

STATE OF WISCONSIN

PERSONNEL COMMISSION

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 *
 LOIS BENDER, *
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 Complainant, *
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 v. *
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 Secretary, DEPARTMENT OF *
 REVENUE, *
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 Respondent. *
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 Case No. 87-0032-PC-ER *
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DECISION
 AND
 ORDER

The complainant is before the Commission on an appeal of an Initial Determination which states:

There is No Probable Cause to believe complainant was discriminated against on the basis of sex. There is No Probable Cause to believe complainant was retaliated against for occupational safety and health reporting.

A hearing was held on complainant's claims, testimony was given, exhibits were received into evidence and the parties submitted post-hearing briefs. The following findings of fact, conclusions of law, decision and order are based upon the record made at the hearing. To the extent that any of the decision might constitute findings of fact, it is adopted as such.

FINDINGS OF FACT

1. Complainant, Lois Bender, was hired by respondent, Department of Revenue (DOR), as a shipping and mailing clerk for a half-time position on October 13, 1986. Afterwards, on November 11, 1986, the position was changed to full-time.

2. As a new employe, complainant was required to serve a six-month period of probation. During November, 1986, complainant was trained on the

mail run by Dale Hagen, a co-worker who had prior experience training new male and female employes.

3. Employees on the mail run make scheduled deliveries and pick-up of mail at designated places throughout the Department of Revenue (DOR). The average time for a new employe to learn the mail run is two weeks.

4. Complainant was trained on the mail run between four and five weeks. She had difficulty keeping on schedule and meeting mail delivery deadlines.

5. From November 24 to December 5, 1986, complainant was assigned to the mail table for training with Paul Pellitterri, who for several years had trained new male and female employes at that position. All outgoing mail is received at the mail table. Employes stationed there are responsible for complying with postal and freight regulations, determining the type and amount of postage, and determining the proper postal service to use for all DOR outgoing mail.

6. Complainant's work performance at the mail table was below average. She had difficulty identifying first- and third-class mail, causing her to apply the incorrect amount of postage. She, also, had difficulty charging metered mail to the proper division or bureau.

7. On December 5, 1986, Ms. Carol Kaiser, complainant's supervisor, met with complainant to discuss her work performance. Complainant was told she would have to improve. Complainant told her supervisor that the men who trained her made her nervous with their derisive remarks and crude language. She said Pellitterri told her that she, "... could screw up a wet dream."

8. Against complainant's wishes, Kaiser confronted Pelliterri with complainant's complaint of harassment and told him such behavior would have to stop.

9. After the December 5, 1986, meeting, complainant was reassigned from the mail table to the machine-labeling room, where she worked on the labeling machine with several other employes, including a Mr. Paul Clampitt.

10. On one occasion, a female co-worker of complainant's reported to Ms. Kaiser that Clampitt was running the machine at higher speeds, causing complainant difficulty in keeping up. Ms. Kaiser immediately called Clampitt into the office and told him to cease such behavior. The incident was written up and placed in Clampitt's personnel file. Complainant performed fairly well on the labeling machine.

11. On January 6, 1987, Ms. Kaiser talked with complainant about her work performance during her first three months of employment with DOR. Ms. Kaiser told complainant she needed to complete her training on the labeling machine, be retrained on the mail run and mail table, and improve her work performance.

12. Before Ms. Kaiser went on sick leave on January 7, 1987, she instructed John Hanson to retrain complainant on the mail run. And on January 21, 1987, complainant began her retraining on the mail run as scheduled.

13. Ms. Kaiser, upon her return to work on January 26, 1987, met with complainant. She continued complainant on the mail run, but on her own and made Hanson available for answering questions.

14. During this same period, Ms. Kaiser talked with her supervisor, Michael Banks, about her concern that complainant would not pass probation. Banks considered the possibility of transferring complainant to a file

clerk position, but new legislation, which was to become effective the next month, elevated the pay range of file clerks and made it impossible to transfer complainant to a clerk position.

