STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

R.S., SR., Appellant,

vs.

Secretary, WISCONSIN DEPARTMENT OF TRANSPORTATION, Respondent.

Case 35
No. 70529
PA(adv)-199

Decision No. 33233-A

Appearances:

Richard F. Rice, Fox & Fox, S.C., 124 West Broadway, Monona, Wisconsin, 53716, appearing on behalf of R.S., Sr.

Charles M. Kernats, Office of General Counsel, Department of Transportation, P.O. Box 7910, Madison, Wisconsin 53707-7910, appearing on behalf of the Department of Transportation.

DECISION AND ORDER

R.S., Sr., appeals the imposition of a disciplinary termination from his employment with the Wisconsin Department of Transportation for allegedly having non-consensual sexual intercourse with another DOT employee. The appeal was filed on January 14, 2011. The parties agreed to the following statement of the issue:

> Whether there was just cause for the termination of R.S. that was imposed by the Department by letter dated December 29, 2010.

The matter was heard on June 28, June 30, July 12 and July 15, 2011, before Hearing Examiner Stuart D. Levitan of the Commission's staff. The parties submitted written arguments by October 4, 2011.

Following issuance of a Provisional Proposed Decision and Order on October 2, 2012, Appellant filed an Application for Fees and Other Costs on November 1, 2012, which Respondent responded to on November 26, 2012.

On January 11, 2013, Examiner Levitan issued a Proposed Interim Decision and Order concluding the Department lacked just cause to terminate R.S. but denying R.S' request for fees and costs. Both parties filed objections to the Examiner's decision and briefs were submitted by February 21, 2013.

The Commission hereby makes the following

FINDINGS OF FACT

1. Respondent Wisconsin Department of Transportation (DOT) is a state agency responsible for the planning, development, financing, administration, construction and maintenance of a variety of services and programs relating to transportation in the State of Wisconsin.

2. Appellant R.S., Sr., was hired by the DOT in September 2007, as a DMV program supervisor, a managerial position. He was promoted to the higher-level managerial position of program chief in July 2008, based in the main DOT offices in Madison, with job duties that included managing a driver's license records program and supervising about 47 employees.

3. Respondent DOT has promulgated TAM 107, which subjects any employee who engages in workplace violence and/or intimidation to disciplinary action, up to and including dismissal from employment.

4. A.B.[1] began working for DOT in 1998, and was promoted to supervisor in November, 1999. She previously worked for a different state agency for about seven years. At the time of hearing she was a program supervisor for the Division of Motor Vehicles, based in Milwaukee, supervising 12 employees.

5. On May 18, 2010, R.S. came to Milwaukee for a 3-day trip for personal and state business. Prior to leaving Madison, he made arrangements to meet A.B. at a Milwaukee night club that evening. After about two hours at the club, R.S. brought A.B. back to his hotel room, where he had sexual intercourse with her.

[1] Not her real initials.

6. In early June 2010, A.B. told one of the employees she supervised that she had been sexually assaulted by R.S.

7. On June 8, 2010 A.B. told her supervisor that she was having a variety of personal problems and in passing indicated she had been raped.

8. On June 16, 2010 A.B. again informed her supervisor of the alleged rape. Her supervisor advised Lynne Judd, Administrator of the Division of Motor Vehicles, of the allegations.Sometime thereafter the Department became aware that R.S. was the alleged perpetrator.

9. On December 29, 2010 Judd terminated R.S. for engaging in non-consensual sex with A.B. on May 19, 2010 in violation of the Department Work Rule TAM 107.

10. There is insufficient evidence to establish that R.S. engaged in non-consensual sexual intercourse with A.B. on May 19, 2010.

Based upon the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSIONS OF LAW

1. The Commission has jurisdiction to review this matter pursuant to Sec. 230.44(1)(c), Stats.

2. Respondent Department of Transportation has the burden to establish just cause to terminate Appellant R.S., Sr.

3. Respondent has not established to a reasonable certainty by the greater weight of the evidence that Appellant engaged in the misconduct alleged in the termination letter of December 29, 2010.

