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CARL JOHNSON, Jr.,
 Complainant,
 v.
 Secretary, DEPARTMENT OF
 HEALTH & SOCIAL SERVICES,
 Respondent.
 Case No. 83-0032-PC-ER
 * * * * *

DECISION
 AND
 ORDER

NATURE OF THE CASE

On March 31, 1983, Complainant filed a charge of discrimination with the Personnel Commission alleging he was terminated by the respondent because of his race, color, and/or handicap. On July 2, 1984, one of the Personnel Commission's Equal Rights Officers issued an initial determination finding no probable cause to believe the complainant had been discriminated against on the basis of race, color or handicap in regard to his termination. Complainant filed a timely appeal of such determination. On November 13, 1984, two days before the scheduled hearing, complainant filed a motion/request to amend the complaint to include a charge of discrimination on the basis of sex. A hearing on the motion/request and on the issue of probable cause was held on November 16, 1984.

FINDINGS OF FACT

1. Complainant is a black male and has had medical treatment for chemical abuse and for stress.

2. On September 7, 1982, complainant was hired by the Department of Health and Social Services (DHSS) for a position at Mendota Mental Health Institute (MMHI) with a classification of Training Officer I and a working

title of Training Coordinator. This position was vacant as a result of a retirement. Complainant's name was obtained from a minority recruitment list. The supervisor of complainant's position was Myrna Casebolt, Training Director for MMHI. The position description for complainant's position indicated that 80% of complainant's time would be devoted to coordinating "specific training programs for MMHI staff across disciplinary lines as assigned." Complainant signed this position description. Complainant had a strong interest in forensics and the potential for working with forensic patients was one of the reasons complainant accepted this position.

3. As of September 22, 1982, complainant had the following assignments:

1. General Orientation: Due November 1, 1982
 - a. Review existing G.O. format
 - b. Revise/update G.O. format
 - c. Submit rough draft of G.O. program to Myrna (October 1, 1982)
 - d. Develop "Action Form" for resources
2. Individual Orientation: Due November 1, 1982
 - a. Review existing I.O. format
 - b. Revise/update I.O. format
 - c. Submit rough draft of I.O. program to Myran (October 1, 1982)
 - d. Develop "Action Form" for resources
3. CPR: Due October or November 1982
 - a. Call Allen Lathrop for schedule times. (Ext. 228)
 - b. Contact Sandra Haas (Central Colony, 249-2151, Ext: 220/346) for CPR training equipment.
 - c. Call Maxine Hameister (229) for training space.
 - d. Advertise in newsletter for instructions/trainers.
 - e. Schedule on monthly bases.
4. Education Update Series: (Monthly Program)
 - a. Contact Jerry Burns for MIS update information
 - b. Coordinate monthly program with Jerry Burns
 - c. Identify specific target populations (institute staff) for education update series
 - d. Use one page announcements with registration forms (memo, newsletter) for monthly programs
5. Quality Assurance:
 - a. Review program format

- b. Revise and update
 - c. Schedule as needed
6. Affirmative Action: (Schedule monthly and as needed)
- a. Review videotape and revised handbook
 - b. Reinstate into general orientation program
 - c. Use newsletter and monthly calendar for scheduling of AA program and unit presentations.
 - d. Get supply of Affirmative Action handbooks for storage room to be used as handouts.
7. Human Life Cycle: Due January, 1983
(7 sessions)
- *a. Schedule at least once a year (B)
 - *b. Contact instructors 5-6 weeks before training event (C)
 - *c. Review program format (A)
 - *d. Consult with training supervisor for instructor replacements as needed.
8. Other:
- 1. Call Maxine Hameister, Ext. 229 to arrange training space for all programs. Include title, time and length of program.
 - 2. Include all training assignments, requests and plans in monthly reports.

4. As of December 1, 1982, complainant had completed planning for two educational update programs, but had not completed the Orientation, CPR, or Affirmative Action assignments. Complainant and Ms. Casebolt agreed to extend the deadlines for these assignments as follows:

- 1) New Employee Orientation program completed by December 10, 1982
- 2) New Employee Orientation program implemented by December 31, 1982
- 3) Affirmative Action/Civil Rights Compliance handbook revised and reprinted with necessary corrections consistent with video tape by December 31, 1982.
- 4) Two new CPR instructors recruited and ready for training by February 1, 1983.

Complainant did not complete these assignments prior to his probationary termination effective March 2, 1983, but they were completed by other MMHI Training Department staff after that date.

