Dennis:</u>	<u>Sick Leave</u>	<u>LWOP</u>
First Year of Employment (from June 14, 1972)	84.0	8.0
Second Year	103.0	125.0
Third Year	88.0	130.6
Fourth Year	82.0	95.7
Fifth Year	107.0	129.2
Sixth Year	99.0	136.9

<u>Florence Dennis</u>	<u>Sick Leave</u>	<u>LWOP</u>
First Year of Employment (from September 13, 1976)	98.0	23.9
Second Year	72.0	90.3
Third Year	37.0	72.0

15. Mr. Dennis had received one counselling or warning and one written reprimand. Ms. Dennis had received two oral reprimands and one written reprimand.

16. After the suspensions, the Dennises were counselled on February 13, 1979 regarding absenteeism. Mr. Dennis had accumulated 64 hours leave without pay between July 29, 1978, and December 30, 1978. Ms. Dennis had accumulated 56 hours LWOP in the same period.

17. There were five non-black custodians with more LWOP than the complainant (44.6 hours) for the period of 11 months prior to the complainant's discharge.

	<u>LWOP</u>
Jacqueline Willems	89.0 hours
Ramona Ytuarte	84.0 hours
Florence Dennis	77.3 hours
Anthony Dennis	62.0 hours
Francisco Ytuarte	52.0 hours

18. The absenteeism records from the date of hire with respect to Willems and the Ytuartes is:

<u>Francisco Ytuarte</u>	<u>Sick Leave</u>	<u>LWOP</u>
First year of employment (from October 23, 1970)	90.5	No record
Second Year	94.7	24.0 (in part no recc
Third Year	90.8	61.2
Fourth Year	99.4	45.0
Fifth Year	83.4	29.8
Sixth Year	122.0	40.3
Seventh Year	72.0	40.5
Eighth Year	92.1	70.0
Ninth Year (thru 3/30/79)	16.0	16.5

<u>Ramona Ytuarte</u>	<u>Sick Leave</u>	<u>LWOP</u>
First year of employment (from December 23, 1974)	95.0	65.7
Second Year	89.0	145.8
Third Year	104.0	51.7
Fourth Year	85.0	99.2
Fifth Year (thru 3/20/79)	8.0	8.5

Jacqueline Willems

First year of employment (from May 31, 1977)	83.0	116.0
Second Year (thru 3/18/79)	88.0	8.0

19. During the periods covered by the preceding leave records, Mr. Ytuarte received 3 oral reprimands, 2 counsellings or warnings, and 2 written reprimands; Ms. Willems, 1 counselling or warning.

20. The respondent discharged the complainant because of his excessive absenteeism and not his race.

CONCLUSIONS OF LAW

1. The Personnel Commission has jurisdiction over this discrimination complaint pursuant to sections 230.45(1)(b) and 111.33(2), Wis. Stats.

2. The respondent is an employer within the meaning of section 111.32(3), Wis. Stats.

3. The complainant has the burden of proving by a preponderance of evidence that respondent discriminatorily discharged him because of his race.

4. The complainant has not met this burden. He has failed to show that his race was a factor in his discharge by the respondent.

OPINION

The general framework for decision of a charge of employment discrimination under Subchapter II of Chapter 111 is set forth by the United States Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); see Anderson v. DILHR, Wis. Pers. Commn. No. 79-PC-ER-173 (7/2/81).

Under McDonnell Douglas, the complainant bears the initial burden of establishing a prima facie case of discrimination. Where a complainant has been discharged for allegedly violating work rules, his prima facie case should include a showing either that he did not violate the rule or that, if he did, non-black employees engaging in similar violations were not punished similarly. Green v. Armstrong Rubber Co., 612 F.2d 967, 968 (5th Cir. 1980), cert. den., 101 S.Ct. 227 (1981); Cf. Harris v. Plastics Manufacturing Co., 617 F.2d 438, 440 (5th Cir. 1980) (claims of unequal enforcement of disciplinary rules "refuted by evidence of specific instances in which white employees were disciplined in precisely the same manner as appellants had been.")

