STATE OF WISCONSIN PERSONNEL COMMISSION

PAULA SCHMIT (KLUMPYAN),

Complainant,

v.

Secretary, DEPARTMENT OF CORRECTIONS,

Respondent.

Case Nos. 90-0028-PC-ER, 91-0024-PC-ER

INTERIM DECISION AND ORDER

These matters are before the Commission on respondent's motion to dismiss for failure to state a claim and also on a dispute as to proper issues for hearing. The motion relates to various aspects of the complaints which allege retaliation based on Fair Employment Act activities. The parties have had an opportunity to file written arguments.

FINDINGS OF FACT

1. Until October of 1989, the complainant worked for respondent as a Correctional Officer 1 at the Columbia Correctional Institution (CCI).

2. On or about October 9, 1989, complainant transferred to the Kettle Moraine Correctional Institution (KMCI) as a Correctional Officer 1, where she was placed on permissive probation.

3. Respondent concluded that complainant had failed to meet probationary standards at KMCI. Effective December 2, 1989, complainant was restored to CCI.

4. On November 29, 1989, the complainant commenced a medical leave of absence. Her leave continued without interruption until her employment was terminated effective December 12, 1990, after respondent had declined to further extend her leave.

5. On February 27, 1990, the complainant filed a charge of discrimination with the Commission. The charge was assigned Case No. 90-0028-PC-ER. On the face of the complaint form, complainant indicated the respondent had

discriminated against her on the basis of sex and had retaliated against her for engaging in Fair Employment activities. In the narrative portion of the complaint, the complainant described a number of incidents which she alleged had occurred during her employment at KMCI and felt were retaliatory. The narrative portion of the complaint also provided, in part:

> I also think I can file under retaliation because of an incident that happened with my boyfriend Sgt. Terry Klumpyan. Sgt. Klumpyan's incident happened on 11-6-89 when he was dismissed from the ERU (sniper team) squad for his union affiliations. How this involves me is once the management found out he was going to sue them civily, I feel they went after me because I was on permissive probation.

6. On February 25, 1991, complainant filed a second complaint. In this complaint, which was assigned Case No. 91-0024-PC-ER, complainant alleged she was discriminated against based on sex and under the Family and Medical Leave Act and was retaliated against for engaging in Fair Employment activities with respect to the respondent's decision effective December 12, 1990 not to extend her medical leave of absence from CCI.

7. In a note which was also received by the Commission on February 25, 1991, the complainant wrote:

> I would like to withdraw the Part of my complaint case #9028-PC-ER retaliation based on fair Employment activities, but still pursue my case #9028 on sex discrimination.

At the time of the note, the complainant was appearing *pro se.*

8. Complainant's claim under the Family/Medical Leave Act in Case No. 91-0024-PC-ER was dismissed by the Commission as untimely by order dated March 20, 1991.

9. Counsel for complainant filed a notice of appearance with the Commission on January 22, 1992. At that time, complainant waived the investigation of her complaint.

DECISION

Respondent objects to any allegation of FEA retaliation raised by the complainant other than her claim in Case No. 91-0024-PC-ER that the decision by CCI not to extend her medical leave was in retaliation for having filed the

complaint in Case No. 92-0028-PC-ER. Respondent contends that the only activity engaged in by the complainant which entitles her to protection from retaliation was the filing of her initial complaint.

Prior to April 28, 1990, the Fair Employment Act's prohibition against retaliation was set forth in §111.322(3), Stats:

> Subject to ss. 111.33 to 111.36, it is an act of employment discrimination to do any of the following:
>
> * * *
>
> (3) To discharge or otherwise discriminate against any individual because he or she has opposed any discriminatory practice under this subchapter or because he or she has made a complaint, testified or assisted in any proceeding under this subchapter.

Pursuant to 1989 Wisconsin Act 228, the prohibition against retaliation was modified by adding sub. (2m) which referred to various other protected activities:

> (2m) To discharge or otherwise discriminate against any individual because of any of the following:
>
> (a) The individual files a complaint or attempts to enforce any right under s. 103.02, 103.10, 103.13, 103.28, 103.455, 103.50, 104.12, 109.03 or 109.07 or ss. 101.58 to 101.599 or 103.64 to 103.82.
>
> (b) The individual testifies or assists in any action or proceeding held under or to enforce any right under s. 103.02, 103.10, 103.13, 103.50, 104.12, 109.03 or 109.07 or ss. 101.58 to 101.599 or 103.64 to 103.82.
>
> (c) The individual files a complaint or attempts to enforce a right under s. 66.293 or 103.49 or testifies or assists in any action or proceeding under s. 66.293 or 103.49.
>
> (d) The individual's employer believes that the individual engaged or may engage in any activity described in pars. (a) to (c).

