

STATE OF WISCONSIN

PERSONNEL COMMISSION

* * * * *
 DAVID BRUMMOND *
 Complainant, *
 v. *
 Chancellor, UNIVERSITY OF *
 WISCONSIN - MADISON *
 Respondent. *
 Case Nos. 84-0185-PC-ER *
 85-0031-PC-ER *
 * * * * *

ORDER


After consulting with the Hearing Examiner and considering the record in this matter, the Commission adopts the Proposed Decision and Order in full, and replaces the third full paragraph on page 12 of the decision with the following language in order to further explain the rationale for dismissing this complaint:

Complainant has met the second element of his case, at least in part. The record supports a finding that respondent terminated complainant for misconduct including improper work performance and threatening statements/gestures to co-workers and non-employees. The record indicates that this behavior may have been related to complainant's organic mental disorder. In this context, complainant's termination is tied to complainant's handicap. However, there is no discrimination herein pursuant to Sec. 111.34(2)(a) Stats. since the record indicates that complainant's handicap is reasonably related to his ability to adequately undertake his job-related responsibilities, and as noted below, respondent made an effort to accommodate his handicap.

The record also supports a finding that respondent terminated complainant for making improper statements to/about women and children that he came into contact with during work hours and unexcused absences. There is no persuasive evidence in the record that this misconduct was caused by complainant's handicap. The respondent used progressive discipline in an attempt to correct complainant's behavior to avoid discharging him but without success. The Commission agrees with respondent's assertion that this behavior constituted misconduct meriting discipline and can find no discriminatory motive relating to respondent's reliance on these factors for termination.

Dated: April 1, 1987

STATE PERSONNEL COMMISSION


DENNIS P. MCGILLIGAN, Chairperson

CHRIS2/1
DPM:baj


LAURIE R. MCCALLUM, Commissioner

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PROPOSED
 DECISION
 AND
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NATURE OF THE CASE

On November 3, 1984, complainant filed a charge of discrimination with the Personnel Commission alleging respondent discriminated against him on the basis of handicap and arrest record in regard to the terms and conditions of his employment in violation of the Fair Employment Act, Subch. II, Ch. 111, Wis. Stats. On February 28, 1985, complainant filed a second complaint alleging that he was discriminated against on the same bases as the first charge in regard to his discharge on November 27, 1984, as well as on the basis of retaliation for filing the earlier complaint. On March 10, 1986, the Commission issued an Initial Determination of No Probable Cause to believe that respondent discriminated against complainant on the basis of handicap, arrest record and/or retaliation in regard to the terms and conditions of his employment and to his discharge. Complainant filed a timely appeal from said determination. A prehearing conference was held on July 1, 1986, before Dennis P. McGilligan, Chairperson, at which time the parties agreed to the following issues:

1. Is there Probable Cause to believe that complainant was discriminated against on the basis of arrest record in regard to conditions of his employment or his discharge?
2. Is there Probable Cause to believe that complainant was discriminated against on the basis of retaliation with respect to his discharge.
3. Is there Probable Cause to believe that complainant was discriminated against on the basis of his handicap in regard to the terms and conditions of his employment and to his discharge.

The hearing was originally scheduled for August 26, 1986. However, the parties later agreed to waive hearing and to submit the case to the hearing examiner through the transcripts of the arbitration hearing, the unemployment compensation hearing, the exhibits introduced at those hearings, the decisions written by the arbitrator, the unemployment appeal tribunal and the Labor Industry Review Commission and the deposition of Mr. William Lamph. Complainant waived his right to file a brief. Respondent filed a brief with the Commission on January 26, 1987.

FINDINGS OF FACT

1. Complainant, David Brummond, began his employment with respondent, UW-Madison on May 2, 1983, as a Building Maintenance Helper 2 (BMH 2). Complainant performed janitorial duties as a member of a work crew from 5:00 p.m. to 1:30 a.m. Monday through Friday.
2. Prior to complainant's hire by respondent, he had been employed by the University of Wisconsin - Parkside as a BMH 2 but lost his job due to his arrest and incarceration in the Kenosha County Jail for a period of about four months. Although he was acquitted, complainant was unable to be re-employed by Parkside because there were no vacancies available at the time. At the time of complainant's hire, respondent was aware he had been incarcerated for a period of time.

