

STATE OF WISCONSIN

PERSONNEL COMMISSION

**VERA HUTSON,**  
*Complainant,*

v.

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

DECISION  
AND  
ORDER

Case No. 96-0056-PC-ER

This matter arises from a written reprimand. An initial determination was issued on October 10, 1997. During a prehearing conference held on February 10, 1998, the parties agreed to the following statement of issue for hearing:

Whether respondent retaliated against complainant because of her participation in activities protected under the Fair Employment Act and/or under the Whistleblower Law, in regard to the written reprimand of August 19, 1996.

At the prehearing conference in February 1998, a hearing was scheduled for July of 1998. The parties subsequently agreed to take the matter off of the Commission's calendar pending the issuance of an initial determination in Case No. 97-0181-PC-ER. The initial determination in that matter was issued on September 14, 1998. Complainant chose not to appeal the "no probable cause" portion of the initial determination and requested a hearing in this matter. The hearing was initially scheduled for February of 1999, but was rescheduled upon the agreement of the parties. The hearing commenced on May 11, 1999, and concluded on June 24, 1999.

The parties had a transcript prepared from the hearing tapes. This transcript was available to the parties at the time they filed their briefs. The examiner has reviewed the transcript and has compared portions of it with the tape recording of the hearing. Some parts of the transcript do not accurately portray the hearing testimony. Those portions of the hearing set forth below are based on the tape recording, rather

than on the transcript. However, citations are still to the corresponding page of the unofficial transcript.

## FINDINGS OF FACT

1. Respondent employs probation and parole agents to maintain contact with offenders who have been placed into the state's criminal justice system. The agents are employed in 6 different regions throughout the State.

2. The generic position description for positions assigned to the Probation and Parole Agent - Senior classification includes the following summary:

Under the general direction of the supervisor, this position is responsible for the provision of services to protect the public by holding offenders accountable for their behavior, the preparation of case plans for offenders; fostering law abiding behavior and positive participation of individual offenders in the community; the preparation of accurate and timely investigation, reports, and case records; community outreach activities, liaison activities and other special assignments as required. This position provides a variety of services for a targeted caseload or program. The work at this level is highly responsible and is performed independently utilizing professional judgment and includes accountability for actions. Program supervision is done on an after-the-fact basis. The agent shall comply with the Department's administrative rules and the agency's policies and procedures.

3. The caseloads of the agents are calculated by using a point system designed to reflect the amount of time spent by the agent supervising offenders. The agent receives 5 points for an offender who must visit the agent every two weeks. However, an offender whose supervision level only requires a visit once every 3 months, referred to as an "administrative" case, generates only 1 point. Until the time relevant to this case, all offenders had to actually meet with an agent on a regular basis. A memo of understanding in effect between the agents' union and management during the period in question provided that the caseload maximum was 260 points. The point system did not include a category for cases in which the agent did not meet with the offender on a scheduled basis.

4. Complainant began working for respondent as a probation and parole agent in 1990, at its Kenilworth Avenue office in Milwaukee. She transferred to the Walnut Street office in April of 1994, to Unit 033 in October of 1995,<sup>1</sup> to Unit 315 in June of 1996, and then to Unit 330. She has been classified at the Probation and Parole Agent - Senior level since July of 1994.

5. Complainant's written performance evaluations were, for the most part, satisfactory. However, "needs improvement" was noted on her 3 month probationary report (Comp. Exh. 38) for the performance expectation for learning case classification and on her March, 1992 report (Comp. Exh. 39) for the performance standard of promptly submitting expense accounts. Her April, 1994 report listed a number of performance expectations or standards that were "not done" and four results of "needs improvement." The supervisor, Margaret Browder, noted that complainant "is not ready for reclass at this time." Complainant refused to sign the evaluation.

6. Complainant received a written reprimand in January of 1994.

7. Respondent conducted a pilot program beginning early in 1995 to supervise offenders by way of a telephone call-in system. The pilot program was conducted in respondent's Madison region (Region 1) and was limited to offenders in that region.

8. The legislature later approved a statewide "administrative minimum" program along the same lines as the pilot program. The program involved working with a private, out-of-state vendor, BI Profile Co. (or "BI"), that operated a telephone bank, to which Wisconsin offenders enrolled in the program were to call. The original estimate was that 12,000 offenders would be supervised under the program. Later estimates were that about 5,000 offenders, or 10% of the entire pool, would participate. 5T118<sup>2</sup> Respondent chose to set up an office for the new statewide program in the Milwaukee Region and designated the office as Unit 033. 4T14

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<sup>1</sup> This is the assignment that is the subject of the present case.

<sup>2</sup> This citation refers to page 118 of the unofficial transcript for the fifth day of hearing, i.e. June 23, 1999.

9. In September of 1995, respondent directed James Wake to implement the new "administrative minimum" program and supervise the agents assigned to Unit 033. Two of the agents in the unit (Lynn Hightire and Bill Voelker) were classified at the Probation and Parole Agent-Entry level, Michelle McKinstry was classified at the Objective level, and the remaining three agents (complainant, Vicki Turner and Diane Bink) were all Senior level agents.

10. If one agent was out of the office, their "cover agent" would handle situations that came up in their absence. 1T184 Senior agents were generally paired with non-senior agents. 4T44 Michelle McKinstry and complainant were cover agents for each other.

11. Mr. Wake reported to Kathleen Ware, one of three assistant or deputy chiefs for the Milwaukee District. Allan Kasprzak was the regional chief for the Milwaukee region. Mr Kasprzak reported to Eurial Jordan, Division Administrator for Probation and Parole.

12. E.J. Borman began working on a half-time basis as Unit 033's program assistant in November of 1995. He began working full-time at approximately the beginning of 1996.

13. Mr. Wake had experience working as both a parole agent and as a supervisor of a probation and parole unit. Starting in 1991, he had coordinated the purchase of goods and services (purchase of service program) for respondent's Milwaukee probation and parole region.

14. Mr. Wake did not want to serve as the supervisor for Unit 033. He told at least some of the agents in the unit that the responsibility was thrust upon him and that his plate was already full. 2T148, 4T182

15. Mr Wake advised prospective agents who were considering transferring into the new unit that they could expect as many as 500 or 1000 cases per agent.

16. Complainant began working in Unit 033 on October 2, 1995. However, she did not receive her initial caseload until November 21, 1995, when she received 4

to 5 boxes of materials from Loreen Tryba, the agent handling the Region 1 pilot project.

17 While in Unit 033, complainant was designated as agent 03301.

18. Respondent's employees typically use a Form C44 to signal certain administrative actions, including an early discharge of a case or to move a client from one agent to another. 4T110 However, because of the large volume of clients handled by the agents in Unit 033, Mr. Wake obtained approval for using a blanket transfer order rather than a C44 for moving files into Unit 033. It was not unusual for an agent in Unit 033 to be responsible for a client before the client's file had reached the agent.

19. Unit 033 clients were classified as low-risk offenders and could not have any outstanding referrals for alcohol and drug use treatment or monitoring. They had to be able to follow directions. The offenders were to have discharge dates of more than 90 days after entry into the program. 5T355.

20. Clients assigned to Unit 033 were required to mail in their court-ordered payments to the unit. The assigned agent kept track of the payments received and then sent the checks on to respondent's cashier's unit. 1T209

21. The unit policy was for the assigned agent to prepare a written receipt for the payments within one week of when they were received and to keep money orders locked in Mr. Wake's desk drawer. An agent out of compliance with this policy was to notify Mr. Wake. 4T117

22. Agent Michelle McKinstry was disciplined for failing to issue timely receipts for money orders from her clients. Ms. McKinstry had accumulated more than 100 money orders that she had failed to timely process and had failed to notify Mr. Wake of her backlog.

23. The clients assigned to Unit 033 were also required to telephone the BI phone bank every month on the day corresponding to the month of their birth and then to enter information via the telephone touch pad. For example, clients born in March were required to call in on the 3<sup>rd</sup> of every month. If an offender in the BI program called in and indicated no change of address, no police contact and no change in their

employment, the assigned agent had no follow-up responsibility as long as the agent had not received any outside information to the contrary 3T3. However, if the call to BI indicated the offender had changed their address or other status, BI would generate an exception report and would fax it to the assigned agent within a couple of days. 3T3. If the client did not call in at all, the agent was also notified and had the responsibility to follow-up with the client. Unit 033 agents received a "missed call" list, i.e. a list of all clients who failed to call in as required by the BI program, every month. 4T116

24. Complainant's practice was to collect the missed call notices and to make follow-up phone calls to the clients "as time allowed."

25. There was no mandatory procedure for following-up on the missed call list. The agent had discretion in terms of choosing the procedure that worked best. At least two agents in unit 033 chose to send out form letters rather than trying to reach the offenders by telephone. One agent, Lynn Hightire, developed a series of three letters of graduated severity 3T117

26. Offenders were not to be discharged from the probation/parole system if they still had obligations owing to the court or victim. The probation and parole agent is responsible for checking to insure that an offender is not discharged "with debts owing." If the client was close to his/her discharge date and still owed money, the agent was to request an extension from the appropriate court and complete an extension form. 1T215 In units other than Unit 033, the agent received a list of offenders who had outstanding financial obligations 90 days before their scheduled discharge date. 1T101 In Unit 033, the unit's program assistant, Mr. Borman, prepared a similar list 60 days before the scheduled discharge date. 1T103 That list was not entirely reliable, but not all agents realized this. Some agents chose to rely on this internally-generated list while others did not and checked the accuracy of the underlying information. 3T122

27 Many agents had problems with cases being discharged with amounts owing. Borman deposition, p. 25. Ms. Bink admitted to Mr. Wake that one of her cases was discharged with about \$100 owing for court costs. Mr. Wake's response was

to tell her to be careful, but she was not formally disciplined. Ms. Bink had incorrectly understood that amounts due for court costs could be ignored when calculating whether amounts were owed. 3T202

28. Agent Lynn Hightire had a propensity to swear in the workplace. She received a written reprimand while employed in Unit 033 for referring to another departmental employe as "that bitch." 3T134. However, Ms. Hightire was not formally disciplined for allowing a client to be discharged from supervision despite owing approximately \$8000. The latter incident occurred when Ms. Hightire had a caseload of approximately 750 of her own clients and, in her role as cover agent, was also responsible for the 750 clients of another agent who was ill. After returning from an enrollment trip to her region in northwestern Wisconsin, Ms. Hightire failed to follow through on a discharge notice. She brought her error to the attention of Mr. Wake.

29. Agent Vicki Turner was disciplined for allowing cases to be discharged for amounts owing. She received a letter of reprimand and a suspension. The disciplinary process began in March or early April of 1996. 1T71 She had no prior discipline during her 18 year career. The discipline was overturned on review.

