STATE OF WISCONSIN PERSONNEL COMMISSION

JAY R. JACOBS,

Appellant,

v.

Secretary, DEPARTMENT OF CORRECTIONS,

Respondent.

Case No. 94-0158-PC

DECISION AND ORDER

NATURE OF THE CASE

This is an appeal pursuant to § 230.44(1)(c), Stats., of a discharge.

FINDINGS OF FACT

1. At the time of his discharge effective May 24, 1994, appellant was employed by respondent in the classified civil service with permanent status in class as a Supervisory Officer 2 (Captain) at the Columbia Correctional Institute (CCI).

2. Appellant began employment in the correctional system in 1981 as a CO1 (Correctional Officer 1), and had worked at CCI since 1986, when he was promoted to sergeant (CO 3), and where he subsequently was promoted to lieutenant and then captain.

3. Prior to his discharge, appellant had been disciplined twice. As a sergeant in 1990 he was given a written reprimand for improperly copying records, and in 1983 he received a verbal reprimand for a "no call, no show" incident. His performance evaluations have always been above average.

4. Appellant's assignment as a captain at CCI was as commander of the third shift. In this role, he was the highest member of management at, and responsible for, the entire institution during the third shift.

5. The specific events on which respondent relied to discharge appellant are set forth in the May 24, 1994, letter notifying him of said discharge (Respondent's Exhibit 17) as follows:

> (1) On April 30, 1994, you made a proposition to a female subordinate officer for sex at the workplace. After the incident, that officer contacted an off-duty Supervisor at home to inform him that you had

> propositioned her to have sex with you, "before you kill yourself." She stated you were losing it, ready to blow, and that you stated you put a gun to your head. At around 2:30 a.m., Security Director Sam Schneiter called you at work and inquired about your well-being. Earlier on this same day, you were at another female officer's house and had put a gun to your head and pulled the trigger. You had stated to her you had a death wish and wanted to make love to one more woman before you shot yourself.
>
> (2) In late 1991 or early in 1992, you made sexual comments to another subordinate female officer about her breasts and stated you wanted some breast milk. Over time, you made other remarks pertaining to her breasts and gestured as if you were grabbing her breasts.
>
> (3) In June or July of 1993, you made comments to another female officer. In this incident, you asked her how tight her ass was and you then stated if she had bigger tits, she would be perfect.
>
> (4) On another occasion, in November or December of 1992, you asked yet another female officer if she was into bondage and if she engaged in three-somes. At a different time, you followed this same female officer to the institution parking lot and would not leave her alone. You wanted a ride from her and after she became rude, you finally left.

The Commission finds that these incidents occurred essentially as alleged.

6. At no time prior to the occurrence of the events of April 30, 1994, did any of the female subordinate officers in question either tell appellant that his behavior was unwelcome or complain about him to others in management. They did not do so because of fear of retaliation by appellant.

7. The letter providing notice of discharge (Respondent's Exhibit 17) also contains the following:

> This discharge is based on your violation of Department of Corrections Work Rules 1, 2, and 5, which state:
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> Work Rule No. 1: "Disobedience, insubordination, inattentiveness, negligence, or refusal to carry out written or verbal assignments, directions or instructions."
>
> Work Rule No. 2: "Abusing, striking, or deliberately causing mental anguish or injury to clients, inmates or others."
>
> Work Rule No. 5: "Disorderly or illegal conduct including, but not limited to, the use of loud, profane, or abusive language; horseplay; gambling; or behavior not becoming a State employee."

8. The DOC Division of Adult Institutions "Guidelines for Employe Disciplinary Action" (Respondent's Exhibit 1A) categorizes Work Rule No. 1

violations as Category B, except those that involve illegal conduct, which are Category C (most serious), and Work Rule No. 2 violations as Category C.

9. The aforesaid guidelines provide the following concerning discipline for Category B and C violations:

> Disciplinary Action
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> The following disciplinary action(s) normally will be taken against an employee determined to be in violation of DOC Work Rules as set forth in Category B. Disciplinary actions in Category B are cumulative from the first violation of work rules until an employee has been free of any further violations for a period of twelve (12) months.
>
> | Misconduct Work Rule Violations | Corrective Disciplinary Action |
> |---|---|
> | First Violation | Written reprimand |
> | Second Violation | One (1) day suspension without pay |
> | Third Violation | Three (3) day suspension without pay |
> | Fourth Violation | From a five (5) day suspension without pay up to and including discharge (to be determined by the Appointing Authority) |
>
> Violations which seriously jeopardize or disrupt the security, health, safety and/or operations of the institution, inmates/residents, and/or staff may be exempted from this disciplinary sequence and subject to disciplinary action up to and including discharge as determined by the Appointing Authority.
>
> CATEGORY C
>
> The following violations are normally subject to severe discipline up to and including discharge as determined by the Appointing Authority. They are included in the guidelines to emphasize the seriousness of committing such violations.