According to Section 22 of Wis. Act 228, the Act "first applies to discharge or other discriminatory action occurring on the effective date of this Section." The date of publication for the Act was April 27, 1990, so, pursuant to §991.11,

Stats., it became effective April 28, 1990, two months after the complainant filed Case No. 90-0028-PC-ER.

The Commission notes that the complainant, while appearing *pro se*, expressly withdrew her FEA retaliation claim in Case No. 90-0028-PC-ER in February of 1991. The respondent has not contended that it is somehow prejudiced by the complainant reasserting that claim at this time, so the Commission will proceed to address the jurisdictional issues raised by the respondent.

As indicated in letters to the Commission dated March 13 and April 2, 1992, complainant contends that she is entitled to FEA retaliation protection in Case No. 90-0028-PC-ER because she had previously filed written grievances, because of conduct engaged in by Sgt. Terry Klumpyan who, at that time, was complainant's boyfriend as well as a union official and sergeant at CCI, and "because KMCI believed that Paula would engage in filing complaints or attempting to enforce employee rights under various Wisconsin laws just like Sgt. Klumpyan." As noted above, the FEA prohibition against retaliation in February of 1990 only extended to persons who had "opposed any discriminatory practice under this subchapter or ... [had] made a complaint, testified or assisted in any proceeding under this subchapter." Complainant failed to make any showing that the grievances she filed or the grievances and unfair labor practice complaints Sgt. Klumpyan filed were proceedings under subch. II, ch. 111, Stats. As a consequence, the complainant has no basis on which to pursue a claim of FEA retaliation in Case No. 90-0028-PC-ER.

With respect to Case No. 91-0024-PC-ER, which relates to the decision at CCI not to extend her medical leave, complainant's retaliation claim is based upon 1) her previously filed discrimination complaint, 2) an allegation under the Family/Medical Leave Act, 3) grievances she had previously filed and 4) on the allegation that respondent believed the complainant would engage in a FEA protected activity. As has already been noted, the respondent has no objection to complainant proceeding with the first allegation which arises from the existence of her previously filed complaint, Case No. 90-0028-PC-ER.

In her May 21, 1992 brief, the complainant explained her FMLA retaliation claim as follows:

> Sec. 111.322(2m)(a) states that it is an act of discrimination for an employer to discharge an individual because the individual files a complaint or attempts to enforce a right under various statutes.

> Included among these statutes are Sec. 103.10... [which] deals with an employee's right to family and medical leave. Clearly the complainant was attempting to enforce her right to remain on medical leave when CCI terminated her. This is the primary basis for her complaint filed on February 25, 1991. Whether or not she was terminated as retaliation for forcefully arguing her medical leave rights is ultimately a question of fact which must be proven at a hearing.

As was noted in finding of fact 8, the Commission has previously dismissed complainant's claim under the FMLA in Case No. 91-0024-PC-ER as having been filed beyond the 30 day time limit established in §103.10(12)(b). Now, more than a year later, the complainant is alleging that she was terminated because she had invoked her medical leave rights. Nothing in the file of this matter indicates that the complainant ever made any reference to the FMLA in any contacts with the respondent about continuing her medical leave. She clearly did not file a FMLA complaint with the Commission until several months after the decision was made to terminate her employment. The fact that the complainant may have "forcefully [argued] her medical leave rights" does not mean that she forcefully invoked her rights under the FMLA. Rights to medical leave under the language of the FMLA are not coextensive with rights to medical leave which may exist under the provisions of the complainant's collective bargaining agreement. The Commission notes that the FMLA only provides 2 weeks of unpaid medical leave each calendar year, that the complainant had been on continuous leave from November 29, 1989 until December 12, 1990, and, pursuant to §Ind 86.01(9) and (10), use of contractual leave without pay by an employe may be deemed to be use of the 2 weeks of unpaid statutory leave. Given the absence of any specific allegations as to the conduct engaged in by the complainant by which she attempted to enforce a right under the FMLA, her allegation of FMLA retaliation under §111.322(2m)(c) is dismissed.

The complainant also argues that certain grievances she had filed were the basis for the respondent's decision not to continue her medical leave:

> Second, Sec. 109.03 Stats. is listed under Sec. 111.322(2m)(a) as a protected activity. Generally speaking, Sec. 109.03 protects employees rights to wage payments and wage claims. "Wages" are defined in Sec. 109.01(3) as including holiday and vacation pay. Complainant filed grievances for wrongful refusal to compensate for holiday pay in the past at Columbia before coming to KMCI.

