VERMONT LABOR RELATIONS BOARD

ANTONIO A. GAMEZ	)	
	)	
v.	)	Docket No. 88-68
	)	
STATE OF VERMONT, BRANDON TRAINING SCHOOL	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On December 1, 1988, Antonio A. Gamez ("Complainant") filed an Unfair Labor Practice Charge with the Vermont Labor Relations Board. The charge alleged that the State of Vermont, Brandon Training School ("State") committed an unfair labor practice pursuant to 3 V.S.A. §965 by discriminating against Complainant on the basis of his national origin, in violation of 3 V.S.A. §961(6).

A hearing was held on May 25, 1989 in the Labor Relations Board hearing room, before Board Members Charles McHugh, Chairman; William Kemsley, Sr. and Catherine Frank. Attorney Herbert G. Ogden, Jr. of Harlow, Liccardi & Crawford, P.C. represented Complainant. Michael Seibert, Assistant Attorney General, represented the State.

The State filed a Memorandum of Law on June 1, 1989. Complainant filed Proposed Findings of Fact, Conclusions of Law and Order on June 2, 1989. The State filed a response to Complainant's Proposed Findings and Conclusions on June 9, 1989, and Complainant filed a Reply Memorandum on June 15, 1989. These latter two memoranda have not been considered by the Board in conformance with the directions of the Board to the parties at the conclusion of the hearing.

FINDINGS OF FACT

1. Complainant is a United States citizen born in Guatemala.

2. Complainant speaks English with a Spanish accent. He communicates clearly in English and is only occasionally difficult to understand because of his accent.

3. Complainant was hired by the State on December 28, 1987. He was hired as a temporary employee to fill the position of Mental Retardation Program Specialist for the Transitional Training Unit at Brandon Training School (Complainant's Exhibit 1).

4. On one of his first few days at work, Complainant was given a tuberculosis test which showed a positive result. He was asked to undergo an X-ray to verify the test results. The X-ray indicated the positive result was erroneous. Complainant lost time from work and requested compensation for this time lost from Brandon Personnel Officer Jay Knable. Compensation for the time was granted. Knable thought that Complainant had been "argumentative" in requesting compensation.

5. On May 16, 1988, Complainant requested to leave work early due to a strained muscle in his back. His request was granted. Complainant's supervisor, Constance Demars, asked Complainant prior to his leaving if he had been injured at work. Complainant responded that he was not sure how he had been injured. At the hospital emergency room later that afternoon, after discussing the incident with a doctor, Complainant deduced the injury must have occurred earlier in the day when he pushed away a student attempting to kiss him.

6. Complainant filed a Worker's Compensation claim to receive benefits from this incident. The claim was denied by Liberty Mutual Insurance on July 11, 1988 because the incident was not reported to supervisors or co-workers at the time it happened, Complainant had indicated to Demars that he did not know how he had hurt his back and the hospital emergency room notes made no mention that Complainant had injured himself at work (Complainant's Exhibits 6, 7).

7. Complainant requested that he be allowed to attend in-service training on two occasions. Both requests were denied. On the first occasion, Complainant's request was denied because management would allow only one employee from each unit to be trained at a time, and someone from his unit was already scheduled. The second time, Complainant's request was denied because he was scheduled for overtime which conflicted with the class schedule. Complainant had expressed an interest in working overtime. Completion of in-service training is not necessary for a temporary employee to attain permanent status.

8. Complainant was never asked by his immediate supervisor to attend a staff meeting in his unit. Staff meetings were held only a few times while Complainant was employed by the State. Meetings were held on Wednesdays, which was a day Complainant was not regularly scheduled to work. They were scheduled on Wednesdays to insure the attendance of Mental Retardation Program Specialists level "B" in order to receive their input. It was also assumed by Complainant's supervisor that Wednesday was the lightest field trip day in the unit. Wednesday actually was the second heaviest day for field trips during the week, although the evidence indicates the direct care staff actually did not participate in the bulk of the Wednesday field trips.

