STATE OF WISCONSIN PERSONNEL COMMISSION

EURIPIDES ALVARADO-ORTIZ,
Complainant,

v.

Secretary, DEPARTMENT OF CORRECTIONS,
Respondent.

Case Nos. 96-0019-PC-ER, 97-0197-PC-ER

FINAL
DECISION
AND ORDER

A proposed decision and order was mailed to the parties in the above-noted case on October 20, 1999, establishing a deadline of November 19, 1999, for the parties to file written objections or to request oral argument. Neither party filed written objections or requested oral argument by the established deadline. On December 7, 1999, the complainant sent the Commission an e-mail message requesting oral arguments and additional time to file written objections. The Commission received the message on December 8th. Complainant's reason for filing a late request were described in the e-mail message as noted below:

> The letter sent to me for the November 19th deadline wasn't received until December 1st. I was not available for three weeks and out of town doing odd jobs. Then when the notice was actually received my lawyer was not available himself. Mr. Lloyd A. Barbee Attorney at Law, who is also a friend of the family, is helping me with my case. I know you still haven't made your final decision yet, and because of that I would like to request more time for both parties. A lot of things that didn't go right with the case are rooted in the lack of legal representation. An extension of time would allow for me to be able to better consult with my Legal consultant, Mr. Lloyd Barbee[1], the case (sic). Thank you.

On December 10, 1999, respondent filed objections to complainant's late request.

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[1] Atty. Barbee did not represent complainant at the hearing and there is no attorney of record

The proposed decision was mailed to complainant at his address of record in Green Bay, Wisconsin, on October 20, 1999. The decision should have arrived at his home address shortly thereafter. Complainant's failure to provide the dates he was away from home is fatal to his claim that he did not receive the decision until almost two months after the decision was issued. Therefore, complainant's requests for oral argument and extended time to file objections are denied. The complainant also made the following statement in his e-mail message:

> I object to submit a motion for cost (sic) because I am on a fixed income and any change would bring hardship to my family. I am not like the DOC who have millions in resources from the tax payers to burn at will . . .

The Commission wishes to advise the complainant that DOC as the prevailing party in these cases has no standing to request that costs be assessed against him.

The Commission, as noted herein, made substantive changes to the proposed decision to reflect the legal rationale of the full Commission. Credibility was not a factor in any of the changes made. These changes are highlighted for the parties through use of alpha footnotes.

These matters are before the Commission on the basis of two separate charges of discrimination in violation of the Fair Employment Act (FEA), Subchapter II, Ch. 111, Stats. The two cases were consolidated for hearing and a hearing was held on the following issues:

> Case No. 96-0019-PC-ER
> Whether complainant was discriminated against on the basis of his race, color or national origin or ancestry when he was reprimanded for poor job performance by Lt. Natzke in 1995-96.
>
> Case No. 97-0197-PC-ER
> Whether respondent discriminated against complainant on the bases of race and national origin or ancestry with respect to terms and conditions of employment in violation of the Fair Employment Act (FEA), Subchapter II, Ch. 111, Stats., and in retaliation against him for engaging in certain protected activities under the FEA, as described in complainant's complaint, signed December 12, 1997.

FINDINGS OF FACT

1. Complainant, Euripides Alvarado-Ortiz, is a male Puerto Rican-American of Hispanic ancestry who was employed as a Correctional Officer at Green Bay Correctional Institution (GBCI) for 22 years. During that period complainant was promoted through the ranks and served as a Sergeant for 15 years.

2. In 1995 complainant was transferred to South Cell Hall and was in charge of this cell hall while on duty. Complainant's immediate supervisor was Captain Christenson. Christenson and Lieutenant Dennis Natzke shared direct supervision of South Cell Hall.

3. On October 5, 1995, during complainant's work shift a fight started on the back side of E Tier in South Cell Hall. Officer Jauquet alerted complainant of the fracas and complainant sounded the alarm for assistance.

4. At that moment, Electrician Technician Brad Fedie was working on a control panel 25 feet from complainant's desk. Complainant directed Fedie to shut the control panel cabinet—which closed all E-Tier doors, left his desk unattended and went to stop the disturbance.