> Therefore, this represents another protected activity under the FEA which complainant was engaged in which could be the basis for retaliation by the employer. She filed another grievance with regard to the wearing of white shoes at Columbia before coming to KMCI.

In the second grievance (which was filed at KMCI rather than at CCI), complainant had alleged a violation of the contract when, as a consequence of wearing white tennis shoes in August of 1989, she was assigned to a different post for one day and was counseled to wear black shoes. This grievance clearly did not relate to wages.

Complainant's first grievance included the following description at the 3rd step:

> Grievants used holiday time as printed on their paycheck stubs. Grievants were not informed that paycheck stubbs were inaccurate; therefore, were not given the opportunity to use earned holiday time. Grievants were notified of their holiday time lost on 2-7-89.

This grievance relates to the enforcement of a right to recover "the full amount of the employe's wages due on each regular pay day" as provided in §109.03(5), where "wages" are defined in §109.01(3) as "remuneration payable... including... holiday and vacation pay," even though the complainant's method of enforcement was via a contractual grievance rather than through a proceeding identified in §109.03. In contrast to the complainant's claim of FMLA retaliation, her wage claim was more closely tied to a specific statutory right. Respondent's motion to dismiss is granted with respect to the retaliation claim based on the tennis shoe grievance, but is denied as to the grievance relating to holiday pay.

Complainant's final basis for claiming retaliation is that respondent believed she would engage in a FEA protected activity. She argues:

> Paula Schmit does not claim any rights to be derived from Sgt. Klumpyan. Rather, the conduct and activities of Sgt. Klumpyan are important and relevant because they speak directly to the question of why Paula Schmit's employer believed she would engage in protected activity under FEA. Sgt. Klumpyan was an active union man who had filed various complaints and grievances for members of the union. KMCI knew that Schmit was involved in a relationship with Klumpyan. It does not take a leap of logic

> to conclude that KMCI was fearful that Schmit would become active in the union by filing grievances and complaints.

The Commission agrees that, by this statement, the complainant has set forth an allegation which falls within the scope of §111.322(2m)(d), and, therefore, may be heard. The respondent's motion to dismiss is denied as to this allegation.

Issues for hearing

By letter dated May 29, 1992, the complainant proposed a series of issues for hearing. The respondent agreed to some of the proposals, objected to others and identified an additional issue. Based upon the submissions of the parties, the Commission establishes the following statements of issue in these matters.

A. Case No. 90-0028-PC-ER

Did the respondent discriminate against the complainant on the basis of sex or retaliate against the complainant for actual or anticipated fair employment activities with respect to:

1. Several sexually disparaging remarks made by Ben Barber and others to the complainant during the weeks of October 9 and October 16, 1989;

2. On November 15, 1989, falsely accusing and reprimanding the complainant for leaving a door unlocked even after a male officer admitted he had done it;

3. Discriminatory discipline arising out of a fight on November 15, 1989, which resulted in complainant getting written up for violating a work rule but not the male captain who also violated several work rules;

4. Sexual harassment and intimidation by Captain Beck on November 24, 1989, during complainant's PPD review;

5. Revocation of probation;

6. Complainant was not given employee assistance and/or retraining like other officers.

B. Case No. 91-0024-PC-ER

Did the respondent discriminate against the complainant on the basis of sex or retaliate against the complainant because she had previously filed Case No. 90-0028-PC-ER, because she had previously filed a grievance relating to holiday pay or because re-

> spondent believed the complainant would engage in an activity described in §111.322(2m)(a) to (c), with respect to the decision not to extend her medical leave and to terminate her employment at CCI.

The respondent objected to two additional issues identified by the complainant for Case No. 90-0028-PC-ER. In its objection to issue A6, respondent stated it was "not supported by any factual allegations." The issue relates to the alleged failure by KMCI to provide retraining or employe assistance instead of deciding to terminate her employment at KMCI during her probation. This issue is sufficiently specific to provide adequate notice to the respondent and need not be supported by any additional factual allegations.

The respondent also objected to the following proposal based upon vagueness: "General treatment by KMCI employees during her KMCI employment was sexual discrimination." The Commission agrees that this proposal is too vague to provide adequate notice for hearing.

The Commission also rejects the complainant's apparent attempt to reserve the right to add issues in the future.[1] Given the nearly two and one-half years which have elapsed since the complainant last worked at KMCI, the complainant has had an adequate opportunity to identify the conduct she is alleging to have been discriminatory.

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[1] In his May 29, 1992 letter, complainant's counsel wrote:

> Since we are still in the discovery stage and still searching for information surrounding these and other incidents of sex discrimination, a final and complete list of each and every specific incident of sex discrimination is not feasible at this time. The materials previously submitted by Paula Schmitt-Klumpyan and her sworn testimony [by deposition] fully set forth many other allegations.

ORDER

Respondent's motion to dismiss is granted in part and denied in part as explained above. The issues for hearing shall be as set forth above.

Dated: September 3, 1992 STATE PERSONNEL COMMISSION

LAURIE R. MCCALLUM, Chairperson

KMS:kms

DONALD R. MURPHY, Commissioner

B. An employe who voluntarily demotes to the highest level position available shall retain his/her current rate of pay. The rate of pay of an employe who voluntarily demotes under any other circumstances shall be no greater than the pay range maximum of the new position.

C. Recall/Reinstatement of Non-Separated Employes

1. A laid off employe who has retained employment status and whose salary was maintained shall retain his/her current rate of pay upon recall/reinstatement.

2. A laid off employe who has retained employment status and whose salary had been reduced shall, upon recall/reinstatement, receive his/her rate of pay at the time of layoff plus any intervening across-the-board general pay adjustments.

D. Recall/Reinstatement of Separated Employes

1. A separated employe who is recalled shall receive his/her last rate of pay plus any intervening across-the-board general pay adjustments.

2. A separated employe who is reinstated within the department shall receive his/her last rate of pay plus any intervening across-the-board general pay adjustments.

3. A separated employe who is reinstated to a department other than the one from which he/she was laid off shall receive his/her last rate of pay plus any intervening across-the-board general pay adjustments, subject to the maximum of the pay range of the position to which he/she is reinstated.

Section 10: Employing Units

152 The existing employing units are set forth in Appendix B hereof. Before any such units are changed, the Union shall be given advance notice of the change pursuant to Article XI, Section 20.

Section 11: Priority of Article VII and Article VIII Rights

When a permanent vacancy occurs and more than one employe is otherwise eligible to fill the vacancy pursuant to the terms and limitations of Article VII and Article VIII of this Agreement, the vacancy shall be filled in accordance with the priorities set forth by the following categories, with transfer under Article VII, Section 1 accorded the highest priority of all.

1. Transfer within the employing unit (Article VII, Section 1).

2. Recall (Article VIII, Section 6) and bumping to a vacancy (Article VIII, Section 5.B). Within this category the most senior employe will fill the vacancy.

3. Transfer between employing units of the department (Article VII, Section 3).

4. Reinstatement within the department (Article VIII, Section 7.A).

5. After the above categories have been exhausted the Employer may fill the position in accordance with other provisions of this Agreement and the Wisconsin Statutes. Employes who seek voluntary demotion in lieu of separation due to layoff under Article VIII, Section 5.B.(2) and employes who seek reinstatement to other departments under Section 7.B., shall be considered along with the other certified candidates for the vacancy provided they meet the qualifications.

When there is mutual agreement between the Employer and the local Union and Council 24, recall may supersede transfers under Article VII, Section 1 and all other lower categories.

Section 12: Definition of Permanent Vacancy

For purposes of this Article, a permanent vacancy is created:

(1) when the Employer decides to fill a new position, or

(2) when any of the following personnel transactions take place and the Employer decides to replace the previous incumbent: termination, transfer, promotion, demotion, resignation or retirement.

Section 13: Relocation Expenses

When the Employer determines that it would be necessary for an employe who is transferring in lieu of layoff, voluntarily demoting as a result of a layoff or bumping to a vacancy, to change the location of his/her residence the Employer shall pay only those expenses of the type and amounts, and subject to the limitations, set forth in sec. 20.917, Wis. Stats.

Exhibit 3

State of Wisconsin \ DEPARTMENT OF HEALTH AND SOCIAL SERVICES

DIVISION OF COMMUNITY SERVICES
CENTRAL STATE HOSPITAL
WAUPUN, WISCONSIN 53963

June 18, 1982

Ms. Jane Schmit
207 Doty Street
Waupun, WI 53963

Dear Ms. Schmit:

This letter is to inform you that effective January 28, 1982, your employment with Central State Hospital is hereby terminated.

In an investigative hearing on June 9, 1982, you denied having sexual contact with a resident, and you also denied knowing the whereabouts of this resident while he was in escape status.

During our meeting on June 17, 1982, these allegations were again discussed. The evidence verifies you did have sexual contact with this resident and knew his whereabouts while in escape status.

Ms. Schmit, you have violated the Department of Health and Social Services Work Rules 1, 5, and 7 which prohibits employees from committing any of the following acts:

Work Rule #1: Disobedience, insubordination, inattentiveness, negligence, or refusal to carry out written or verbal assignments, directions, or instructions.

