

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	DOCKET NO. 79-15S
MS. KIM LYON)	RE: SEX DISCRIMINATION

FINDINGS OF FACT, OPINION AND ORDER

Statement of the Case

On March 1, 1979, Ms. Kim Lyon, through her attorney, Alan P. Biederman, filed a grievance with the Vermont Labor Relations Board appealing her dismissal from State service. Ms. Lyon, a probationary employee at the time of her dismissal, filed this appeal pursuant to 3 V.S.A. §1001(a), alleging that the reason for her discharge was sex discrimination.

The State filed its answer on April 17, 1979, denying the charges of discrimination on account of sex, and maintaining Grievant had been dismissed for failure to consistently meet the requirements of her job.

Hearings on this matter were held before Board members Kimberly B. Cheney, and William G. Kemsley, Sr., on October 18, 1979, and January 24, 1980. Member Robert H. Brown was absent from both hearings. Grievant was represented by Attorney Alan P. Biederman. Assistant Attorney General Bennett E. Greene represented the State.

The State's Requests for Findings of Fact, Conclusions of Law and Fact, and Order were filed on February 27, 1980, by Assistant Attorney General Greene. Proposed Findings of Fact were filed by Attorney Biederman on March 3, 1980.

FINDINGS OF FACT

1. On June 19, 1978, Grievant was hired by the Vermont Agency of Transportation as a seasonal employee.
2. During the summer of 1978, Grievant worked out of the Castleton garage of the Vermont Agency of Transportation. Her immediate supervisor was Michael Irwin, who in turn, was supervised by Neil Tinker, General Foreman.
3. Grievant's duties during the summer consisted of highway maintenance and included a great deal of road repair work. This type of work involved primarily the patching of roadway and laying of new asphalt upon roadways, requiring Grievant to either rake hot asphalt "mix" or shovel stone.
4. During the summer, Grievant performed her work satisfactorily.
5. In August, 1978, Grievant applied for a permanent full-time position with the Agency of Transportation as a Highway Maintenance Worker A. (State's Exhibit #6)
6. Grievant represented on her application for a Highway Maintenance A position that she had no medical condition which should have been considered in assigning her work.
7. Grievant also represented on her application that she had recently been employed with the Agency of Transportation as a "Temporary" Highway Maintenance employee during which time she had been trained to operate "the trucks." (State's Exhibit #6)
8. In June of 1978, Grievant learned that she had mononucleosis. Grievant suffered from this condition throughout the summer of 1978.
9. Effective September 17, 1978, Grievant was hired as a permanent full-time employee with the Vermont Agency of Transportation and was

classified as a Highway Maintenance Worker A (hereinafter "HMW A").
(State's Exhibit #7, p. 3)

10. Prior to her temporary and full-time employment with the Agency of Transportation in 1978, Grievant had been employed by the Department of Forests and Parks for a period of four months.

11. While employed by the Department of Forests and Parks, Grievant was required to cut brush, use a lightweight chain saw to cut young trees, participate in road grading operations, and to repair culverts.

12. Grievant was forced to leave her work with the Department of Forests and Parks because of undisclosed medical reasons for which she was hospitalized.

13. During her period of employment with Forests and Parks, Grievant was absent from work due to both illnesses and injury. As a result of uncontrollable coughing accompanying a virus, Grievant cracked her ribs. Grievant also broke her foot on the job during this time.

14. Grievant is five feet four inches tall and during her employment with the Agency of Transportation she weighed approximately 130 pounds.

15. Commencing September 17, 1978, Grievant reported for work at the Clarendon garage. The Clarendon garage is within District #3, which consists of central western Vermont. During the period of her employment, Grievant was the only female employed at District #3, excluding clerical and secretarial employees.

16. Harley Weeks, HMW "C", the Area Foreman at the Clarendon garage was responsible for directing and assigning Grievant's work.

17. The job description of HMW A (State's Exhibit #1) states as required knowledge, skills and abilities:

Working knowledge of and skill in using tools and equipment used in highway maintenance. Good physical condition and ability to work long hours under varied climatic conditions.

18. Grievant's work assignments most often consisted of brush cutting, "cold patching" (road surface repairs), guard rail replacement and "flagging" traffic at paving sites.

