STATE OF WISCONSIN CIRCUIT COURT BRANCH III DODGE COUNTY

VIRGINIA ALLEN,
Petitioner,

vs.

CASE NO. 09 CV 523

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,
Respondent.

DECISION NO. 32557-C1

MEMORANDUM DECISION AND ORDER

On April 13, 2007, the Wisconsin Department of Corrections suspended Petitioner, then a program support supervisor in the Division of Community Corrections, for five days and transferred her from the Beaver Dam office to an office in Milwaukee.[1] On Petitioner's administrative appeal, Respondent Wisconsin Employment Relations Commission (hereinafter WERC) affirmed that decision on May 6, 2009. The reason for this disciplinary action was an August 2006 incident in which Petitioner allegedly touched the buttocks of Agent Jeff Moylan, who worked in the Beaver Dam office. Petitioner now seeks judicial review of WERC's decision.

STANDARD OF REVIEW

Judicial review of agency decisions is governed by Chapter 227. Section 227.57 sets forth the applicable scope and standard of review:

> **(1)** The review shall be conducted by the court without a jury and shall be confined to the record ... .
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> **(2)** Unless the court finds a ground for setting aside, modifying, remanding or ordering agency action or ancillary relief under a specified provision of this section, it shall affirm the agency's action.
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> ...
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> **(5)** The court shall set aside or modify the agency action if it finds that the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action, or it shall remand the case to the agency for further action under a correct interpretation of the provision of law.

[1] The issue of the involuntary transfer is not currently before the Court. This appeal concerns the suspension only.

> **(6)** If the agency's action depends on any fact found by the agency in a contested case proceeding, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. The court shall, however, set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by substantial evidence in the record.
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> ...
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> **(8)** The court shall reverse or remand the case to the agency if it finds that the agency's exercise of discretion is outside the range of discretion delegated to the agency by law; is inconsistent with an agency rule, an officially stated agency policy or a prior agency practice, if deviation therefrom is not explained to the satisfaction of the court by the agency; or is otherwise in violation of a constitutional or statutory provision; but the court shall not substitute its judgment for that of the agency on an issue of discretion.
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> ...
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> **(10)** Upon such review due weight shall be accorded the experience, technical competence, and specialized knowledge of the agency involved, as well as discretionary authority conferred upon it. ...

Sec. 227.57, Wis. Stats.

DISCUSSION

Discipline of employees "with permanent status in class" requires a finding of "just cause." *See* sec. 230.34(1)(a), Wis. Stats. WERC interprets the requirement of "just cause" to include three elements: (1) whether the employee committed the act, (2) whether the act, if committed, constitutes just cause for discipline, and (3) whether the discipline imposed was excessive.

Petitioner was disciplined for a violation of DOC Harassment Policy, Executive Directive 7, which prohibits sexual harassment and defines "sexual harassment," in part, as "unwelcome physical contact" and "unwelcome ... physical contact of a sexual nature." Petitioner concedes that she may have inadvertently touched Moylan's buttocks or hip area over his clothes. However, Petitioner claimed then – and still claims today – that the touch was unintentional and was not intended to sexually harass or intimidate Moylan.

Based on the testimony of the parties, the agency found that Petitioner's action was intentional. The agency based its decision on its assessment of the witnesses' credibility – primarily, Moylan's detailed recollection of the incident, including a contemporaneous journal entry, as well as the fact that the touching required Petitioner to move her hand across her body. WERC then noted,

> As we see it, certain areas of anatomy, including the buttocks, are presumptively zones of sexual privacy. Intentional and unwelcome touching in those areas would fall ipso facto within the directive's prohibition of "physical contact of a sexual nature." Accordingly, generally

> speaking, we construe the rules to prohibit physical contact in such recognized zones of privacy, if, as here, the contact is both unwelcome and intentional. It is not necessary to delve further into the states of mind of either the person being touched or the person doing the touching in order to establish a violation of the directive. ...

WERC therefore determined that a violation had occurred. It further determined that that violation warranted discipline, due to "substantial turmoil" in the Beaver Dam office in 2007, and the likelihood that such unwanted touching could "further interfere with officer work performance." Finally, WERC cited a reprimand of Petitioner in 2006, and discipline imposed for similar conduct in other cases, to find that the suspension imposed was not excessive.

Petitioner has challenged the agency's findings of fact, its interpretation and application of the harassment rule, and its determination that discipline was warranted. Upon its review of the record, the Court concludes that Petitioner fails to meet her burden to overturn the WERC decision.

As stated above,

> If the agency's action depends on any fact found by the agency in a contested case proceeding, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. The court shall, however, set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by substantial evidence in the record.

Sec. 227.57(6), Wis. Stats. The "substantial evidence" test is met as long as reasonable minds could arrive at the same conclusion as the agency or, stated differently, as long as the findings are reasonable. *See Kitten v. State Dep't of Workforce Dev.*, 2002 WI 54, Par. 5, 252 Wis. 2d 561, 644 N.W.2d 649.

> The test is not whether a preponderance of the evidence supports the [agency's] determinations, but whether reasonable minds could arrive at the same conclusion reached by the [agency]. ... Moreover, when reviewing the record, we look for evidence which supports the decision made by the [agency], not for evidence which might support a contrary finding that the [agency] could have made, but did not. ... We will set aside the [agency's] decision ... only if our review of the record convinces us that "a reasonable person, acting reasonably, could not have reached the decision from the evidence and its inferences."