5. Complainant's South Cell Hall Post Orders provided, "The Sgt. is responsible for overall security and control of the entire cell block."

6. Lieutenant Natzke and several other officers responded to the alarm. As they entered South Cell Hall no officer was at the sergeant's desk. Natzke wrote a disciplinary investigation report on complainant's actions.

7. On October 13, 1995, Captain James Zanon held a pre-disciplinary meeting with complainant. Union representation was declined. Complainant stated he left the desk area because of his prior long time function and habit as a utility sergeant.

8. Zanon recommended complainant be disciplined and complainant received a one day suspension without pay. The suspension was subsequently reduced to a written reprimand by letter dated October 16, 1995.

9. On October 8, 1995, Natzke sent a memorandum to GBCI Security Director Kent informing him of certain duties performed by complainant as South Cell Hall Sergeant that he believed were inconsistent with GBCI security procedures and practices. No evidence was presented indicating Natzke kept similar records on other officers, but respondent considered it good practice to document employe work problems.

10. On December 1, 1995, Natzke verbally reprimanded complainant for allowing inmates to drag laundry baskets across the floor causing scuffs and scratches in the wax on the concrete floor. The marks were caused by immobile wheels on overloaded garbage coasters. To correct the problem complainant placed a work order to have the defective wheels replaced. After the floors were buffed, the marks were no longer visible.

11. On January 5, 1996, Natzke informed complainant that he was in trouble because Sgt. Phillips, the third shift sergeant, had written an incident report stating complainant had left a personal check to an inmate unattended in the main desk drawer. Officer Duane Natzke advised Lt. Dennis Natzke (his brother) that he, not complainant, had left the check in the desk and forgotten about it.

12. During the morning on February 8, 1996, complainant received a phone call at his desk from Social Services inquiring about an inmate, who was to report to his social worker. Complainant checked the schedule and determined the inmate's location.

13. While complainant's back was to his desk, Lt. Natzke entered the cell hall behind 5 inmates. Natzke observed that complainant did not acknowledge his or the inmates' presence and had a newspaper on his desk opened to the business section. Along side the newspaper was a piece of paper with stock quotations jotted down.

14. Lt. Natzke took the newspaper and the piece of paper with stock quotes from complainant's desk and left the cell hall. Natzke later delivered the items to the security director.

15. Complainant had been reading his newspaper earlier that morning. Complainant gave the newspaper to Officer Aaron Servais, who was sitting in front of the desk across from him. Servais was reading a section of a newspaper when he noticed Natzke entering the cell hall. Servais laid the paper down and went up on the cell hall tiers. When he returned the newspaper was gone.

16. Lt. Natzke never witnessed complainant reading the paper that day nor did he testify to observing Servais reading it. The newspaper Natzke removed from complainant's desk was the property of an inmate. The paper with handwritten stock quotations belonged to complainant.

17. On February 15, 1996, complainant filed a charge of discrimination with the Personnel Commission (Case No. 96-0019-PC-ER), alleging respondent discriminated against him on the bases of his color, race and national origin or ancestry.

18. By a hand delivered letter dated February 16, 1996, complainant was notified of a one day suspension without pay for inattentiveness on February 8, 1996, in violation of work rule 1.

19. On February 28, 1996, complainant directed an officer to sign an inmate population count form prior to the actual count being taken. This was in violation of the South Cell Hall population count procedure, which requires a physical count of inmates before signing the population count form.

20. Sergeant Ann Van Beek, who was sitting across the desk from complainant, confronted complainant regarding the signing of the count form prior to the actual count. Complainant reported his actions regarding the count to the shift supervisor, Lt. Stephen Finnel.

21. Later that same day Finnel talked with Van Beek and the utility officer involved in the incident. Van Beek refused to formally write up complainant.

22. On February 28, 1996, Lt. Finnel wrote an Employe Disciplinary Investigation report on the count incident.

23. A pre-disciplinary meeting was held on February 29, 1996. In attendance were Captain Christenson, complainant's supervisor, complainant and union representative Gary Mercier. Complainant stated he made a mistake having the officer sign off prior to taking the count, but that he did not call in the count prior to the physical determination of the population count.