15. In January 1987, Ms. Kaiser began personally monitoring complainant's work on the mail run. She saw improvements in some aspects of complainant's work, but she believed complainant continued to fail to schedule work in terms of importance and to get her work completed.

16. During a meeting with Ms. Kaiser on February 6, 1987, complainant reported that a piece of inter-D mail was repeatedly being returned for sortment and she suspected "sabotage" by a co-worker. Complainant still was having difficulties completing her work on the mail run.

17. On February 10, 1987, complainant was injured, while working on the loading dock, when an overhead door came down and hit her on the head. Except for working a few hours February 16, 1987, complainant remained off work until March 2, 1987. Complainant filed an accident report on the day of the accident.

18. On February 16, 1987, when complainant returned to work, Mr. Banks asked her about the accident. She gave him the same substantive information provided in the accident report.

19. During this same period, early February, 1987, Ms. Kaiser decided that complainant in all probability would not pass probation. She consulted about it with her supervisor, Mr. Banks, and the DOR Affirmative Action Officer.

20. On March 17, 1987, Ms. Kaiser and Mr. Banks told complainant she would not pass probation and they had advised the bureau director to terminate her.

21. On March 23, 1987, complainant was notified by letter that she was terminated, effective April 3, 1987.

22. On March 23, 1987, Mr. Bruce Brozek, chief of respondent's Employment Relations section, received a letter from complainant which provided information for her Worker's Compensation claims. In that same letter, she asked about an investigation of her accident.

23. On the same day, March 23rd, complainant wrote Ms. Kaiser accusing a co-worker of causing her accident.

24. On March 26, 1987, a Department of Administration Safety Officer began conducting an investigation of complainant's accident. He was assisted by a DOA staff person and a union representative.

25. On April 13, 1987, the Safety Officer, in a written report, stated he found no evidence of wrongdoing by the accused co-worker or any malfunction of the overhead door. He said the normal procedure used by most drivers when exiting the building was "very interesting" and recommended reviewing this procedure with complainant.

26. Complainant presented no evidence which would cause the Commission to make a finding contrary to the Safety Officer's accident report.

CONCLUSIONS OF LAW

1. The Personnel Commission has jurisdiction over complainant's claim of discrimination pursuant to §§230.45(1)(b) and 111.375(2), Wis. Stats.

2. Complainant has the burden of proving by a preponderance of evidence there is probable cause to believe respondent discriminated against her on the basis of sex and retaliated against her for reporting an occupational safety and health hazard by terminating her.

3. Complainant has failed to meet her burden of proof. There is no probable cause to believe complainant was discriminated against by respondent on the basis of sex and/or retaliated against by respondent for reporting an occupational safety or health hazard.

OPINION

The complainant alleges that she was discriminated against by respondent because of her sex. Within that context, she claims that she was subjected to sexual harassment, treated differently in regard to employment training, and terminated for reporting an unsafe work condition.

While this is not a hiring discrimination case, with respect to complainant's allegation of disparate treatment, the analytical process expressed in McDonnell Douglas¹ is applicable.

With respect to the allegation of disparate treatment, complainant, a female, presented evidence demonstrating she was qualified for the Shipping and Mailing Clerk 1 position, and, later, was rejected, but failed to prove respondent's reasons for rejecting her were pretextual.

On this point, complainant testified that male employees made bets on her ability to lift heavy mail parcels. She also testified that a male employee increased the speed of a labeling machine, making it difficult for her to keep up with her work. Yet another male lead worker told her she would never make probation. However, complainant failed to prove these incidents occurred because of her sex. No evidence was presented showing that new employees, who were male, did not receive similar treatment.