State ex rel. Gendrich v. Litscher, 2001 WI App 163, Par. 12, 246 Wis.2d 814, 632 N.W.2d 878 (internal citations omitted). When applying the substantial evidence test, it is important to note that the reviewing court does not make its own assessment of witnesses' credibility. *See Stacy v. Ashland County Dep't of Public Welfare*, 39 Wis. 2d 595, 603, 159 N.W.2d 630 (1968). Finally, "[t]here may be cases where two conflicting views may each be sustained by substantial evidence.

In such a case it is for the agency to determine which view of the evidence it wishes to accept." *See Samens v. LIRC*, 117 Wis.2d 646, 660, 345 N.W.2d 432 (1984). The finding at issue here is the agency's finding that the brief touching by Petitioner was an intentional act. The Court believes that a reasonable finder of fact could have come down on either side of this issue. The finding made by the WERC here was not the ***only*** reasonable conclusion that could have been reached, but it was ***a*** reasonable conclusion. Therefore, the Court has no authority to contradict it.

With respect to WERC's interpretation and/or application of "just cause" and the harassment directive, standards of judicial deference are set forth in caselaw:

> This court has historically applied one of three levels of deference to an agency's interpretation and application of statutes: great weight deference, due weight deference, or no deference (de novo review). ...
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> The level of deference accorded to such decisions depends on a number of factors including "the extent to which the 'administrative agency's experience, technical competence, and specialized knowledge aid the agency in its interpretation and application of the statute[]'" and "'the comparative institutional capabilities and qualifications of the court and the administrative agency[.]'" ...
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> **Great weight deference**, the highest level of deference, is appropriate where: "'(1) the agency was charged by the legislature with the duty of administering the statute; (2)[] the interpretation of the statute is one of long-standing; (3)[] the agency employed its expertise or specialized knowledge in forming the interpretation; and (4)[] the agency's interpretation will provide uniformity and consistency in the application of the statute.'" ...
>
> However, the appropriate test for great weight deference is not whether the agency has "decided a case presenting the precise facts raised by [the present] appeal . . . ." ... Rather, the correct test is whether the agency "'has experience in interpreting [the] particular statutory scheme'" at issue. ...
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> Additionally, we should defer to an agency interpretation when the "'legal question is intertwined with factual determinations or with value or policy determinations'" and the agency involved "'has primary responsibility for determination of fact and policy.'" ... Under the great weight standard, we will uphold an agency's interpretation of a statute so long as it is reasonable, even if a more reasonable interpretation exists. ...
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> This court applies an **intermediate level of deference**, "known as **'due weight'** or 'great bearing[,]'" ... where "'the agency has some experience in an area, but has not developed the expertise which necessarily places it in a better position to make judgments regarding the interpretation of the statute than a court.'" ... This intermediate standard of review is based on recognition that the legislature entrusted application of the particular statute

> to the agency and not on the agency's expertise. ... Under the due weight deference standard, we will uphold an agency's interpretation of a statute so long as it is reasonable and the court finds that no other more reasonable interpretation is available. ...
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> Finally, **de novo review**, under which an agency's interpretation of a statute is "given no weight at all," ... is applied "when the issue is 'clearly one of first impression' for the agency or 'when an agency's position on an issue has been so inconsistent [such that it] provides no real guidance.'" ... However, regardless of the level of deference given, this court "will not uphold an agency's interpretation of a statute if it is contrary to the clear meaning of a statute." ...

Clean Wis., Inc. v. PSC of Wis., 2005 WI 93, Par. 37-43, 282 Wis. 2d 250; 700 N.W.2d 768 (internal citations omitted) (emphasis added). It does not appear to the Court that Petitioner is in any way challenging WERC's basic understanding of the statutory "just cause" requirement. Instead, it seems Petitioner objects to the "presumption," referenced above, that any intentional touching of the buttocks – no matter how "innocent" or fleeting – is a violation of the harassment rule.

To begin with, to the extent that the controversial "presumption" is an interpretation or application of the statutory standard of "just cause," the Court concludes that WERC is entitled to some degree of deference. WERC has longstanding experience and considerable expertise in reviewing employee disciplinary issues. And Petitioner has not shown that WERC's position on this particular issue has been inconsistent.

Whether the "presumption" is given "great weight" or only "due weight" deference does not really matter, because the Court finds the presumption reasonable and does not believe a more reasonable application or interpretation is available. It is important to remember that the "presumption" of harassment referred to ***intentional*** contact. The Court believes that all reasonable adults in 21st Century America – not simply those working for the State of Wisconsin – understand that intentional touching of an fellow employee's buttocks is (or can easily be considered) a form of harassment. Petitioner is therefore hamstrung by the agency's finding that her conduct was intentional – a finding that, while arguable, is entitled to a high degree of deference by the Court (see above).

Finally, the Court agrees with the WERC's conclusion that a five-day suspension was not excessive, in light of Petitioner's prior reprimand, the state of employee relations in the Beaver Dam office, and discipline assessed in similar cases.

CONCLUSION & ORDER

In short, the Court finds that Petitioner has failed to meet her burden to demonstrate that the agency's decision must be overturned.

THEREFORE, the decision of Respondent Wisconsin Employment Relations Commission is hereby AFFIRMED.

The Court intends this to be the final judgment or order for purposes of appeal under sec. 808.03(1), Stats. *See Tyler v. RiverBank*, 2007 WI 33, Par. 25, 728 N.W.2d 686; *Wambolt v. West Bend Mut. Ins. Co.*, 2007 WI 35, Par. 4, 728 N.W.2d 670.

Dated this 16th day of March, 2010.

BY THE COURT:

Hon. Andrew P. Bissonnette
Circuit Court Judge, Br. III
Dodge County, Wisconsin

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