4. Respondent did not have just cause to terminate Appellant.

5. The Respondent was substantially justified in taking the position that it had just cause to terminate R.S' employment and accordingly he is not entitled to an award of costs and fees under Sec. 227.485, Stats.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following

ORDER

Respondent's decision to discharge Appellant is rejected.

Appellant's application for fees and costs is denied.

This matter is remanded to the Respondent for further action in accordance with this decision.

Given under our hands and seal at the City of Madison, Wisconsin, this 31st day of May, 2013.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott /s/
James R. Scott, Chairman

Rodney G. Pasch /s/
Rodney G. Pasch, Commissioner

Department of Transportation (R.S.)

MEMORANDUM ACCOMPANYING DECISION AND ORDER

The discharge of Appellant R.S., Sr. arises out of an off-duty incident between himself and a female co-worker. R.S., an upper level supervisor with the Wisconsin Department of Transportation was based in Madison but had occasion to spend several days in Milwaukee to attend to both business and personal matters. A.B. also worked at DOT but was based in Milwaukee. She functioned as a lower level supervisor and was not a direct report to R.S.

R.S. and A.B. knew of each other but were not personal friends. In early May of 2010 R.S. sent an email greeting to A.B. Over the following days R.S. sent various written communications and made telephone calls expressing an interest in A.B. On May 18 they mutually arranged to meet at a bar located on the northwest side of Milwaukee. A.B. had one glass of wine at home before arriving at the bar at about 10:00 p.m. on May 18, a Tuesday. R.S. had arrived earlier and met her at the door and paid her admission fee of $10.00. A.B. had at least two drinks over the next two hours. R.S. drank non-alcoholic beverages and paid for A.B.'s drinks. They kissed once while standing at the bar but no other open displays of affection occurred at the bar.

Around midnight they left together and went to R.S. vehicle. They proceeded to downtown Milwaukee where R.S. registered for a room at the Hampton Inn. A.B. remained in the vehicle and called a friend, leaving a message. After registering, R.S. moved the car into the hotel parking ramp and he and A.B. entered the hotel and went to his room.

Inside the room R.S. removed all of his clothing except his undershorts. A.B. who was wearing tight jeans removed her pants and laid down beside R.S. on the bed. (Tr. p. 56) R.S. then moved on top of A.B. and began kissing her. He engaged in at least one act of sexual intercourse.

After an hour R.S. drove A.B. back to her vehicle on the northwest side of Milwaukee. During the ride A.B. expressed concerns that during the previous year she had received poor evaluations at work and she asked R.S. to call her to make sure she woke up in time to go to work. R.S. called her at 2:39 a.m. to make sure she arrived home and again at 5:59 a.m. to make sure she was awake. Upon waking A.B. felt sore and was concerned about having had unprotected sexual relations. She called her medical clinic for an appointment, and was told the earliest she could see a health care provider was Friday. On Friday, May 21, A.B. was seen by a physician's assistant at Aurora Health Care West, who

observed that she was "in no acute distress," but that it was "obvious that she is uncomfortable when she is sitting." The report of that visit reads in part:

> The patient is a 37-year-old female. . . . She states that 2 days ago she was sexually active. It was very forceful and, in fact, she states that she did not want to, but she was somewhat forced to do it and it was rough. She developed some soreness almost immediately afterwards. . . . She did not use a condom. She is not interested in pressing charges. She states that afterwards that she used a new soap and is not sure if that might be part of the problem that is causing her to be so irritated in the vaginal area.
>
> . . .
>
> I once again reviewed with her the fact that if this was forceful and she was saying no, that this is considered rape but she is not interested in any type of legal action for this.

On May 19 and for several days thereafter R.S. attempted to reach A.B. by telephone but she did not take his calls. The two did not speak to each other between May 19 and June 8.