24. By letter from Warden Daniel Bertrand dated March 15, 1996, complainant was notified that he was being removed from his position as first shift South Cell Hall Sergeant for violating respondent work rule 1 and placed on utility sergeant duty, effective March 20, 1996. Complainant did not receive a demotion in rank or a suspension. Complainant was removed as cell hall sergeant because of the February 28, 1996, inmate count incident.[A]

25. On March 20, 1996, complainant received a phone call from Officer Willeman asking why he was absent from work. The call was made in accordance with the GBCI "No Call, No Show" policy. If a person's shift starts and he/she is not there, a call is made to determine the reason. In this instance, a scheduling error had been made and complainant was not required to be at work. Willeman transferred the call to complainant's supervisor and the matter was rectified.

26. On October 24, 1996, complainant and Officer David Corpus, a Hispanic male, transported an inmate to the Wisconsin University Hospital/Clinic in Madison, Wisconsin. Before an inmate can be temporarily released from GBCI for reasons such as a medical report, the patient must have a temporary or emergency release order. This release order must be secured by the transportation officer during the transport. When complainant and Corpus returned from the hospital with the inmate they did not have the release order.

27. The release order was the only authority complainant and Corpus had to take the inmate off GBCI grounds. Shift Supervisor Capt. Patrick Brandt verbally reprimanded them for losing the release papers. Brandt told them that he should "put them in jail with the inmates." Complainant characterized the remarks as "nutty".

[A] This last sentence was added to clarify the record

Complainant knew Brandt had no authority to put him in jail, but found the remarks inappropriate and offensive.[B]

28. On March 18, 1997, shortly after an incident, Security Director (Capt.) Brandt, Associate Warden of Security (Capt.) Kent, Capt. Natzke and Capt. Pfister discussed inmate problems and unrest. Comments were made to the effect that complainant made inmate cell assignments like a social worker and did not delve into the basis for requests for cell reassignment. However, no one suggested that complainant was to blame for inmate unrest.[C]

29. Complainant retired from his position at GBCI on May 15, 1997. Complainant was 50 years old at the time he retired and this was the first time he was eligible for retirement benefits.

30. On December 17, 1999, complainant filed a second complaint with the Commission (Case No. 97-0197-PC-ER), alleging he had been retaliated against by respondent since filing his initial complaint and was forced to retire.

CONCLUSIONS OF LAW

1. These cases are properly before the Commission for a decision pursuant to §230.45(1)(b), Stats.

2. Complainant has the burden of proof to establish respondent discriminated against him on the basis of race, color, national origin or ancestry in violation of the Fair Employment Act, Subchapter II, Chapter 111, Wis. Statutes; and/or on the basis of retaliation for engaging in activities protected under the FEA, as described in complainant's discrimination complaints.[D]

3. Complainant has failed to satisfy his burden of proof in both instances.

4. Respondent did not discriminate or retaliate against complainant as alleged in Case No. 96-0019-PC-ER and Case No. 97-0197-PC-ER.

[B] Changes made in #27 of FOF were for purposes of clarification
[C] Changes made in #28 of FOF were for purposes of clarification

OPINION

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

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

I. Color, Race, National Origin/Ancestry Charge: Case No. 96-0019-PC-ER

Complainant's claim that he is a member of a class protected by the FEA is not at issue. Therefore, he satisfies the first element of a prima facie case. Regarding the remaining two prima facie elements, complainant, in support of his allegation, directs attention to four incidents: 1) the October 5, 1995, work shift fight in South Cell hall and subsequent written reprimand on October 16, 1995; 2) the December 1, 1995, verbal reprimand by Lt. Natzke for allowing inmates to drag laundry baskets across the floor causing scuff marks on it; 3) the statement to complainant by Lt. Natzke that complainant was in trouble because of an incident report that identified complainant as having left a bank check unattended in his desk drawer; and 4) the newspaper incident, where on February 8, 1996, Lt. Natzke entered South Cell Hall behind several inmates unnoticed by complainant, and removed a newspaper and a note from complainant's desk.

[D] Conclusions of Law Number 2 was changed for purposes of clarification.