30. When a supervised offender complained to an agent about the agent's conduct, the agent was to inform the client there was a procedure for filing a written complaint, and provide the client with the unit supervisor's name and phone number, if requested.

31. The assigned agent is responsible for obtaining an "apprehension request" for conduct such as the failure of a client to report in or a complaint of an assault by the client. 3T68

32. The Senior agents in Unit 033 had the discretion to develop their own work procedures.

33. Complainant held the opinion that not all of the offenders who were enrolled in the BI program were appropriate for that program and that some of the case files had been poorly maintained before they reached Unit 033. 2T196

34. In November of 1995, the phone number to be called by all clients enrolled in the program was changed. All clients had to be notified of the change. 3T154, 4T30

35. Various information systems were available to the agents in Unit 033:

a. Individual case files included a ledger maintained by the agent showing monies received from the client. The case files included various documents related to the client. Case files for relatively few clients did not reach Unit 033.

b. The Unit 033 database. This database was designed by Mr. Wake with input from BI and the agents in Unit 033. 4T25 It listed the offender's name, address and phone, the name of the referring agent, the assigned 033 agent, when and how the offender was enrolled in the administrative minimum program, moneys owed by the offender, the projected date for the offender to be discharged from the program, the offender's alcohol and other drug abuse obligations and any special status for that offender. 4T24, 2T141.

c. The CACU, or "Client Account Cashier Unit" database. 4T27 Prepared by respondent's Division of Community Corrections in Madison, this database covered all offenders in the entire probation and parole system, statewide. The Division of Community Corrections generated a monthly statement, both alphabetically by offender and then sorted by agent number, for all the cases assigned to a particular agent, as entered into the computer in Madison. The monthly statement listed each offender by name and number and included the date they were placed on supervision, 2T182, all court cases active for that offender, the offender's status as either a probationer or a parolee, and their discharge date. It also tagged those cases in which the offender still owed money and the court had extended their obligations. "Screen 77" was the master cashier's list in CACU showing how much money was owed by each offender. (Example is Resp. Exh. 143). When there was a discrepancy between the information on Screen 77 and the ledger in the case file, it was up to the agent to reconcile that discrepancy. 1T107



d. Various information provided automatically by BI, 4T25, including an "exception report." This report was generated when an offender called and (self) reported an address change or a contact with police. The report also showed if the offender failed to pay financial obligations. The exception report was faxed by BI directly to the agent assigned to that offender. Other reports from BI included a "missed call" list. This list was generated on the 17<sup>th</sup> of each month. The missed call list was an alphabetical list of those offenders who had not made their call into the phone bank that month. It included the offender's phone number. Finally, BI prepared a "no call" list, issued at the beginning of every month, of offenders in the entire program who had not called in at all during the previous month. The offenders were grouped in the list according to the number of their assigned agent.

36. Complainant's computer skills were very limited when she began working in Unit 033. Some of the other agents in the unit had no such skills when they began. While employed in the unit, complainant did not regularly access information that was available on the computer in terms of CACU and DOC data, although complainant was able to access the information in the Unit 033 database. 2T162

37. Mr. Wake became concerned that agents in Unit 033 were choosing, too readily, to return the case file of a program enrollee to the agent who had previously handled the case (i.e. the "referring" agent) whenever the 033 agent had to follow up on something with the client. As a consequence, in February or March of 1996, Mr. Wake directed the agents to obtain his approval before any file could be returned to the referring agent.

38. Unit 033 assumed responsibility for about 3000 offenders. There were approximately 500 cases per agent in the unit when the unit was fully staffed. After most of the agents transferred out of the unit in June of 1996, the remaining two agents (Ms. Hightire and Ms. Bink) divided responsibility for the entire caseload. They were assisted by the unit's program assistant.

39. Once an offender was enrolled in the BI program, s/he did not have the discretion to withdraw from the program. However, unit staff could choose to remove

someone from the program and return the offender's case file to the referring agent. There were, at least initially, no definitive rules in terms of the circumstances necessary to drop an offender from the program and return their file. Some of the agents wanted specific standards for making that determination.

40. It is a common practice for a supervisor of probation and parole agents to ask to review individual case files when an issue arises and when the supervisor needs additional information in order to better understand the issue. It was Mr Wake's standard practice to request a file whenever he received a call regarding a case. 4T33 Mr Wake sought files more frequently from complainant and Ms. Turner because the cases in their regions tended to have a higher profile and the clients tended to have more violations. Borman deposition, p. 15.

41. Complainant was on vacation from December 20, 1995, to January 4, 1996.

42. Complainant sent a memo dated February 5, 1996,<sup>3</sup> to James Wake, and sent copies to two union officials and Kathleen Ware. Comp. Exh. 27 The memo provided, in part:

I am writing this correspondence to request workload relief and/or authorized overtime of one hour per every 5.5 points over the 260 point caseload cap per our union contractual agreement for the 1995-97 contract year. I am currently supervising a total of 559 cases 475 under my agent number and 84 for a co-worker who will be out on sick leave for the next four to seven weeks.

Due to the excessive workload and a caseload that continues to grow without a foreseeable end, coupled with the lack of clarity under a supervisory style that is extremely arbitrary and capricious. [sic] I have found the work environment to be highly stressful and terribly distracting to try to manage my caseload adequately and professionally. I am at this time requesting that reasonable guidelines be established that would enable me to perform my job. . .

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<sup>3</sup> Complainant claims the February 5<sup>th</sup> memo is a protected activity under the whistleblower law.

Two other agents in Unit 033, Vicki Turner and Michelle McKinstry, were also understood to support the memo.

43. On receiving the memo, Mr. Wake forwarded it to his supervisor, Kathy Ware. Mr. Wake also responded by memo (Resp. Exh. 109) dated February 9, 1996, scheduling a meeting in Kathy Ware's office later in February. Ms. Turner, Ms. McKinstry and complainant asked to have a union representative present during the meeting. Ms. Ware clarified by memo (Resp. Exh. 110) that the three were not entitled to union representation at the meeting.

44. Complainant was scheduled to conduct enrollments, i.e. to enroll offenders in her region, from February 20<sup>th</sup> through February 23<sup>rd</sup>

45. Complainant was on medical leave from February 7, 1996, until February 19, 1996.

46. It was the practice of agents in Unit 033 to handle court reviews for that agent's clients, rather than having the referring agent appear before the court. 4T53 Complainant felt that where the referring agent had already scheduled a court review for an offender in the BI program, the referring agent, rather than the Unit 033 agent assigned to the case, should attend that court review. 2T196

47. Complainant was involved in a heated argument with Mr. Wake on February 19<sup>th</sup>. The incident is accurately described in Mr. Wake's memo of the same date to Ms. Ware (Resp. Exh. 116):

This morning at approximately 8:40 AM, I approached Vera Hutson at the supply cabinet in Unit 033 work area and asked for her Doctor's excuse. I also asked her if she had any information concerning a Kimberly Curtis court hearing in Madison. Parenthetically, this is a case in which a hearing concerning extension was set up for February 9, in which neither the offender nor someone from our agency attended. The District Attorney had attempted to contact Vera while she was on sick leave, upset that no one was there. Vera stated that she had seen some information concerning a missed court review but didn't know who had set it up.

I directed her to contact Assistant District Attorney Ann Sayles of Dane County to schedule a review hearing. She stated she would not do this. I asked her if she was refusing my directive. She said yes, and that it looked like we "have a problem." I reiterated my directive. She then

began speaking loudly and defiantly, stating, "I am sick of you dumping other people's crap on me." I asked her, "what did you just say," and she repeated the last remark and words to the effect that it was not her job to do this hearing because "someone else had set it up." She stated it was my job to take care of this not hers. She stated that if I was going to write her up she would give me paper right then.

She then walked over toward her desk area, turned and shouted to me, in a threatening tone, that she was tired of being treated differently and harassed because she was black. She accused me of harassing her and stated she wanted to point this out publicly. She stated that I said good morning to EJ [Borman] and to Dianne Bink but said nothing to her. She stated that she, Vera, gets dumped on with everyone else's work while Dianne Bink, a white person, runs the unit and does nothing for anyone else. She stated I'm always interrupting her and Vicki Turner, but I never interrupt Dianne. She stated she would bring action against me, and she was saying all these things in public and those in the room would be witnesses. And if they chose to lie later, that would be their problem, or words to that effect.

In response to this outburst, I prepared a memo to Vera, directing her to manage the problem with this missed court review.

48. Despite Mr Wake's directive, complainant ultimately arranged for a region 1 agent to appear at the court review for Kimberly Curtis.

49. Mr. Wake took the following actions after the incident with complainant on February 19<sup>th</sup>:

a. Mr. Wake contacted two of complainant's previous supervisors, Ms. Browder and Mr. Duame, and asked them about their experiences with complainant. Mr. Duame reported that he had been so frustrated by dealing with complainant that he had considered taking a demotion. Ms. Browder stated that complainant had filed an Affirmative Action claim against her for denying complainant's reclassification request and that complainant was ultimately given the reclassification in exchange for withdrawing the Affirmative Action claim. 5T74, 5T83 Ms. Browder also said that there were some irregularities with some of complainant's cases and that complainant had falsified some documents. Ms. Browder sent Mr Wake copies of documents that ex-

plained the basis for Ms. Browder's recommendation that complainant's reclassification be denied.

b. Mr. Wake filed a complaint with respondent's Affirmative Action office on February 21, 1996, as a consequence of the February 19<sup>th</sup> incident. Mr. Wake contended that Ms. Hutson was harassing him and creating a hostile environment. Mr. Wake was not interviewed as a consequence of his claim with the AA office until May 31, 1996.

c. Mr. Wake began to keep a separate file on complainant in order to document the interactions he had with her. Mr. Wake felt he needed to protect himself in the event complainant decided to file a complaint against him.

d. Mr. Wake reduced his communications with complainant to writing or made sure that someone else was present during face-to-face contacts with complainant.  
4T123, 5T64

e. In a memo (Comp. Exh. 26) dated February 19<sup>th</sup>, Mr. Wake directed complainant to review a list of Region 1 cases "without files" and take certain actions by March 1<sup>st</sup>. Complainant had not completed this assignment by the time she left Unit 033 in June of 1996. 3T41

50. Mr. Wake and Ms. Ware met with complainant regarding the February 6<sup>th</sup> "workload relief" memo on February 29, 1996. During this meeting, Ms. Ware asked complainant to describe the problems she perceived with Unit 033. Complainant referred to the absence of basic guidelines and to inconsistencies in how agents handled similar situations. Complainant called James Wake "incompetent" and incapable of running the unit. Mr. Wake attended the meeting. Ms. Ware explained that Unit 033 was not subject to the memo of understanding between the agents' union and management, regarding caseload. (Finding of Fact 3).

