

RICHARD PROCESS,
Complainant,

v.

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

**RULING
ON
MOTION TO
DISMISS**

Case No. 00-0157-PC-ER

This matter is before the Commission on the respondent's motion to dismiss the complaint for failure to state a claim. Complainant alleges he was discriminated against, in violation of §101.055, Stats., for having engaged in certain occupational safety activities. The parties have been provided an opportunity to file written arguments. The following facts, set forth as allegations in complainant's submissions, are taken as admitted for the purpose of ruling on respondent's motion.

FINDINGS OF FACT

1. At all times relevant to this matter, the complainant has been employed by respondent as a correctional officer at the Green Bay Correctional Institution (GBCI).

2. Complainant suffered an injury to his jaw when he broke up an inmate fight on December 28, 1999.

3. On December 28th, complainant filed an "Employee's Work Injury and Illness Report" with his employer in order to initiate a Worker's Compensation claim. Complainant's form included the following information:

*Describe in detail what you were doing when the injury/illness occurred.
How exactly did it happen?*

While responding to a fight I was hit on the right side of my jaw by inmate Tuitt #308656.

In your opinion, what could be done to prevent other similar accidents?

None.

4. Also on December 28th, complainant completed an "Incident Report" on a Department of Corrections form. The form included 12 boxes under the heading of "Type of Incident (Check All that Apply)." Complainant checked the "assault" box. Unchecked boxes are titled "escape", "cell entry", "discharge of firearm", "death", "offender placed in restraints", "fire", "use of force", "disturbance", "use of chemical agent-type", "informational", and "other/specify " Complainant described the incident as follows:

On the above date and time while responding to a fight in the Barber Shop, I was struck on the right side of my jaw by inmate Tuitt #308656 as I was attempting to separate the two inmates (Tuitt - Sterniy).

Another section on the form, describing "Further Action Taken by Security Director" was completed the following day, December 29th That section reads:

As noted, injury report submitted. Based on report injury appears to be from an inadvertent punch rather than intentional, during the course of an altercation. Received medical attention.

5. Complainant later underwent surgery on his temporomandibular joint.

6. GBCI delayed filing a worker's compensation claim for complainant's injury until May of 2000.

7 The worker's compensation claim was denied on October 24, 2000, because the paperwork was not timely submitted.

8. Complainant filed a complaint with the Personnel Commission on November 20, 2000, in which he alleged that respondent had retaliated against him based on occupational safety and health reporting.

9. The sole protected activities arguably raised by complainant are his actions of filing the injury report and the incident report described in Findings 3 and 4.

CONCLUSIONS OF LAW

Complainant has failed to state a claim under the public employee safety and health provisions, §101.055, Stats.

OPINION

This case is before the Commission pursuant to respondent's motion to dismiss for failure to state a claim. The Commission analyzes such a motion according to the procedure set forth in *Morgan v. Pennsylvania General Ins. Co.*, 87 Wis.2d 723, 731-32, 275 N.W. 2d 660 (1979):

For the purpose of testing whether a claim has been stated pursuant to a motion to dismiss under sec. 802.06(2)(f), Stats., the facts pleaded must be taken as admitted. The purpose of the complaint is to give notice of the nature of the claim; and, therefore, it is not necessary for the plaintiff to set out in the complaint all the facts which must eventually be proved to recover. The purpose of a motion to dismiss for failure to state a claim is the same as the purpose of the old demurrer – to test the legal sufficiency of the claim. Because the pleadings are to be liberally construed, a claim should be dismissed as legally insufficient only if “it is quite clear that under no conditions can the plaintiff recover.” The facts pleaded and all reasonable inferences from the pleadings must be taken as true, but legal conclusions and unreasonable inferences need not be accepted.

Complainant alleges that respondent Department of Corrections retaliated against him, in violation of §101.055, Stats., because he exercised a right under that section. Pursuant to §101.055(8)(ar), Stats:

No public employer may discharge or otherwise discriminate against any public employee it employs because the public employee filed a request with the [Department of Commerce], instituted or caused to be instituted any action or proceeding relating 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.

The only activities that complainant alleges he took that even arguably fall within the scope of §101.055(8)(ar), were filing two reports on December 28th, after the injury.

Neither of these two documents suggest respondent took an inappropriate action or had some inappropriate policy that placed complainant's health and safety in jeopardy. Nothing indicates that the complainant filed either report in order to suggest that his injury resulted from negligence by his employer, or that respondent needed to take some corrective action in order to reduce or eliminate the risks reflected in the report. The information on the forms indicates they were filed as a matter of course, pursuant to respondent's policies.

The complainant was not complaining of an unsafe or unhealthy condition, a condition that was correctable or an injury that was preventable. He simply reported that he had been struck by an inmate. These reports fall outside of the protections set forth in §101.055(5), Stats., which provides that a public employee "who believes that a safety or health standard or variance is being violated, or that a situation exists which poses a recognized hazard likely to cause death or serious physical harm" may request an inspection. The Commission recognizes that activities other than those covered by §101.055(5), Stats., may serve as the basis for filing a complaint of retaliation under §101.055(8)(b), Stats. The full scope of the conduct that is protected by the law is described in §101.055(8)(ar), Stats., which is set forth above. However, the complainant's two reports still do not qualify.

Because the Commission finds that the complainant did not exercise a right related to occupational safety and health under §101.055, Stats., the Commission issues the following

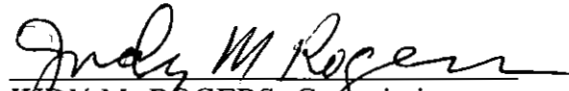
ORDER

Respondent's motion to dismiss the complaint for failure to state a claim is granted and this matter is dismissed.

Dated: March 8, 2001 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

KMS:000157Cru11


JUDY M. ROGERS, Commissioner

Parties:

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NOTICE

OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the

decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)
2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.

2/3/95