In contrast, respondent presented several female witnesses, trained by the same lead workers as complainant, who passed probation. They

¹ McDonnell Douglas Corp. v. Green, 411 U.S. 792, 5 FEP Cases (1973)

acknowledged some "teasing" took place but testified that such behavior was neither hostile nor malicious. One witness testified that male employees cautioned her against lifting heavy mail parcels and were willing to assist her. No evidence was presented suggesting women were trained differently from men (or that complainant was trained differently than other employees, male or female). We can only conclude complainant was not treated differently because of her sex.

In Zabkowitz v. West Bend Co., 589 F. Supp. 70, 38 FEP Cases 610 (1984), the court held: In order to prevail on a Title VII claim based on sexual harassment by co-workers, a plaintiff must show that (1) she is a member of a protected class, (2) she was subjected to unwelcome verbal or physical conduct of a sexual nature, (3) but for her sex, she would not have been subjected to the sexual conduct, (4) the sexual conduct was sufficiently severe or pervasive that it unnecessarily interfered with her work performance or created an intimidating, hostile or offensive working environment, and (5) the employer knew or should have known of the harassment but failed to take immediate and appropriate corrective action. Also, the court held: The elements of a sexual harassment claim under Title VII are also the elements of a similar claim under the Wisconsin Fair Employment Act, Wis. Stats. §§111.32(13) and 111.366.

While it is clear complainant belongs to a protected group as defined in the Wisconsin Fair Employment Act (FEA), it is the belief of the Commission that complainant failed to present evidence sufficient to meet the remaining tests of sexual harassment. Complainant was the subject of some harassment but most of it was gender neutral. Complainant's testimony about bets being made on her ability to lift heavy mail parcels, a labeling

machine being run too fast for her to keep up and pieces of mail being repeatedly returned to her station, are gender-neutral incidents.

Complainant also testified that on at least two occasions demeaning sexual comments were made in her presence. These incidents have elements of sexual harassment.

With one exception, female witnesses testified that they were trained by the same persons as complainant and never felt harassed. The one female witness who testified about being sexually harassed said, in 1981 a male employe -- who trained complainant in 1986 -- with two others began using filthy language degrading women, as she entered the mailroom to retrieve some mail. After her husband came to her work place the following day and confronted the offender, the witness reported the incident to her supervisor. Witnesses, both male and female, also testified that swearing, telling jokes and talking about sex was common to both genders. This testimony does not appear to prove that complainant was subjected to continuous sexual harassment or to a sexually hostile or offensive environment.

If complainant had established that she was the subject of continuous sexual harassment, it is clear she failed to establish that respondent, upon notice of same, failed to take immediate action. Contrary to complainant's assertions, the clear evidence shows that Ms. Kaiser, the unit supervisor, when told by complainant of instances of being subjected to improper conduct, immediately confronted the accused offenders and directed them to stop such conduct. Kaiser also placed complainant at a new work station and told her she would be retrained by a different person.

Complainant was, in fact, returned to the mail run, a former work station, for retraining by a different lead worker, but she still had

trouble maintaining the mail run schedule. Complainant never again complained to Ms. Kaiser about the conduct of her current or former trainers.

The complainant also alleges that she was retaliated against -- discharged by respondent because she requested an investigation, after she was hit on the head by an overhead door on the loading dock. Under Wisconsin's occupational safety and health law, §.101.055(8)(a), Stats., a state employe cannot be discharged for filing a request with the Department of Industry, Labor and Human Relations (DILHR), initiating or causing the initiation of an action involving occupational safety or health.

The evidence on the question of retaliation does not support complainant's allegation. It is doubtful complainant established she engaged in protected activity described in §.101.055(8)(a), Stats., before she was terminated. However, it is clear complainant failed to establish that respondent's decision to terminate her was motivated by retaliation.

