STATE OF WISCONSIN PERSONNEL COMMISSION

LORI ANN CYGAN,
Complainant,

v.

Secretary, DEPARTMENT OF CORRECTIONS,
Respondent.

Case No. 96-0167-PC-ER

RULING ON MOTION TO DISMISS

On December 20, 1996, Ms. Cygan filed a complaint alleging that respondent discriminated against her on the bases of race and sex in violation of the Fair Employment Act (FEA), §111.31, et seq., Stats.; as well as in retaliation for her participation in activities protected under the FEA (hereafter, FEA Retaliation) and under the Occupational Safety and Health (OSH) Reporting statute, §101.055, Stats., (hereafter, OSH Retaliation). She withdrew the claim of FEA Retaliation by memo dated January 9, 1997.

Respondent's motion to dismiss is limited to complainant's claim of OSH Retaliation. Both parties filed briefs, with the final brief received by the Commission on September 8, 1997. The findings of fact are made solely for the purpose of resolving the present motion and are based on reviewing the pleadings in a light most favorable to complainant (as is proper in the context of a motion to dismiss).

FINDINGS OF FACT

1. Complainant works for respondent as a correctional officer at the Green Bay Correctional Institution (GBCI).

2. On September 4, 1996, GBCI managers informed complainant that GBCI had received threats on complainant's life from inmates. They had been aware of the threats for a month prior to the time they finally informed complainant.

3. On October 1, 1996, an inmate gave complainant a letter stating to the effect that Sgt. Walker had attempted to incite inmates against complainant. Complainant reported the matter to her shift supervisor and on October 2, 1996, was advised by GBCI management to file a harassment complaint against Sgt. Walker which she did on October 8, 1996. Complainant contends she "put up" with harassment and intimidation from Sgt. Walker for seven years and reported the same when he attempted to incite the inmates against her.

4. An Affirmative Action meeting was held at GBCI on October 23, 1996, at which time complainant asked what respondent would do to protect her. The suggestion was made that complainant change work shifts to avoid Sgt. Walker, but she declined because she felt she had done nothing wrong and the shift change was not convenient for her. The meeting ended with complainant being told that GBCI would "wait and see what happens" and if anything did happen it would be dealt with at that time.

5. On October 29, 1996, complainant was warned by an inmate to "be careful". Complainant reported the same to management who conducted an investigation and on October 31, 1996, informed complainant that sufficient evidence existed to suspend Sgt. Walker with pay pending investigation. Incidents continued to occur which reasonably lead complainant to fear for her safety.

6. On December 2, 1996, complainant was informed that Sgt. Walker had been re-assigned for one year, with the right to transfer back to GBCI at the end of the year.

7. Complainant fears for her safety should Sgt. Walker be allowed to return to GBCI. Nor is complainant persuaded that respondent has shown a commitment in the past to protect her from the safety risks associated with his harassment should it re-occur.

OPINION

Respondent first contends the case should be dismissed because complainant did not file a request with the Department of Commerce (DOCom) about health or safety issues at work. The Commission disagrees. The applicable statutes are shown below:

> §101.01(1m), Stats. "Department" means the department of commerce.
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> §101.055(8)(ar), Stats. No public employer may discharge or otherwise discriminate against any public employe it employs because the public employe filed a request with the department, instituted or caused to be instituted any action or proceeding relation to occupational safety and health matters under this section, testified or will testify in such a proceeding, reasonably refused to perform a task which represents a danger of serious injury or death or exercised any other right related to occupational safety and health which is afforded by this section. (Emphasis added.)

The Commission rejected a similar argument in *Sadlier v. DHSS*, 87-0046, 0055-PC-ER, 3/30/89. Mr. Sadlier worked at Lincoln Hills School, a secure correctional facility for juveniles. He filed an internal disclosure of the following unsafe working conditions: a) health risk of employe exposure to AIDS and hepatitis, b) security risk caused by malfunctions associated with a newly-installed locking system and c) unsafe patrol vans. He also reported the safety problems via union grievances. The Commission held the disclosures were protected under §101.055(8)(ar), Stats., and such conclusion was based in part on an analysis of 29 CFR §1977.9(c), a rule promulgated under the federal OSH Act (29 USC §651-678); which is applicable to the state statute pursuant to §101.055(1), Stats. Application of the same principles used in *Sadlier* to Ms. Cygan's case leads the Commission to conclude that her claim of OSH Retaliation is not defeated by her failure to report unsafe conditions to the DOCom.