51. Mr. Wake and Ms. Ware also met with Michelle McKinstry and Vicki Turner regarding the "workload relief" issue.

52. Mr. Wake convened a unit meeting on March 13, 1996. The meeting related to procedures and practices as well as issues within the unit. During the meet-

ing, complainant commented to Mr. Wake, "You are treating us like slaves."<sup>4</sup> After this statement, Mr. Wake abruptly terminated the meeting.

53. Also on March 13<sup>th</sup>, Mr. Wake issued a memo to complainant directing her to submit Daily Activity Logs and weekly work plans on a regular basis. The complainant had last done so in December of 1995. All other agents in Unit 033, except Ms. Turner, regularly submitted these documents.

54. Complainant left work at 2:00 p.m. on March 13<sup>th</sup>

55. In a memo dated March 14<sup>th</sup>, Mr. Wake asked complainant if her absence at the end of the day on the 13<sup>th</sup> was work-related.

56. On March 15<sup>th</sup>, complainant wrote a memo to Allan Kasprzak, Regional Chief for Milwaukee. She sent copies to James Wake and Kathy Ware, among others. The memo (Comp. Exh. 2) read:

I gave a memo to you, Kathy Ware and Jim regarding workload relief. Ever since I give that memo Jim['s] behavior towards me has escalated in very intimidating, harassing and vindictive actions. The memo of 2-6-96 was addressed in a meeting with Kathy Ware and Jim and myself on 2-29-96. However, as I stated to Kathy and in the meeting with Jim present the issues were not just workload relief. The issues were also Jim's behavior as a Supervisor. I have gotten to the point that I fear for my personal safety. Especially since 3-13-1996 when Jim angrily and abruptly stopped our unit meeting. He became visibly upset and began to tremble, his face was very red and his lips were white. He has pretty much maintained that persona to date 3-15-1996. He has not spoken one word to me since the unit meeting but I have observed him glaring at me. I feel a strong [sense] of fear that he might explode. Jim's demeanor has and is causing the environment in the unit to be very tense. Other agents have voiced their concerns of fear for their personal safety. Something is very, very wrong down here. We should not have to work in such an environment. I am asking for your help in trying to resolve the concerns we have in this unit. As well as the above issues there are definite issues of favoritism and probably nepotism. There is a definite divide in the unit created by Jim. Due to my fearing for my personal safety, I feel the need to inform others about the concerns in this unit. I have gotten to the point that I can't focus on my work, I am very

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<sup>4</sup> Complainant claims her comment during the March 13<sup>th</sup> work unit meeting is a protected activity under the Fair Employment Act.

stressed when I leave work and I am starting to lose sleep because the conditions in this unit are very unsafe, unstable, and Jim Wake does not allow ANY of us to discuss the issues.

57. Also on March 15<sup>th</sup>, complainant wrote a memo to Mr Wake that read:

Jim I am leaving to go home. I will use personal time. I am afraid for my personal safety in regards to your behavior towards me. I feel very uncomfortable to the point it is affecting my job.

58. In a March 18<sup>th</sup> memo regarding "Conflict Resolution in Unit 033," Mr. Kasprzak invited complainant, Ms. Turner and Ms. McKinstry to a meeting at 8:30 a.m. on March 19<sup>th</sup> "to assess the desire of the parties to resolve problems" rather than "to talk about individualized concerns." Comp. Exh. 30. In a memo of the same date, the complainant and agents Turner, McKinstry and Voelker indicated that all members of Unit 033 should be invited to attend the meeting. They noted: "We feel it is dysfunctional in itself to only invite 3 out of the 6 agents in unit 033 to work out a plan to correct any dysfunction within the unit." Respondent denied the request.

59. Three meetings relating to complainant's claim were held on March 19<sup>th</sup>

60. Attendees of the first meeting on the 19<sup>th</sup> included complainant, agents Turner and McKinstry, Mr. Wake, Ms. Ware, Regional Chief Alan Kasprzak, Assistant Regional Chief John Barian and union representative Kathy Kosminski. During the course of this meeting, attendees discussed the agent's caseload relative to Memorandum of Understanding between the union and management, as well as other unit issues. The following interchange occurred between Mr. Kasprzak and the complainant, as described by complainant:

I remember Mr Kasprzak saying you work with rapists and murderers, how can you be afraid of Mr. Wake? And I said, when I go to the reception area and bring back a murderer or rapist I know what I'm dealing with. I don't expect that kind of behavior [inaudible] from my supervisor 3T36

During the course of this meeting, Mr Wake stated that he felt he was being harassed. Mr Kasprzak declared that those present at the meeting had agreed to get along. He described the "outcomes" of the meeting in a memo (Resp. Exh. 130).

61. The second meeting on March 19<sup>th</sup> related to complainant's allegation that Mr. Wake made her workplace unsafe. Attendees at this meeting included complainant, Mr. Wake, Ms. Ware, Mr. Kasprzak and a union representative. Mr. Kasprzak said that he felt complainant's allegation was unfounded. Mr. Wake said he could not work with complainant and that he was afraid of false accusations. Mr. Kasprzak refused to move anyone from the unit.

62. Attendees at the third meeting on March 19<sup>th</sup> were Mr. Kasprzak, Mr. Wake and Ms. Ware. Mr. Wake made contemporaneous notes of the third meeting. Those notes accurately describe Mr. Kasprzak's comments. The notes (Comp. Exh. 49) read, in part:

[Alan Kasprzak said]

- I am a wimp for saying that I was extremely upset and hurt by remarks Vera has made. He said he would not move me, even temporarily, this would [indecipherable] like caving in to them.
- I asked to have someone else manage the problem with Vera that my reputation would suffer.
- It was like a pack of dogs seeing someone in fear if I was to show hurt or weakness - the "dogs" would attack me if they saw weakness.
- I am to put on a façade of being in charge
- The strategy is to separate them (the trouble makers) and grind them down one by one
- The way to beat a bully is to beat him senseless.

I reiterated that I feel harassed by the accusations made against me.

I just ignore harassment complaints against me. The Dept will ride it out and the complainant will be bought off and the reward to them (complainant is piddly). They gave [an agent] \$7000. After attorney fees she got nothing.

This is all part of being a manager

Mr. Kasprzak's comments at this third meeting referred to complainant, Ms. Turner and Ms. McKinstry.

63. Ms. Ware was shocked by Mr. Kasprzak's comments. She told Mr. Wake that she was very offended by the comments. 5T263. Mr. Wake reported Mr.



Kasprzak's comments to Eurial Jordan on two occasions. Mr Jordan understood the comments referred to complainant, Ms. Turner and Ms. McKinstry 5T198. Mr Jordan later spoke with Mr. Kasprzak and told him the comments at the March 19<sup>th</sup> meeting with Mr Wake and Ms. Ware were inappropriate. 5T181 Mr Jordan was aware of Mr. Kasprzak's March 19<sup>th</sup> comments at the time Mr. Kasprzak was recommending that a disciplinary investigation be conducted of the complainant. 5T186

64. On March 19 and 20, 1996, after being advised on the 19<sup>th</sup> by Alan Kasprzak that following up on the lists of missed calls should be given a higher priority, complainant telephoned approximately 40 of her clients who had missed calls. Of those offenders, 3 or 4 had already been discharged from the BI program. 2T117 Before making these calls on March 19 and 20, complainant did not check to see if the offenders had been discharged from the program. 2T177 This information could have been obtained by checking the CACU listing for the offender. 5T352 It would have been both logical and good practice for complainant to check to see whether the offender had been discharged before telephoning that offender on March 19<sup>th</sup> and 20<sup>th</sup> 5T354 Some of complainant's follow-up calls served as bases for the letter of reprimand later issued to complainant.

65. On March 25<sup>th</sup>, both complainant and Agent Diane Bink arrived early to the unit. Complainant made the following comment to Ms. Bink: "Bink, what are you doing here so early? Do they have you spying on us?" Ms. Bink, who appeared to be upset by the comment, reported the incident to Mr Wake. Mr. Wake described the incident in a March 28<sup>th</sup> memo (Resp. Exh. 135) to Ms. Ware. This incident later served as one of several bases for a written reprimand issued to the complainant.

66. On March 29<sup>th</sup>, complainant spoke with Michael Sullivan, Secretary of the Department of Corrections, regarding Unit 033. (Comp. Exh. 10)

67 In a memo to Ms. Ware dated April 2, 1996, Mr. Wake reported:  
E.J. Borman mentioned to me today that, after the last set of enrollments in February, he has had a significant number of offenders (8 to 10 calls per day) assigned to Vickie Turner, Vera Hutson, and Michelle McKin-

stry tell him that they did not want to leave voice mail messages for these agents because there was no response to previous voice mail messages.

68. On April 17, Mr Wake asked complainant to provide him with two of her case files. He made requests for two additional files on both April 18 and 19. (Comp. Exh. 31)

69. By memo (Resp. Exh. 140) dated April 19, 1996, Ms. Ware directed complainant to report for an investigatory interview on April 23<sup>rd</sup>. The memo referenced allegations that complainant had "violated Work Rules #1, 4, 13 by engaging in behavior which could be a violation of the Harassment policy, and using demeaning and abusive language with offenders."

70. In a memo<sup>5</sup> (Comp. Exh. 10) dated April 22<sup>nd</sup>, regarding "racial discrimination from Kathy Ware Assist. Chief, James Wake Unit Supervisor," complainant asked Secretary Michael Sullivan for assistance in dealing with issues in Unit 033. The memo read:

Mr. Sullivan in our conversation on 3-29-96 I informed you of problems in the Min/Admin. Phone in supervision unit regarding Supervisor Jim Wake. You stated that you had directed Mr Jordan to deal with the situation. I'm not sure if that happened. Kathy Ware & James Wake have continued to harass and intimidate me. It is very obvious that they do not want me in this program. However, James Wake's behavior has not been addressed. I have been accused of violating work rule #1, 4, 13. This is the first I have heard of such violations. James Wake made it very clear that he does not want this program. He also made it clear to me that because he does not want this program "perhaps I am taking my anger out on you guys." Mr. Wake has been obnoxious, unavailable to me & several others which interfered with our job functions as well as very intimidating to me to the point I feared for my personal safety & left the work site to protect myself. I have been in a few meetings with Kathy Ware & James Wake. To no avail. Kathy Ware has been just as intimidating as James Wake. It appears she is very biased & not trying to resolve the situation but more finger pointing at me & others in what I believe is her attempt to run several of us out of the unit because we don't fit their plan for the unit. There blatant unequal treatment. [sic] There are two people who were hand picked by administration those two people are free to do their job w/o interference the rest of us have had

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<sup>5</sup> Complainant claims this memo was a protected activity under the Fair Employment Act.

continual road blocks in our attempts at performing our jobs. The intimidation has been a problem from day one and it escalated after we submitted memos requesting workload relief. Kathy Ware & James Wake have blatantly violated work rules. It is obvious around Region 3 that there are and have been problems with James Wake. It appears that management is aware of the problems but continues to blame anyone who attempts to get the problems address[ed].