10. Immediately prior to the commencement of the incident set forth in paragraph 5(1), above, appellant had been involved in an approximately 24 hour argument with his wife, which left him emotionally distraught and situationally depressed. However, he neither was suffering from any psychotic thought processes nor was he out of contact with objective reality when these events occurred.

11. In his capacity as a supervisor, appellant has received extensive training with respect to laws and departmental policy concerning sexual

harassment, and had explicit job responsibilities to implement civil rights compliance and respond to staff complaints related to civil rights compliance.

12. DOC Executive Directive 7, "Subject: Harassment and Hazing," dated January 1991 (Respondent's Exhibit 1), includes, among other things, the following:

> "Sexual harassment" includes unwelcome sexual advances, unwelcome physical contact, or unwelcome verbal or physical conduct of a sexual nature. "Unwelcome verbal or physical conduct of a sexual nature" includes, but is not limited to, the deliberate, repeated making of unsolicited gestures or comments, or the deliberate display of offensive sexually graphic materials which is not necessary for business purposes. Sexual harassment also includes general derogatory comments about either females or males.
>
> * * *
>
> Questions Frequently Asked
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> * * *
>
> 3. What can a supervisor do to demonstrate a sincere effort to prevent harassment in the workplace?
>
> In addition to posting the DOC policy and making sure that all employees have read and understood it, the supervisor should:
>
> a. Set a positive example in terms of language and behavior;
>
> b. Make it clear to all staff that jokes and printed material which may be offensive should be kept out of the workplace;
>
> c. Respond to staff concerns regarding harassment in a serious and timely manner. Charges should be investigated promptly by the appointing authority's designee;
>
> d. Be aware of the workplace climate and be proactive in terms of prevention, rather than wait for charges to be filed ...

13. On July 8, 1993, the DOC Secretary issued a memorandum (Respondent's Exhibit 9b) which refers to the misunderstanding of the DOC harassment policy by some staff that had been discovered in the course of investigating certain harassment allegations. This memo includes, in part, the following:

> In many cases, staff described inappropriate behavior occurring "among friends and colleagues" as a way to cope with stress and frustration on the job. Frequently employees expressed the misconception that if people don't complain, this is acceptable behavior.

I WOULD LIKE TO MAKE SEVERAL POINTS VERY CLEAR:

1. Certain language, jokes and written/pictorial material are not acceptable in the workplace irrespective of the receptivity of the audience. Racial, ethnic, sexual and homosexual slurs, jokes and imitations will not be tolerated and are not acceptable in any form.

2. Teasing others on the work site, while it may begin as mutually friendly, oftentimes exceeds the boundaries of good taste. Such behavior may be offensive to observers, and occasionally escalates into abusive behavior which is offensive and hurtful to one or both participants. People need to be sensitive to the risks and recognize they will be held accountable if they exceed acceptable limits. What is considered acceptable is frequently "in the eyes of the beholder."

3. Violation of the harassment policy does not require that the offended party state his/her offense to the behavior. Even active participation by the offended party may not prevent allegations and findings of harassment. This has been a consistent misunderstanding. Certain behaviors are simply not acceptable by their nature.

4. Supervisors are required by policy to actively intervene when they witness or are apprised of violation of the harassment policy. I want to make clear that supervisors are expected to respond assertively to these situations and will be held accountable for their follow-up. It is also essential that they play an active role in creating a positive and harassment-free environment, modeling appropriate behavior, and making their expectations clear.

5. The consequences for harassment go beyond violations of Department policy. Employees who engage in this behavior will be subject to discipline up to and including termination and may be subject to outside legal liability and may not be protected by the Department.

14. With respect to any of the charged behavior set forth in the notice of discharge (see paragraph 5, above) that occurred prior to the date of this memo, appellant knew or should have known as a reasonable supervisor that his actions were inappropriate sexual harassment regardless of whether the employes in question stated that these activities were unwelcome.

