

MATTHEW C. DAMA,
Complainant,

v.

**Secretary, DEPARTMENT OF
CORRECTIONS,**
Respondent.

Case No. 96-0126-PC-ER

**FINAL DECISION
AND ORDER**

NATURE OF CASE

This matter is before the Commission on a complaint by complainant, Matthew C. Dama, alleging respondent, Department of Corrections (DOC), discriminated against him because of his national origin or ancestry, race and sex, in violation of the Wisconsin Fair Employment Act (WFEA), Subchapter II, Ch. 111, Stats., with respect to terms and conditions of his employment and when his probationary employment was terminated. The Commission consulted with the hearing examiner and adopts the proposed decision and order with some changes made to reflect the Commission's rationale. The Commission agreed with the hearing examiner's credibility determinations.

FINDINGS OF FACT

1. Complainant Matthew Dama, a male of Native American ancestry, was hired by respondent as a Probation and Parole Agent-Entry on July 10, 1995. Like all initial hires, he was required to serve a one-year probationary period.

2. Complainant was initially scheduled to work at the State Office Building in Milwaukee, Wisconsin, but before his first day of work, he was reassigned to work in unit 311 at 1819 East Kenilworth Place.

3. As a Probation and Parole Agent, complainant was required to comply with the Department of Corrections rules, policies and procedures; and his particular

job responsibilities were to provide services to protect the public by holding offenders (probationers and parolees) accountable for their behavior; prepare case plans for offenders; foster law-abiding behavior and positive participation of individual offenders in the community; prepare accurate and timely investigations, reports, and case records; engage in community outreach activities, liaison activities and other special assignments as required.

4. Complainant's first line supervisor was Corrections Field Supervisor Irving Suesskind. Suesskind's supervisor was Assistant Regional Chief, Kathleen Ware. The Milwaukee Region, Regional Chief was Allan Kasprzak.

5. In January 1994 complainant began dating Sherri Schmidt. Schmidt had been convicted of theft in 1992 and was required to serve probation and pay restitution.

6. In January 1995 Schmidt became complainant's fiancé. She and her 7-year-old son began residing with complainant. They lived together during the period in issue and shared some household expenses.

7. On July 13, 1995, shortly after he was hired by respondent, complainant signed an Employee Statement attesting that he had carefully read respondent's work rules, and was aware of the contents of its fraternization policy and guidelines concerning relationships between employees of respondent and inmates, clients and residents.

8. For the first several months complainant was housed in a temporary substitute office because of crowded conditions caused by a remodeling project. But complainant was not the first staff person to use this space on a temporary basis. At least one other probation and parole agent and one program assistant had been previously assigned that substitute office until other space became available.

9. On one occasion another agent complained to supervisor Suesskind that complainant had made inappropriate comments in a meeting involving an agent and one or more offenders. The agent told Suesskind that complainant had sided with the offender against the agent. Suesskind discussed the agent's complaint with complainant. He explained to complainant how his comments could be perceived as

siding with the offender. After the discussion Suesskind determined complainant had not intended his comments to be offensive. Complainant never was given or issued a reprimand for this incident.

10. In August and September 1995 complainant went to Agent Basic Training—training sessions for new probation and parole agents. On at least two occasions respondent's fraternization policy was discussed.

11. During this same period in August 1995, complainant was aware of a local newspaper article regarding a female parole agent arrested with a live-in convict charged with violating parole, who was held for charges of misconduct in office.

12. Complainant had binder copies of respondent's work rules and fraternization policy in his office.

13. In mid-December 1995 Field Supervisor Maxine Martinez Harris informed Suesskind of a possible fraternization problem involving complainant—that complainant possibly was living with a woman who was on probation. In turn, Suesskind informed his immediate supervisor Kathleen Ware. Regional Chief Kasprzak directed Ware to investigate.

14. On January 4, 1996, complainant was hand-delivered a letter, by his supervisor from respondent's Milwaukee central office, notifying complainant to appear for an investigatory interview, regarding an allegation that he had violated respondent's fraternization policy and work rule one.