3. Complainant has an organic mental disorder as a result of a brain injury received in a motor vehicle accident in 1975. He suffers from severe anxiety.

4. In November 1983 complainant passed probation after improving his performance throughout the probationary period.

5. At a meeting convened on January 30, 1984, complainant was informed by his supervisors that his co-workers had made several complaints about complainant's behavior and his work performance. In a follow-up letter dated February 1, 1984, John Erickson, Supervisor of Operations, stated:

Although individually these incidents are not particularly significant, they begin to add up to an intolerable situation. Some of the complaints involve rather intangible actions toward crew members such as they way you clench your fist or glare at them when you are mad. Other complaints are more concrete such as when other crew members are required to help complete your assigned work run because you didn't properly pace yourself.

6. In early February, 1984, complainant was reassigned to a different crew and transferred to the McArdle Building as a result of a complaint from a female student in Noland Hall expressing a fear of complainant. Neither the reassignment nor the transfer was disciplinary in nature. However, in October of 1983, the same female student had filed a complaint regarding complainant's behavior with university security who made a report of the incident and notified complainant's supervisors. Complainant's supervisor discussed the incident with him. Complainant was thereupon restricted to a different building but remained on the same crew.

7. On February 23, 1984, complainant met with Donald Sprang, Personnel Manager, and John Erickson to explain that he had a handicap that affected his ability to schedule time. Complainant was asked to provide a

current medical evaluation with specific recommendations for accommodations needed to permit him to perform custodial work.

8. In a meeting on March 15, 1984, precipitated by an unexcused absence on March 13, 1984, complainant's work performance and behavior were again addressed. In a written reprimand summarizing this meeting dated March 19, 1984, Erickson stated the following:

Mr. Ubich [complainant's Union steward] asked for specific suggestions on what you should do to make your behavior more acceptable. First, you need to control your emotions and actions when experiencing what you feel is a stressful situation. Although you profess to be a non-violent person, your reaction to such situations creates a fearful atmosphere for those around you. Secondly, you must stifle your talking and stop debating everything over and over again. Do more listening and less talking and accept the guidance and directions of your supervisors. Thirdly, get a current assessment of your mental condition with written specific suggestions for necessary accommodations we could make to enable you to do your job. Fourthly, do not abandon your job whenever the situation is not to your liking. Stay on the job and try to cope with the problem rather than running away from it.

We want to make it clear to you that we will not tolerate behavior that creates a hostile working environment. Failure to control your behavior on the job site in a recognized acceptable manner will result in disciplinary action being taken including termination.

9. On April 23, 1984, complainant, Donald Sprang, Dr. Ned H. Kalin, Assistant Professor, School of Psychiatry (who had examined complainant), Department of Vocational Rehabilitation counselors, and others met to discuss possible means of accommodating complainant's handicap. Dr. Kalin stated that complainant suffered severe anxiety and the primary need was to relieve as much stress on complainant as possible. Dr. Kalin further stated that complainant had difficulty adjusting to new areas. The discussion involved how to structure complainant's work assignments to achieve that accommodation. A DVR counselor offered complainant the assistance of a job coach. A job coach would work with complainant with the intent of

assisting him in his adaptation to his job. Complainant rejected the job coach offer fearing that he would be viewed as having a babysitter. The Physical Plant agreed not to rotate complainant's job tasks as was done for other employes and to create a job that would minimize changes and be limited in scope.

10. On May 2, 1984, a two-month medical leave without pay was authorized for complainant. The reason specified by complainant was "receiving medical treatment."

11. On July 2, 1984 complainant returned to work. On July 4, 1984, complainant accused a fellow worker of spreading false rumors about him. His supervisor brought the two workers together that same night to discuss the matter. The co-worker denied he had done what complainant said but was warned about doing so in the future.