19. Harley Weeks, as Area Foreman of the Clarendon garage, was able to observe Grievant's job performance for approximately four months. As Grievant's supervisor, Harley Weeks observed during her probationary period that Grievant generally did less work than other HMW's. Harley Weeks attributed Grievant's deficiencies when assigned heavy manual labor, to her size and general physical condition, weakened by recurring illnesses and injuries. While he tried, when possible, to assign Grievant less physically demanding work, Grievant still did not perform adequately.

20. Examples given by Harley Weeks regarding his observations of Grievant's abilities included the following instances. When clearing roads and roadsides of fallen trees, Grievant was not able to lift lengths of wood weighing much more than thirty pounds, and needed to rest often. During construction operations on a Forests and Parks road in October-November, 1978, Grievant "stood around" a great deal of the time she was assigned to pick rocks from the road. In patching operations, Grievant only partially filled her shovel. On one occasion in the fall of 1978, Harley Weeks directed another HMW, Robert McNulty, to instruct Grievant in driving a 2 1/2 ton truck. Harley Weeks observed Grievant frequently "stall out" the truck and fail to operate it smoothly. As a result of his observations and

report from HMW McNulty, he believed that Grievant was endangering the truck from the way she was operating it, and he believed from his observations that she was not experienced in truck driving.

21. Thereafter, Grievant was generally not assigned to operate the heavy trucks, either during road work or snow plowing operations.

22. Grievant's mononucleosis condition continued in the fall and winter of 1978, and by her admission, caused her general physical condition to weaken during her probationary period as HMW A. During her probationary period at the Clarendon garage, Grievant also suffered from "walking" pneumonia, a bruised leg injury which Grievant admitted was the result of horseplay on the job and a recurrence of her cracked ribs injury.

23. On December 7, 1978, a workday for Grievant which immediately followed an absence from work on account of illness, Grievant verbally resigned. (State's Exhibit #7, p. 2) Assigned to a lifting task that day, Grievant testified that she "felt miserable" and probably had returned to work too soon. On that day, Grievant left work.

24. Grievant testified that during the months of October, November and December, 1978, her mother, friends, and doctor advised her to resign from her position as HMW A because of her poor health. Grievant regarded their advice as "badgering."

25. Subsequent to her verbal resignation, Grievant in fact did not resign. Once she "felt better," Grievant changed her mind and did not consent to putting her resignation in writing.

26. Grievant admitted her persistence was a "matter of pride," and that she kept on working because she wanted to prove she could do it, in spite of her health problems and her sex.

27. Grievant was routinely the last person to be assigned work at the

start of the day. Generally, Grievant was assigned to work with other crew members, rather than to work independently.

28. Grievant was occasionally the butt of horseplay and obscene and abusive jokes. While Grievant admitted engaging in some horseplay on the job in the same manner as her fellow workers, she did not join or encourage her co-workers in their use of vulgar and profane language, directed at her or otherwise.

29. On or about November 1, 1978, Alan Couch became the District Transportation Administrator for District #3. In that capacity, Alan Couch supervises the operation of several garages including the Clarendon Garage. Shortly after assuming his duties in this District, Alan Couch requested that a special performance evaluation be done on Grievant, having heard some reports that Grievant was not "doing her share of the work."

30. The use of performance evaluation reports is governed by Section 13 of the Rules and Regulations for Personnel Administration (State's Exhibit #12). Supervisor Couch directed Harley Weeks and Neil Tinker to complete a special performance evaluation of Grievant as a corrective measure, to put Grievant on notice of her deficiencies so she might improve and successfully complete her probationary period.

31. The Personnel Evaluation Form (State's Exhibit #3) was completed by Harley Weeks on November 9, 1978. Harley Weeks completed ratings #1 through #12 on Page #1 of the Evaluation Form. Harley Weeks further added comments in Sections B and C of the Evaluation Form.

32. Neal Tinker reviewed the ratings done by Harley Weeks. In those areas where Neal Tinker disagreed with Mr. Weeks, he placed a mark with the initials "N.T." placed beneath the mark. His ratings of Grievant's

performance were lower than the ratings of the Mr. Weeks in four areas. Further, Neal Tinker completed the comments in Item D of the form.