15. After complainant gained information from a fellow agent—that allegations in respondent's letter probably involved Sherri Schmidt—complainant approached Suesskind, who instructed him to consult with a union representative.

16. When complainant approached Suesskind on January 4, 1995, about the allegations in the letter, Suesskind believed it inappropriate to talk with him without the presence of a representative from the union.

17. Later that same day, complainant telephoned Ware to have his scheduled January 5, 1996, investigatory interview with her rescheduled. The interview was rescheduled to January 10, 1996.

18. Also that same afternoon, Schmidt telephoned her probation agent and left a message that she wanted to come in and pay her restitution.

19. On January 9, 1996, Schmidt reported to her probation agent and made full payment of her restitution. She was discharged from probation on February 15, 1996.

20. At the investigatory interview on January 10, 1996, Assistant Regional Chief Ware first informed complainant of alleged work rule violations and the evidence the department possessed which substantiated the violation. Then Ware provided complainant an opportunity to respond to the allegations. After that Ware asked complainant some follow-up questions. Complainant testified that he was aware Schmidt was on probationary supervision and he had an inkling she was the subject of investigation, but prior to January 4, 1996, never suspected she was still under supervision. His alleged lack of knowledge was not credible.¹

21. By memorandum dated January 18, 1996, Ware reported her interview with complainant to Eurial Jordan, Administrator of respondent's Division of Probation and Parole. Ware recommended the matter be referred for a pre-disciplinary interview.

22. Regional Chief Kasprzak assigned Assistant Regional Chief Cheryl Cantrell Redd to conduct complainant's pre-disciplinary hearing; and by letter dated February 12, 1996, complainant was directed by Redd to appear at a pre-disciplinary hearing on February 19, 1996.

23. The pre-disciplinary hearing was held as scheduled; and was attended by complainant with union representative Sandy Janis. By memorandum dated March 1, 1996, Redd provided Kasprzak a report of the hearing. Kasprzak reviewed the report and forwarded it to Administrator Jordan. The report included a general recommendation for discipline.

¹ Furthermore, even if such testimony were considered as truthful, complainant knew about respondent's fraternization rule and had sufficient "inkling" about his fiancé's situation that he should have clarified the matter when he first learned of the rule to ensure compliance.

24. Complainant was discharged from employment as a Probation and Parole Agent by respondent on March 15, 1996, in a letter dated March 14, 1996, signed by Administrator Jordan. The letter, in part, provides:

This discharge is based on your violation of the following Department of Corrections Work Rule and Fraternalization Policy:

Work Rule No. 1: "Disobedience, insubordination, inattentiveness, negligence, or refusal to carry out written or verbal assignments, directions or instructions."

The basis for this decision is due to your residing with a probationer, Sherri Schmidt, who also was in absconder status. When you became aware that she was on probation, you continued to reside with her and did not request an exception to the fraternization policy.

25. The Fraternalization Policy (Executive Directive 16) referred to in the discharge letter, in pertinent part provides:

II. Policy

A. Employees of the Department of Corrections may not have relationships with

- an inmate, client, or juvenile offender under the supervision or custody of the Department of Corrections or the Department of Health and Social Services.

IV. Clarification of Policy

G. Relationships prohibited by the policy include

1. living in the same household as an offender.

26. Under the Policy's Exception Procedure, the department secretary could grant an exception, but the employe had the responsibility of informing his/her immediate supervisor in writing of any current relationship or relationship that is being considered which has the potential of violating the fraternization policy.

27. Prior to the investigation, complainant never informed his supervisor of his relationship with Sherri Schmidt.

28. Complainant did not receive his first 3-month performance evaluation (PPD), covering the period from July 10 through October 10, 1995, until December 6, 1995. After his discharge, complainant requested his second 3-month (interval)

performance evaluation, but respondent did not prepare and provide one because he was no longer an employe.