On June 8 A.B. did make a passing reference to having been raped to her supervisor who did not pick up on the comment. On June 15, A.B. learned through medical tests that she had genital herpes. She called R.S. and informed him of the diagnosis and indicated that he could not be ruled out as the source. R.S. responded that he was not the source.

The following day A.B. informed her supervisor that she needed a day off and began crying heavily. A.B. told her supervisor that she was raped and she also advised that the rapist was a DOT employee.

Eventually A.B. went to the Employee Assistance Program for help and identified R.S. as the perpetrator. As a result of continuing medical issues she was placed on leave from June 18, 2010 through January 3, 2011. R.S. was discharged on December 29, 2010.

The examiner viewed this case as essentially a dispute turning on the word of one employee against that of another. In his view the credibility dispute could not be resolved based upon his view of the testimony of the principals. He turned to the circumstantial evidence in reaching his determination that the State failed to meet its burden. We reach the same result on a slightly different basis.[2]

[2] The Commission decision varies slightly from the examiner's only in the manner in which the undisputed facts are interpreted. The Findings of Fact and Memorandum Decision have been revised to reflect the record and eliminate unneeded factual findings and analysis.

We begin with an examination of the Department's primary arguments. The Department asserts that the examiner applied an incorrect standard to his analysis of the evidence. We disagree but do note that the examiner's reference to the reasonable certainty standard as a "very high standard" is misleading. Suffice it to say in our analysis of the evidence we apply the "reasonable certainty by the greater weight or clear preponderance of the evidence" standard set forth in Reinke v. Personnel Board 53 Wis.2d 123, 137, 191 N.W.2d 833 (1971). That is the same standard of proof as utilized in ordinary civil cases and is unquestionably applicable here.

Once past the standard of proof argument, the Department essentially argues that the examiner failed to accord sufficient weight to some of the evidence it developed. In the same vein the Department argues that some of its evidence clearly undermines R.S' credibility. The individual pieces of evidence are discussed below. We preface our observations by noting that under Sec. 227.45(1), Stats. administrative agencies and their examiners are obliged to "admit all testimony having reasonable probative value" and are directed that "(B)asic principles of relevancy materiality and and probative force shall govern the proof of questions of fact." We know that while all manner of evidence may be admitted it does not necessarily follow that it is all entitled to equal weight. The common law and statutory rules of evidence were developed to ensure that competent evidence be used to make determinations. While they provide no basis for excluding evidence having "reasonable probative value" they often provide guidance as to the weight to be accorded such evidence.

With those concepts in mind we discuss below the Department's arguments relative to the weight accorded to various pieces of evidence.

Prior Convictions

The Department repeatedly references R.S.' two prior misdemeanor convictions from 1997 as strong evidence that R.S. used "physical force against women." We conclude that the evidence has minimal probative value. The Department did not introduce the criminal complaint in either matter. We are left with the testimony of R.S. regarding the charges. He denied there was any allegation of force in either the fourth degree sexual assault charge or the disorderly conduct charge. (Tr. 16) In fact the Department was limited to asking R.S. whether he had been convicted of a crime and the number of convictions. He truthfully disclosed the number of convictions and at that point DOT, as the proffering party, would normally be barred from further inquiry. State v. Smith 203 Wis.2d 288, 297, 553 N.W.2d 824 (Ct. App. 1996). The information about the specifics of the underlying charges would not be admissible in a court of law. Given the relaxed standard set forth in Sec. 227.45(1), Stats. together with the lack of objection by R.S., the examiner permitted the inquiry into the specifics. If anything, however, R.S.' explanation of the circumstances underlying the charges aided his cause rather than harming it.

Furthermore the Department hired R.S. in 2007 knowing of his prior convictions. (R. 146) We are left with the fact that R.S. was convicted of a misdemeanor charge of fourth degree sexual assault and a misdemeanor conviction of disorderly conduct involving his wife. The charges were filed in 1997, thirteen years before this incident. We assign little weight to this evidence.