Complainant's immediate supervisor discussed the content of the meetings with Complainant (Complainant's Exhibit 14).

9. Complainant was the subject of a derogatory nickname by fellow employees while he was employed by the Brandon Training School. He and a fellow employee, who was half Japanese, were called "Cheech and Chong". "Cheech and Chong" are stereotypes of Hispanic Americans with many negative traits. The nickname was based on Complainant's national origin. Complainant, who speaks with a Spanish accent, was made fun of by co-workers due to his accent. None of his supervisors were aware of the nickname or the criticism of Complainant's accent. Complainant did not report the incidents.

10. On August 29, 1988, Complainant requested a change in his scheduled hours so that he could attend college classes. The request was granted. He was allowed to come to work at 3:30 on Monday and Friday afternoons, and 2:30 on Tuesdays, instead of 1:45 each afternoon as previously scheduled.

11. In early October, Unit Program Supervisor Karen Hawley, the overall supervisor of the cottage in which Complainant worked, was requested by Edward Fish, Brandon Superintendent, to prepare a list of temporary employees to be slated for layoff in early November. The layoffs were necessary because expenditures on salaries were projected to exceed the budget allocation for that fiscal year. Fish informed Hawley that layoffs did not have to be based on seniority, but should be based on performance. Hawley evaluated her staff members and chose one person from each cottage for each shift to be laid off. In Complainant's cottage, two other temporary employees worked the same shift. One, Jack Quirk, was considered by Hawley to be a superior

employee to Complainant and the other employee, Barbara Capek. Hawley determined that Complainant and Capek were equal in their performance of duties. Hawley slated Capek for lay off because she had less seniority than Complainant. Hawley submitted Capek's name on the layoff list to Superintendent Fish on October 13, 1988.

12. Sometime shortly before October 14, 1988, marijuana had been removed from the grounds of the Brandon Training School by State Police. It was not known who was responsible for planting the marijuana.

13. On the night of October 14, 1988, Complainant parked his vehicle in the school parking lot and departed with co-workers in another vehicle to attend a party. After the party, the co-worker returned Complainant to his vehicle. Complainant spoke to a Brandon Training School security guard who informed him that his car should not be parked on the grounds after hours. Complainant then drove his vehicle, a white Chevrolet, off the grounds via the driveway. The security guard noticed what looked like dry cornstalks in the back of the other vehicle, a blue Subaru. The Subaru then drove off the grounds over the lawn instead of using the driveway. An officer of the Brandon Police Department later suggested to the security guard that the dry cornstalks actually might have been an "illegal substance" (Complainant's Exhibit 2).

14. The security guard reported this incident to Superintendent Fish. Fish subsequenty instructed Personnel Officer Knable to examine Complainant's personnel file to review his employment history at Brandon Training School (Complainant's Exhibit 2).

15. On October 21, 1988, Superintendent Fish asked Hawley if Complainant was slated for lay off. When Hawley said he was not, Fish asked if it would make a difference to the unit if Complainant were to be laid off instead of Capek. Hawley informed Fish that their qualifications were equal. Fish then requested that Complainant be laid off in place of Capek.

16. No investigation of the incident of October 14th was made. No inquiries were made to identity the substance in the back of the blue Subaru, and whether it was illegal. No inquiries were made to determine who else was in the blue Subaru besides Complainant and the driver. Fish decided to dismiss the driver of the blue Subaru, but she resigned instead.

17. Fish decided that Complainant should be laid off primarily due to the October 14 incident because Fish thought that Complainant possibly was involved in illegal drug posssession on Brandon Training School grounds. In making this decision, Fish also relied on the tuberculosis test incident and Complainant's Worker's Compensation claim. Knable informed Fish that Complainant had been argumentative concerning the tuberculosis testing incident. Fish concluded that the Worker's Compensation claim submitted by Complainant had been fraudulent.

18. On October 21, 1988, Superintendent Fish sent Complainant a letter which provided in pertinent part as follows:

> I regret to inform you that your temporary employment at the Brandon Training School will end as of November 5, 1988. As you know, there has been a reduction in the Training School's spending authority, resulting in the necessity to reduce the number of staff.

> Please be assured that this action in no way reflects the value that the administration of the Training School places on the service that you have given. I sympathize with you for any personal hardship that this may cause.
>
> I would like to urge you to contact the Personnel Office as soon as possible to ask any questions you may have and to find out about reemployment opportunities. We would like to know of your interest in short-term or substitute employment at the Training School. The Personnel Office also has information about employment possibilities with community mental retardation provider agencies.
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> (Complainant's Exhibit 9)

19. Personnel Officer Knable sent Complainant a memo on October 26, 1988, informing him of other organizations hiring in the mental health and related fields. The memo requested information from Complainant as to his availability to work other shifts or positions should they become available at the Brandon Training School. Complainant was instructed to complete the form and return it as soon as possible. Knable did not receive a completed form from Complainant (Complainant's Exhibit 10).

20. Complainant was employed by the State for more than 190 days in 1988.

21. Prior to being laid off, Complainant was not informed by any management representative that his temporary status had changed.

22. A permanent position can be created in State government only if it is approved by the legislature or if the position is transferred within or between departments.

23. Complainant was qualified for the position of Mental Retardation Program Specialist.

OPINION

The main issue in this dispute is whether the State committed an unfair labor practice by terminating Complainant's employment on the basis of his national origin. It is an unfair labor practice for an employer to discriminate against an employee on the basis of national origin. 3 V.S.A. §961(6).

However, we first need to address two preliminary issues. The first preliminary issue is the effect of the State's failure to file an answer to the unfair labor practice complaint issued by the Board. Section 16.11 of the Board's Board's Rules of Practice provides:

> The respondent ordinarily shall have the right to file an answer within 10 days after service of the complaint... The answer shall admit or deny each specific allegation of the complaint, unless the party asserts that it is without knowledge or information thereof sufficient to form a belief. An allegation in the complaint not specifically denied in the answer, unless the party asserts that it is without knowledge or information thereof sufficient to form a belief, shall be deemed admitted and shall be so found by the Board.

In the complaint issued in this matter, the Board adopted "for purposes of this complaint the allegations contained in the charge" filed by Complainant. Accordingly, pursuant to Section 16.11, the State's failure to file an answer means that the allegations made in the charge filed by Complainant are deemed admitted by the State. However, we note that the admission of "allegations" relates to the underlying material facts alleged in the charge, and not to the ultimate conclusion of law concerning whether Complainant was discriminated against on the basis of his national origin. In our findings of fact, we have incorporated the underlying material facts alleged in the charge which we deem to be relevant.

The second preliminary issue we need to address is the State's claim that the Board is without jurisdiction to hear this unfair labor practice charge. The State contends that protection under the unfair labor practice provisions of the State Employees Labor Relations At, 3 VSA §901 et seq., extends only to "State employees" as that term is defined therein, and that a temporary employee such as Complainant is not included in the definition of "State employee" pursuant to 3 VSA §902(5)(a) and 3 VSA §311(a)(11).

3 VSA §902(5)(a) excludes from the definition of "State employee" an individual "exempt or excluded from the State classified service under the provisions of Section 311 of this title". 3 VSA §311 provides in pertinent part:

> a) The classified service to which this chapter shall apply shall include all positions and categories of employment by the State, except as otherwise provided by law, and except the following:
>
> ...(11) Persons employed in a temporary capacity with the approval of the governor for a period not to exceed 190 workdays in any one calendar year.

We reject the State's contention that Complainant is excluded from the definition of "State employee" as a temporary employee pursuant to 3 VSA §311(a)(11). This subsection does not apply to Complainant because he was employed for over 190 workdays in 1988, the year in which he was laid off.