Regarding these four incidents, complainant makes this general argument: He had worked at GBCI for over twenty years and compiled a good work record. However, subsequent to his transfer in May 1995 to South Cell Hall (SCH) as SCH Sergeant, which was directly supervised by Lt. Natzke, he became the subject of a series of complaints from Lt. Natzke and conspiratorial followers. Complainant argues that this sudden flood of complaints was based on the fact that he is Puerto Rican and of Hispanic ancestry.

While it is doubtful complainant has presented evidence establishing the third element of a prima facie case, the fundamental question is whether respondent discriminated against complainant as charged. In answer to this question the Commission concludes the evidence presented is insufficient to reach that result.

In testifying about the four incidents that were the basis of his complaint, complainant provided no specific evidence of discrimination because of his race, color, national origin or ancestry. Complainant testified he had difficulty with Lt. Natzke, that Natzke engaged in "nitpicking," finding fault with him over insignificant details; and that other people "do stuff" and "if [he is] reprimanded for it, they should be equally across the board." However, complainant presented no witnesses or documentary evidence to substantiate this claim. Complainant did testify that "[management] favor certain type of people—you are either a 'Hawk' or a 'Social Worker' type guard"—he was a social worker type of guard and that was "probably why they wanted to remove [him] from the office." However, if this is an accurate assessment, then such treatment was not on the basis of race, color, national origin or ancestry. Complainant neither testified nor presented any evidence that Lt. Natzke or others told ethnic jokes, called him or other Hispanics derogatory names or demeaned them on the basis of their ethnic background.

In conclusion, the evidence presented does not support complainant's contention that he was treated differently from other non-Hispanic officers.

II. Discrimination and Retaliation Charges Under FEA: Case No. 97-0197-PC-ER

The criteria for establishing a prima facie case of discrimination are as observed above in Case No. 96-0019-PC-ER. To establish a prima facie case of retaliation, a complainant must show that (1) complainant engaged in statutorily protected activity, (2) complainant suffered an adverse action by the employer, and (3) a causal link exists between the protected activity and the adverse action. *Acharya v. Carroll*, 152 Wis. 2d 330, 448 N.W.2d 275 (Ct. App. 1989). Whether a claim of discrimination or retaliation under the FEA, a complainant is required to show that he/she was subject to a cognizable employment action. *Klein v. DATCP*, 95-0014-PC-ER, 5/21/97. Here there is no dispute with regard to whether the evidence of record establishes the first element of a prima facie case of discrimination and retaliation under the FEA. Also, there is no dispute respondent, prior to the current allegations of discrimination and retaliation, knew complainant had filed a discrimination complaint against them. Accordingly, the question is whether there was "an adverse employment action."[E]

Complainant alleges he suffered the following adverse actions by respondent: 1) On March 20, 1996, he was removed from his position as South Cell Hall Sergeant for alleged improper procedure for obtaining inmate count on February 28, 1996; 2) on October 24, 1996, Captain Patrick Brandt threatened he was going to put complainant in jail with the inmates; 3) on March 18, 1997, Captain Patrick Pfister told complainant that Associate Warden Robert Kent, Lt. Dennis Natzke and Captain Patrick Brandt were plotting to blame him for all the unrest and problems at GBCI; 4) on April 6, 1997, Officer Mike Obravac told complainant that he and Sergeant Haevers were caught reading the newspaper by Lt. Natzke, but Natzke took no disciplinary action against them; and 5) on May 3, 1997, Officer Obravac and Sergeant Timothy Huck told complainant that, while they were on duty on May 2, 1997, in the lower segregation unit, they saw Lt. Natzke reading the newspaper.

[E] This portion of the legal analysis was restructured and expanded to reflect the charges of discrimination and retaliation in this case.

Turning to the first of these allegations, complainant testified that he did not follow the proper procedure for obtaining and reporting the count. He admitted he violated the institution security policy and presented no evidence of treatment differing from other "protected" or "non-protected" officers in similar circumstances. Although an adverse result occurred, it can not be concluded this incident and subsequent discipline was discriminatory or retaliatory as alleged.