29. None of the principals involved in the investigation and discipline of complainant knew that complainant was of Native American ancestry.

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §230.45(1)(b), Stats.

2. Complainant has the burden to show respondent discriminated against him as alleged in the issues for hearing.

3. Complainant has failed to meet his burden to show respondent discriminated against him as alleged in the issues for hearing.

OPINION

The issue in this case is: Whether complainant was discriminated against on the basis of national origin or ancestry, race, or sex when his probationary employment was terminated, or with respect to various terms and conditions of his employment as alleged in the charge of discrimination. The terms and conditions of employment allegations, as provided in the discrimination complaint, are as follows:

1. That complainant was never made to feel comfortable in a predominantly female office;
2. That complainant was not given his own office until after eight months of his employment;
3. That complainant was told to be clean shaven by his supervisor even though he had a full beard;
4. That his sex, race/national origin were compromised on numerous occasions;
5. That he was harassed by a female counterpart who felt threatened when two males were hired;
6. That complainant was "shunned" by his first and second line supervisor after he was placed under investigation;
7. That he was denied a final performance evaluation; and
8. That after termination of employment it took him more than a month to obtain a copy of his personnel file.

In analyzing a claim of discrimination under the Wisconsin Fair Employment Act (FEA), the Commission consistently uses the method of analysis set forth in *McDonnell-Douglas v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 5 FEP Cases 965 (1973), *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 25 FEP Cases 113 (1981) and progeny. Under this procedure, complainant has the initial burden to show a prima facie case of discrimination. If complainant meets this burden, then the employer has the burden of articulating a non-discriminatory reason for the actions taken which complainant may, in turn, attempt to show was a pretext for discrimination.

Turning to complainant's charge of discrimination regarding terms and conditions of employment, to establish a prima facie case complainant must show: 1) that he is a member of a class protected by the FEA; 2) that he suffered an adverse term or condition of employment, and 3) the adverse terms or condition exist under circumstances which give rise to an inference of discrimination.

Complainant's national origin or ancestry, race and sex is not at issue. Therefore, he satisfies the first element of a prima facie case. Regarding the adverse terms and conditions of employment complainant makes six arguments: 1) that he was reprimanded for giving correct department policy and for a remark not directed to the individual in question; 2) that Assistant Regional Chief Ware and union representative Janis rescheduled the investigatory interview; 3) that he was provided with less than adequate office conditions for several months; 4) that he was instructed by Basic Training Coordinator Dunnum, during agent basic training, that he was required to request an exception to the fraternization policy up to the investigatory stage, if aware of possible violations, but not thereafter; 5) that respondent failed to assist him in obtaining documents which contained pertinent information; and 6) that respondent failed to send him his personnel file in a timely fashion.

We now turn to the evidence presented pertaining to these arguments. Complainant presented no evidence to confirm his testimony that he was reprimanded.

Irving Suesskind, complainant's supervisor, testified that soon after complainant was hired, complainant as a new agent was asked to sit in and observe a violators group meeting run by another agent. At the meeting, complainant made a comment that gave the perception he was siding with the offender against the agent. A third source complained to Suesskind. Suesskind discussed the matter with complainant and determined that complainant had not meant to offend the agent. Suesskind testified that no verbal or written reprimand was given complainant.

Regarding rescheduling the investigatory interview from January 5, to January 10, 1996, Ware testified complainant telephoned her and requested rescheduling the interview because he was having difficulty finding a union representative and they agreed on a date that was convenient for complainant. Ware testified she did not know Janis was complainant's representative until they arrived together at the regional office for the interview. Complainant testified Ware and Janis rescheduled the interview to accommodate Janis' schedule. Janis was not named as a witness and was not at the hearing. Regardless, complainant fails to explain how he was adversely affected by this change, and none is apparent from the evidence presented.