12. On July 11, 1984, complainant, at his request, met with Frank Rice, Director, Physical Plant. Complainant informed Rice that he wanted to seek other employment and asked that he not be given a bad recommendation and that he wanted a three month leave of absence. Rice granted these requests. Complainant was permitted to return to work when a doctor certified he was ready to do so.

13. On September 4, 1984, Dr. Aris Alexander requested that complainant be returned to work on a part-time basis. Complainant returned to work on or about September 5, 1984 on a half-time basis.

14. By letter dated October 1, 1984, respondent informed complainant that he was being suspended for one day without pay due to an incident where complainant verbally attacked a co-worker. The co-worker had reported an incident where complainant had made a statement to him in the presence of several children suggesting they give the children a urinal

block to suck on. (A urinal block is the disinfectant/deodorant with the shape of a small, pastel hockey puck found in restroom urinals). A meeting was scheduled between complainant, the co-worker, complainant's immediate supervisor (Richard Nickels), and a union steward. Complainant, however, refused to participate in the meeting. Nevertheless, shortly thereafter, he burst into the room where the meeting was being held and while in a very agitated state made several threatening gestures and shouted an obscenity at the co-worker. In the aforesaid letter complainant was warned "that further work rule violations will result in more severe disciplinary action which may include a longer suspension without pay or termination of your employment."

15. By letter dated October 4, 1984, complainant was informed of a three-day suspension without pay for threatening behavior toward his supervisor Richard Nickels. This incident followed complainant's return to work on October 2, 1984 whereupon complainant asked Nickels whether the co-worker also had been disciplined. Upon learning that the co-worker had not been disciplined, complainant became angry, swore at Nickels, balled his fist and threatened to hit him. Complainant received another warning that further work rule violations could result in a longer suspension or discharge.

16. Complainant received another five day disciplinary suspension without pay on November 6, 1984 for violating a work rule requiring timely notification of absence or tardiness.

17. On November 15, 1984, the complainant encountered a person he did not recognize who was requesting entrance to the building. Complainant inquired of three crew members who were working in an adjoining room if any of them recognized the person at the door. When none of those crew members responded to his question, he became upset and called the co-worker,

who had been involved in the urinal block incident, "Porkey". The use of this name renewed a dispute between him and that co-worker that had begun during the winter months of 1984. This name-calling then resulted in another meeting with his supervisor after which complainant was told to take the rest of the work shift off because of a threat he made during this meeting against the co-worker.

18. On the same date sometime after the aforesaid incident, complainant encountered a graduate student, William Lamph, in an elevator at McArdle Laboratory. Lamph entered the elevator that complainant had previously boarded. While sharing the elevator with complainant, complainant appeared very agitated, stared intently at Lamph and clenched his fists. Lamph expressed fear for his safety which was magnified because of the radioactive materials he was carrying. Lamph reported this incident to complainant's supervisors and filed a written statement regarding same.

19. Complainant was discharged in a letter to complainant from Donald Sprang on December 4, 1984, citing the above incident as precipitating his discharge.

20. Complainant did not get along with with some of his co-workers. They cited his often crude sexual references about women as well as his difficulty in completing his work assignments resulting in his co-workers having to assist him. They also did not like his threatening behavior.

21. There is no record nor any allegation that complainant ever physically struck or assaulted anyone while employed by respondent.

22. There was no evidence that complainant's co-workers were informed by any of respondent's supervisory personnel about complainant's arrest and incarceration. No co-worker expressed any knowledge of the charges brought against complainant following his arrest.

CONCLUSIONS OF LAW

1. The Personnel Commission has jurisdiction over this discrimination complaint pursuant to §230.45(1)(b), Stats. and §PC 4.03(3), Wis. Adm. Code.
2. The respondent is an employer within the meaning of §111.32(3), Stats.
3. The complainant has the burden of proving that there is probable cause to believe that respondent discriminated against him on the basis of arrest record in regard to conditions of employment or his discharge.
4. The complainant has the burden of proving that there is probable cause to believe that respondent discriminated against him on the basis of retaliation with respect to his discharge.
5. The complainant has the burden of proving that there is probable cause to believe that respondent discriminated against him on the basis of handicap in regard to the terms and conditions of his employment and to his discharge.
6. The complainant has not satisfied his burden as to any of these matters.