Regarding the alleged verbal threat on October 24, 1996, by Capt. Brandt, complainant corroborated Officer Corpus' testimony that Brandt said, "you fuckers I should put you in jail." Complainant testified he was not offended by Brandt's use of profanity, but by the statement that he should put them in jail. Also, complainant testified he knew Brandt had no authority to put them in jail and thought this remark "nutty." Complainant and Corpus had in fact lost the release/transport orders for the inmate. However, neither complainant nor Corpus was written up or formally disciplined for this action. Finally, no evidence was presented showing that Brandt used the word "fuckers" only when speaking to or about Hispanics; and complainant testified he did not believe Brandt was making a racially derogatory comment to him. Since no action was taken against complainant, the incident does not amount to an adverse employment action. See *Pierce v. Texas Dept. of Crim. Justice, Inst. Div.*, 37 F.3d 1146, 1150 (5th Cir. 1994). In addition, complainant's own testimony negated any conclusion of discrimination or retaliation.[F]

Captain Pfister testified he never told complainant that Kent, Natzke and Brandt were plotting against him. Pfister testified he told complainant about a discussion that took place after an incident, and that some people were "floating balloons" as to why it occurred. According to Pfister, complainant's name was mentioned as "making social worker moves," but it was decided this kind of activity by complainant was not the cause of the cell hall problems. Complainant was never cited in an incident report or disciplined for causing cell hall problems. Complainant failed to show the alleged action occurred.

[F] The last two sentences of this paragraph were added to clarify the Commission's rationale.

Regarding allegations four and five, complainant states in his complaint that they pertained to Case No. 96-0019-PC-ER and "show that work rules were not being followed by Lt. Dennis Natzke. Nor were rules being enforced fairly." These two incidents do not involve complainant and, therefore, are not adverse actions against him. However, it appears complainant offered the allegations as evidence of differential treatment. With respect to allegation four, the person who allegedly made this statement was never called as a witness. None of the witnesses called at hearing corroborated this allegation. Therefore, this allegation brought in Case No. 97-0197-PC-ER, albeit in connection with Case No. 96-0019-PC-ER, can not be relied upon to support complainant's charges of retaliation or discrimination, because it is based solely on hearsay. The same can be said in regard to any connection it might have with Case No. 96-0019-PC-ER.[G]

Sergeant Huck's testimony regarding allegation five was oblique. Huck did not recall the conversation in issue, but did not deny it. Huck did not confirm that he saw Lt. Natzke reading a newspaper on May 2, 1997, but stated most everyone reads newspapers while on duty. Huck stated there is a work rule prohibiting such conduct, but that newspaper reading is permissible conduct during lulls. The ambiguity of Huck's testimony lacks sufficient credibility to sustain this allegation. Further, respondent presented evidence showing that a white male officer was suspended for three days for reading a newspaper. Still, it is well to observe that complainant was not disciplined for reading a newspaper. Complainant was disciplined for failing to acknowledge the entrance of five inmates to the cell block—inattentiveness at his post. Clearly the evidence does not support the claims of discrimination or retaliation.

Though not set forth as an issue for hearing, complainant merges constructive discharge with the issues of discrimination and retaliation. Complainant alleges he was forced to retire to avoid further retaliation and conflict, and because he was concerned with his physical safety. The particular question is whether the alleged acts of discrimination and retaliation by respondent in violation of the FEA made working

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[G] Changes in this paragraph were made for purposes of clarification.

conditions so intolerable that complainant was forced to retire, i.e., resign. *Goss v. Exxon Office Systems*, 747 F.2d 344, 36 FEP Cases, 345, 346 (3rd Cir. 1984) Complainant offered no evidence in support of his physical safety allegation, and the predicate of this constructive discharge assertion—race, color, national origin or ancestry discrimination and retaliation—was considered and rejected. Therefore, we need not discuss this allegation further.

ORDER

These complaints are dismissed.

Dated: December 27, 1999.

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

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Parties:
Euripides Alvarado-Ortiz
1309 Ponderosa Ave
Green Bay WI 54313

Jon E Litscher
Secretary, DOC
PO Box 7925
Madison WI 53707-7925