Respondent does not dispute complainant's charge regarding poor office conditions for his first several months of employment. Both complainant and his supervisor testified to that effect. The building was in a state of disrepair. It was being remodeled, there was inadequate space for all employees, and complainant shared a back room with another recently hired agent. They also had trained together. Complainant argues these work conditions made it difficult to handle any caseload placed on them. This might be true, but complainant presented no evidence this office assignment was based on his national origin or ancestry, race or sex. Also, complainant presented no evidence inferring he was terminated because of his job performance.

No evidence of discrimination was presented with respect to complainant's arguments that respondent failed to assist him in obtaining certain unspecified documents and failed to send him his personnel file in a timely fashion. None of the witnesses called to testify were involved in this episode, which occurred after

complainant was terminated². This matter was addressed in the Initial Determination; and here as there, no evidence was presented to suggest the delay was due to complainant's national origin or ancestry, race or sex.

Complainant made no argument regarding his allegation that he was denied a final performance evaluation. Again, this incident occurred after complainant was terminated. Complainant made this request after he had been discharged by respondent, and no evidence was presented showing discrimination based on national origin or ancestry, race or sex.

Turning to the discharge, the elements of a prima facie case are: 1) that complainant is a member of a class protected by the Fair Employment Act; 2) that complainant was qualified for the job; 3) that despite complainant's qualifications, he was discharged; and 4) that subsequent to complainant's discharge, he was replaced by a person outside the complainant's class. *Hatcher v. Greater Cleveland Reg. Transit. Auth.*, 746 F. Supp. 679, 684 (N.D. Ohio, 1989) Here the first three elements of the prima facie case are not in dispute. Complainant is a member of a class protected by the FEA, he was qualified for the job, and despite that he was discharged. The remaining question is whether he was treated differently than other employees because of his national origin or ancestry, race or sex. On this question complainant argues:

Ms. Dunnum, head of agent basic training and sole authority of the departments rules and policies stated I was required to request an exception to the fraternization policy up until the investigatory stages if I was aware I was violating said policy but not thereafter; this is not the way in which my termination case was followed.

Turning to the evidence, Jayne Dunnum, a Staff Development Program Manager, testified that from 1990 to June 1998 she was Agent Basic Training Coordinator and oversaw the training program for new agents; including curriculum development—making sure it followed the division's policies, procedures and operation manuals. At times she functioned as an instructor. Dunnum never testified that she is

² Respondent did not raise the question of whether this incident occurred within the "terms and conditions of employment" time frame; and this decision does not address that question.

the sole authority of the department's rules and policies, as complainant alleges; and no evidence was presented to support this claim. Also, Dunnun never testified that complainant's responsibility to request an exemption from the fraternization policy ceased once he was under investigation as a suspected violator of this policy. Complainant never asked Dunnun that question. After posing a hypothetical similar to his circumstances, complainant asked whether he had missed a step. Dunnun replied, "The step you missed was not informing your supervisor before you were under investigation."

Also, complainant argues that compiling statistical information regarding similar cases of agent termination is one of the main tasks of the regional chiefs, but the training coordinator, his supervisor and the three regional chiefs failed to have such statistical information when testifying at the hearing. Yet complainant failed to present any evidence establishing that any of the witnesses he questioned about statistical information was responsible for developing or keeping such statistics. Also, complainant presented no evidence of other similarly situated employees treated differently from him, because of his national origin or ancestry, race or sex. None of the three regional chiefs involved in complainant's disciplinary procedure was aware of complainant's Native American ancestry.

Finally, regarding complainant's terms and conditions of employment allegations not discussed, complainant made no arguments regarding them. No apparent evidence was presented regarding allegations one, four and five. Regarding allegation three, complainant's supervisor testified he did not recall ever making any statement about complainant's appearance or dress, and no evidence was presented supporting this allegation.

Accordingly, the Commission believes the evidence in this hearing record is not sufficient to conclude respondent discriminated against complainant as alleged in his complaint.

ORDER

This complaint is dismissed.

Dated: May 19, 1999.

DRM:rjb:960126Cdec2

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

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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