STATE OF WISCONSIN PERSONNEL COMMISSION

JAMES MARTIN,

Appellant,

v.

Secretary, DEPARTMENT OF CORRECTIONS,

Respondent.

Case No. 94-0103-PC-ER

RULING ON MOTION TO DISMISS

This matter is before the Commission on the respondent's motion to dismiss for failure to state a cause of action upon which relief may be granted and for lack of subject matter jurisdiction.

In May of 1994, the complainant sought a copy of certain materials from the file in a case then pending before the Commission, Neal v. DOC, 94-0019-PC-ER. Respondent moved for a protective order. The respondent's motion was the subject of a ruling by the Commission on June 2, 1994. That ruling described the nature of the allegations in Neal as follows:

> The complaint was filed on February 10, 1994, and alleges discrimination based on sex. The complaint references a number of incidents and concludes with the following paragraph:
>
> > I feel as if a select few male officers are using their union board positions to harass the female officers at OCI [Oakhill Correctional Institution] and at the UWH & C [University of Wisconsin Hospital and Clinics] and that the OCI administration is aware of this situation but allows it to continue, if not encourage it, to distract from other situations at OCI.
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> The general nature of the harassment alleged in the body of the complaint is "reporting every rule violation the female officers did to see how the OCI Administration would respond." One of the "few male officers" identified in the complaint is James Martin. Complainant later amended her complaint to include a letter of suspension received on February 26, 1994.

In its June 2nd ruling in Neal, the Commission denied DOC's motion for protective order and provided Mr. Martin with a copy of materials from that file.

On July 11, 1994, complainant filed his own complaint with the Commission arising from respondent's conduct in the Neal matter. The complainant alleges that he was discriminated against based upon age and sex and retaliated for engaging in Fair Employment Act activities. As noted below, the Commission understands at least certain of the allegations to arise from various statements made by respondent in the course of its written answers in the Neal case.

Respondent's initial answer in the Neal case, contained in a letter dated March 23, 1994, included the following statements:

> This is a complaint which complains mostly about actions of male co-workers taken while they are acting in their capacity as union officials. The Personnel Commission does not have jurisdiction over those actions any more than the respondent does. However, the respondent is sympathetic to complainant's distress and would like to meet to conciliate with her and perhaps offer some suggestions about what remedies she could seek. Accordingly, the respondent will not move to dismiss this complaint at this time.
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> As the Commission might remember, in the last three years or so the Oak Hill Correctional Institution (OCI) has had to deal with charges of sexual harassment made by nurses... against male correctional officers working in the University of Wisconsin Security Unit (UWSU). The Asche case went to hearing; other cases went to arbitration. The local union filed literally dozens and dozens of various grievances and complaints against OCI management in retaliation against said management for actions it took to terminate the sexual harassment at the UWSU. Mr. Jim Martin, the UWSU union steward, filed a grievance demanding OCI pay female officers at the UWSU less because they could not conduct strip searches pursuant to the respondent's administrative rules.
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> Certain male members of the OCI union local apparently out to strike back against the female OCI management, have allegedly been keeping "little black books" about female co-workers in order to see how OCI management would respond to work rule and policy violations by female officers. It is alleged that when a male officer makes a mistake or commits misconduct fellow male officers either do not report it or lie if questioned about it later. If a female officer does the same thing, the male officers make sure she is reported, especially where, as in this case, the female officer tells the truth and admits to an infraction.
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> The respondent employer may not tell one of its employees, in this case Mr. Jim Martin, whether he can or can not "keep a little black book" on the female officers at the UWSU. If the male offi-

> cers present a united front to management, management does not have proof upon which to base any action. If the local union officials are not doing a good faith job of representing the female union members' interests, management can not do much about it. On the other hand, the management must take action against employees when they admit they violate the rules.
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> We have no proof that the union selectively feeds management information on the female officers. We have to deal with the union as the exclusive bargaining agent and representative of the OCI officers.
>
> An investigation meeting was held with Captain Houser to address the claims made by Ms. Neal in her complaint about conversations with him. He denied telling Ms. Neal the union had complained about her taking time off the UWSU to smoke, he denied telling her he and the security director knew problems on the UWSU occurred because Jim Martin did not want women working on the UWSU and denied that Jim Martin ever admitted to him that he (Martin) had not reported Officer Scallissi when he allegedly was late.
>
> We hope that at conciliation we can convince Ms. Neal that our hands are tied but that she has remedies elsewhere.