33. On December 12, 1978, Alan Couch summoned Grievant to his office to discuss her performance. He was aware Grievant had verbally resigned during the previous week, and advised Grievant that her resignation would have to be given in writing to become effective. (State's Exhibit 11, section 12.02) When Grievant informed Alan Couch that she did not now intend to resign, he informed her that there were certain areas of her performance which were deficient, based on the personal observations of her supervisors and co-workers. He told Grievant she was expected to do the same work as other HMW's on her crew. Grievant responded that she was, in fact, doing the work in the same manner as other HMW's. Alan Couch then informed Grievant that he had been told otherwise. Couch testified that Grievant then became very defensive in response to his criticism, feeling it wholly unwarranted.

34. On December 22, 1978, Grievant reported to the Clarendon garage. At that time, she was instructed by Harley Weeks to wash the windows and sweep the floor.

35. After Harley Weeks left the Clarendon garage, Grievant, within the hearing of Robert McNulty, stated aloud to herself that if Mr. Weeks wished to have the windows washed he could wash them himself. Grievant testified that she felt the cleaning assignment was "women's work." Grievant had previously been directed to clean windows by Neal Tinker during her summer job and she in fact did clean the windows.

36. Harley Weeks testified that he has cleaned the garage windows and swept the garage floor, as have other HMW's from time to time.

37. Grievant did, in fact, clean the windows and sweep the floor.

38. Robert McNulty observed Grievant reading the newspaper for approximately one hour, immediately after Harley Weeks had instructed her to wash the windows and sweep the floor.

39. On or about December 19, 1978, Alan Couch, as the appointing authority, added comments to Grievant's performance evaluation and signed it. (State's Exhibit #3)

40. Sometime between December 22, 1978, and December 28, 1978, Neil Tinker informed Alan Couch of Grievant's alleged refusal to follow Harley Week's order to clean the garage.

41. On December 28, 1978, Alan Couch summoned Grievant to his office. At this time, he officially dismissed Grievant, giving her a letter of dismissal and a copy of the special performance evaluation. (State's Exhibit #3). At this time, Alan Couch discussed with Grievant as reasons for her dismissal, chronic absenteeism and unsatisfactory job performance.

42. On the Evaluation Form, a rating of "1" means "Unsatisfactory," a rating of "2" means "Inconsistently meets job requirements," and a rating of "3" means "Consistently meets job requirements."

43. On item numbered "4" on the evaluation form, referring to absenteeism, tardiness and dependability, Harley Weeks gave Grievant a rating of "2" and Neil Tinker gave Grievant a rating of "1."

44. Grievant agreed with both ratings.

45. During the first three months of her probationary period as HMW A, Grievant was absent due to illness or injury for a total of eleven days. Of these eleven days, Grievant had sick days accumulated for only six. The remaining five were "off payroll," meaning Grievant received no compensation.

46. On item numbered "10" on the evaluation, referring to following rules, regulations and procedures, both Harley Weeks and Neil Tinker gave Grievant a rating of "2."

47. Grievant agreed with that rating.

48. On items numbered "2" relating to quality of work, "3" relating to efficiency and productivity, and "11" regarding physical strength and stamina, both Weeks and Tinker gave Grievant a rating of "2."

49. Grievant disagreed with the rating of "2" on said items numbered "2," "3," and "11" as indicated in Finding #46.

50. Personnel Regulation 10.064(State's #10) reads: "A performance evaluation of at least 'Adequate' shall be required for completion of probation." An "Adequate" rating is a "3," which means the employee "consistently meets job requirements."

51. Grievant failed to achieve a performance evaluation rating of at least "Adequate" before the end of her probation. Grievant received an overall rating of "2," meaning Grievant inconsistently met job requirements.

52. Grievant was given ten days severance pay upon dismissal.

CONCLUSIONS OF LAW AND OPINION

As a probationary employee, Grievant's right to appeal her dismissal is limited by 3 V.S.A. §1001(a). That section enables classified employees in their initial probationary period to appeal grievances to this Board only if the employee alleges he or she has been the victim of discrimination prohibited by statute. In this case, Grievant alleges she was the victim of discrimination on account of her sex, a prohibited act under 3 V.S.A. §1001(a) (and 21 V.S.A. §495).