On February 10, 1984, complainant completed a required accident form after returning to work from treatment of her injury suffered earlier that day. In response to the question, what can be done to prevent other accidents of this nature, complainant wrote: "Find out what's wrong with the garage door and fix it." Mr. Banks, who was not there at the time of the accident, began investigating upon his return the following day. He checked the operation of overhead doors and found no malfunctions. Complainant next returned to work, for a short period of time, February 16, 1987. Mr. Banks told complainant about his investigation and asked her to tell him about the accident. Complainant essentially repeated the account of the accident as submitted on the accident report form. A week after, complainant was told of her impending termination. On March 23, 1987, respondent received a letter from complainant inquiring about an

investigation of her accident. On another piece of correspondence to respondent received the same day, in a post script, complainant said her mind had cleared, she knew exactly what happened and who was involved. Complainant never requested DILHR to investigate her accident, nor did she request respondent to investigate the accident, outside the required routine reporting and investigating channel, until after she was informed that she was going to be terminated.

If, arguendo, complainant established that she requested or initiated an investigation of her accident prior to notification of her termination, the evidence shows that respondent's approach toward complainant was consistent throughout her probationary period.

On January 6, 1987, at complainant's three-month evaluation meeting, Ms. Kaiser informed complainant that her work performance would have to improve. Also in January, Mr. Banks investigated the possibility of transferring complainant to a file clerk position. On February 6, 1987, after complainant was retrained on the mail run, Ms. Kaiser acknowledged, in her notes, that complainant continued to have trouble establishing priorities and completing her work. It was clear to Ms. Kaiser that at complainant's current job learning rate, she would not master tasks to the level necessary to pass probation nor would she complete training within the probationary period. Towards the end of February, Ms. Kaiser decided that complainant would not pass probation. On March 4, 1987, Ms. Kaiser wrote her supervisor, Mr. Banks, recommending complainant's termination. From Mr. Banks, the recommendation to terminate complainant moved up through the supervising ranks to the division chief. On March 17, 1987, Ms. Kaiser and Mr. Banks told complainant she would not pass probation. The following day, March 18, 1987, the division administrator signed

complainant's letter of termination, effective April 3, 1987. On March 23, complainant was given the letter of termination by her supervisor.


It is the Commission's belief that complainant did suffer isolated incidents of sexual harassment. However, in each case, respondent, upon notice of such conduct, took immediate action to remedy the matter. The remedy took the form of confronting and reprimanding the offending party, placing complainant in another work environment, providing new team leaders for complainant and retraining complainant. The evidence clearly establishes that complainant was not subjected to continuous sexual harassment which caused her to fail probation. The evidence also clearly establishes that complainant was terminated when respondent concluded complainant could not master the necessary job skills within the probationary period.

The Commission notes that respondent presented considerable evidence for the purpose of showing that complainant's appeal was motivated solely by an attempt to continue her employment with respondent. In that connection, respondent offered Respondent's Exhibit 23, an Initial Determination (ID), Re: Brian Fliehr v. DOA, Case No. 85-0155-PC-ER, and the presiding hearing examiner reserved ruling on it. The Commission rules that this document should not be admitted into evidence since it did not tend to prove or disprove the issue involved.

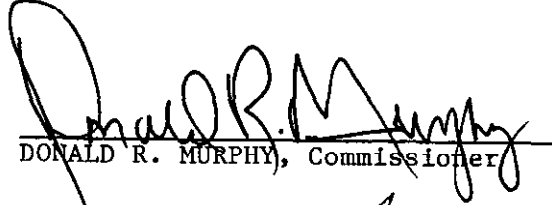
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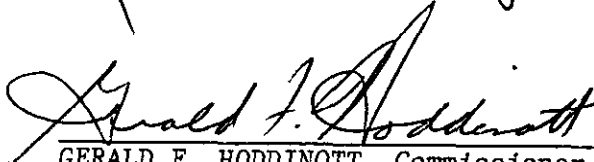
Complainant's claims of discrimination and retaliation against her by respondent are dismissed.

Dated: August 24, 1989 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

DRM:rcr
RCR01/4


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