DECISION

Section 4.03(2), Wis. Adm. Code defines probable cause as follows:

(2) Probable Cause Defined. Probable cause exists when 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.

In a probable cause proceeding such as the one before us, the evidentiary standard applied is not as rigorous as that which is required at a hearing on the merits. Nonetheless, it is useful to use the McDonnell-Douglas format in analyzing the record before the Commission in this complaint. In this regard the Commission notes that under the Wisconsin Fair Employment

Act, the initial burden of proof is on the complainant to show a prima facie case of discrimination. The employer then has the burden of demonstrating a non-discriminatory reason for the actions taken which the complainant may, in turn, attempt to show was in fact a pretext for discrimination. See McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Dept. of Community Affairs v. Burdine, 540 U.S. 248 (1981).

Arrest Record

In the case of a discharge, the elements of a prima facie case are that the complainant 1) is a member of a class protected by the Fair Employment Act, 2) was qualified for the job and performed the job satisfactorily, and 3) despite satisfactory performance, the complainant was discharged under circumstances which give rise to an inference of discrimination.

Complainant meets the first element. Complainant has an arrest record and respondent was aware of it. Secondly, the evidence shows that complainant was qualified for the job and performed in a generally satisfactory manner, at least during his six month probationary period. However, complainant's job performance during the period of time from his successful completion of probation to his termination was unsatisfactory. In this regard the record indicates that complainant did not complete his assigned work, was verbally abusive and threatening to both co-workers and supervisors, was threatening toward and made off-color remarks about non-students and children and had unexcused absences/tardiness. Therefore, complainant does not meet the second element of this analysis.

The next element of complainant's prima facie case is to demonstrate that he was discharged under circumstances which give rise to an inference of discrimination. No reasonable inference of discrimination can be drawn

from the record. Respondent's knowledge of complainant's arrest record was known prior to the hire. Contrary to complainant's assertions there is no persuasive evidence that complainant was treated any differently because of whatever legal problems he had. Complainant has failed to establish any reasonable connection between his arrest record to any condition of employment or his discharge. Based on this evidence, the Commission finds it reasonable to conclude that complainant was not terminated under circumstances which give rise to an inference of discrimination.

Assuming arguendo that complainant established a prima facie case of discrimination, complainant's case still must fail. As noted above, respondent has demonstrated a non-discriminatory reason for terminating complainant -- unsatisfactory work performance. Complainant may, in turn, attempt to show this reason was in fact a pretext for discrimination. Complainant, in fact, attempted to demonstrate this without success. The record, contrary to complainant's assertions, indicated respondent did not discriminate against complainant on the basis of arrest record in regard to conditions of his employment or in discharging him from the position of Building Maintenance Helper 2 at the UW-Madison.

Based on the aforesaid definition of Probable Cause, and all of the foregoing, the Commission finds it reasonable to conclude that there is No Probable Cause to believe that complainant was discharged from his employment on the basis of his arrest record and the Initial Determination finding same is affirmed.

Handicap

As noted above, in a probable cause proceeding such as the one before us, the evidentiary standard applied is not as rigorous as that which is required at a hearing on the merits. Nonetheless, it is useful to use the legal standard enunciated by the Court in Brown County v. LIRC, 124 Wis. 2d

560, 369, N.W. 2d 735 (1985) in footnote 5 at 564, in analyzing the record before the Commission in this complaint. In said footnote the Court stated that in a handicap discrimination case arising under the Wisconsin Fair Employment Act there are three essential elements of proof:

... First, there must be proof that the complainant is handicapped within the meaning of the Fair Employment Act. *Boynton Cab. Co. v. ILHR Dept.*, 96 Wis. 2d 396, 406, 291 N.W.2d 850 (1980); *Samens v. LIRC*, 117 Wis. 2d 646, 658, 345 N.W.2d 432 (1984). The burden of proving a handicap is on the complainant. *American Motors Corp. v. LIRC*, 119 Wis. 2d 706, 710, 350 N.W.2d 120 (1984). Second, the complainant must establish that the employer's discrimination was based on the handicap. *Boynton Cab*, supra; *Samens*, supra. The burden then shifts to the employer to establish, if it can, that its alleged discrimination was permissible under sec. 111.32(5)(f), Stats., 1979-80, which allows an employer to refuse to hire a handicapped applicant if "such handicap is reasonably related to the individual's ability adequately to undertake the job-related responsibilities of that individual's employment...." *Boynton Cab*, supra; *Samens*, supra; *American Motors Corp.*, supra.