Work Rule #5: Disorderly or illegal conduct including, but not limited to, the use of loud, profane, or abusive language; horseplay; gambling; or other behavior unbecoming a state employe.

Work Rule #7: Failure to provide accurate and complete information when required by management or improperly disclosing confidential information.

Due to the seriousness of these violations, we are going ahead with this termination.

Your classification is included in the Security and Public Safety Bargaining Unit covered by the collective bargaining agreement in effect between the State of Wisconsin and AFSCME Council 24, Wisconsin State Employees Union, AFL-CIO and accordingly, if you allege that this action was not based on just casue, you may appeal this through the contractual grievance procedure.

Sincerely,

James C. Powell
Director

cc: Personnel File
President - LOCAL 178
Ken DePrey - BPER

Exhibit 4

GRIEVANCE MUST BE FILED ON THIS FORM

Complete this report, following instructions below. Detach last copy (green) and submit rest of set to the proper representative of your employer.

State of Wisconsin
AD-25

EMPLOYE CONTRACT GRIEVANCE REPORT

Grievance Step - circle one: 1 2 (3)

No. - for Agency use only

If this is a group grievance, use name and classification of spokesman and attach a sheet listing the names and classifications of other grievants.

TYPE OR PRINT

Name - Last, First, Middle Initial	Classification	Bargaining Unit
Schmit, Jane	OFFICER 3	3 & PS
Agency: DHSS / Division of Corrs. & Comm Svcs.	Employing Unit: DCI / CSH	Work Unit: 2 Pm - 10 Pm
Work Unit Telephone: 324-5377	Headquarters Location: Waupun, WI.	Shift or Hours of Work: 2 Pm - 10 Pm

This grievance alleges violation of Article 4 Section 9 of the labor agreement.

Describe the grievance - state all facts, including time, place of incident, names of persons involved, etc.

Allegations listed on termination notice were never proven to be true. Therefore termination is unjust.

DHSS/BPER --

16 JUL 82 1:28

Relief sought

Reinstatement with full back pay & benifits.

Employe's Signature	Employe Representative's Signature	Date Submitted
Jane Schmit (ESE)	Harvey D. Hoffman (ESE)	7-15-82

Employer's Decision

The contract has not been violated. The action taken against you was for just cause. The relief you are seeking will not be granted. Grievance denied.

Employer's Signature	Title	Date Received	Date Returned
Peter Grunwald	Employment Relations Specialist		12/14/82

INSTRUCTIONS

Individual employes have the right to present grievances in person or through representatives of their own choosing at any step of the grievance procedure.

In the event that the employe is not satisfied with the supervisor's written decision, or if the supervisor does not return an answer within the time limits set out in the collective bargaining agreement, to be considered further, the grievance must be appealed to the next higher step or appealed to arbitration within the time limits set forth in the agreement.

See your collective bargaining agreement for time limits for presenting and acting on grievances. Failure to observe these time limits will result in loss of appeal rights. These time limits may be extended only by mutual agreement.

Exhibit 5

November 1, 1983

Mr. Jack Kasten

Dodge Correctional Institution
Waupun, Wis. 53963

Dear Mr. Kasten,

I am writing to inform you, that as of the court decision dated October 26, 1983, I have been totally cleared and exonerated of the criminal charges made against me.

Thus, in reference to the letter sent to me, dated January 29, 1982, you stated that I would be restored to my position with full back pay and benefits.

I request at this time, that you inform me when my starting date will be, at either Dodge Correctional Institution or Taycheedah Correctional Institution, and when I will receive my full back pay and benefits; in accordance with your aforementioned statement in writing.

Please be informed that I expect a prompt reply to my request. I am anxiously awaiting my reinstatement.

Respectfully,

Jane A. Schmit
207 Doty Street
Waupun, Wis. 53963

Exhibit 6

State of Wisconsin \ DEPARTMENT OF HEALTH AND SOCIAL SERVICES

DIVISION OF CORRECTIONS
DODGE CORRECTIONAL INSTITUTION
P.O. BOX 661
WAUPUN, WISCONSIN 53963
414-324-5577

November 8, 1983

Ms. Jane Schmit
207 Doty Street
Waupun, WI 53963

Dear Ms. Schmit:

This is in response to your letter inquiring about reinstatement at Dodge Correctional Institution. Due to your termination, you have no mandatory reinstatement rights.

Your termination was based on violation of State work rules.

Sincerely,

J.T. Kest

Jack T. Kestin
Personnel Manager

JTK/dk