Mr. Sullivan as long as Kathy Ware is the person we take our complaints to nothing will ever be resolved.

I am asking your assistance in dealing with these issues. I and others are sitting ducks in this unit. Kathy & James have [been] working daily to find something to use against us. I know that I complained & was afraid of James Wake behavior to the point I left work. In a meeting with Kathy Ware, Allan Kasprzak, James Wake and Kathy Kozminski & myself Kathy stated to me that I could ruin a career & Allan said to me that no one in Region 3 management would ever believe my concerns. I believe Kathy Ware, James Wake and others will do anything to get me out of the unit & the Dept. The Allegations in the attached letter are false I have not engaged in the behavior indicated any more than every agent in the unit including the two hand picked agents. I have approx 500 to 525 clients James or Kathy have not approached me with the issues. This is truly retaliation. [sic]

71. On April 23<sup>rd</sup>, Mr. Wake asked complainant to provide him with two of her case files. (Comp. Exh. 31)

72. Complainant was out of the office conducting enrollments in her region from April 24 through 26. (Resp. Exh. 144)

73. By memo (Resp. Exh. 142) to Ms. Ware dated April 25, Mr. Wake identified "further issues" regarding complainant, and described three cases that he had dealt with during the previous week. Two of those cases became bases for the written reprimand later issued to complainant.

74. Complainant's investigatory interview, initially scheduled for April 23<sup>rd</sup>, was conducted by Ms. Ware on April 30<sup>th</sup>. Mr. Wake did not participate. Complainant was present with a union representative. The interview took the entire afternoon. Ms. Ware followed the standard procedures she normally employed when conducting such interviews. Ms. Ware subsequently prepared a 7 page, single-spaced memoran-

dum (Resp. Exh. 146) to Eurial Jordan, Division Administrator for Probation and Parole, summarizing the results of that interview. The memorandum accurately summarizes what occurred during the interview. The memo concluded with the recommendation that the "matter be referred for a pre-disciplinary hearing for violation of Work Rules #1, 4, and 13."

75. At some time during April of 1996, complainant filed an internal complaint of Fair Employment Act discrimination based on race and military status with respondent's Affirmative Action office.<sup>6</sup> The complaint was subsequently investigated. The investigation resulted in a finding of "no probable cause."

76. By memo (Resp. Exh. 145) to Ms. Ware dated May 3<sup>rd</sup>, Mr. Wake identified additional situations/incidents involving complainant. These topics were not referenced in the letter of reprimand later issued to the complainant.

77. By memo (Resp. Exh. 147) from Ms. Ware dated May 9<sup>th</sup>, complainant was directed to report for a pre-disciplinary hearing on May 14<sup>th</sup>. The hearing was later rescheduled. Complainant objected to having Ms. Ware preside over the pre-disciplinary hearing. As a consequence, Assistant Regional Chief John Barian was given that responsibility.

78. Complainant was on medical leave from May 9, to June 10, 1996.

79. Complainant transferred out of Unit 033 effective June 10, 1996. Agents Turner, McKinstry and Voelker also transferred from the unit on that date.

80. After June 10<sup>th</sup>, all of the work assigned to the unit was performed by the remaining staff of Agents Lynn Hightire and Diane Bink, Program Assistant E.J. Borman, under the supervision of Mr. Wake.<sup>7</sup>

81. By memo (Resp. Exh. 149) dated June 26<sup>th</sup>, Mr. Barian scheduled the pre-disciplinary hearing for June 28, 1996. The hearing was postponed.

82. Respondent convened the pre-disciplinary hearing for complainant on July 9<sup>th</sup>, after complainant had left Unit 033. Mr. Barian was aware of complainant's

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<sup>6</sup> Complainant claims that her internal complaint was a protected activity under the Wisconsin Fair Employment Act.

February 5<sup>th</sup> "work relief" memo and was also aware that complainant had filed a complainant about Mr. Wake with the Affirmative Action office. Mr. Barian was aware complainant and others blamed the nature of supervision provided by Mr. Wake and Ms. Ware as the reason work was not getting done in Unit 033. 5T222

83. Mr. Wake was on leave at the time of the pre-disciplinary hearing. 4T123

84. Complainant brought a union representative to the pre-disciplinary hearing, but did not bring witnesses or documents, nor did she make any attempt to obtain any documents. During the hearing, complainant denied serious performance problems and asserted that management was making her a scapegoat, that the allegations against her reflected managerial problems, and that other agents had similar problems. 5T222+, Resp. Exh. 150.

85. Mr. Barian had read Ms. Ware's investigative summary report and read portions of that report during the pre-disciplinary hearing but he did not review the underlying case files.

86. Mr. Barian issued a pre-disciplinary report (Resp. Exh. 150) to Eural Jordan on August 6, 1996. The report stated, in part:

*Mitigation Offered:*

Ms. Hutson denies serious under performance. She claims that she was caught up in a bad work situation due to management's lack of proper organization of work. She states that she is being made a scapegoat for system failure. Vera further claims that all six agents have committed the violations. She states that she is being forced out by management and that she has done her job.

*Just Cause:*

The investigation supports just cause and mitigation seems to be more of offering excuses. Vera has now transferred to another unit as have other agents involved in the unit controversy.

*Recommendation: Discipline*

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<sup>7</sup> Language was added to this finding from the proposed decision to better reflect the record.

87 It was Mr. Jordan's decision whether respondent should discipline the complainant, as well as the level of any discipline. Mr. Jordan generally accepts Mr. Barian's disciplinary recommendations. 5T240

88. After Ms. Ware completed her pre-disciplinary investigation, she had no involvement in the decision to discipline complainant. Mr. Wake also was not involved in that decision.

89. Respondent issued a written reprimand (Resp. Exh. 151) dated August 19, 1996, to complainant. The reprimand states that complainant violated the following work rules:

Work Rule A-1. "Insubordination, disobedience, or failure to carry out assignments or instructions."

Work Rule A-4: "Negligence in performance of assigned duties."

Work Rule A-13: "Intimidating, interfering with, harassing (including sexual or racial harassment), demeaning, or abusive language in dealing with others."

The reprimand listed seven violations. Each of the seven violations is quoted, in its entirety, below, followed by additional facts relevant to that violation.

90. Violation #1 (Linda Jorgensen)

*On 03-19-96 and 03-20-96, while discussing with Linda Jorgensen the status of her case, you did threatening [sic] Ms. Jorgensen with filing harassment charges against her. Ms. Jorgensen had been attempting to explain to you that she was no longer on supervision and had been granted an early discharge in December of 1995. This is a violation of Work Rule A-13 and A-4.*

a. Ms. Ware's memo (Resp. Exh. 146) prepared after the investigatory interview with the complainant, summarized this incident as follows:

On 3/20/96 Regional Chief Allan Kasprzak received a voice mail message from Linda Jorgensen complaining that Vera Hutson had been rude to her on 3/19 as well as 3/20. I then phoned Ms. Jorgensen on 3/21/96 at which time she explained that on 3/19/96 she had received an answering machine message from Agent Vera Hutson instructing her that she had not been complying with the phone-in supervision program which is a violation of her probation and that she was to send in \$40 for her supervision fee. Ms. Jorgensen then phoned her prior agent, Pam

Charvat, the next morning on 3/20/96 and confirmed with Ms. Charvat that she had indeed received an early discharge and that she was not required to participate in the phone-in supervision program. Ms. Charvat advised the offender that she would call the agent and take care of it and that the agent would not be calling her again. Consequently, at approximately 11:15 A.M. on 3/20/96, Agent Hutson did phone Ms. Jorgensen again. At that time, Ms. Hutson demanded that she explain why she had not returned her phone call. According to Ms. Jorgensen when she attempted to explain, Ms. Hutson would not allow her to speak and that all she could say was yes ma'am several times. She stated to her that she was no longer on probation and had received an early discharge. Ms. Hutson reportedly responded words to the effect that she was looking at a November report and that "you are still on probation and you haven't called." She stated that Ms. Hutson then hung up the phone on her. Ms. Jorgensen then phoned the agent's number and left a voice mail message telling her the prior agent's name and phone number so that she could contact the prior agent to confirm the early discharge. She also indicated on the voice mail message that she felt Ms. Hutson had no right to call her nor to harass her. She indicates that Ms. Hutson then called her back at approximately 11:40.

According to Ms. Jorgensen, Agent Hutson made statements to the effect of "you're harassing me, I could press charges on that, I don't have to listen to this" and when asked who her supervisor was, Ms. Hutson responded "I don't care if you talk to my supervisor, I won't share that information with you." Ms. Jorgensen advised that Ms. Hutson should listen to her voice mail messages as Agent Charvat had left a message explaining the early discharge, to which she states Ms. Hutson replied, "If all I did was listen to my phone messages I couldn't get my work done." I subsequently spoke with Agent Pam Charvat on 3/27/96, who confirmed that she had received a phone call from Linda Jorgensen regarding Agent Hutson's call. She stated that she immediately called and left a message regarding the early discharge and asked Ms. Hutson not to call the offender any longer and if she had any questions, to call the agent. Agent Charvat stated that in her assessment, Ms. Jorgensen was a reliable offender as she had supervised her while on probation supervision. She confirmed that Ms. Jorgensen was on supervision for Contributing to the Delinquency of a Minor, the charges stemming from the offender allowing her 15 year old daughter to get married out of state under age. Ms. Jorgensen adjusted well to probation supervision and was granted an early discharge in December, 1995. She described Ms. Jorgensen as "credible."

b. Complainant had a large backlog of "missed calls" as of March 19<sup>th</sup>. Ms. Jorgensen had not called into the BI program for at least several months prior to complainant's call on March 19<sup>th</sup>. During the first call to Ms. Jorgensen on March 19<sup>th</sup>, complainant stated, "You are in violation and a warrant could be issued for your arrest."

c. Ms. Jorgensen had been discharged from the program on December 14<sup>th</sup>. This information was available to complainant on CACU (explained in Finding 35c) but she did not make the effort to obtain it.

d. Approximately 10% of the "missed call" follow-up calls that complainant made on March 19<sup>th</sup> and 20<sup>th</sup> were to persons who had already been discharged from the BI program.

e. Complainant did not accept Ms. Jorgensen's statement that she had been released from the BI program, nor did complainant make any effort to verify that statement. Complainant directed Ms. Jorgensen to submit a copy of the discharge document.

f. Complainant either failed to access the voice mail message from Agent Chervat confirming that Ms. Jorgensen had been discharged, or decided to ignore that message.

g. Ms. Jorgensen complained to both Mr. Kasprzak and to Ms. Ware that complainant had harassed her and refused to listen to her during their phone conversations. Respondent reasonably relied upon these contentions when Agent Charvat confirmed that she had left a voice mail message for complainant not to contact Ms. Jorgensen and confirmed that Ms. Jorgensen was credible.

h. Complainant did not present any telling evidence at either the investigatory hearing or the pre-disciplinary proceeding to show that her actions were appropriate or that the descriptions by Ms. Jorgensen or Agent Charvat were inaccurate.