Respondent next contends the OSH Retaliation claim should be dismissed because the specific dangers alleged by Ms. Cygan are not protected under state or

federal OSH laws. The crux of respondent's argument is shown below in pertinent part (p. 4, respondent letter dated 6/17/97):

> [R]espondent believes the OSHA, secs. 101.055, Stats., and 101.11, Stats, are intended to cover physical conditions at the workplace and NOT mere activities at the workplace. The entire focus of the federal regulatory scheme, which is the model for the Wisconsin scheme, is focused on physical conditions of the workplace. It sets standards for workplace exposure to harmful materials; including chemicals, dust, infectious agents and similar physical contaminants; it sets standards on safety equipment and procedures and on work site conditions. There is nothing in federal law to suggest the . . . legislature intended to use as a guide in establishing standards for public employee safety in Wisconsin are designed to regulate issues of how the job is performed or how co-workers or prison inmates treat each other.

The Commission addressed this question for the first time in *Leinweber v. DOC*, 97-0104-PC-ER, 8/14/97. The ruling here is consistent with the ruling in *Leinweber*.

State statutes were intended "to give employes of the state . . . rights and protections relating to occupational safety and health equivalent to those granted to employes in the private sector" under the federal Occupational Safety and Health Act (OSHA), §101.055(1), Stats. Accordingly, the Commission turns to federal law for guidance.

The federal OSHA creates two employer duties. The first is the duty to follow specific standards promulgated by OSHA under 29 USC §5(a)(2). The second is referred to as the "general duty clause" of 29 USC §5(a)(1), which was designed to allow OSHA to address safety issues which were not the subject of a specific standard. Under the general duty clause, the employer must keep the place of employment free from recognized hazards that are causing or likely to cause death or serious physical harm to employees.

The general duty clause has been interpreted by OSHA to include issues of workplace violence. *See*, for example, *DSS v. American Federation of State, County and Municipal Employees, Council #61*, Iowa, OSHRC 1979, 1979 OSD ¶23, 324

(dealing with assaults of employees by mental patients). In fact, OSHA has promulgated guidelines concerning violence in the work place. *See*, Guidelines for Preventing Workplace Violence for Health Care and Social Service Workers—OSHA 3148-1996, and proposed guidelines to reduce homicide risk in night retail establishments CCH; Vol. IV; ¶12,715 on p. 19,583.

A clear pronouncement of OSHA's identified role in workplace violence cases was found in the May 1996, Vol. 1, #2, issue of Baker & McKenzie's Global Labour, Employment and Employee Benefits Bulletin as shown below in pertinent part:

> OSHA Workplace Violence Guidelines. Scope of the Guidelines:
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> The OSHA guidelines address work site analysis, hazard control, training, and the need for management vigilance of on-the-job violence. While the guidelines on abating violence are only voluntary guidelines, OSHA will continue to enforce workplace safety through its general duty clause in 5(a)(1) of the Occupational Safety & Health Act of 1972. The general duty clause requires an employer to keep its workplace free from known hazards which can cause death or serious harm. OSHA may, in appropriate circumstances, cite employers for a violation of the general duty clause if there is a recognized hazard for workplace violence and the company does nothing to abate the problem. In an inter-agency memorandum directed to OSHA's regional administrators on March 25, 1996, the agency indicated that additional guidelines are being prepared for workplace violence in the late-night retail sector. Further, it is likely that the future OSHA efforts in this are will focus on similar, generalized workplace violence guidelines. . . .

Based on the foregoing, the Commission disagrees with respondent that workplace violence is not regulated under occupational safety and health laws.

ORDER

Respondent's motion to dismiss is denied. This case will proceed with investigation of the complaint.

Dated: September 10, 1997.

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

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