Grievant is not entitled to appeal any nondiscrimination related reason for her dismissal. Accordingly, our review here is limited to a determination of fact as to whether Grievant was dismissed because of discrimination on account of sex. It is not necessary to examine the State's action within the conceptual framework of "just cause" as well. Compare, Grievance of Richard Harrison, 2 VLRB 304 (1979). (Non-probationary employee who alleged racial discrimination was also evaluated on "just cause" standard)

Our review of the facts requires inquiry into the State's reasons for Grievant's dismissal. We must determine if the facts are sufficient to establish discharge as motivated by legitimate, non-pretextual considerations. In so doing, we are guided by State v. Whitingham School Board, et al., (Vt. Supreme Court Docket #273-78 Slip Op. December 18, 1979) which sets forth the burden of proof standard applicable here.

... the critical questions are whether or not the plaintiff established a prima facie case of discrimination, and, if so, was the defendant employer's evidence sufficient to establish some legitimate nondiscriminatory reason for the refusal to hire.* The legal pattern to be followed derives from McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973).

Grievant has met her prima facie burden here. She belongs to a class protected by statute; she had demonstrated qualifications for the HMW A job sufficient to gain an initial appointment; she had previously performed like work for the State satisfactorily, and despite her apparent fitness for the position at the time she was hired, Grievant was ultimately discharged. A set of facts exist sufficient to establish that a prima facie instance of sex discrimination occurred.

*While the facts in McDonnell Douglas and State v. Whitingham, *supra*, involved an employer's refusal to hire, the U.S. Supreme Court has subsequently applied the same burden of proof pattern to discharge cases. See McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976).

However, we find the State has established nondiscriminatory reasons for Grievant's dismissal. Grievant was dismissed because she was unable to meet the requirements of her job consistently. We find nondiscriminatory, legitimate reasons for Grievant's dismissal: excessive absenteeism and apparent physical inability to carry her "share" of the work on a highway maintenance crew. We suspect Grievant's absences and less than satisfactory job performance were probably the result of continuing ill health rather than any disability inherent in the female sex. But, whether Grievant's disability was due to illness or physical inability to do heavy work, the evidence supports the employer's performance evaluation, and the action taken here. The State in dismissing Grievant, properly exercised its right to terminate probationary employees. This conclusion is even more compelling where the facts in this case show Grievant's health and job performance seemed to deteriorate rather than improve during her probationary period.

We are, nevertheless, concerned that there is some evidence that Grievant was subject to a particular form of sex discrimination. The male workers, according to Grievant, used foul language with sexual overtones. The type of humor and physical horseplay testified to could constitute sexual harrassment by her fellow employees in that Grievant, because of her sex, was placed in an uncongenial employment atmosphere. She was not "one of the boys" and is legally not required to become one in order to keep her job. The employer has a legal obligation to maintain a nondiscriminatory work environment. On balance, however, we do not find this conduct so continuous and offensive as to impair Ms. Lyon's ability to work and be a contributing cause to her discharge. The fact that Grievant did not complain of these activities, and may have voluntarily engaged in some

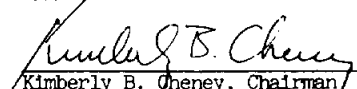
instances of horseplay, would not preclude us from finding such conduct constitutes sex discrimination. The employer, as we have said, has a duty to take positive action to prevent such conduct. See Equal Employment Opportunity Commission interim guidelines, Title 29 CFR, Chap. XIV, Part 1604.11, clarifying EEOC's position that sex-related intimidation in the workplace is sex discrimination. CCH Employment Practices, 2214, ¶13950.11 (March, 1980). Here, however, there is a preponderance of the evidence which indicates nondiscriminatory reasons for Grievant's dismissal existed. C.f. Grievance of Richard Harrison, supra. See also Kyriazi v. Western Elec. Co., 461 F.Supp. 894, 933-942, and 949-950, for a lengthy discussion of these points in the context of a civil rights suit for damages.

ORDER

Now, therefore, based on the foregoing findings of fact, conclusions of law and opinion, the grievance of KIM LYON is ORDERED DISMISSED and is DISMISSED.

Dated this 11th day of April, 1980, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Kimberly B. Cheney, Chairman


William G. Kemsley, Sr.