In a letter dated May 13, 1994, respondent filed its answer to the amended complaint in the Neal case. The May 13th letter from respondent's counsel included the following statements:

> Ms. Neal was disciplined because she told another officer that an officer named Schultz had been "dry-humping" an inflatable doll while Schultz worked as a correctional officer at the UW Security Unit and that he should have been fired. That statement got back to Schultz and others and created some distress; it made it more difficult to carry out the state's business. Since Ms. Neal had already received a written reprimand within the one year prior to the inflatable doll statement, under the DAI Disciplinary Guidelines she received a one day suspension.
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> As was noted in the respondent's first answer, the complainant points to the fact that other officers who did similar things were not disciplined. However, management has no proof the other officers did what the complainant said they did; no one has come forward to prove it and the complainant speaks only from hearsay. Without proof management cannot act. While it is to complainant's credit that she tells the truth and admits it when she makes a mistake, the fact others do not do so and deprive management of the proof it needs to carry out corrective discipline does not mean management is discriminating against the complainant.

> The respondent also wishes to point out that when it has proof that male employees engage in sexual harassment it acts aggressively. The Schultz person the complainant made her statement about was demoted, suspended from 30 days and transferred when management had proof he sexually harassed nurses at the UW Security Unit. A lieutenant named Al Asche, whose case was heard by the Commission, was suspended for 15 days and transferred to another institution. The respondent punishes male and female alike when the proof exists.

In his complaint of discrimination, complainant refers to these two letters filed by respondent's counsel in the Neal case:

> On 6/13/94 I recieved documents from the Personnel Commission with letters from Mr. Gregory V. Smith, Assistant Legal Counsel for the Department of Corrections. These letters were regarding PC Case #94-0019-PC-ER; Neal Vs DOC. Mr. Smith makes allegations against myself as well as other Unionrepresentatives. He states he is sympathetic to Ms Neals allegations none of which are in any way harassment, or discriminatory. Grievances are filed on behalf of the Union, not for the employer. The fact that Management has a policy that establishes discrimination does not make that policy correct. As far as keeping "little black books", again nothing is wrong with keeping notes. And Management has not shown I have used any information I may have against anyone. And Mr. Smith statement that Male staff cover up or lie for each other is in itself harassment.... Management has not treated all staff equal and they are well aware of their failure to do so.
>
> OCI management gave Sgt. Brian Beahm a letter of job instruction for allegedly denying a female officer the opportunity to use the telephone to call OCI to turn herself in for smoking on the unit. But to the best of my knowlege they did nothing about the smoking on the unit. They (Capt. Lemke) had knowledge of a female parking in lot 76 with a permit issued by OCI Management but chose not to do anything about it. But this same OCI Management disciplined a male officer for having his parking ticket validated, once when OCI was contractually obligated to see that the officer had his parking paid for by management. They are the ones who have taken a stand as to Male and Female being treated differently.... The above is in regards to Mr. Smiths letter dated 3/23/94.
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> In Mr. Smiths letter dated 5/13/94 gives Ms Neals statement of not treating staff equally validaty as to if it where fact.... Many of Ms Neals complaints are unfounded and untrue.... DOC/OCI is so orientated to protecting females that they fail to look at the records and treat all Staff (MALE & FEMALE) fairly or equally. Because of these allegations by Ms Neal OCI has again conducted one of its investigations and is taking disciplinary action against

> Capt Houser.... I find Mr. Smith's letters to be a direct attempt to create a Hostile work environment, and also a way of trying to intimadate me. His actions and failure to request the PC to dismiss Ms Neals complaint is again prejudicial in that it try's to make false statements against the UNION. Because of his letters I percieve that he is attacking me and this attack is an attempt to interfere with my duties as a Union Representative....
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> I want Mr. Smith to give me a letter from him and the Department of Corrections that states that I have not harassed anyone, and that the DOC will move to have Ms. Neals complaint dismissed. I also want it stated that they will not take any retaliation against me for my filing this Complaint and the Union activities I have been involved in, and that they will leave me alone and allow me to do the duties as 1st shift Sgt. at the UWH& CSU as properly as I always have until I choose to leave the Unit or Retire.