15. The following are some examples of other disciplinary action imposed by respondent:

(a) A captain at KMCI with an overall good work record was discharged for a single incident involving an inpromptu and unauthorized discharge of a

firearm loaded with blank rounds in the direction of another officer, while in the institution's sallyport. The Commission concluded that this disciplinary action was not excessive primarily because of the extremely serious threat to the safety of the institution it posed. Paul v. DHSS, 87-0147-PC (4/19/90).

(b) A lieutenant at the UW Hospital Security Clinic was suspended for 15 days because of failure to properly supervise officers in his unit who were involved in frequent acts of sexual harassment in the nature of hostile and demeaning profanity and sexually-oriented comments directed at UW nurses, as well as for himself bringing a lewd photo into the workplace. The Commission concluded that because of the serious nature of the harassment involved, this was not excessive discipline. Asche v. DOC, 90-0159-PC (3/10/93), reversed on other grounds (procedural due process), Asche v. State Personnel Commission, 93CV1365 (12/8/93) (appeal pending).

(c) A lieutenant at CCI received a written reprimand for referring to certain inmates as "queers" in front of a public tour group. Respondent considered this a single (and first) Category B rule violation.

(d) Two CO 2's at CCI were disciplined on the basis of a conversation between them which happened to have been picked up on tape. One received a written reprimand for having made sexually explicit comments. The other received a suspension for having made derogatory comments about inmates.

16. On May 4, 1994, appellant was examined by a clinical psychologist (Dr. Larabee) at the behest of respondent, which had asked for an evaluation as to whether appellant posed a threat to himself or others at work. Dr. Larabee concluded that appellant did not. Dr. Larabee's evaluation also "failed to reveal the presence of any psychotic thought processes" and concluded that "the patient is in contact with objective reality." (Appellant's Exhibit 1). In addition, Dr. Larabee concluded that "Mr. Jacobs is an individual who can and does learn from his past experiences. He is not prone to making the same mistake twice once he is fully aware of how his actions or decisions have caused a problem." id.

17. On May 10, 1994, the CO who appellant had propositioned at CCI on April 30, 1994, (see Finding 5(1), above) obtained a harassment injunction against complainant in Columbia County Circuit Court (Respondent's Exhibit 15), enjoining appellant from having any contact with her.

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §230.44(1)(c), Stats.

2. Respondent has the burden of proof.

3. Respondent has established that there was just cause for the discipline imposed.

4. Respondent has established that the discipline imposed was not excessive.

OPINION

In appeals of this nature, the employer has the burden of proof and must establish to "a reasonable certainty by the greater weight or clear preponderance of the evidence" the facts necessary to show just cause for the disciplinary action imposed. Reinke v. Personnel Board, 53 Wis. 2d 123, 137, 191 N.W. 2d 833 (1971). The employer also has the burden of proof with respect to the related question of whether the discipline imposed was excessive under the circumstances. Barden v. UW, 82-0237-PC (6/9/83).

In this case, there can be very little question that there was just cause for the imposition of discipline. Appellant contends that while his conduct admittedly violated respondent's sexual harassment policy as "clarified" by the DOC secretary's July 8, 1993 memo (Respondent's Exhibit 9b), his behavior prior to that date should be evaluated by a different standard because he was not aware before then that his behavior violated the harassment policy. For example, he contends in his post-hearing brief at pp. 7-8 as follows:

> Appellant used sexual innuendo, made sexual jokes and comments, and discussed sexual matters with his co-workers and subordinates on numerous occasions prior to July of 1993.... A review of the work rules (Exhibit 1B) makes clear that all employes who joked in a sexual manner violated the mandates of the harassment policy. All employes who discussed personal sexual matters with other employes violated the work rule about causing mental anguish if Jacobs' conduct is interpreted as such a violation.

This contention is unpersuasive. All of appellant's conduct which was alleged and has been found to have occurred, went beyond merely engaging in sexual innuendo, jokes, comments and discussion. The record supports the characterization of appellant's actions in the letter providing notice of discharge (Respondent's Exhibit 17) as showing a pattern of predation. As

opposed to mutual banter or other similar kinds of behavior, no reasonable captain could have believed that the kind of behavior appellant engaged in was appropriate.

Appellant also argues that the incident which occurred off-duty on April 30, 1994,[1] must be viewed in a different light because it occurred off-duty and appellant and the female officer were friends.