Medical Report

The day after the alleged rape, A.B. contacted a doctor's office but was unable to get an appointment until Friday, May 21. She was examined by Nancy Sherwood, a physician's assistant. (R. 144) Sherwood did not testify at the hearing. Her report includes the following statement:

> "She states two days ago she was sexually active. It was very forceful and, in fact, she states she did not want to, but she was somewhat forced to do it and it was rough."

The report which was properly admitted into evidence does constitute hearsay. Had Sherwood testified she could have recounted what A.B. told her regarding her symptoms. Such testimony would have qualified as an exception to the hearsay rule under Sec. 908.03(4), Stats. which provides an exception for descriptions of past or present symptoms made for purposes of medical diagnosis or treatment. See gen. State v. Nelson, 38 Wis.2d 418, 430, 406 N.W.2d 385 (1987). The statutory exception allows a doctor (or perhaps a physician's assistant) to testify about a patient's self-serving statements made to a doctor but does not create an exception for written medical opinion. See Judicial Council Committee Note (1974) reprinted in Wis. Stat. annotated Sec. 908.03(4) at 467-468 (West 1975).

The document also reflects Sherwood's recitation of what she told A.B. including Sherwood's view that the conduct constituted rape. That statement is also hearsay and in any event does not constitute a reliable medical opinion. Absent the opportunity for R.S.' lawyer to cross-examine Sherwood her written observations have little probative value. A true medical opinion may well have been dispositive in this case but of course that was not provided. The absence of such evidence may well be consistent with A.B.'s stated desire to avoid legal action.

The Department argues that the "medical records" provide substantial support for its position. In the aggregate we find that the documents add little to the Department's case. While the medical records themselves constitute hearsay they do corroborate A.B.'s version of events and thus do not run afoul of Gehin v. Wisconsin Insurance Board 278 Wis.2d 111, 148, 692 N.W.2d 572. There our Supreme Court found that uncorroborated hearsay cannot constitute "substantial evidence" for purposes of judicial review of an agency's decision. *Id. at* ¶81. While corroborated hearsay passes the Gehin test it does not escape the "inherently suspect" label. We therefore assign it little weight. The Examiner's Proposed Finding of Fact 6 has been deleted to reflect our conclusion.

R.S' credibility

The De partment argues that R.S has little credibility and that the examiner's findings and opinion so conclude. We find nothing in the recitation of events leading to the get together at the bar that suggests that R.S.' assertions are incredible. The fact that R.S. went to the tryst armed with condoms does not support the idea that he intended to force himself on A.B. Similarly the fact that R.S. initiated the contact that culminated in the agreement that A.B. meet him at Nostalgia II at 10:00 p.m. at night does not indicate a plan to rape A.B. R.S. may well have been optimistic about his prospects for sexual gratification but preparedness and pursuit do not equal rape.

A.B.'s credibility

The Department argues that because her supervisor believed A.B.'s recitation of the facts her credibility is enhanced. The argument is that because Brisco had previous doubts about A.B.'s truthfulness but believed her account of the alleged rape, somehow A.B.'s credibility is enhanced. To the extent Brisco was allowed to recount her belief in A.B.'s version of events that testimony is questionable. State v. Haseltime 120 Wis.2d 92, 96, 352 N.W.2d 73 (Ct. App. 1984) ("No witness, expert or otherwise should be permitted to give an opinion that another mentally and physically competent witness is telling the truth.") See also U.S. v. Bonner 302 F.3d 776, 780 (7th Cir. 2002) (evidence of truthful character is admissible only after an attack on credibility under Federal Rules of Evidence). Furthermore Brisco's belief in the truthfulness of A.B.'s version of the events is limited by the fact that she did not interview R.S. in order to obtain his version.

Equally lacking in probative value is the argument that the investigators and other members of management "believed" A.B. over R.S. Certainly it is accurate to note, as the State has, that the examiner's decision reflects his inability to conclude that one or the other is telling the truth. He essentially found both of the participants to be credible and believable. Once having reached that conclusion the examiner found that circumstantial evidence and inferences therefrom became determinative.