In its motion to dismiss, respondent incorrectly characterizes the complaint in this matter as arising from the statements made by respondent's counsel in responding to complainant's Open Records request in the Neal case. Nothing in the language of the complaint references that document. In contrast, there are numerous references in the complaint to language used by respondent's counsel in the two answers filed in Neal. Even though the respondent has mischaracterized the origins of the complaint, respondent's theory behind its motion to dismiss still bears analysis because it is based on the premise that conduct by an attorney representing the Department in another proceeding cannot be considered an employment action.

The instant complaint was filed under the Fair Employment Act, subch. II, ch. 111, Stats. In §111.322(1), Stats., the FEA bars the following acts of employment discrimination:

> To refuse to hire, employ, admit or license any individual, to bar or terminate from employment... any individual, or to discriminate against any individual in promotion, compensation or in terms, conditions or privileges of employment... because of any basis enumerated in s. 111.321.

In Larsen v. DOC, 91-0063-PC-ER, 7/11/91, the Commission addressed the issue of whether an allegation that the respondent had asked complainant irrelevant personal questions at a deposition could serve as the basis for a separate claim of FEA retaliation. In analyzing the phrase "terms, conditions or privileges of employment," the Commission held:

> [O]nce the employer and employe become opposing litigants in a statutorily-provided proceeding before a third party agency, this context basically is not that of an employment relationship, and the employer's actions as a litigant in that litigation normally would not implicate any "terms, conditions, or privileges of employment." The proceeding may arise out of the employment, but the relationship between the parties in the conduct of the litigation is not that of employer and employe. This is illustrated by the fact that the employer has no authority to control the employe's conduct of the litigation, and that the basic framework for the parties' conduct in such proceedings is the Administrative Procedure Act (Chapter 227, stats.), §§230.44 and 230.45, stats., and Chs PC, Wis. Adm. Code. An employe's rights with regard to deposition questioning will not be found in the substantive civil service code governing the employment relationship. Rather, it will be found (as relevant here) by reference to §§PC 4.03, Wis. Adm. Code, and 804.01(3)(a), stats., pursuant to which the Commission "may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Therefore, it is neither a term or condition of employment in the sense of a requirement, nor is it a privilege of employment in the sense of a right or advantage granted to an employe.
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> While the Commission is cognizant of the FEA's liberal construction clause, §111.31(3), stats., it would be going beyond a fair liberal construction to hold that "terms, conditions or privileges of employment," §111.322(1), stats., encompasses an employer's line of questioning at a deposition taken in connection with the employe's appeal of a disciplinary action. In addition to the rationale discussed in the preceding paragraph, the Commission notes there is a dearth of reported authority holding that litigation tactics are cognizable under the FEA or similar laws. Furthermore, such a holding would have significant negative policy implications. If any allegedly abusive line of questioning or other litigation tactic could be the basis for a charge of FEA retaliation, this could lead to a plethora of new litigation. On the other hand, failure to so extend the reach of the FEA does not mean that there is no remedy against oppressive discovery tactics. As noted above, a party has the prerogative under §PC 4.03, Wis. Adm. Code, and 804.01(3)(a), stats., to request the Commission to enter an order with respect to discovery "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."

In Larsen, the basis for the discrimination claim related to respondent's conduct during a deposition in another case, involving the same parties. In the instant case, the claim relates to the conduct by respondent's attorney in a case to which complainant was *not* a party. That distinction is not dispositive

in that in both cases the conduct of the respondent occurs in the context of a legal proceeding and is outside of an employment setting.