5. During complainant's employment at MMHI, Ms. Casebolt received complaints about complainant's work from Sue Jansen of MMHI's Nurse Mentor Group relating to the quality of a Problem-Solving program complainant had coordinated and from Linda Merril, Chairperson of the MMHI Staff Development Committee, relating to complainant's failure to submit reports of First Aid, Confidentiality, and Affirmative Action/Civil Rights Compliance training programs by the January 17, 1973, deadline set by the Committee.

6. Complainant also helped to coordinate an ad hoc employe orientation program relating to forensic patients and a new segment of the new employe orientation program relating to computers. Dr. Robert Miller, MMHI's Director of Forensic Training; Dr. Gary Maier, Clinical Director of MMHI's Forensic Program; and Jerry Burns, a Management Information Supervisor at MMHI, felt that complainant did a good job coordinating these programs, i.e., met deadlines, demonstrated good understanding of issues and concepts, and was very responsive and facilitative.

7. Complainant and Ms. Casebolt met frequently to discuss complainant's assignments and work performance. On occasion, in discussing complainant's failure to meet deadlines or performance goals, Ms. Casebolt would raise her voice and use profane language. Ms. Casebolt did not discuss with complainant his race or previous psychological treatment during these discussions.

8. Ms. Casebolt is a very demanding supervisor and has raised her voice and used profane language in discussions with white employes she supervises. Ms. Casebolt has served as a member and chairperson of MMHI's Affirmative Action Committee and is acknowledged by her co-workers and supervisor to have done a good job on the committee.

9. During complainant's employment at MMHI, he initiated discussions with Dennis Dokken, MMHI Personnel Manager, regarding his employment. Complainant told Mr. Dokken that he felt Ms. Casebolt was not treating him fairly and he implied that some of the problems he was experiencing were related to his race. Mr. Dokken does not recall that complainant told him that Ms. Casebolt made any statements regarding his race or mentioned his treatment history.

10. In an evaluation of complainant's performance dated February 11, 1983, Ms. Casebolt stated that, overall, complainant appeared to be very industrious and eager to do a good job but had difficulty in completing assignments, following instructions, and meeting target completion dates and she was recommending his termination. Subsequently, in a memo to Terence Schnapp, Director of MMHI, complainant requested a meeting with Mr. Schnapp, Ms. Casebolt, Mr. Dokken, and Pickens Winters, Jr., the Affirmative Action/Civil Rights Compliance Officer for the Division of Community Services to discuss Ms. Casebolt's termination recommendation. A meeting was held and Mr. Winters' investigation concluded that he concurred with the decision to terminate complainant's employment "based upon his failure to satisfactorily complete work assignments and to complete assignments on time." In a letter to complainant dated February 24, 1983, Mr. Schnapp advised complainant that his probationary employment was being terminated effective March 2, 1983. A white female was hired to fill the position after complainant's termination.

11. On March 31, 1983, complainant filed a charge of discrimination with the Personnel Commission alleging he was terminated by respondent because of his race, color and/or handicap. On July 2, 1984, one of the Personnel Commission's Equal Rights Officers issued an initial determination

finding no probable cause to believe that complainant was discriminated against on the basis of race, color or handicap in regard to his termination. Complainant filed a timely appeal of this determination. In early September, 1984, complainant retained Attorneys A. Steven Porter and Jacqueline Macaulay to represent him in this matter. Attorney Macaulay represented complainant at the September 19, 1984, prehearing at which both parties agreed to the following issue:

Whether there is probable cause to believe that respondent discriminated against the complainant based on handicap, race and/or color as set forth in his complaint of discrimination and, accordingly, whether the initial determination of "no probable cause" should be affirmed or reversed.

On November 13, 1984, two days before the scheduled hearing, complainant filed a motion/request to amend the complaint to include a charge of discrimination on the basis of sex and gave the following rationale for the motion/request:

This additional basis for complaint is described in complainant's description of the actions complained of, i.e., that his supervisor 'would excuse or attribute her inappropriate behaviors to a lack of experience working with non-degreed professional black men.' However, complainant did not check 'sex' in the enumeration of causes of discrimination on the form. Complainant's attorneys have, in the course of discovery, found support for complainant's inclusion of his sex as a source of discrimination and will present that evidence at the scheduled hearing.

12. Respondent's decision to terminate complainant was based on his unsatisfactory work performance, not his handicap, race, and/or color.

CONCLUSIONS OF LAW

1. This case is properly before the Commission pursuant to §230.45(1)(b), Wis. Stats., and PC4.03(3), Wis. Adm. Code.

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

3. It is within the discretion of the Personnel Commission whether to grant or deny complainant's motion/request to amend the complaint to include the issue of discrimination on the basis of sex in complainant's termination.

4. The Personnel Commission, in its discretion, declines to grant such motion/request.

5. The complainant has the burden to prove that there is probable cause to believe that respondent discriminated against him on the basis of his race, color, and/or handicap in terminating him.

6. The complainant has not sustained his burden.

OPINION

Motion/Request to Amend Complaint

Complainant's motion/request to amend presents two questions: (1) whether the scope of the hearing should be expanded to include the issue of sex discrimination and (2) whether the complainant should be allowed to amend his original complaint to include a charge of sex discrimination.

(1) The Commission obtains its jurisdiction over discrimination complaints pursuant to §230.45(1)(b), Stats., which requires the Commission to "[r]eceive and process complaints of discrimination under §111.375(2)." The latter provision merely indicates that only those discrimination complaints against a state agency as the employer are to be handled by the Commission.

Procedures governing the Commission's equal rights cases are found in Chapter PC 4, Wis. Adm. Code and in §111.39, Stats. The rules and statutes indicate that a hearing can only be held after an initial determination has been made [see Adams v. DNR & DER, Case No. 80-PC-ER-22 (1/8/82)]:

If the department finds probable cause to believe that any discrimination has been or is being committed..., the department shall issue and serve a written notice of hearing... [§111.39(4)(b), Stats.]

This subchapter applies to each agency of the state except that complaints of discrimination ... against the agency as an employer shall be filed with and processed by the personnel commission under §230.45(1)(b). [§111.375(2), Stats.]

When there is an initial determination of no probable cause ...
... the complainant may petition the commission for a hearing on
the issue of probable cause wherein the commission may affirm or
reverse the initial determination. [§PC 4.03(3), WAC].

If, after a determination of probable cause, the commission is
unable to eliminate the alleged discriminatory practice or act
through conciliation, it shall issue and serve a written notice of
hearing. [§PC 4.07(1), WAC]

There are also strong policy considerations preventing a complainant
from unilaterally expanding the scope of the hearing. Allowing a complainant
to completely bypass the investigation stage would both increase the likeli-
hood of unnecessary hearings and decrease the opportunity for conciliation.

In addition, complainant has not advanced any convincing reason for
waiting until 2 days before the scheduled hearing to file his motion/request
to amend. Complainant was personally aware at least as early as the date he
received the initial determination that only charges of discrimination on the
basis of race, color and/or handicap had been investigated. His attorneys
were aware at least as early as the date of the prehearing conference that
sex discrimination was not an issue for hearing. Section 227.07(1), Stats.,
requires that a party to a contested case, such as the matter under consid-
eration here, be given at least 10 day's notice of the issue(s) to be con-
sidered at the hearing. Under the circumstances, to allow the scope of the
hearing to be expanded to include the issue of sex discrimination would not
only be unfair to respondent who would have had inadequate notice that such
issue was to be heard but would also undermine the integrity of the processes
and procedures of the Personnel Commission.

For the reasons outlined above, the Commission restricts the scope of the hearing in this matter to those charges of discrimination for which an initial determination has been issued.

The second question presented by complainant's motion/request is whether complainant should be allowed to amend his discrimination complaint to include a charge of sex discrimination. This is a matter within the discretion of the Commission. In view of the untimeliness of complainant's request/motion, the fact that he is represented by counsel, and the fact that there has been no indication that this allegation of sex discrimination was not known or knowable at the time the original complaint was filed, the Commission declines to permit the amendment of the original complaint to include a charge of sex discrimination.¹

Probable Cause

In McDonnell-Douglas v. Green, 411 U.S. 792 (1973) and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981), the United States Supreme Court developed a framework for analyzing complaints of employment discrimination. In an appeal of a no probable cause determination, a similar

¹The Commission adds the following comments to the proposed decision and order: The record is clear that the complainant's attorney was present at the prehearing conference and stipulated to the issue for hearing. There was no attempt to show cause as to why the amendment was not requested earlier than it was. If the amendment had been granted, the hearing would have had to have been postponed, possibly substantially, since the new allegation of discrimination would have had to have been investigated. Furthermore, there is no basis upon which to relieve complainant of the stipulation as to the issue for hearing. Compare, Nunnelee v. Knoll, Wis. Pers. Bd. No. 75-77 (3/22/76).

analysis is appropriate, although the ultimate burden on the complainant is less. The complainant need not establish that discrimination occurred, but rather, that there is reasonable ground for belief supported by facts or circumstances strong enough in themselves to warrant a prudent person in the belief that discrimination probably has been or is being committed. §PC 4.03(3), Wis. Adm. Code.