Complainant's Handicap

The initial question before the Commission is whether the complainant is handicapped. Section 111.32(8), Stats. 1983-84, provides:

- (8) "Handicapped individual" means an individual who:
- (a) Has a physical or mental impairment which makes achievement unusually difficult or limits the capacity to work;
 - (b) Has a record of such an impairment; or
 - (c) Is perceived as having such an impairment.

Respondent argues that the complainant failed to show he is handicapped. Complainant takes the opposite position.

The record supports a finding that complainant is handicapped. In this regard the Commission points out that the record indicates that complainant suffers from an organic mental disorder; that this disorder created stress and anxiety which made it difficult for him to perform his job; that respondent attempted to accommodate complainant's handicap by

giving him leave without pay, employing him on a part-time basis and assigning him work in a way so as to minimize stress and anxiety.

In view of the above, and the aforesaid statutory definition of a "handicapped individual" the Commission finds it reasonable to conclude that complainant has met the first element of his case by establishing that he suffered from an organic mental disorder and that this condition limited his capacity to work at the University.

Employer Discrimination Based on the Handicap

Complainant also bears the burden of establishing that respondent's action in terminating his employment was based on complainant's handicap.

Brown County, supra.

Complainant has failed to meet the second element of his case. Respondent argues that complainant's behavior constituted misconduct meriting discipline. The Commission agrees. The record supports a finding that respondent had cause for terminating complainant. In this regard the record indicates that complainant did not perform his work properly; made threatening statements/gestures to co-workers and non-employees; made improper statements to/about women and children that he came into contact during work hours and had unexcused absences. The respondent used progressive discipline in an attempt to correct complainant's behavior to avoid discharging him but without success. The record contains no persuasive evidence that respondent had a discriminatory motive in discharging the complainant.

Complainant also argues that respondent failed to accommodate his handicap. However, the record does not support a finding regarding same. To the contrary, the record indicates that respondent attempted to accommodate complainant's handicap in a number of different ways throughout complainant's period of employment.

Based on all of the above, the Commission finds that there is No Probable Cause to believe that complainant was discriminated against on the basis of his handicap with respect to the terms and conditions of his employment and to his discharge.

Retaliation

To establish a prima facie case in the retaliation context, there must be evidence that 1) the complainant participated in a protected activity and the alleged retaliator was aware of that participation, 2) there was an adverse employment action, and 3) there is a causal connection between the first two elements. A "causal connection" is shown if there is evidence that a retaliatory motive played a part in the adverse employment action. See Jacobson v. DILHR, 79-28-PC, (4/10/81) at pp. 17-18, and Smith v. University of Wisconsin-Madison, 79-PC-ER-95, (6/25/82) at p. 5.

Although complainant did file a complaint shortly before his termination, there is no evidence that this played a part in the decision to discharge him. Nor did complainant introduce any persuasive evidence that respondent took any other adverse action against complainant in the retaliation context. Therefore, the Commission rejects this claim by complainant.

Based on all of the foregoing, the Commission finds that the answer to the issues as stipulated to by the parties is NO, there is no probable cause to believe respondent discriminated against the complainant on the basis of arrest record or handicap in regard to the terms and conditions of his employment or his discharge. Nor is there probable cause to believe that complainant was discriminated against on the basis of retaliation with respect to his discharge.

ORDER

The initial determination of "no probable cause" is affirmed and this case is dismissed.

Dated: _____, 1987 STATE PERSONNEL COMMISSION

DENNIS P. MCGILLIGAN, Chairperson

DPM:jmf
JMF01/2

DONALD R. MURPHY, Commissioner

LAURIE R. McCALLUM, Commissioner

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