Our analysis is similar and we agree that this truly is a he said/she said dispute. The primary problem that the Department has is that A.B.'s pattern of behavior on the night in question is wholly inconsistent with someone claiming no romantic interest in R.S. A.B. agreed to meet R.S. at a bar relatively late on a weekday night. She acknowledged kissing R.S. and then accompanying him to a downtown hotel located at least twenty minutes from the bar where they had spent the last two hours. It is true that A.B. claimed R.S. was only giving her a ride to her car and that she did not want to ride downtown with him. However, A.B. had ample opportunity to call a friend or even the police if she truly was being transported against her wishes.

A.B. was not coerced into entering R.S.' hotel room and certainly not forced to remove her pants when R.S. came out of the bathroom in his underwear. While R.S. may have forced himself on A.B. it is equally plausible that her cry of rape may be a result of "morning after" regret. While the Department argues that R.S. had every incentive to falsify his testimony, A.B. herself was in trouble at work and may well have been looking for a medical "excuse" for her shortcomings.

The record discloses a lack of sufficient corroborating evidence to support the termination. Accordingly we find that the Department lacked just cause to discharge R.S.

Fees and Costs Under Equal Access to Justice Act

On November 1, 2012 Appellant R.S. made a timely application for attorney's fees in the amount of $44,030 and costs in the amount of $5,397.24. Section 227.485(3), Stats., provides in part:

> In any contested case in which an individual . . . is the prevailing party and submits a motion for costs under this section, the hearing examiner shall award the prevailing party the costs incurred in connection with the contested case, unless the hearing examiner finds that the state agency which is the losing party was substantially justified in taking its position or that special circumstances exist that would make the award unjust.

The quoted language is a portion of Wisconsin Equal Access to Justice Act which mirrors the federal counterpart. We are aided in our interpretation of the Wisconsin EAJA by reference to federal court case law. Sec. 227.485(1), Stats.

The state agency which is the losing party bears the burden of proving that its position was "substantially justified." The act itself defines substantially justified as "having a reasonable basis in law and fact." Id. at Sec. (2)(f). To meet its burden the State must demonstrate:

> "(1) a reasonable basis in truth for the facts alleged; (2) a reasonable basis in law for the theory propounded; and (3) a reasonable connection between the facts alleged and the legal theory advanced."

Sheely v. Wisconsin Department of Health and Social Services 150 Wis.2d 320, 338, 442 N.W.2d (1989) citing Phil Smidt and Son, Inc. v. NLRB 810 F.2d 638, 642 (7th Cir. 1987). The fact that the government agency lost the case creates no presumption that the agency was not substantially justified in its actions. *Id.* The United States Supreme Court has held that the government's position is substantially justified if it is "justified in substance or in the main – that is justified to a degree that could satisfy a reasonable person." Pierce v. Underwood, 487 U.S. 552, 565, 108 S.Ct. 2541, 2550, 101 L.Ed 2d 490 (1988).

We are satisfied that the Department of Transportation was substantially justified in its position. As noted this was a very close case and "closeness of the question is, in itself evidence of substantial justification." Cummings v. Sullivan 950 F.2d 492, 498 (7th Cir. 1191). The Department undertook an extensive investigation before making the decision to terminate. The employee was given ample opportunity to respond and address the evidence that was raised. The behavior if true clearly violated the work rule and fully warranted discharge. A reasonable person faced with a serious allegation such as that made by A.B. and with no apparent reason to disbelieve her assertion, would be justified in terminating the perpetrator. Essentially DOT had no alternative but to choose between the two. The risk of allowing an accused rapist to remain in a supervisory position was simply too great. In the end we held only that the agency failed to meet its burden of proof. We made no finding that R.S. did not engage in the alleged conduct. The Department's position was substantially justified and accordingly the request for fees and costs is denied.

Dated at Madison, Wisconsin, this 31st day of May, 2013.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott /s/
James R. Scott, Chairman

Rodney G. Pasch /s/
Rodney G. Pasch, Commissioner

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