In this case, the complainant has not demonstrated unequal enforcement of work rules. He alleges that Mr. Holzman's personal investigation of his excuse for the August 16, 1981 absence was evidence of disparate racial treatment. However, the complainant's lengthy absentee record provides an equally plausible explanation of why Holzman viewed this latest excuse with particular scrutiny. Moreover, Holzman similarly sought to personally verify the hospitalization of a relative that the Dennises gave as their excuse for absence from work in September

1978. When he was unable to do so and they were unable to provide him with additional proof, he disciplined them. Similarly, after he confronted the complainant with evidence of minimal "storm damage" and gave him a chance to explain, he was unable to do so satisfactorily and he was disciplined.

The complainant argues that he was discharged while the Dennises were given only a five day suspension. However, his leave record since beginning employment with the respondent shows that the number of leave hours he had taken far exceeded those taken by either Dennis. Furthermore, the complainant had received a number of reprimands and two suspensions prior to his discharge. Neither of the Dennises had been suspended before this incident.

The complainant asserts that the relevant comparative statistic is the leave records of the Dennises and three other non-Black custodians for the 11 months prior to his discharge. Those records do show that the complainant had the least number of hours taken as LWOP. However, Mr. Holzman testified repeatedly that he relied on the complainant's attendance throughout the latter's entire tenure in the department. It is true that the letter informing the complainant of his discharge (see Complainant's Exhibit 1) only cites specific absenteeism subsequent to the complainant's most recent suspension in 1977. However, this letter is not inconsistent with the supervisor's testimony. The letter points out that, following his suspension for absenteeism, he continued to be absent and that his "continued excessive absenteeism is an abuse of University Work Rules which cannot

be condoned or tolerated." (emphasis added). The Examiner's role is not to substitute his judgment on what is the appropriate period for evaluating whether absences are continuing. Rather, it is to judge whether the respondent has laid a proper foundation for believing that the more comprehensive statistical analysis was in fact the basis for the discharge. Such assertion is credible and evidence in support thereof should be admitted.^{FN}

The complainant was absent (sick leave and leave without pay) a total of 391.5 hours his first year of employment, 459.4 the second year, 269.6 the third, 264.5 the fourth, 336.3 the fifth, and 152.5 hours the last year, prior to his termination. This overall attendance record is very poor, and considerably worse than the other employees in the unit who had more LWOP than the complainant during the period of 11 months immediately preceding the termination.

The complainant also argues that the respondent's claim to the use of progressive discipline was belied by the fact that the Dennises were not subjected to more serious discipline than counselling following additional absenteeism after their suspension. However, there is nothing in this record to show that progressive discipline requires

FN The examiner reserved a ruling on the admissibility of certain charts setting forth the attendance records of various employees. These documents, Respondent's Exhibit 6 and 7, are now admitted into evidence.

an inexorable move to a more severe form of discipline after each infraction. Indeed, following his first suspension, the complainant received 10 reprimands for absenteeism before a second suspension, and then 3 reprimands and a counselling/warning before his discharge.

Finally, the complainant argues that much of his absenteeism was for circumstances beyond his control, such as illness. However, the work rules prohibit excessive as well as unexcused absence, and an employer is not required to tolerate excessive absenteeism even when it is not the fault of the employe. See Kaestner v. Personnel Board, Dane County Circuit Court Case No. 138-247 (3/28/73). There was no indication that the complainant was treated differently than anyone else in this respect.

ORDER

Because the respondent has not engaged in discrimination, this complaint is dismissed.

Dated: May 13, 1982 STATE PERSONNEL COMMISSION

Parties

William Norwood
c/o William Whitnall
P.O. Box 534
Racine, WI 53401

Robert O'Neil
1700 Van Hise Hall
1220 Linden Dr.
Madison, WI 53706

Laurie R. McCallum
LAURIE R. McCALLUM, Commissioner

James W Phillips
JAMES W. PHILLIPS, Commissioner

Commissioner Murphy abstained from voting in this decision due to his employment with the University of Wisconsin at the time this complaint was filed.