In termination cases, such as the instant case, the McDonnell-Douglas analysis requires that complainant establish the existence of a prima facie case of discrimination, i.e., there must be evidence that complainant is a member of a class protected by the Fair Employment Act; that complainant was qualified for the job and performed the job satisfactorily; and that, despite satisfactory performance, the complainant was discharged under circumstances which give rise to an inference of discrimination. The employer may rebut the prima facie case by articulating legitimate, non-discriminatory reasons for its actions. Finally, the complainant may then offer evidence that the employer's stated reasons are a pretext for discrimination.

In this case, the evidence shows that complainant is black and has had medical treatment for chemical abuse and for stress and is, therefore, protected by the provisions of the Fair Employment act on the basis of his race, color, and/or handicap. Respondent has not disputed that, on the basis of his training and experience, complainant was qualified for the Training Officer 1 position at the time the decision was made to hire him.

The issue of whether complainant was satisfactorily performing his duties is one of the key factual issues in this case. The record clearly indicates that complainant consistently failed to meet deadlines for the completion of assignments. Complainant and his supervisor agreed that these

deadlines were realistic and discussed complainant's failure to meet these deadlines frequently during the course of his employment. The assignments were possible to complete since they were completed by other staff after complainant's termination. Completing assignments in a timely fashion is necessary for the satisfactory performance of any job and it must be concluded, therefore, that complainant's work performance as a Training Officer 1 was unsatisfactory.

If complainant's performance had been satisfactory and he had established a prima facie case of employment discrimination, respondent could have rebutted this prima facie case by articulating legitimate, non-discriminatory reasons for complainant's termination. The reasons articulated by respondent for its action were complainant's failure to complete work assignments, follow instructions and meet target completion dates. These are clearly legitimate and non-discriminatory reasons for terminating an employe.

The final step in the McDonnell-Douglas analysis calls for the complainant to offer evidence that the employer's stated reasons are a pretext for discrimination. Complainant alleges in this regard that Ms. Casebolt made statements to him during their discussions of his work performance related to his race and his treatment history. Ms. Casebolt denies having made such statements. Mr. Dokken, whom complainant frequently consulted regarding the problems he was experiencing with his job and with Ms. Casebolt, recalled complainant felt these problems were related to his race. Mr. Dokken does not recall, however, that complainant told him that Ms. Casebolt had made any statements regarding his race. Mr. Dokken also testified that, if complainant had alleged that Ms. Casebolt had made such statements, Mr. Dokken probably would have discussed this with her and he does not recall any such

discussion. Mr. Dokken does not recall complainant ever mentioning to him his treatment history. Complainant offers no other evidence to substantiate the above allegations and the Commission finds that Ms. Casebolt did not make statements to complainant regarding his race or treatment history.

Complainant further implies that Ms. Casebolt's use of loud and profane language during their discussions demonstrates pretext. The Commission does not offer an opinion as to whether this is an effective management tool but simply notes that Ms. Casebolt used this approach in dealing with other white employees whom she supervises. The record does not indicate whether any of these employees is handicapped.

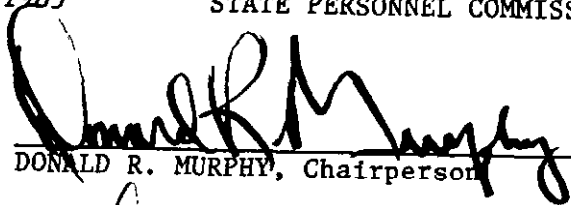
Finally, complainant implies that Ms. Casebolt's failure to acknowledge that the primary focus of complainant's position was forensics training demonstrates pretext. The record does not indicate that complainant's position was created or structured to meet training needs occasioned by the closing of Central State hospital and the attendant influx of forensic patients to MMHI. The record does indicate that the position complainant filled was vacant as a result of a retirement and the position description which complainant signed indicates that 80% of the position's time would be devoted to coordinating specific training programs for MMHI staff across disciplinary lines. It appears that complainant had a strong interest in forensics and may have neglected his other assignments to work in the forensics area. Clearly, however, Ms. Casebolt had the authority to assign work to complainant and to assign priorities to these assignments and her exercise of this authority, regardless of complainant's interest in a particular area, does not demonstrate pretext.

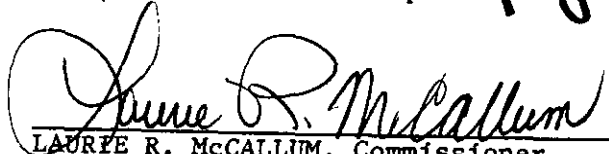
ORDER

The Motion/Request to Amend this Complaint is denied. This complaint is dismissed.

Dated: Jan. 30, 1985

STATE PERSONNEL COMMISSION


DONALD R. MURPHY, Chairperson


LAURIE R. McCALLUM, Commissioner


DENNIS P. MCGILLIGAN, Commissioner

LRM:ers
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