



5. On January 13, 1995, complainant left a note in Rozier's office mailbox which included her home phone number and the following message: "Are you married? Are you in a relationship? If no, do you want this pussy?" (Respondent's Exhibit 1).

6. Rozier was stunned by this note, and after discussing the matter with a coworker, he reported it to management.

7. On January 17, 1995, complainant called Rozier at home. He told her not to call him again, hung up, and had his home phone number changed.

8. On January 5, 1995, complainant was acting as receptionist. She called Sandra Loncaric, a white female agent, who was interviewing a client with whom complainant was familiar. Complainant referred to the client in profane and derogatory language. Subsequently, after complainant had been counseled about this incident by both Loncaric and complainant's supervisor (Suzanne Schmitt, white female), she again referred to the client in a profane and derogatory manner to Loncaric.

9. On January 18, 1995, Loncaric inquired of complainant's supervisor about the status of a revocation summary complainant had had for typing for about three days. Later that day, complainant walked into Loncaric's office, threw the summary on her desk and told her that in the future she should come directly to her with such concerns, rather than going through her supervisor. When Loncaric said that was not how it was done, complainant said "That's a crock of shit" or words to that effect. Later that day, complainant said to Loncaric as they passed in the hall "stuck up and goddamn stupid," or words to that effect. Complainant also made derogatory gestures and noises to Loncaric that day.

10. On January 19, 1995, complainant called Leslie Lauersdorf (a white female Program Assistant) and said "Bitch, your days are numbered", or words to that effect. Earlier that day, complainant's supervisor (Schmitt) had told complainant not to have further contact with Rozier and to refrain from abusive contacts with other staff. Some weeks before this incident, complainant had asked Lauersdorf for information about Rozier's personal life, and when Lauersdorf refused to tell her whether Rozier was engaged to his girlfriend, complainant got upset and said something to the effect of "when you need a favor, I'll remember this."

11. On January 20, 1995, complainant was suspended with pay, and with instructions she was to remain at home during working hours. Later that

afternoon, Cheryle Cantrell-Redd (African-American female), the Assistant Chief of the Milwaukee Region of the Division of Probation and Parole, tried without success to reach complainant at home several times between 1:20 and 3:00 p.m. to inform complainant of an investigatory interview on January 24, 1995.

12. Following Cantrell-Redd's investigation, which included interviewing complainant, she found that complainant had violated several work rules and recommended a predisciplinary hearing. (Respondent's Exhibit 10).

13. Following a predisciplinary hearing by John Barian, Deputy Regional Chief of the Milwaukee Region (white male), he concluded that work rules had been violated and recommended discipline, although not specifically the degree of discipline. (Respondent's Exhibit 12).

14. Eurial Jordan, Administrator, Division of Probation and Parole (black male), then effectuated complainant's discharge, effective March 13, 1995. (Respondent's Exhibit 13).

15. No one who was involved in the discharge of complainant was aware of the specific circumstances of the negotiated settlement of complainant's complaint concerning her discharge from RCI, which had led to her employment at Holton Street.

#### CONCLUSIONS OF LAW

1. This matter is appropriately before the Commission pursuant to §§230.45(1)(b).; 103.10(12), stats.

2. Complainant has the burden of proof to establish that respondent discriminated against her on the basis of sex, sexual orientation, and race, and in retaliation for FEA or FMLA activities, in connection with her discharge.

3. Complainant did not sustain her burden of proof.

4. Respondent did not discriminate against complainant as aforesaid.

#### OPINION

Under the FEA, the complainant has the initial burden of establishing a "prima facie" case -- i.e., certain facts which give use to an inference of discrimination. Respondent then must articulate a non-discriminatory rationale for its actions, after which complainant attempts to establish that the

rationale was a pretext for discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668, 5 FEP Cases 965 (1973). Where the entire case has been tried on the merits, and the parties have fully tried the question of whether the employer's rationale for the adverse employment action was pretextual, whether a prima facie case was established "is no longer relevant," U.S. Postal Service Bd. of Govs. v. Aikens, 460 U.S. 711, 715, 75 L. Ed. 2d 403, 410, 103 S. Ct. 1478 (1983), and the question of whether the employer intentionally discriminated against the complainant should be directly addressed, id. Therefore, the Commission will proceed to address directly the merits of complainant's claims.