However, an employe's off-duty misconduct can constitute just cause for disciplinary action when the activity either "can reasonably be said to have a tendency to impair his performance of the duties of his position or the efficiency of the group with which he works," or is "so substantial, oft-repeated, flagrant or serious that his retention in service will undermine public confidence" in the government. State ex rel Gudlin v. Civil Service Comm., 27 Wis. 2d 77, 87, 133 N.W. 2d 799 (1965); accord, Safransky v. Personnel Board, 62 Wis. 2d 464, 474, 215 N.W. 2d 379 (1974). In Safransky, the Court provided the following elaboration of this test:

> In determining whether "cause" for termination exists, courts have universally found that persons assume distinguishing obligations upon the assumption of specific governmental employment. Conduct that may not be deleterious to the performance of a specific governmental position -- i.e., a department of agriculture employee -- may be extremely deleterious to the performance of another governmental occupation -- i.e. teacher or houseparent in a mental ward. Thus it is necessary for this court to determine the specific requirements of the individual governmental position. 62 Wis. 2d at 475.

Appellant was not only a captain, but also the third shift commander who was in charge of the entire institution. This is an extremely responsible job requiring good judgment in dealing with potentially serious matters. The type of activity in which appellant engaged involved, among other things, extremely poor judgment in the use of a firearm.[2] This activity satisfies the criteria set forth in Gudlin and Safransky and was properly relied on by respondent as a basis for discharge.

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[1] "Earlier on the same day, you were at another female officer's house and had put a gun to your head and pulled the trigger. You had stated to her you had a death wish and wanted to make love to one more woman before you shot yourself." May 24, 1994 letter providing notice of discharge (Respondent's Exhibit 17).

[2] Appellant testified that the gun in question was loaded, but there was no round in the firing chamber.

While the Commission concludes there was just cause for the imposition of discipline, the question remains whether the degree of discipline imposed was excessive. Some factors which enter into this determination include the "weight or enormity of the employe's offense or dereliction, including the degree to which, under the Safransky test, it did or could reasonably be said to tend to impair the employer's operation and the employe's prior record." Barden v. UW, 82-0237-PC (6/9/83). Another factor which can be considered includes the discipline imposed by the employer in other cases, Larsen v. DOC, 90-0374-PC (5/14/92). In this case, the appellant has also made arguments involving the employer's disciplinary policy (Respondent's Exhibit 1A) and the psychological evaluation (Appellant's Exhibit 1) obtained after the April 30, 1994, incident at the direction of management, as well as other mitigating circumstances.

Respondent's disciplinary guidelines (Respondent's Exhibit 1A) provide for progressive discipline under most circumstances, but both category B and C violations are subject to discharge for a first offense depending on the severity of the offense. For example, the policy provides with respect to category B violations that:

> Violations which seriously jeopardize or disrupt the security, health, safety and/or operations of the institution, inmates/residents, and/or staff may be exempted from this [progressive] disciplinary action up to and including discharge as determined by the Appointing Authority.

Therefore, regardless of whether appellant's behavior would fit within Categories B or C, discharge would not be outside the parameters of the policy if the offense is sufficiently serious. In the Commission's opinion, appellant's actions were sufficiently serious that respondent's failure to have used progressive discipline was not inconsistent with its disciplinary guidelines.

Obviously, the fact that appellant is a high-ranking member of management contributes to the seriousness of the sexual harassment in which he engaged. This is particularly the case because of the 1991 enactment of the Civil Rights Act of 1991 which added greatly to the damages that can be assessed against an employer who has engaged in intentional discrimination. Sexual harassment by a high-ranking supervisor conceivably could be imputed directly to the employer as intentional discrimination. See, e.g., Volk v. Coler, 46 FEP Cases 1287, 1298, 845 F. 2d 1422 (7th Cir. 1988). Also, appellant's

misuse of a firearm, discussed above, is a more serious matter in consideration of appellant's high rank and the fact he is in complete charge of the institution's security on the third shift.