91. Violation #2 (Agent Bink)

*On 03-25-96, you did state to Agent Dianne Bink, "What are you doing here? Are you spying on me for Jim and Kathie Ware?" This statement*



*was made in an intimidating and accusatory manner, in violation of Work Rule A-13.*

a. Ms. Ware's memo (Resp. Exh. 146), which was prepared after the investigatory interview with the complainant, summarized this incident as follows:

On March 19, 1996 Regional Chief Allan Kasprzak, along with members of the management team, met with several agents in Unit 033 in an attempt to address concerns within the unit. As an outcome of that meeting, Chief Kasprzak issued a memorandum dated March 19, 1996 . which under the #6 indicates "Foster a unit atmosphere of mutual respect in a harassment free environment" (all pledged to work on this). Ms. Hutson was in attendance at the meeting on March 19, 1996, as well as received a copy of the memorandum. On 3/25/96, Supervisor Wake noticed that Dianne Bink looked upset. He questioned her Ms. Bink then stated that when she arrived in the work area on the morning of 3/25/96 Agent Vera Hutson stated to her, "What are you doing here? Are you spying on me for Jim and Kathy Ware?"

92. Violation #3 (Robert Zweifel)

*In the latter part of March, 1996, you did advise offender Robert Zweifel that if he wanted to return to maximum supervision he would need to contact the supervisor in Jefferson. This is in violation of Work Rule A-1.*

a. Complainant telephoned Mr. Zweifel as part of her "missed call" follow-up calls on March 19<sup>th</sup> and 20<sup>th</sup>

b. Mr. Zweifel had not called in to the program since October of 1995. 2T120.

c. Based solely upon the March telephone conversation, complainant concluded that Mr. Zweifel was "low functioning."

d. Mr. Zweifel stated he did not want to continue to participate in the BI program. The referring agent no longer worked in Region 1. Complainant directed Mr. Zweifel to speak with the supervisor of the local office, Pat Millichap.

e. Complainant concluded that Mr. Zweifel did not fit the parameters of the BI program.

f. Although Mr. Zweifel's case file was available to her, complainant did not review it. Complainant did not contact Ms. Millichap. Complainant did not "staff" the case with Mr. Wake or with anyone else.

g. Ms. Millichap wrote a memo to complainant and Mr. Wake dated March 25, 1996, regarding Mr. Zweifel. The memo, Resp. Exh. 153, page 3, states, in part:

I've had several conversations with this offender. He has been trying to cooperate with the program. However he is limited and has a hard time dealing with change and understanding how to make things work. . He said that [complainant] told him I'd have to request his case be returned. This doesn't seem to me how the program should work. But on behalf of Mr. Zweifel, (so as to not see him fail) I'm asking for the case to be returned to my attention immediately. I'm surprised the offender had to make this request. I didn't hear from the agent of record.

h. On April 2, 1996, Ms. Millichap sent a letter (Resp. Exh. 153, page 1) to Mr. Zweifel that included the following language:

When we last spoke on the phone I told you I would request your file be returned to the Jefferson Office. Since we talked, I have talked to Jim Wake, the supervisor for the unit that monitors clients who use the BI system (telephone call-in.)

Mr. Wake is trying to work out some way for you to make the call and send your payments in thru the mail. If they work out something for you they will contact you directly. They will try to have a program in place for your April report.

93. Violation #4 (Ray Klauer)

*On 01-01-96, Ray Klauer was placed in custody. Several individuals have reported that you stated you had not signed the C-44 yet so it wasn't your case and you refused to take appropriate action. This is in violation of Work Rule A-4.*

a. Respondent requires that whenever there is an allegation a client has assaulted someone, the client must be placed in custody or an apprehension request must be ordered. 5T274 Once the client is in custody, the agent assigned to the case must carry out an investigation of the alleged violation in order to revoke probation.

b. Ray Klauer had been convicted of battery and was one of complainant's clients from Region 1. On January 1, 1996, Mr. Klauer allegedly engaged in domestic

violence. Complainant was on vacation at that time. On January 2<sup>nd</sup>, Agent Diane Bink issued an "Order to Detain" Mr Klauer (Resp. Exh. 138) on behalf of the complainant.

c. Complainant returned to work on January 4, 1996. When she returned, complainant should have promptly investigated the alleged violation by Mr Klauer in order to revoke his probation.

d. Mr. Wake received reports from several individuals that complainant was declining to take any action because she had not signed a Form C44 (see Finding of Fact 18) for the case. Resp. Exh. 138 These reports came from the Region 1 referring agent (Loreen Tryba) via Ms. Millichap; the victim via Ms. Millichap; the Jefferson Count victim witness advocate program via Ms. Millichap; and from an ex-spouse of Mr Klauer. In his April 15, 1996, memo (Resp. Exh. 138) to Ms. Ware, Mr. Wake also reported that Ms. Millichap told him she had left numerous voice mail messages for complainant in an effort to clear up the matter, and that when complainant did not respond, Ms. Millichap had asked for the case back and had handled the revocation herself.

94. Violation #5 (Dawn Brandtmeier)

*On 04-15-96, you were informed by Program Assistant E.J. Borman that the Manitowoc Police Dept. had indicated that Luann Brandtmeier, mother of offender Dawn Brandtmeier, had received threatening phone calls from her daughter. The MPD indicated that Mrs. Brandtmeier felt threatened and the Manitowoc Police Dept. was concerned for the mother's safety as well. The Brandtmeier case was assigned to Agent Michelle McKinstry and you were Agent McKinstry's cover agent. You told Program Assistant Borman that you had a doctor's appointment and would be leaving the office shortly and that either you or Agent McKinstry would handle it the following day. This is a violation of Work Rule A-1.*

a. This situation was more completely described in a memo (Resp. Exh. 139) dated April 17, 1996, from Mr Wake to Ms. Ware, which stated, in part:

On 04/16/96 E.J. Borman approached me regarding a situation which occurred in the office the previous day, Monday April 15, 1996.

He stated that in the afternoon he had retrieved a voice mail message to the Unit's main number from Officer Greg Martel of the Manitowoc Police Department. Officer Martel stated that one of Michelle McKinstry's offenders, Dawn Brandtmeier, had been making harassing and threatening phone calls to her adoptive mother, Luanne Brandtmeier. Officer Martel further stated that Luanne Brandtmeier had written out a statement but had not yet pressed charges. Officer Martel wanted this office [to] take action because Luanne Brandtmeier felt she was threatened and he was concerned for her safety.

Later that afternoon, approximately 3:00 PM, E.J. retrieved a second message from voice mail, this time from Luanne Brandtmeier. She sounded upset and afraid, stating her daughter had been threatening her and the rest of the family by phone. She said she was concerned for the safety of herself and her family. E.J. then took this information to Michelle McKistry's cover agent, Vera Hutson. Vera told him she had a doctor's appointment and would be leaving the office shortly and that either herself or Agent McKinstry would handle it on Tuesday the 16<sup>th</sup> when someone called back with more information or when Agent McKinstry was informed about it.

He told me following this he was quite upset because he felt the people involved were at risk and that there wasn't sufficient action occurring to insure their safety. He informed Michelle McKinstry about the situation as soon as she arrived the next day.

b. Complainant was the cover agent for Michelle McKinstry who was out of the office on April 15<sup>th</sup>. Dawn Brandtmeier was Ms. McKinstry's client. Complainant was unfamiliar with the Brandtmeier case file. 3T69

c. E.J. Borman informed complainant about the threatening calls from Dawn Brandtmeier to Luanne Brandtmeier shortly before complainant was due to leave work for a medical appointment.

d. Proper procedure would have been for complainant to discuss the matter with a supervisor, obtain an apprehension order or, if complainant was unavailable, to have another agent immediately respond to the information.

e. Complainant told Mr. Borman, that she or Michelle McKinstry would handle the matter the next morning. Complainant did not initiate any steps to have an apprehension order issued and did not take the matter to a supervisor

95. Violation #6 (Gary Kryshak)

*Regarding the case of Gary Kryshak, you failed to take appropriate action that would insure Mr. Kryshak did not discharge with costs owing. Though you indicated you were working with the Clerk of Courts, Barbara Borde, to get an amended court order, Ms. Borde stated she had not spoken with you directly to work out getting an amended court order or extending the case two years. This is in violation of Work Rule A-1 and A-4.*

a. Ms. Ware's memo (Resp. Exh. 146) prepared after the investigatory interview with the complainant, included the following information regarding this incident:

Agent Hutson stated that the offender had gone to court in December of 1995 to get an extension. She indicated that she had talked with Barbara Borde on the 15<sup>th</sup> and that Ms. Borde had advised her she was going to check in traffic court as they were responsible for issuing the amended court order. When advised that Ms. Borde had stated to Supervisor Wake that she had never spoken directly with Agent Hutson, Ms. Hutson then stated "I talked to a human being, I don't know if it was her." She indicated that she had attempted to phone the clerk of courts one time prior to April 18, but could not recall when it was. She did not recall when she had received the file for this offender for ongoing supervision. She indicated that she had just got the notice the offender was discharging in the past couple of days and she had put it in her desk.

I believe Ms. Hutson has misrepresented information. She did not speak directly to the clerk of courts regarding the extension of Gary Kryshak. Furthermore, in her notes she indicates to Supervisor Wake that this case had been extended for two years which is not accurate. Ms. Hutson was negligent in not following on the case prior to the discharge date of 3/15/96 and admits that she did not call and follow up until 4/18/96 when she received the note from her supervisor

b. Mr Wake's practice was to monitor all discharged cases in the unit.  
4T80.

c. Because of an incorrect court order, the probationary period for Gary Kryshak was originally entered as 3 years (with a discharge date in March 15, 1996) rather than 4 years. Shortly after the original court order was issued, the court issued a

corrected order, but the new discharge date was not picked up in respondent's computer system.

d. Mr. Kryshak was one of complainant's clients.

e. Consistent with his normal practice, Mr. Wake accessed information (Resp. Exh. 143, page 6) regarding Mr. Kryshak in April of 1996. This material showed a discharge date of March 15, 1996, and showed that he still owed \$1907.03.

f. On April 19<sup>th</sup>, Mr. Wake asked to see the case file. Resp. Exh. 142, page 2. Complainant returned the file with a note stating:

[T]his case appears to have discharged but it really hasn't. I've been working with the Court Clerk Barbara Borde to get the amended court order I last spoke with her on 4/18/96. He has been extended 2 yrs.

g. Mr. Wake described his subsequent actions as follows:

I called [Dane County Circuit Court Clerk Barbara Borde] on 4/22/96 and reached her.

