

[REDACTED] Failure to arm campus police as OSHA violation

X-Mailer: [REDACTED]
Date: Thu, 20 May 1999 17:09:10 -0400
Reply-To: [REDACTED]
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Subject: Failure to arm campus police as OSHA violation
[REDACTED]

The Wisconsin Court of Appeals just punted an issue to that state's supreme court which should interest those schools using commissioned but unarmed campus police officers.

In *West v. Department of Commerce*, No. 98-1693, 1999 WL 308751 (Wisc. Ct. App. May 12, 1999), the plaintiff, a female campus police officer at the University of Wisconsin-Oshkosh filed an occupational health & safety complaint against the university with the state Department of Commerce. The substance of the complaint was that the university requires its police to perform a broad range of law enforcement tasks, including effecting arrests, but refuses to permit them to carry firearms on-duty, and thus exposes its officers to a "condition which poses a recognized hazard likely to cause death or serious physical harm to a public employee."

The Department of Commerce refused to grant West a hearing, finding "the use of firearms by law enforcement personnel" to be beyond their purview under state OSHA. The state trial court reversed the Department and ordered it to grant a hearing, and the Department appealed. In its release last week, the Court of Appeals refused to decide the issue (or even express an opinion), but instead urged the state supreme court to take jurisdiction over the case.

In the past few years I have seen a number of campus police unions attempt to arm officers by lobbying university and state officials and, of course, through the collective bargaining process. I have not, however, previously seen such a demand framed as a workplace safety issue. One can certainly see the reasonableness of the officers' argument that they feel less safe attempting to apprehend potentially armed offenders than they would if they were armed themselves. On the other hand, the same argument could be made with respect to semi-automatic weapons vs. revolvers, hollow-point bullets vs. regular ammunition, and even equipment other than weapons (computers in cars to give officers more information, etc.). Once OSHA is interpreted to protect employees from the malefaction of other people, as opposed to ambient "conditions," I don't see where the line can possibly be drawn.

I certainly wish my colleagues in Wisconsin the best of luck with this, and I guess I'd encourage those of you with similar problems on your own campuses to keep an eye on developments there.

[REDACTED]

[REDACTED]

Date: Thu, 20 May 1999 17:04:40 -0500
Reply-To:

Subject: Re: Failure to arm campus police as OSHA violation

>Once OSHA is interpreted to protect employees from the malefaction of
>other people, as >opposed to ambient "conditions," I don't see where the
>line can possibly be drawn.

Unfortunately, that train left the station a long time ago. Federal OSHA has had "Workplace Violence" Guidelines in place for hospital workers and retail establishments for a few years. OSHA proposed to enforce the guidelines under the General Duty Clause. I do not know of any litigated case, but there are settlements out there where employers agreed to implement workplace violence policies and procedures.

Associate General Counsel

Office of the General Counsel

Robin WEST, Petitioner-Respondent,
v.
DEPARTMENT OF COMMERCE, Respondent-
Appellant,
Board of Regents of the University of Wisconsin
and the University of
Wisconsin-Oshkosh, Respondents.

No. 98-1693.

Court of Appeals of Wisconsin.

May 12, 1999.

APPEALS OF WISCONSIN

Before Snyder, P.J., Brown and Nettesheim, JJ.

*1 Pursuant to Rule 809.61, Stats., this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination.

ISSUE

When a campus police officer is assigned to perform the full range of patrol duties and yet is prohibited from carrying a firearm, is the potential for violent encounters a "recognized hazard likely to cause death or serious physical harm" of the type meant to be addressed by Wisconsin's public employee safety statute, § 101.055, Stats.?

FACTS

Robin West is a police officer at the University of Wisconsin-Oshkosh (UWO). As such, her duties include the full range of patrol activities, including the apprehension of lawbreakers. Pursuant to the UWO chancellor's policy, campus police may not carry a firearm unless they are transporting money or escorting others doing the same. After unsuccessful attempts to convince the chancellor to change his policy, West filed a complaint with the Department of Commerce (DeCom) alleging occupational safety and health violations. DeCom investigated her complaint, initially found a violation and directed the UWO to correct it, but later dismissed West's complaint without issuing an enforcement order. DeCom concluded that it "lacks jurisdiction over the issuance and use of firearms by law enforcement personnel." Based on a review of federal decisions interpreting the Occupational

Safety and Health Act (OSHA), 29 U.S.C.A. §§ 651-678 (West 1999) (the protection of which is coextensive with that of Wisconsin's public employee safety and health statute, see § 101.055(1), Stats.), DeCom determined that the "occupational safety and health act ... [is] limited to physical conditions in the workplace." It deemed West's complaint out of its sphere of authority, no matter what facts she would have been able to show at a hearing, and thus denied her a hearing. West appealed DeCom's decision to the circuit court, which reversed and ordered DeCom to grant West a hearing. DeCom now appeals that decision.

DISCUSSION

Wisconsin's public employee safety law (WisOSHA) affords government employees the same protection extended to private sector employees under OSHA. See § 101.055(1), Stats. At issue here is DeCom's duty to issue an order to the employer when DeCom finds a "condition which poses a recognized hazard likely to cause death or serious physical harm to a public employe." *Id.* subd. (6)(a)1. While DeCom couched its denial to grant West a hearing in terms of jurisdiction, we see the real issue as whether the potential harm here--the possibility of being injured by the public while performing the work duties of an unarmed police officer--is the type of harm meant to be addressed by WisOSHA.