Appellant's discharge does not appear to be disproportionate when compared with other transactions. The actions of the captain who was discharged in connection with firing blank rounds at another officer (Finding 15(a), above) were more likely to have led to death or injury, but he was discharged for a momentary lapse in judgment, while appellant engaged in an extended course of intentional misconduct. The lieutenant at the UW Hospital security ward who was suspended for 15 days in connection with sexual harassment of nurses (Finding 15(b)) was involved primarily in negligent supervision as opposed to intentional sexual harassment, and this would provide a basis for a lesser penalty. Appellant relies primarily on the CCI lieutenant who received a written reprimand for referring to certain inmates as "queers" in front of a tour group. (Finding 15(c)). This behavior is distinguishable from appellant's because it was a single incident and he was not engaging in direct harassment of a specific individual when he made the comment. The last transaction involves two rank and file CO's who were engaged in a conversation in which sexual comments and derogatory comments about inmates were made. (Finding 15(d)). They received a written reprimand and a one day suspension. These comments in a conversation between two nonsupervisory personnel are considerably different from appellant's pattern of intentional misconduct. In conclusion, the other discipline of record while somewhat difficult to compare to appellant's situation, does little to support appellant's position on the question of excessiveness.

Appellant's overall employment record was good, with no disciplinary action since 1990, and that apparently minor. Clearly, this factor weighs in appellant's favor on the issue of whether the penalty was excessive.

Appellant also argues that his mental state on April 30, 1994, should be considered an extenuating circumstance. The record reflects that appellant was emotionally distraught as the result of a long quarrel with his wife, and in connection with this he was situationally depressed. The psychologist appellant called as a witness professed no opinion as to whether appellant was "in touch with reality" on April 30, 1994. Based on the record evidence, including appellant's testimony, it is concluded that he was in touch with

reality at that time. On balance, while appellant's mental state during this period can be considered a mitigating factor, it would not be given great weight given appellant's manipulative behavior and the fact that he was not out of touch with reality.

A related point made by appellant is that the psychological evaluation concluded that appellant "does not pose a physical threat at this time to other individuals at his workplace." Appellant's Exhibit 1. Appellant argues that since the purpose of the evaluation requested by management was to answer the question of "whether or not the patient posed a physical threat to himself or persons at his place of employment," id., the conclusion that he did not should have led to his continued employment, particularly in light of the psychologist's opinion that appellant "can and does learn from his experience" and is not prone to making the same mistake twice once he is fully aware how his actions or decisions have caused a problem." While the Commission agrees that these aspects of the report works in appellant's favor, it does not follow that respondent was more or less bound to this course of action once it had been ascertained that appellant did not pose a physical threat to himself or others. Respondent requested this evaluation shortly after the April 30, 1994, incident, when it was in the process of investigating and gathering information.[3] While it is understandable in light of appellant's bizarre behavior that respondent would want a psychological evaluation to address the issue of whether appellant posed a physical threat, this is just one piece of information respondent had to weigh.[4]

When all of the circumstances surrounding this matter are evaluated, a strong case can be made for removing appellant from the supervisory ranks in light of the nature of his behavior. On the other hand, given the results of the psychological evaluation and appellant's past good work record, a reasonable argument can be made that a demotion to the nonsupervisory CO2 level, possibly accompanied by a transfer to another institution, would have

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[3] The evaluation occurred on May 4, 1994; appellant was not discharged until May 24, 1994.

[4] If the psychological evaluation had resulted in a conclusion that appellant posed a threat to himself or others as a result of a psychological condition outside the normal range, responent might have been obligated by §230.37(2), stats., or the Fair Employment Act, to have explored a possible accomodation short of discharge.

been more appropriate as a matter of personnel management than outright discharge from state service.

In most cases of employe misconduct, once it has been determined that there is just cause for discipline, the employer has a range of discipline that can be imposed, extending from reprimand to discharge. The Commission consistently has held that once just cause for the imposition of discipline has been found, it will not modify the actual discipline imposed unless it was excessive. See e.g., Reimer v. DHSS, 92-0781-PC, 02/03/94. Excessive means "the quality or state of exceeding the proper or reasonable limit or measure." BLACK'S LAW DICTIONARY 504 (5th ED. 1979).

In trying to resolve the question of whether appellant's discharge was excessive, one of the key factors involves the degree of seriousness of the underlying misconduct. The discipline of employes for engaging in sexual harassment has generated a substantial amount of litigation. These cases reflect more or less of a pattern of recognition of a strong public policy against sexual harassment that justifies strong measures by management against employes who have engaged in sexual harassment.