Barbara Borde also said that Vera called her office on 4/18/96, but Ms. Borde was unavailable for her call. Vera left a message with the receptionist saying that she needed an order extending Mr. Kryshak's probation. Later that day, when Ms. Borde tried to reach Vera, Vera was unavailable. Vera again, per Ms. Borde, tried to reach her on 4/19/96, but Ms. Borde was on vacation.

Ms. Borde stated that at no time did she talk directly with Vera to work out getting an amended court order" or extending the case two years. In fact, Ms. Borde was very confused by Vera's request, since the Court had, close to the time of original sentencing, sent a "corrected" order showing that one of the Counts in the case was for four years probation, not three years. This would put the discharge date for the case on 3/15/97 not in 1996.

Following this conversation, I sent a message to Bobbi Otis and discovered that no one had ever sent the "corrected" court order. Bobbi later informed me she had never received the "corrected" order - which I have now sent her. I also contacted Barbara Borde and informed her of the corrected status of this case in our records.

h. While complainant had tried to contact the court on April 18<sup>th</sup>, she did not speak with Ms. Borde and did not know that a corrected court order had been is-

sued some time earlier. At the time she contacted the court, complainant was seeking an order extending Mr. Kryshak's probation.

96. Violation #7 (Michael Dougherty)

*On 04-19-96, Supervisor Jim Wake requested the file of Michael Dougherty from you as there was concern about the case discharging with over \$1400 in obligations owing. You responded by writing a note that stated, "we do not have a file on Michael Dougherty according to E.J.'s computer. We don't have an agreement on him according to the computer. I don't have any info on him in my missing file book." A check with CACU indicated that this case had been transferred to you on 01-30-96. This is in violation of A-1 and A-4.*

a. Complainant became the agent of record for Michael Dougherty no later than January 30, 1996.

b. During February and March of 1996, complainant received CACU printouts showing that Mr. Dougherty was scheduled to be discharged from supervision on March 29, 1996, with amounts owing.

c. Complainant took no action to obtain an extension so that Mr. Dougherty would not be discharged.

d. Mr. Dougherty was discharged from supervision on March 29, 1996, still owing \$1407.07.

e. As part of his review of discharged cases, Mr. Wake asked to see Mr. Dougherty's file on April 19, 1996. Complainant responded by saying she did not have the file or other records regarding Mr. Dougherty.

97 Complainant appealed the written reprimand under the contractual grievance procedure and, at arbitration, the imposition of the written reprimand was upheld.  
3T66

#### CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to §§230.45(1)(b) and (g), Stats.

2. It is the complainant's burden of proof to show that respondent reprimanded her because of her participation in activities protected under the Fair Employment Act (FEA) or under the whistleblower law.

3. The complainant failed to meet her burden.

## OPINION

### I. Fair Employment Act retaliation claim

The analytical framework for retaliation cases was laid out in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973). This framework provides that the burden is first on the petitioner to show a prima facie case; that this burden then shifts to respondent to rebut the prima facie case by articulating a legitimate, non-discriminatory reason for its action; and that the burden then shifts back to petitioner to show that respondent's reason is a pretext for discrimination.

The petitioner may establish a prima facie case of Fair Employment Act retaliation by showing that she engaged in a protected activity under the FEA and the alleged retaliator was aware of that participation, that the employer subsequently took an adverse action against her and that there is a causal connection between the protected activity and the adverse action. *Hecht v. UWHCA*, 97-0009-PC-ER, 3/17/99.

### II. Whistleblower retaliation claim

The whistleblower law provides protection to certain employees of the State of Wisconsin who have engaged in one of the various activities specified in §230.80(8), Stats. In the present case, the relevant provision is §230.80(8)(a), Stats., which protects a lawful disclosure of information made under §230.81, Stats.

The various methods for disclosing information that result in protection under the whistleblower law are set forth in §230.81. The typical disclosure is "in writing to the employee's supervisor" as provided in §230.81(1)(a). However, a disclosure need not be made to a first-line supervisor in order to qualify. Qualifying disclosures may be made instead to a second-line supervisor, third-line supervisor, or higher level su-



pervisor in the employe's supervisory chain of command. *Benson v. UW(Whitewater)*, 97-0112-PC-ER, etc., 8/26/98

Once an employe engages in, or is perceived as engaging in, an action protected by the whistleblower law, §230.83(1) provides that retaliatory action may not be initiated, threatened or administered. "Retaliatory action" is defined in §230.80(8) as a "disciplinary action taken because of" a protected activity, and specifically includes a reprimand. Section 230.80(2)(a), Stats.<sup>8</sup>

A complainant may establish a prima facie case of whistleblower retaliation by showing: 1) she participated in an activity protected under the whistleblower law and the alleged retaliator was aware of that participation, 2) disciplinary action occurred and 3) a causal connection exists between the first and second elements of the prima facie case. *Sadlier v. DHSS*, 87-0046 and 0055-PC-ER, 3/30/89.

The whistleblower law is designed to protect an employe who discloses information the public has an interest in having disclosed. More specifically, the statute protects disclosures of "information," as defined in §230.80(5):

"*Information*" means information gained by the employe which the employe reasonably believes demonstrates:

- (a) A violation of any state or federal law, rule or regulation.
- (b) Mismanagement or abuse of authority in state or local government, a substantial waste of public funds or a danger to public health and safety.

Some of the terms within this definition are defined elsewhere in §230.80:

(1) "*Abuse of authority*" means an arbitrary or capricious exercise of power.

(7) "*Mismanagement*" means a pattern of incompetent management actions which are wrongful, negligent or arbitrary and capricious and which adversely affect the efficient accomplishment of an agency function. "Mismanagement" does not mean the mere failure to act in accordance with a particular opinion regarding management techniques.

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<sup>8</sup> On pages 34 and 35 of her post-hearing brief, complainant contends that certain conduct by respondent in addition to the August 19<sup>th</sup> written reprimand constituted retaliation under §230.80(2), Stats. Respondent correctly noted that the issue for hearing was limited to the written reprimand. The Commission will not consider the new claims raised for the first time in complainant's brief.

(9) "*Substantial waste of public funds*" means an unnecessary expenditure of a substantial amount of money or a series of unnecessary expenditures of smaller amounts of money.

In order to make a protected disclosure under §230.81(1)(a), the employee must have information the employee "reasonably believes demonstrates" a violation of law, mismanagement, a waste of public funds or a danger to public health/safety. In other words, the question is whether a reasonable person, similarly situated, would believe this information demonstrated a violation of law, etc.

In addition to the "reasonable belief" requirement, the statutory framework for the whistleblower law requires the "information" to be disclosed.<sup>9</sup> An employee who has knowledge that fits the definition of "information," does not make a disclosure unless, under all the circumstances, the disclosure adequately describes the "information." For example, an employee may know that highly caustic chemicals are being stored in leaking containers at his employer's loading dock, but if the employee merely writes a note to her supervisor that there is a "safety issue" without otherwise describing that issue, she has not disclosed the information so as to engage in a protected activity under the law.<sup>10</sup> As noted by the Commission in *Elmer v. DATCP*, 94-0062-PC-ER, 11/14/96:

The whistleblower law covers only certain specific kinds of disclosures made in specific ways. The legislature obviously did not intend to provide blanket protection for any kinds of employee utterances which might result in retaliation by the employing agency.

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<sup>9</sup> Section 230.81(1), Stats.

<sup>10</sup> This paragraph is being modified to make it clear that the meaning and extent of the disclosure can be informed by the surrounding circumstances.

III. Analysis of alleged protected activities

On page 30 of her post-hearing brief, complainant identified the "work relief memo" of February 5, 1996, as her protected activity under the whistleblower law.<sup>11</sup>

On pages 40 and 41 of the same brief, complainant made the following reference to the protected activities that were the basis for her FEA retaliation claim:

The anti-retaliation provision of the WFEA has two parts [A] verbal complaint to the employer of "sexist cronyism" falls within the scope of a protected activity under the WFEA. *Vallez v. UW-Madison*, 84-0055-PC-ER, 2/5/87

In Hutson's case, she opposed discrimination by Wake when she complained that he was treating the agents like slaves on March 13, 1996. Hutson also filed a formal Complaint with AA, complained directly to Kasprzak on April 19, 1996, and finally to the DOC Secretary, Mike Sullivan on April 22, 1996. (C-10).

Those actions identified by complainant as her protected activities are analyzed separately, below.

A. Alleged whistleblower law protected activity: February 5, 1996, memo from complainant to James Wake, with copies to union officials and Kathleen Ware.

Complainant's February 5<sup>th</sup> memo provided, in part:

I am writing this correspondence to request workload relief and/or authorized overtime of one hour per every 5.5 points over the 260 point caseload cap per our union contractual agreement for the 1995-97 contract year. I am currently supervising a total of 559 cases 475 under my agent number and 84 for a co-worker who will be out on sick leave for the next four to seven weeks.

Due to the excessive workload and a caseload that continues to grow without a foreseeable end, coupled with the lack of clarity under a supervisory style that is extremely arbitrary and capricious. [sic] I have found the work environment to be highly stressful and terribly distracting

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<sup>11</sup> There was some discussion at hearing of other possible protected activities, but complainant has, in her brief, clearly identified the February 5<sup>th</sup> "work relief" memo as the basis for her claim of whistleblower retaliation.

to try to manage my caseload adequately and professionally. I am at this time requesting that reasonable guidelines be established that would enable me to perform my job. . .

Complainant references several topics in her memo. She states there is an "arbitrary and capricious" supervisory style and that there are no "reasonable guidelines" to enable her to perform her job. She also alleges that she is burdened by an "excessive workload." She provides specific information about the size of her caseload and states that it exceeds the numerical limit established in the applicable bargaining agreement. She says that her caseload "continues to grow."