While Complainant remained a temporary employee once he became employed for over 190 days in 1988, he was a temporary employee with a different status. He now no longer was barred explicitly from SELRA's provisions. We conclude he gained at least the limited right to file an unfair labor practice charge pursuant to 3 VSA §961(6), alleging

discrimination "on account of race, color, creed, sex or national origin". This grants employees with Complainant's status rights similar to those held by applicants for State employment in the classified service and classified employees in their initial probationary period pursuant to 3 VSA §1001(a), which grants them the right of appeal to the Board if they believe themselves discriminated against on account of "their race, color, creed, sex, age or national origin".

For us to rule otherwise would be to give no effect to the 190 day limit for temporary employment mandated by the Legislature. We do not believe the Legislature enacted such a limit without meaning to provide some sanction for exceeding the limit. Thus, we conclude we have jurisdiction under the unfair labor practice provisions of SELRA to determine whether Complainant was discriminated against on account of his national origin.

We turn to addressing that main issue. The US Supreme Court has set forth the basic allocations of burden and order of presentation in discrimination cases. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). The McDonnell Douglas analysis applies to all discrimination defined under Title VII, including discrimination based on national origin. Id at 802. Carino v. Univ. of Oklahoma Board of Regents, 750 F2d 815, 818 (10th Cir., 1984). The Supreme Court has further refined its McDonnell Douglas test by making it clear that the burden of proof remains at all times with the plaintiff. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). The Vermont Labor Relations Board has accepted the McDonnell Douglas analysis in sex discrimination cases brought before the Board. Grievance of Hilary

Smith, 12 VLRB 44, 53 (1989). Grievance of Rogers, 11 VLRB 101 (1988). This analysis is also applicable to discrimination based on national origin.

In a case alleging disparate treatment, the employee must first prove a prima facie case of discrimination by the preponderance of the evidence. If the employee succeeds in proving the prima facie case, then the burden is shifted to the employer to articulate a legitimate, nondiscriminatory reason for the discharge. Burdine, 450 U.S. at 253. Smith, 12 VLRB at 53. The employer need not persuade the court that the proffered reason was the true motivation for the discharge. It must only raise a genuine issue of fact as to whether the employer discriminated against the employee. Burdine, 450 U.S. at 254. Finally, if the employer carries this burden, the employee must then prove by a preponderance of the evidence that the legitimate reason offered is not the true reason, but rather a pretext.

The first issue is whether Complainant has presented a prima facie case of discrimination against the State for terminating his employment because of his national origin. A prima facie case of discrimination based on national origin consists of proving that (1) the employee belongs to a protected class, (2) that he or she was qualified for the position, (3) that despite such qualifications he or she was rejected, and (4) that after the rejection, a party not subject to a similar national origin was hired or retained for the position. McDonnell Douglas Corp., supra at 802. Carino v. Univ. of Oklahoma Bd. of Regents, supra at 818. Smith, supra at 53. The employee's burden for establishing a prima facie case is "not onerous." Burdine, 450 U.S. at 253.

Applying this standard to the facts of this dispute, the Board finds that Complainant has established a prima facie case of discrimination based on national origin. First, Complainant is a member of a protected class. Complainant is a citizen of the United States born in Guatemala, and 3 V.S.A. §961(6) protects against discrimination based on national origin. Second, Complainant must be qualified for the position. The clear weight of the evidence is that Complainant was qualified for his position. Third, Complainant must show that despite his qualifications he was removed from his position. Since Complainant has been laid off despite these qualifications, then the third requirement has been met. Finally, Complainant must show that after his lay off, a non-Hispanic employee was employed or retained in the position. Complainant has shown that two non-Hispanic employees were retained in identical positions to his, one having qualifications considered exactly equal to Complainant. By meeting these requirements, Complainant has successfully established a prima facie case of discrimination based on national origin.

Since Complainant has successfully proved a prima facie case by the preponderance of the evidence, the State now must articulate a legitimate, nondiscriminatory reason for the discharge. Burdine, 450 U.S. at 253. The employee's prima facie case of discrimination will be rebutted if the employer articulates lawful reasons for the action; that is, to satisfy this intermediate burden, the employer need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus. Id, at 257.