To begin with, there are a number of cases where courts have overturned labor arbitration awards which reduced penalties against employes who engaged in sexual harassment. These cases are particularly significant because of the generally very limited role of courts in reviewing arbitrators' decisions, see e.g., United Paperworkers Intl. Union v. Misco, 484 U.S. 29, 98 L.Ed. 2d 286, 108 S.Ct. 364 (1987):

> [T]he courts play only a limited role when asked to review the decision of an arbitrator. The courts are not authorized to reconsider the merits of an award even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract.
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> * * *
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> So, too, where it is contemplated that the arbitrator will determine remedies for contract violations that he finds, courts have no authority to disagree with his honest judgment in that respect ... as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision. 484 U.S. at 36, 38, 98 L.Ed. 2d at 298-99.

However, there is a public policy exception to this general rule:

> A court's refusal to enforce an arbitrator's award under a collective bargaining agreement because it is contrary to public policy is a specific application of the more general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy. That doctrine derives from the basic notion that no court will lend its aid to one who founds a cause of action upon an immoral or illegal act, and is further justified by the observation that the public's interests in confining the scope of private agreements to which it is not a party will go unrepresented unless the judiciary takes account of those interests when it considers whether to enforce such agreements.
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> A court's refusal to enforce an arbitrator's interpretation of such contracts is limited to situations where the contract as interpreted would violate "some explicit public policy" that is "well defined and dominant, and that is to be ascertained by reference to the laws and legal precedents, and not from general considerations of supposed public interests.'" 484 U.S. at 42-43, 98 L.Ed. 2d at 301-02 (citations omitted).

In Newsday v. L.I. Typographical Union, 915 F.2d 840, 54 FEP cases 25 (2d Cir. 1990), the Court upheld the overturning of an arbitration award in favor of a discharged employe. The employe had engaged in three instances of offensive touching of co-employes, and had been disciplined previously for sexual harassment. However, the arbitrator determined that the employer should have applied progressive discipline and ordered the employe reinstated. The Court reviewed the statutory framework and case law underlying the public policy against sexual harassment, and held that the arbitrator's award "tends to perpetuate a hostile, intimidating and offensive work environment," and "prevents Newsday from carrying out its legal duty to eliminate sexual harassment in the workplace."

A similar result was reached in Stroehmann Bakeries v. Local 776, 969 F.2d 1436, 59 FEP Cases 249 (3d Cir. 1992). The arbitrator ordered an employe who had been discharged for sexually harassing a customer reinstated because of the employer's insufficient investigation prior to discharge. The arbitrator did not make any determination as to whether the sexual harassment had occurred as alleged. The Court upheld the vacation of the award, holding that:

> Under the circumstances present here, an award which fully reinstates an employe accused of sexual harassment without a determination that the harassment did not occur violates public policy. Therefore, Arbitrator Sands construed the agreement between the parties in a manner that conflicts with the well-defined and dominant public policy concerning sexual harassment in the workplace and its prevention. 59 FEP Cases at 254.

There have been decisions which have refused to vacate on public policy grounds arbitrators' awards in favor of employes who were involved in sexual harassment. Chrysler Motors v. Allied Ind. Workers, 959 F.2d 685, 58 FEP Cases 693 (7th Cir. 1992), is perhaps the best known. This case involved an employe who was discharged after he touched a co-employe in a sexual manner. The arbitrator determined that the employe probably could be rehabilitated, and that a discharge was too severe a penalty for what was in effect a first offense.[5] While the Court recognized the public policy against sexual harassment, it did not perceive a violation of this policy by the award under the circumstances. As compared to the instant case, the employe was not a member of management, and had been discharged for a single incident.

This line of cases is significant because, while they are not direct precedent for the matter before the Commission, they underscore the well-recognized, strong public policy interest in combating sexual harassment in the workplace, which in turn can be a significant factor in evaluating whether the discipline of an employe found to have engaged in sexual harassment constitutes an excessive action.

Another somewhat analogous line of cases involve the "misconduct" standard under the Wisconsin Unemployment Compensation law. Again, these cases are not direct precedent, but they do provide some guidance. An employe can only be denied benefits on the basis of misconduct when guilty of:

> [C]onduct evincing such wilful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good-faith errors in judgment or discretion are not to be deemed "misconduct" within the meaning of the statute.

Boynton Cab Co. v. Neubeck, 237 Wis. 249, 259060, 296 N.W. 636 (1941). When a discharged employe is found to be ineligible for benefits because of

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[5] The arbitrator refused to consider other incidents which the employer discovered after the discharge.

misconduct under this standard, it provides some indication of the type of behavior that can be considered to be of a rather serious nature.