Complainant's comments about an "arbitrary and capricious" supervisory style and the lack of "reasonable guidelines" are too general and conclusory to satisfy the statutory requirement for making a disclosure of "information." Complainant's statements could relate to the general concept of "mismanagement" that is defined in §230.80(7), but it is impossible to say that these references in her February 5<sup>th</sup> memo describe mismanagement. Therefore, complainant's references to the style of supervision and to a lack of guidelines do not satisfy the requirements for a protected whistleblower disclosure.<sup>12</sup>

The second topic of complainant's February 5<sup>th</sup> memo is her allegation that she has an excessive workload. The record raises significant questions about whether it was reasonable to conclude that the workload was excessive. The memo suggested that the number of cases assigned to complainant far exceeded the cases permitted under the point system worked out between management and the agent's union. However, as part of that point system, each "administrative case" was valued at 1/2 point, and that status required a meeting with the client every 6 months. The agents in Unit 033 had no required meetings with their clients in the BI program. In addition, other agents in the unit were clearly able to handle their caseloads and, in fact, after four agents had left

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<sup>12</sup> This paragraph from the proposed decision and order has been modified for the same reason as expressed in footnote 10, i.e. to avoid the implication that determining the adequacy of a disclosure is limited to the four corners of the disclosing document.

the unit, the two remaining agents were able to service the unit's entire caseload of 3000. 3T160

Even though there is significant evidence suggesting it would have been unreasonable to believe complainant's caseload was excessive, agents McKinstry and Turner shared complainant's opinion.<sup>13</sup> Without deciding this point, the Commission will assume that complainant has been able to meet her burden of showing hers was a "reasonable belief" that the caseload assigned her was excessive and, as a consequence, a wrongful and negligent management action.

Even assuming complainant has met the "reasonable belief" standard and that establishing a workload level is a wrongful management action that is not a "management technique," complainant's disclosure did not describe a "pattern of incompetent management actions" as required in the definition of "mismanagement." This language reflects a clear legislative intent to provide the protections of the whistleblower law to only those employees who identify a *series* of incompetent management actions, i.e.

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<sup>13</sup> The fact that two of complainant's co-workers also expressed concern that the workloads in Unit 033 were excessive is not dispositive as to the question of whether complainant has met her burden of showing she held a "reasonable belief" under the whistleblower law. In *LaChance v. White*, 174 F.3d 1378, 15 IER Cases 119 (CA FC 1999), *cert. den.*, 15 IER Cases 1824 (US SupCt, 2000), the court analyzed a claim under the federal Whistleblower Protection Act, 5 U.S.C. §2302(b)(8), which prohibits retaliation against an "employee because of (A) any disclosure of information by an employee which the employee reasonably believes evidences (ii) gross mismanagement " The court held that a showing by the employee that "was familiar with the alleged improper activities and that his belief was shared by other similarly situated employees" was inadequate to support a violation of the Whistleblower Protection Act:

We conclude, therefore, that the proper test is this: could a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee reasonably conclude that the actions of the government evidence gross mismanagement? A purely subjective perspective of an employee is not sufficient even if shared by other employees. The WPA is not a weapon in arguments over policy or a shield for insubordinate conduct. Policymakers and administrators have every right to expect loyal, professional service from subordinates who do not bear the burden of responsibility. If personnel management is to be undone by the board, which of course has no responsibility for the result of its orders, the bases for its action must be thoroughly established.

more than an isolated instance of alleged mismanagement. Complainant's reference to an excessive workload is not a protected disclosure of "information."<sup>14</sup>

This result is supported by the Commission's decision in *Pfeffer v. UW (Parkside)*, 96-0109-PC-ER, 3/14/97. In *Pfeffer*, the complainant contended his letter to the President of the University of Wisconsin System, a letter that questioned the decision to transfer all third shift custodians to the day shift, was a whistleblower disclosure. In addition to complainant, 11 other custodians signed the letter. The Commission concluded that the letter did not allege a "pattern" of "incompetent management actions," and that it reflected a disagreement involving a "failure to act in accordance with a particular opinion regarding management techniques."

B. Alleged Fair Employment Act protected activity: March 13, 1996, meeting of the work unit

This contention relates to complainant's comment to Mr. Wake, "You are treating us like slaves." (Finding of Fact 52). After this statement, Mr. Wake abruptly terminated the meeting. The meeting related to procedures and practices as well as issues within the unit.

Complainant contends that her "slaves" comment was a protected FEA activity. The question is whether complainant's statement fits within the protections of §111.322(2m), or (3), Stats. The latter subsection prohibits discharges and other employment actions "because [complainant] has opposed any discriminatory practice under

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<sup>14</sup> This paragraph in the proposed decision has been modified to focus on a larger portion of the definition of "mismanagement" than just the reference to a "pattern." In the present case, respondent decided that the caseload for the agents in Unit 033 could end up between 500 and 1000 clients. (Finding 15). Complainant disagreed with the appropriateness of that conclusion. Complainant does not contend that such a caseload "violated state or federal law, rule or regulation," was a substantial waste of public funds, or was a danger to public health and safety. The remaining category of "information" for a protected disclosure, "mismanagement," was not written so expansively as to include all remaining problems that might crop up in the workplace.

this subchapter." The record shows complainant's comment at the March 13<sup>th</sup> meeting was offered because she wanted the agents to have a stronger voice in determining how the unit should operate. Complainant was not suggesting that Mr Wake's treatment of the unit was racially motivated. Complainant explained her comment (2T68) as follows:

Q Do you remember what was said just prior to him ending the meeting?

A I remember saying something like, "Come on, Jim, you're treating us like slaves." It's like, do the work, do the work, do the work, but there's no explanation, no reason, just do the work. And that was my voice to him. And to me, that's a tone I would have with anyone that I was having a serious discussion with about a serious issue.

Q And when you made a reference to "slaves," what was your purpose for referring to that?

A That it was pretty much, do the work, do the work, work, work, work. Don't ask questions, just do it, just do it.

Q Did that have anything -- comment have anything to do with race in your mind?

A At that point I don't think so.

Q At some later point -- what, what do you mean by "at that point?"

A At that point I didn't think so. .

Q You said later on you reached a different conclusion. What were you referring to?

A I was referring to the fact that it seemed to me that I didn't have an option as a senior agent to make decisions about my caseload. And I also noted that Vicky Turner was the most senior agent in there and we were just given directives to work, to work, to work. And it did cross my mind, is it because -- is it because of our race? You know, um. Then it did cross my mind.

Complainant admitted that at the time she made the statement, she did not intend to suggest that the management actions were based on race. Complainant's own testimony simply does not support complainant's argument in her post-hearing brief that she

"opposed discrimination by Wake when she complained that he was treating the agents like slaves." The fact that complainant may, at some *later* time, have started to wonder whether Mr. Wake's actions were motivated by race, does not make her March 13<sup>th</sup> comment a protected activity.

C. Alleged Fair Employment Act protected activity: complainant complained directly to Mr. Kasprzak on April 19, 1996, of discrimination

There is no evidence that complainant met with or spoke to Mr. Kasprzak on April 19<sup>th</sup> or that she sent correspondence to Mr. Kasprzak on that date. Therefore, complainant has not met her burden as to this allegation.

D. Alleged Fair Employment Act protected activity: April 22, 1996, memo from complainant to Secretary Sullivan, Comp. Exh. 10

This memorandum is set forth in Finding of Fact 70. Complainant sent copies of the memo to Kathy Ware, James Wake and Allan Kasprzak, among others.

The title of the memo specifically referenced "racial discrimination from Kathy Ware Assist. Chief, James Wake Unit Supervisor." While there is no mention of race discrimination in the body of the memo, by making a reference to race discrimination in the title, complainant engaged in a protected activity under the Fair Employment Act, §111.322(3), when she sent the April 22<sup>nd</sup> memo to Secretary Sullivan.

E. Alleged Fair Employment Act protected activity: complainant's formal complaint with the respondent's Affirmative Action office

The record reflects that complainant filed an internal complaint of discrimination, based on race and military status, with respondent's Affirmative Action office in April of 1996. This conduct was clearly a protected activity for the purpose of an allegation of FEA discrimination.



IV Remaining elements of analysis

While complainant has failed to show she engaged in any activities that fall within the scope of the whistleblower law, her April 22<sup>nd</sup> memo to Secretary Sullivan and her discrimination complaint to the respondent's Affirmative Action office are both protected activities under the Fair Employment Act. The August 19<sup>th</sup> written reprimand was an adverse employment action. Complainant established a causal connection for purposes of a prima facie case because of the relatively brief period of time between the protected activities and the written reprimand.

Respondent takes the position that the August 19<sup>th</sup> written reprimand reflected actual performance problems by the complainant and that the reprimand was not issued in retaliation for complainant's protected activities.

While the written reprimand was issued just a few months after complainant's protected activities, the disciplinary process was underway when Ms. Ware sent her April 19<sup>th</sup> memo directing complainant to report for an investigatory interview later in April. In other words, complainant was already being investigated for violating Work Rules 1, 4 and 13 when she engaged in her first protected activity under the Fair Employment Act, i.e. when she sent her April 22<sup>nd</sup> memo to Secretary Sullivan. This sequence strongly undercuts complainant's allegations of retaliation because respondent had already decided their concerns about complainant's work performance necessitated a formal investigation.

The record is not clear as to the date complainant engaged in her second protected activity, filing the internal discrimination complaint. Because it is complainant's burden of proof and because complainant failed to offer evidence as to the day in April when she filed it, the Commission will treat the complaint as having been filed on the last day of April, i.e. Tuesday, April 30<sup>th</sup>. Again, this date is *after* respondent had initiated its disciplinary investigation of complainant's work.

The Commission will also examine the facts relating to the reprimand, to determine whether there was a reasonable basis<sup>15</sup> for the various violations cited in the letter of reprimand, or whether they are unsupported. If no support exists for the violations cited in the reprimand, illegal retaliation could be inferred. Each violation listed in the letter of reprimand is discussed separately, below.

A. Analysis of Violation #1 (Linda Jorgenson)

Ms. Jorgenson had not called into the BI program for at least several months prior to complainant's call on March 19<sup>th</sup>. An underlying problem with complainant's conduct was that she did not get around to following up on her "missed call" list until after the meeting with Mr. Kasprzak on March 19<sup>th</sup>, and then she called all of the names on the list without checking to see if everyone was still participating in the program. Complainant admitted that "3 or 4" of the persons she called on these 2 days had been discharged.<sup>16</sup> Ms. Jorgenson had been discharged from the program on December 14<sup>th</sup> (Resp. Exh. 131), more than 3 months before complainant's call. Complainant's delay in following up on the missed call list and her ignorance of the fact that Ms. Jorgenson had been discharged from the program in December did not reflect well on the program. It was reasonable for Ms. Jorgenson to be miffed upon receiving complainant's first call, especially when complainant told her, "You are in violation and a warrant could be issued for your arrest." 2T116. Complainant later asked Ms. Jorgenson to send in a copy of the discharge papers, 3T51, rather than obtaining confirmation of the discharge from an in-house source, even though it was respondent who had sent the pa-

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<sup>15</sup> The Commission's analysis of the written reprimand is distinct from the just cause analysis conducted as part of the contractual grievance procedure. While the issue of just cause can be an appropriate consideration at the analytical stage of determining pretext in a claim arising from the imposition of discipline, the ultimate issue in whistleblower cases is whether retaliation occurred, not whether there was just cause for the imposition of discipline. *Sadlier v. DHSS*, 87-0046, 0045-PC-ER, 3/30/89. However, the Commission notes that the reprimand was upheld when complainant had it reviewed under the provisions of her collective bargaining agreement.