Respondent articulated a number of reasons for complainant's discharge, as summarized in the above findings. Complainant's attempts to show pretext involved the denial of certain conduct attributed to her, and efforts to downplay the significance of conduct that was not denied.

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. However, it must be remembered that even if the employer's case is not the strongest, and the employer is mistaken about some aspects of the charges, this normally is not conclusive on the issue of discrimination, because the employer may have had a reasonable belief in the accuracy of the information it had available, and may not have been motivated by a discriminatory animus.

In any event, complainant was unable to make any kind of showing that respondent's basis for discharge was lacking in factual foundation. For example she continued to insist throughout the proceedings in this case that there had been some kind of mutual flirtation going on between her and Rozier, and that Rozier's denial of this was a lie. However, there is absolutely no evidence in the record to support this. Complainant tries to attach some significance to Rozier at one point allegedly retrieving a file on his own

rather than having a file clerk retrieve it for him (his usual practice).<sup>1</sup> Assuming that this occurred as alleged, it does not demonstrate that Rozier was interested in complainant. Furthermore, none of the many witnesses who testified concerning this matter corroborated her allegation, including the witnesses complainant called on her own behalf. It was clear from the testimony and demeanor of all the witnesses that Rozier was embarrassed and taken aback by complainant's note and phone call, and from an objective standpoint had done nothing to encourage complainant.

Complainant also contends that management overreacted to her note to Rozier, and that the term "pussy" in the African-American community connotes an attractive woman rather than necessarily having a vulgar sexual connotation. While there was some evidence in the record to support this contention, it was contrary to the testimony on the subject by the African-American witnesses employed at Holton Street, and complainant did not establish that respondent's professed concern about her use of this term was a pretext for discrimination.

With respect to the other alleged misconduct, much of complainant's case consists of allegations that witnesses against her were lying. Again, there is nothing in the record to establish this. Furthermore, complainant admitted during the course of the investigations that she had used some profanity, see, e.g., Respondent's Exhibit 10. Complainant's attempts to attribute the witnesses' complaints about her to racism are also undermined by the facts that Rozier is black, as is Cantrell-Redd, who did the bulk of the investigation, and Jordan, the Division Administrator who fired her. While complainant also presented evidence that in other employment settings her performance was good and she had not exhibited the behavior involved here, this evidence is of little weight against the foregoing considerations, including the fact she admitted to using some profanity. While it is clear that respondent's rationale for the discharge was not pretextual, there are two other aspects of this case that will be addressed.

As to retaliation, while management at Holton Street and the Division of Probation and Parole was aware that complainant was being hired as a result of a settlement of a case related to her employment at RCI, it is uncontradicted that they did not know what that case involved. Also, the fact that it involved a

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<sup>1</sup> The former required him to accompany the file clerk (complainant) down to the file area.

different division makes it much less likely that the principals in this case would have been motivated to have retaliated against her.

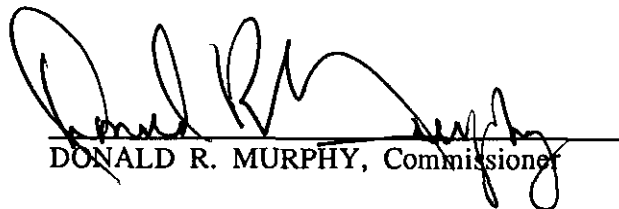
Finally, as to the sexual orientation aspect of this case, there is no evidence whatsoever that complainant's sexual orientation (heterosexual) played any part in management's motivation to discharge her. Complainant apparently is contending that she would not have been attracted to Rozier if she had not been heterosexual, and therefore her sexual orientation entered into the discharge. However, discrimination on this basis would require that management was motivated to act against her because she was heterosexual (as apposed to homosexual or bisexual), not because her sexual orientation was a contributing factor to some action management deemed improper.

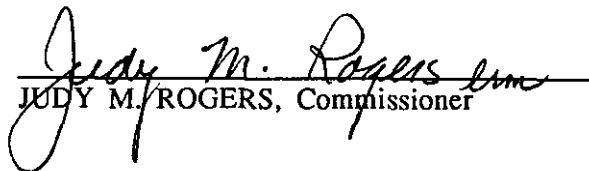
ORDER

This charge of discrimination is dismissed.

Dated: August 5, 1996 STATE PERSONNEL COMMISSION

AJT:pf

  
DONALD R. MURPHY, Commissioner

  
JUDY M. ROGERS, Commissioner

Parties:

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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