

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MATTHEW SEILER, Appellant,

vs.

STATE OF WISCONSIN, DEPARTMENT OF CORRECTIONS, Respondent.

Case 171
No. 71824
PA(adv)-265

DECISION NO. 33993-C

Appearances:

Victor Arellano, with Kurt Kobelt on the brief, Arellano & Phebus S.C., 1468 N. High Point Road, Suite 202, Middleton, Wisconsin, appearing on behalf of Matthew Seiler.

Julio R. Barron, Chief Legal Counsel and Andrea Olmanson, Legal Counsel, Department of Corrections, 3099 E. Washington Avenue, P.O. Box 7925, Madison, Wisconsin, appearing on behalf of the State of Wisconsin, Department of Corrections.

DECISION ON MOTION TO CLARIFY

By decision dated March 11, 2016, we rejected the Department of Corrections' decision to discharge Matthew Seiler and converted the discharge to a 10-day suspension. As a part of the award, Seiler was entitled to be restored to the position he held prior to the discharge. The DOC understands that Seiler must be restored to the position of correctional sergeant which is the job title he held at the time of his discharge. DOC proposes to place Seiler in the correctional facility in Portage, Wisconsin. Seiler counters that he is entitled to be restored to the position he held at the Oakhill Correctional Institute (OCI) facility in Oregon, Wisconsin. More specifically, he claims a right to the specific assignment of lobby sergeant on the second shift. We are advised by affidavit of Seiler that there are five vacancies on the second shift at OCI.

DOC in turn argues that placing Seiler in the OCI facility would be disruptive and have adverse consequences.

We recognize that returning someone to a workplace after a lengthy period of absence due to discharge can have consequences in any workplace. The important point is that it is the employer in this case that was at fault, not Seiler. As the prevailing party, he is entitled to be restored to his previous employment absent some extraordinary circumstances. For example, in *Sands v. Menard, Inc.*, 210 WI 96, ¶ 12, 328 Wis.2d 647, 787 N.W.2d 384, our Supreme Court vacated an order of reinstatement for an attorney employed as in house legal counsel. The court reasoned that in those circumstances the former employee would be “forced to violate her ethical obligations as an attorney” and accordingly the order would violate public policy. *Id.* The employer however did not escape responsibility but was required to compensate the victim with front pay.

Similarly, the Seventh Circuit has recognized that in some circumstances reinstatement may not be an appropriate remedy. *Bruso v. United Airlines*, 239 F.2d 848, 862 (7th Cir. 2001) (Title VII management employee would no longer enjoy the confidence and respect of superiors); *Hyhert v. Heast Comp*, 900 F.2d 1050, 1055 (7th Cir. 1990) (reinstatement would promote hostility).

In such cases however the typical alternative remedy is a period of front pay. Here DOC does not decline reinstatement but instead suggests an alternative place of employment with (at least in Seiler’s view) less favorable working conditions.

Before we consider an alternative argument, we must be satisfied that placement at OCI is a significant problem. DOC’s showing in that regard falls far short of the mark. An affidavit from a management employee who formerly worked as a warden is proffered. It is however replete with speculation about problems which may occur if Seiler is reinstated to OCI. No basis for the opinions is proffered other than the affiant’s prior employment. No personal experience with reinstated employees is offered as a basis for the speculative opinions.

DOC’s reliance on prior civil service decisions which limit our ability to review transfer or assignment decisions is specious. The fact that we do not have jurisdiction over assignments as an original matter is not dispositive of our ability to order a specific remedy or otherwise clarify the nature of the remedy.

DOC posits (as a hypothetical) that it could reinstate Seiler for one day at OCI and then transfer him to another facility without fear of any action by this agency. To the contrary, we might well view such an action as a constructive demotion. Furthermore, the circuit court would have jurisdiction over a claim that such action would constitute a failure to comply with our order per § 230.44(4)(c), Stats.

The bottom line is that we rejected the decision to terminate Seiler. DOC is obliged to reinstate him to the position he held at the time of his discharge at the current rate of pay and with the current benefit level. That obligation does not however include a specific work

assignment. DOC shall assign Seiler to a second shift correctional sergeant position at the OCI facility.¹ This decision shall be deemed a modification of the order issued on March 11, 2016.

Signed at the City of Madison, Wisconsin, this 19th day of April 2016.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

Rodney G. Pasch, Commissioner

James J. Daley, Commissioner

¹ We assume based on Seiler's un rebutted affidavit that such vacancies exist.