<sup>16</sup> In contrast, Lynn Hightire testified she didn't remember ever calling anyone who had already been discharged from the program.

pers to Ms. Jorgensen and even though Agent Charvat had confirmed that Ms. Jorgensen was no longer in the program. Complainant and Ms. Jorgensen spoke again. Ms. Jorgensen reported that complainant had threatened to press charges and had stated that Ms. Jorgensen was harassing complainant. Ms. Jorgensen promptly called Alan Kasprzak to complain about the complainant's conduct. She also later spoke with Ms. Ware and told her that complainant was rude, refused to believe that Ms. Jorgensen had been discharged, hung up on her on two occasions and would not listen or let her speak. 5T264 The fact that Ms. Jorgensen had been discharged was shown on the CACU at the time complainant made the calls on March 19<sup>th</sup> and 20<sup>th</sup>. Screen 77 showed that complainant was no longer in the program. Ms. Ware presented complainant with a copy of the information and told her not to call Ms. Jorgensen again. 2T113 Agent Charvat confirmed to Ms. Ware that Ms. Jorgensen was credible and reliable.

Complainant denied that she harassed Ms. Jorgensen. (Resp. Exh. 146, p. 4) This denial is inconsistent with the various statements admitted by complainant. It is also inconsistent with the information reported by Ms. Jorgensen. Respondent engaged in a reasonable effort to investigate Ms. Jorgensen's allegations. The investigatory memo by Ms. Ware showed that she spoke with both Ms. Jorgensen and Agent Charvat to get their version of events. The complainant had the opportunity to provide information at both the investigatory and pre-disciplinary conferences. Ms. Jorgensen died before the Commission held the hearing in this matter. Neither party called Ms. Charvat as a witness.

The Commission notes that Allegation #1 in the letter of reprimand cites Work Rules A-13 and A-4, i.e. that complainant harassed Ms. Jorgensen and was also negligent. Respondent reasonably believed that complainant was negligent for not checking to see if a case had been discharged before she made her calls on March 19<sup>th</sup> and 20<sup>th</sup>.

and for not checking (or not relying upon) the voice mail message from Agent Charvat.<sup>17</sup>

B. Analysis of Violation #2 (Agent Bink)

During both the investigatory interview and the administrative hearing, complainant admitted she asked Ms. Bink whether she was a spy. However, complainant contends she did not intimidate Ms. Bink. On cross examination, Ms. Bink made a general statement denying that complainant had intimidated her.<sup>18</sup> However, testimony by Mr. Wake and E.J. Borman<sup>19</sup> as well as documents from the time (Resp. Ex. 135) showed that Ms. Bink appeared upset and intimidated by the incident. Complainant's comment to Ms. Bink was inappropriate. It was inconsistent with the objective stated in the March 19<sup>th</sup> meeting with Mr. Kasprzak. Respondent reasonably believed complainant had called Agent Bink a "spy" for management.

C. Analysis of Violation #3 (Robert Zweifel)

Mr. Zweifel had not called in to the program for 5 months. When complainant did finally follow-up on her missed call list and contacted Mr. Zweifel, complainant tried to get rid of the case by telling Mr. Zweifel to contact Ms. Millichap if he wanted to drop out of the BI program. Complainant did not engage in an effort to see if there was a way to keep Mr. Zweifel in the program. She ignored procedures and did not staff the case with Mr. Wake and she did not contact Ms. Millichap to get her input. Complainant wanted to dump the file onto someone else. She tried to get rid of the file

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<sup>17</sup> E.J. Borman testified that it was a fairly common practice for complainant to let her voice mail message system fill up with 54 calls so that a new caller would bypass the voice mail message box and be forwarded to someone else. (Borman deposition, pp. 8 and 17)

<sup>18</sup> Q Did Ms. Hutson ever say or do anything to you that was intimidating to you?

A No. She had a partition between us, so -- and she didn't say anything to me.

Q And did she ever do anything that was -- you found to be harassing?

A No, not really. 3T204

without going through the proper channels and without even looking at the file. Respondent reasonably believed that complainant had failed to follow instructions on dealing with this type of a case.

D. Analysis of Violation #4 (Ray Klauer)

Upon returning to work on January 4<sup>th</sup>, complainant should have dealt with the Klauer case by following up on the Order to Detain (issued in complainant's absence by Diane Bink) and investigating the alleged violation in order to revoke Mr Klauer's probation. Mr. Wake received calls from a variety of sources indicating that complainant was refusing to act because she had not signed a Form C44 and, therefore, was not the agent of record. These calls are reflected in Mr. Wake's April 15<sup>th</sup> memo. (Resp. Exh. 138) However, complainant clearly was the agent of record as indicated on page 3 of Resp. Exh. 138, which lists Agent 03301 (complainant) as the agent for Mr. Klauer.

It was complainant's responsibility, as the assigned agent, to conduct the investigation of the alleged violation in order to revoke Mr. Klauer's probation. Complainant did not fulfill that responsibility and dumped the file by sending it on to Ms. Millichap in Region 1. Complainant was negligent by failing to handle the revocation investigation and by getting rid of the case to Ms. Millichap. Given that complainant was the agent of record listed on the only relevant document in the case file, given that she did not conduct the revocation procedure or do anything other than pass the case to Ms. Millichap, it is a reasonable conclusion that complainant was negligent in fulfilling her responsibilities.

E. Analysis of Violation #5 (Dawn Brandtmeier)

As the cover agent for Michelle McKinstry who was out of the office, complainant had the responsibility to act upon a report that one of Ms. McKinstry's clients,

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<sup>19</sup> Mr. Borman testified that Ms. Bink was crying when she went to Mr. Wake's office and later described the spying incident. Borman deposition, page 18.

Dawn Brandtmeier, was threatening her mother. However, complainant declined to act and said it could wait until the next day. Complainant did not follow the proper procedure and did not follow existing policy. Complainant contends she did what was necessary because the police were already involved. However, police could not act because Luanne Brandtmeier refused to sign a complaint naming her daughter. The police were relying on the Division of Probation and Parole to take some action to eliminate the danger to Luanne Brandtmeier and her family. Complainant learned of the situation as she was about to leave for a doctor's appointment. To the extent that complainant assumed the police were in a position to handle the matter, she was mistaken and she did not take the time necessary to learn the relevant facts. She also did not make the effort to get someone else in the office to take over for her so that she could go to her medical appointment. The net result was that nothing happened until the next day when Ms. McKinstry arrived at work. In the interim, Luanne Brandtmeier and her family were at risk. It was reasonable for respondent to conclude that complainant acted improperly as the cover agent when she received the report of a client threatening a relative and simply deferred acting upon it until the next day.

F. Analysis of Violation #6 (Gary Kryshak)

The letter of reprimand concluded that complainant failed to carry out her assignments and was negligent with respect to her client, Gary Kryshak. The records produced from Unit 033's database showed that complainant had allowed Mr. Kryshak to be discharged from the program even though he still had outstanding financial obligations. Complainant was unaware, until after Mr. Wake became involved in the case, that Mr. Kryshak's actual discharge date was in March of 1997, rather than March of 1996. So even though the case had not discharged with money owing, that favorable result was not due to complainant's diligence. Complainant had allowed the Kryshak case to languish. Complainant stated that she had spoken with Ms. Borde, the clerk for the court in question. This statement was inconsistent with the information provided by Ms. Borde. Complainant later backtracked and said she had merely been in contact

with the court. Respondent reasonably believed that complainant was negligent and was not carrying out her assignments by not being on top of the Kryshak case. Unit 033 records showed that the client had discharged in March with nearly \$2000 owing. Those records turned out to be wrong, but the positive resolution of the matter was due to Mr. Wake's efforts, rather than to complainant.

G. Analysis of Violation #7 (Michael Dougherty)

The CACU print out for Michael Dougherty was an exhibit at hearing. (Resp. Exh. 148) The printout lists complainant as the agent and a discharge date of March 29<sup>th</sup>. Between January 30<sup>th</sup>, when complainant became the agent of record for Mr. Dougherty, and March 29<sup>th</sup>, complainant did not take any action to obtain an extension so that Mr. Dougherty would not be discharged with amounts owing.

The printout from the Unit 033 database (Comp. Exh. 54, page 2) confirms that complainant mishandled the Dougherty file. Most of the clients listed on the printout have either a Y or N under the "F" or "financial obligations" column. Where there is a "Y", the next column for "\$ owed" has an amount in it. However, for Mr. Dougherty, the "F" column is blank. During the hearing, complainant noted that Mr. Dougherty did have a "N" listed on the printout. However, that "N" is in the "Mu" column, which stands for "multiple cases," rather than the financial obligations column. Complainant's testimony showed she misunderstood a fundamental aspect of the respondent's record system.

It is undisputed that complainant did not have a file for Mr. Dougherty, but that fact did not absolve complainant from the responsibility of preventing his discharge with nearly \$1500 owing. There were many different sources of information available to the agents in Unit 033. Complainant should have availed herself of another information source and obtained an extension for Mr. Dougherty.

V Summary

The above analysis of the individual violations described in complainant's letter of reprimand supports formal discipline of the complainant. Complainant failed to engage in a protected activity under the whistleblower law. Respondent had begun the disciplinary process before complainant engaged in her first protected activity under the Fair Employment Act. Vicki Turner and Michelle McKinstry were also disciplined by respondent, even though they had not engaged in any protected activities under the Fair Employment Act. All of these factors lead the Commission to conclude that illegal retaliation did not occur in this matter. The decision to issue complainant a written reprimand was not based on complainant's protected FEA activities.

There were certainly other instances where agents in Unit 033 violated procedures. Not all of those actions resulted in discipline. Some other employees avoided formal discipline even though they may have allowed a client to discharge with amounts owing. But complainant is unable to point to another agent in her work unit who avoided discipline yet had a comparable number of performance problems. The various incidents involving complainant were extensive and her discipline only amounted to a written reprimand.

The complainant failed to show pretext and to meet her burden of proof.

Complainant exhibits a single-mindedness that served as the source of her performance problems and of conflict with other employees. Complainant did not like various aspects of her work situation at Unit 033 from the day she first interviewed for the vacancy.

Complainant saw only one path to take in her employment setting. That path recognized her personal goals and interests but ignored the interests of the work unit. She consistently acted with the approach that the end justified the means. Her attitude undercut her work performance and her credibility as a witness.



ORDER

This matter is dismissed.

Dated: August 28, 2000 STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

KMS:960056Cdec1.2

  
JUDY M. ROGERS, Commissioner

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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.

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