For example, in Nowak v. LIRC, 58 FEP Cases 621 (Eau Claire Co. Circuit Court 1991), an employe was discharged after she left a sanitary napkin stained with a red glue product on a co-employe's chair. She had been warned before about making comments of a sexual nature to another employe. The Court affirmed LIRC's denial of benefits of the basis of misconduct. The Court held that regardless of whether her conduct met the definition of sexual harassment per se, her action was "in deliberate disregard of standards of behavior which an employer has the right to expect. Furthermore, it shows nothing more than a substantial disregard of the employer's interests and of the employe's obligations to the employer." 58 FEP Cases at 623.

In Renier v. LIRC, 58 FEP Cases 1097 (Brown Co. Circuit Court 1992), the Court upheld the denial of benefits to a non-supervisory employe who had engaged in sexual harassment in a shop where the general atmosphere was "sordid and depraved," and where notwithstanding some participation in this kind of conduct by both male and female employes, the claimant's behavior had "crossed the fine line between tolerable behavior and sexual harassment." 58 FEP Cases at 1100.

There is another somewhat related area involving wrongful discharge claims by management employees accused of sexual harassment. Scherer v. Rockwell Intl., 766 F. Supp. 593, 56 FEP Cases 215 (N.D. Ill. 1991); affirmed, 975 F.2d 356, 59 FEP Cases 1301 (7th Cir. 1992); involved an employment contract with a high-ranking company official which provided for termination on the grounds of, among other things, "misconduct." He was terminated for making repeated sexual advances toward his secretary and other subordinate employes. After discussing various possible meanings of the term "misconduct," the District Court held as follows:

> As applied in this case, there can be no doubt that allegations of sexual harassment, exposing the employer to the potential for liability in violation of federal law, falls outside of any definition of "reasonable" behavior that may be constructed ... and well within any definition of "misconduct," most particularly "deliberate violation of a rule of law." In the plain and ordinary meaning of the term, no employee could rationally believe that such behavior that violates federal law as well as company policy would not be understood as "misconduct." This Court finds that the term "misconduct" is not ambiguous as a matter of law and that Rockwell was entitled to terminate an employee for sexual

> harassment under the language of paragraph 13(a). 56 FEP Cases at 221 (citation and footnote omitted).

Similarly, in Williams v. Waremont Corp., 875 F.2d 1476, 49 FEP Cases 1576 (10th Cir. 1989), the Court upheld the discharge of a supervisor who had made sexual comments and gestures in a decision which included the following:

> There is a further consideration. Williams was in a supervisory position. That fact alone must serve to put him and any similarly situated employee on notice that higher standards are required of them, and punishment obviously operates on a different level than that applied to hourly employees.
>
> Public policy also affects our construction of this contract claim. Here, public policy operates to require a construction of contract terms in favor of giving the employer broad discretion in its efforts to eliminate sexual harassment from the workplace. In this area of judicially created contracts and contract rights, it is perfectly consistent to impose a rule of contract construction which favors the enforcement of a workplace free from offensive sexual conduct. 49 FEP Cases at 1582.

Again, these holdings reinforce the general concept that it is reasonable for an employer to take strong action in response to sexual harassment in the workplace, particularly that perpetrated by management employes.

In conclusion, while a decent argument can be made that demotion and transfer of the appellant would have served respondent's interests in combating sexual harassment and requiring responsible behavior by its supervisors, the decision to discharge was within the scope of management's prerogatives and not excessive. Appellant was a high-level supervisor who was in sole charge of the institution on the third shift. He engaged in a pattern of sexually predatory behavior toward female subordinates, when he knew or should have known that his actions violated not only agency policy but also state and federal law, and exposed respondent to extensive potential liability. Furthermore, his reckless use of a firearm exacerbated the seriousness of his misconduct as a supervisor. Particularly in light of the strong public policy that exists against sexual harassment, the various extenuating circumstances such as his good prior record and his emotional state on April 30, 1994, do not lead to the conclusion that a discharge was an excessive penalty.

ORDER

Respondent's action discharging appellant is affirmed and this appeal is dismissed.

Dated: May 15, 1995 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

AJT/jan

Parties:

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

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

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

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

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

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

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.) 2/3/95