The Commission noted that if the complainant in Larsen had been permitted to dispute the respondent's conduct in pursuing a particular line of questioning in a deposition, cases could turn into spiraling discrimination claims, even though the effect of the questioned conduct on the litigant does not directly involve the employment relationship. The Commission implicitly rejected the view that a "hostile environment" claim, premised upon the conduct of an attorney representing the respondent during litigation, falls within the scope of "terms, conditions and privileges of employment."

Here, the conduct complained of, i.e. statements made by respondent's counsel in its answers to Ms. Neal's claim, also cannot be said to be part of the employment relationship existing between the respondent and Mr. Martin. The answers did not serve as the basis for imposing discipline against the complainant, nor is there any contention by the complainant that the comments were disseminated by respondent in the workplace setting. Here, the complainant only gained access to the answer by filing an open records request.

As noted in the analysis in Larsen, there is a dearth of reported cases on this topic, even though Title VII also prohibits discrimination "with respect to... compensation, terms, conditions, or privileges of employment." 42 U.S.C. §2000e-2(a)(1). In Senter v. General Motors Corp., Inland Div., 383 F. Supp. 222, 11 FEP Cases 1068, (S.D. Ohio, 1974); aff'd 532 F.2d 511, 12 FEP Cases 451; cert den 429 U.S. 870, 50 L.Ed 2d 150, the employer's response of rejecting a grievance alleging discrimination based upon race with respect to promotional opportunities served as a basis for a claim of race discrimination where the respondent's action included suspending the complainant when he was directed to withdraw the grievance and failed to do so. The court concluded that this suspension had a "chilling effect" upon the assertion of rights by black employes and found the suspension constituted illegal retaliation. The conduct of the employer in Senter involved a specific act of discipline. In the instant complaint, the alleged term, condition or privilege of employment consisted merely of statements found in an answer filed by respondent in a case to which complainant was not a party.

The Commission acknowledges that a discrimination claim can be based upon an allegation of a discriminatorily hostile or abusive environment. In Harris v. Forklift Systems, 510 U.S. __, 126 L.Ed. 2d 295, 63 FEP Cass 225 (1993), the Supreme Court discussed the standard to be applied in such cases as follows:

> When the workplace is permeated with "discriminatory intimidation, ridicule, and insult," that is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment," Title VII is violated.
>
> This standard... takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury. (63 FEP Cases 225, 227, citations omitted)

The Commission is satisfied that the environment of ongoing litigation between the employer and an employe other than the complainant, as reflected in the allegations of discrimination in the instant case, does not constitute a "workplace" as considered by the Court in Forklift.

In his response to the motion to dismiss, the complainant draws a comparison to the respondent's failure to file a motion to dismiss the Neal case and contends that respondent would rather attack the complainant than file a motion to dismiss Ms. Neal's allegations. This comparison again relates to the manner in which respondent is defending the two cases rather than to some conduct by respondent occurring outside of the context of the litigation of the two claims.

The above analysis by the Commission relates to complainant's allegation that the statements by respondent's counsel in the Neal case constituted discrimination/retaliation against him. The focus of the original complaint appears to be on the conduct by respondent's counsel. However, the complainant also appears to to base his allegations of discrimination/retaliation on other conduct by management. Some of the complainant's statements in this regard are set forth above in the quoted portions of the complaint.[1] The complainant appeared to expand on these allegations in his response to the respondent's answer. In order to minimize any delays in this case, the Commission will provide the complainant an opportunity to more clearly identify his allegations in this matter which remain after this interim ruling.

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[1]Page 4 of this ruling.

ORDER

The respondent's motion to dismiss is granted in part, in that complainant's allegations of discrimination/retaliation arising from the content of pleadings dated March 3, 1994 and May 13, 1994, in the Neal complaint are dismissed. The complainant is provided a period of 25 days from the date this order is signed in which to clarify or amend his remaining contentions of discrimination/retaliation. The clarification/amendment should list, number and specifically describe the remaining incidents of conduct by respondent alleged to be discriminatory/retaliatory.

Dated: December 22, 1994 STATE PERSONNEL COMMISSION

LAURIE R. MCCALLUM, Chairperson

KMS:kms
K:D:temp-1/95 Martin

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner