STATE OF WISCONSIN PERSONNEL COMMISSION

**BRYAN LEINWEBER,**
***Complainant,***

**v.**

**Secretary, DEPARTMENT OF CORRECTIONS,**
***Respondent.***

Case No. 97-0104-PC-ER

RULING ON MOTION TO DISMISS

On June 17, 1997, Mr. Leinweber filed a complaint alleging that respondent discriminated against him on the bases of handicap, national origin/ ancestry, sex and use/nonuse of a legal product in violation of the Fair Employment Act (FEA), §111.31, et seq., Stats.; as well as in retaliation for his participation in activities protected under the Whistleblower law, §230.80, et seq., Stats. (hereafter, Whistleblower Retaliation) and under the Occupational Safety and Health (OSH) Reporting statute, §101.055, Stats. (hereafter, OSH Retaliation). The Commission initially assigned case number 97-0090-PC-ER to the entire complaint but later separated the OSH Retaliation allegation as case number 97-0104-PC-ER.

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 July 25, 1997. The findings of fact are made solely for the purpose of resolving the present motion.

## FINDINGS OF FACT

1. Complainant has worked for respondent since June 2, 1986, at various correctional institutions and in various positions.

2. On November 11, 1996, complainant was employed at the Drug Abuse Correctional Center (DACC) in Oshkosh, Wisconsin as a social worker. He conducted

a session of Gestalt therapy with a group of inmates who engaged in role playing for the purpose of learning "the concept of being the victim of a crime." DACC management received complaints about the session and investigated the same on November 26-27, 1996.

3. On November 27, 1996, DACC suspended complainant. He was told to leave the building immediately because DACC could not ensure his personal safety, security and protection, and was afraid he would be assaulted by inmates. This resulted, apparently, from inmate feelings over the therapy session described in the prior paragraph.

4. On December 17, 1996, complainant was reassigned on a temporary basis to the John C. Burke Correctional Center (JCBCC) because respondent still could not provide for complainant's safety at DACC. While working at JCBCC complainant received about 33 threatening telephone calls to his unpublished home telephone number and at least 3 more threatening calls to his DACC office. DACC management requested assistance from the Oshkosh Police Department who placed a wire tap on all of complainant's incoming calls.

5. On February 10, 1997, complainant was ordered to report to work at DACC. On February 20, 1997, he filed incident report #375240, to inform DACC management and his union of his unsafe working conditions wherein he noted:

> On November 26, 1997, I was removed from my work site (DACC) . . . "for your own personal safety, security, and protection," . . . On February 10, 1997, I was returned to social work duties at DACC with the same supervisor, Mary Kuehnl. [She] and I did meet in my office at approximately 2:00 p.m. that day. I asked M. Kuehnl how my work situation was now safe, with no additional or different security measures in place or to be put in place. I received no definitive answer. . . I very explicitly told [her] that I feared greatly for my personal safety. I requested to have a correctional officer present on 1K at all times, video taping of all group interactions, to have a lock installed on my office door that I could lock from the inside to provide sanctuary, to be more visible to other staff by being allowed to conduct the group process in the 1K day room from 6:10 p.m. until 8:00 p.m. I was told on February

> 10, 1997, at approximately 4:00 p.m., that none of my requests would be granted. I was also told . . . the Oshkosh Police Department had been summoned to DACC to record my voice mail and all telephone conversations because there were two threatening voice mail messages on my voice mail and because I had reported threatening telephone calls to my residence. DACC still remains . . . full of illegal street gang members with no increase institutional security to be provided. I am denied access to my voice mail still. All messages are screened by supervisor Kuehnl then allegedly passed on to me. I continue to request additional security personnel to no avail. I was told on February 10, 1997, by supervisor Kuehnl that social workers made up part of the security component at DACC, although I am not a correctional officer. Correctional officers are very frequently completely absent from 1K for extended period of time due to management direction. I am the only staff person working 11:15 a.m. - 8:00 p.m., and am very frequently the only staff person on 1st floor Kempster Hall DACC. I also did request that the officer station be moved to the center area to provide additional visibility, monitoring and security. This request was also denied on February 10, 1997, by Mary Kuehnl. I also asked to have both security Captain's offices to be placed on the living units to increase security; this also was denied by M. Kuehnl on February 10, 1997. To date my personal safety, security, and protection are in peril with no positive response from management. I feel that I am not amply protected at DACC and still continue to feel fearful and unnecessarily psychologically stressed.

6. The work environment at DACC worsened from a safety standpoint. There were times when complainant was the only staff person on a cell hall for 3-5 consecutive hours.

7. Respondent sent complainant a letter dated May 14, 1997, which stated as follows in relevant part:

> Based on your medical limitations this letter serves as official notice of our intention to terminate your employment as a Social Worker-Senior, for medical reasons.
>
> You are being afforded an opportunity to respond to the reasons for termination. A meeting is scheduled for Monday, May 19, 1997 . . .

8. By letter dated May 20, 1997, respondent terminated complainant's employment citing medical reasons as the basis for discharge.

## OPINION

Respondent first contends the OSH Retaliation claim must be dismissed because it was untimely filed. The Commission disagrees. OSH Retaliation complaints must be filed within 30 days after the employe received knowledge of the discrimination or discharge, pursuant to §101.055(8)(b), Stats. The OSH Retaliation complaint was filed on June 17, 1997, which was within 30 days after the date of the termination letter.

Respondent incorrectly measured the 30-day period as commencing with the May 14, 1997, letter which scheduled a meeting for complainant to present information in regard to respondent's expressed intention to terminate his employment for medical reasons. However, a final decision had not been made or communicated to complainant until the June 20th letter. Accordingly, the 30-day period for filing a complaint commenced with the final notice of termination.[1]

Respondent also 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.
>
> §101.055(8)(ar), Stats. No public employer may discharge or otherwise discriminate against any public employe it employes 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

[1] Respondent, by letter dated 8/5/97, requested that the Commission's investigator execute an affidavit on the timeliness issue and that she be excused from further involvement with the case. Respondent felt the investigator had information as to when complainant received the May 14, 1997, letter of intent to terminate employment. It is unnecessary for the Commission to resolve this request because resolution of the timeliness issue hinges on receipt of the May 20, 1997, letter of termination; rather than on the prior letter.

> 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 (on a form entitled "Abnormally Hazardous Task Report" (AHTR)): 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 found that 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); applicable to the state statute pursuant to §101.055(1), Stats. Application of the same principles used in *Sadlier* to Mr. Leinweber's case leads the Commission to conclude that his claim of OSH Retaliation is not defeated by his failure to report unsafe conditions to the DOCom.

Respondent next contends the OSH Retaliation claim should be dismissed because the specific dangers alleged by Mr. Leinweber are not protected under state or federal OSH laws. The gravamen of respondent's argument is shown below in pertinent part (p. 4 respondent letter dated 6/25/97) with emphasis as it appears in the original document:

> [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 on work site conditions. There is nothing . . . to suggest the . . . legislature intended to . . . regulate issues of how the job is performed or how co-workers or prison inmates treat each other.

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 turned to federal law for guidance.

The federal OSHA creates two employer duties. The first is the most commonly-known 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:
>
> 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 the claim of OSH Retaliation is denied.

Dated: August 14, 1997.

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

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