DeCom's Argument

DeCom contends that West is not entitled to a hearing because, as a matter of law, there is no set of facts she could prove that would bring her claim within the ambit of WisOSHA. According to DeCom, the threat of a violent encounter with a member of the public is not the type of hazard over which DeCom has jurisdiction, as it is not a physical condition of the workplace. In support of its argument, DeCom cites *Oil, Chemical and Atomic Workers International Union v. American Cyanamid Co.*, 741 F.2d 444 (D.C.Cir.1984). There, the court held that OSHA did "not apply to a policy as contrasted with a physical condition of the workplace," and thus American Cyanamid's requirement that women of child-bearing age undergo sterilization was not a cognizable job hazard. *Id.* at 448. Rather, hazards meant to be addressed under the act were concrete, physical

(Cite as: 1999 WL 308751, *1 (Wis.App.))

workplace conditions, "such as toxic chemicals or fumes ... [or] ... physical hazards." Id. (quoted source omitted).

*2 This view is bolstered by OSHA's own compliance manual, issued in 1972. There, a recognized hazard is described as:

a condition that is ... detectable (1) by means of the senses (sight, smell, touch and hearing), or (2) is of such wide, general recognition as a hazard in the industry that even if it is not detectable by means of the senses, there are generally known and accepted tests for its existence

OCCUPATIONAL SAFETY AND HEALTH LAW 118 (Stephen A. Bokart et al. eds., 1988) (quoting OSHA COMPLIANCE OPERATIONS MANUAL, ch. VIII, § A.2.b(1)). Cases determining what is and is not a recognized hazard have adhered to this tangibility requirement. See, e.g., *Usery v. Marquette Cement Mfg. Co.*, 568 F.2d 902 (2d Cir.1977) (dumping of demolition debris through unprotected chute); *American Smelting & Refining Co. v. Occupational Safety and Health Review Comm'n*, 501 F.2d 504 (8th Cir.1974) (airborne concentrations of lead); *Titanium Metals Corp. v. Usery*, 579 F.2d 536 (9th Cir.1978) (titanium-related fire hazards). If this list were embodied in a statute, the canon of ejusdem generis would dictate that while the list might not be exhaustive, additional elements must be of the same type as those listed--measurable, material hazards. Furthermore, the list covers only those hazards over which the employer has some control, unlike the possibly violent propensity of the citizenry at issue here. Thus, the policy choice the UWO chancellor has made here is not the type of hazard meant to fall within the WisOSHA. In short, WisOSHA is meant to cover concrete, physical hazards, not abstract threats.

Finally, DeCom points out that the UWO police are under the control of the UWO chancellor. See § 36.11(2)(b), Stats. The chancellor's decision not to arm campus police is well within his discretion and not reviewable by DeCom.

West's Argument

West counters that WisOSHA, like OSHA, is a remedial statute that should be interpreted broadly in order to effect its purpose. The idea is to protect workers from job-related hazardous conditions.

[FN1] Neither WisOSHA nor OSHA defines the term "recognized hazard," but OSHA's legislative history shows that Congress intended the meaning of the term to evolve with changes in industry, technology and health care. See Wendy A. Cherner-Maneval, *Occupational Safety and Health--Employer Policy Excluding Fertile Women Workers Permitted Under OSHA--Oil, Chemical & Atomic Workers International Union v. American Cyanamid*, 741 F.2d 444 (D.C.Cir.1984), 58 TEMP. L.Q. 939, 951-52 (1985). The hazard to West is real and tangible; she runs the risk of physical harm at her job just as a construction worker on a platform runs the risk of falling off. And just as an employer of a welder must furnish him or her with a safety helmet, so must the UWO allow West to carry a firearm. Furthermore, the chancellor does have control over this situation; he could easily render her workplace less harmful by allowing her to carry a weapon. Finally, West points out that the vesting of control in the chancellor does not mean that he is free to flaunt WisOSHA any more than he could choose to pay university employees less than minimum wage. Once the chancellor has made the decision to require campus police to perform the full range of patrol activities, including apprehension of criminals, he has no choice but to properly equip them to carry out these tasks by permitting them to carry weapons.

CONCLUSION

*3 If West prevails, DeCom anticipates being swamped with an ever-expanding sphere of work "conditions" for which it must grant hearings. On the other hand, West may have to contend with situations at work for which her employer refuses to properly equip her. Because the resolution of this case involves the determination of a policy question that will likely recur, we respectfully request that the supreme court take jurisdiction over this case.

FN1. At oral argument, West spent much of her time arguing that DeCom's decision was made without a fact-finding hearing in which she could have provided proof that putting a campus police officer on the street without a gun is hazardous. She asserted that this case is all about whether DeCom is going to be forced to let her prove her factual contention. She contends that the whole issue in this case is factual because whether a circumstance is a "recognized hazard" is a question of fact, not of law. But we are satisfied that West begs the question. The question is whether the term "recognized hazard" is limited to physical hazards in

the workplace or whether the term encompasses employer-made nonphysical hazards. That is a question of law. If the question of law is determined in her favor, then she can provide facts at a hearing to show that her employer created a hazardous condition which DeCom has the power to regulate. Not until then. West's brief, unlike her oral

argument, contends, at its beginning, that the term "recognized hazard" must be broadly defined. Whether the breadth of definition includes intangible hazards is the legal question which must be resolved.

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