The Brandon Training School was involved in a personnel cutback due to budgetary constraints at the time of Complainant's layoff. He was laid off with several other temporary employees as part of these cut backs. The primary reason articulated by the State for why Complainant was one of those chosen for lay off was the October 14 incident because Superintendent Fish thought that Complainant possibly was involved in illegal drug possession on Brandon Training School grounds. The State also relied on the tuberculosis testing incident and Complainant's Worker's Compensation claim to support Complainant's layoff.

While these reasons are not fair or proper reasons for discharge, as discussed below, they do constitute admissible evidence which would allow us to reasonably conclude that the employment decision had not been motivated by discriminatory animus. Burdine, supra, at 257. The State is not required to prove that this proffered reason is the motivation behind the discharge. Burdine, 450 U.S. at 254. They must merely create a genuine issue of fact. Id. This proffered reason is sufficient to meet the State's burden of articulating a legitimate, nondiscriminatory reason for the termination.

Since the State has met its burden in articulating this reason for discharge, to be successful in his claim, Complainant must prove by a preponderance of the evidence that the State's reason is a pretext. A pretext is defined as a statement that does not describe the actual reason for termination. Mister v. Illinois Cent. Gulf R.R., 832 F.2d 1427, 1435 (7th Cir. 1987). The employer does not need a good reason, and a mistaken business decision is not a pretext merely because it is a mistake. Id.

Complainant has presented no evidence to prove that the State's decision was a pretext. It is clear that there was no good reason for Complainant's layoff. The State exhibited extremely poor personnel management in deciding to lay off Complainant. It is extremely poor personnel practice to lay off an employee based on suspicions surrounding an incident which was never investigated. The underlying assumption of this lay off is that Complainant was somehow involved in drugs because of the October 14th incident. This assumption has no foundation. It was merely based on a speculation by a police officer who was not at the scene that dried cornstalks might be an "illegal substance". However, the fact that Superintendent Fish operated under the unfounded, unsubstantiated impression that Complainant was possibly involved in illegal drug activities does not make his decision to lay off a pretext. A mistaken business decision is not necessarily a pretext. Mister, supra.

We similarly conclude that relying in part on the tuberculosis testing incident and Complainant's Workman's Compensation claim as a basis for the layoff demonstrated poor personnel practices. It was unfair and improper for the State to fault Complainant as "argumentative" for pursuing wages he reasonably thought he was entitled to with respect to the tuberculosis testing incident. It also was unfair and improper for the State to conclude Complainant had submitted a fraudulent Worker's Compensation claim given that Complainant was never questioned by management about the circumstances leading to the claim. When Complainant was given an opportunity at the hearing to explain the circumstances, it was evident his claim was not fraudulent.

However much we believe that the State's decision to lay off Complainant was based on extremely poor personnel management, Complainant has not proved by a preponderance of the evidence that the State's reason is a pretext for discrimination. He has not shown any nexus between his national origin and the layoff decision. Complainant did not prove that any of his supervisors knew or should have known that Complainant was the victim of racial jokes and criticism from his co-workers due to his accent. He did not demonstrate that national origin discrimination was involved in denial of his requests for in-service training or his lack of involvement in staff meetings. He did not demonstrate that any other action taken by his supervisors demonstrated discrimination due to national origin. We conclude that the reasons cited by the State for Complainant's layoff demonstrated extremely poor personnel management practices, but that these were the actual reasons and were not a pretext for discrimination. By failing to prove that the State's proffered reason was a pretext, Complainant has failed to prove a case of discrimination based on national origin.

ORDER

Now therefore, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED that the unfair labor practice charge filed by Antonio A. Gamez in Docket number 88-68 is DISMISSED.

Dated this 18th day of August, 1989, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Charles H. McHugh, Chairman

William G. Kemsley, Sr.

Catherine L. Frank