

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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ANDREA J. SAWALL, Appellant,

vs.

DEPARTMENT OF CORRECTIONS, Respondent.

Case 182  
No. 71913  
PA(adv)-284

DECISION NO. 34019-D

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**Appearances:**

Mr. Michael J. Kuborn, Attorney, Curtis Law Office, P.O. Box 2845, Oshkosh, Wisconsin, appearing on behalf of Appellant Andrea J. Sawall.

Mr. Karl R. Hanson, Office of State Employment Relations, 101 East Wilson Street, Madison, Wisconsin, appearing on behalf of Respondent Department of Corrections.

**DECISION AND ORDER**

Appellant Andrea J. Sawall filed an appeal with the Wisconsin Employment Relations Commission on December 28, 2012, contesting a one-day disciplinary suspension she received from her employer. The matter was assigned to Examiner Lauri A. Millot who held a hearing in the matter on November 8, 2013. Subsequently, Examiner Millot issued a proposed decision and order, and the Department of Corrections filed a timely request for review by the Commission.

The Commission, having reviewed the record and arguments of the parties makes the following:

**FINDINGS OF FACT**

1. Respondent Department of Corrections (“DOC”) is an agency of the State of Wisconsin and operates the State prison system including the Redgranite Correctional

Institution (hereinafter referred to as “RCI”) in Redgranite, Wisconsin. RCI is a medium level security facility providing treatment to 1,000 inmates.

2. Appellate Andrea J. Sawall is employed by the DOC at RCI and holds the rank of sergeant.

3. Sawall was suspended for one day for violations of DOC Work Rules #6 – Falsification of records and #12 – Verbally threatening, intimidating, demeaning or interfering with another employee or using profane or abusive language with another employee. The date of Sawall's suspension was August 8, 2012.

4. Sawall used the words “fuck” and/or “fucking” in the course of a brief conversation with her supervisor who is also her husband. The conversation took place while both were on duty on May 17, 2012.

5. The use of crude and profane language is commonplace at RCI and typically does not lead to the imposition of discipline.

6. Sawall was charged with violating DOC Work Rule #12 and was the subject of an investigation.

7. Following the completion of the investigation, it was determined that Sawall's recollection of the conversation was different from that of her supervisor and a coworker who overheard the conversation. She was also charged with violating DOC Work Rule #6 which prohibited knowingly providing false information.

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

### **CONCLUSIONS OF LAW**

1. The Wisconsin Employment Relations Commission has jurisdiction over this matter pursuant to § 230.44(1)(c), Stats.

2. The DOC has failed to establish just cause for the discipline imposed on July 30, 2012 upon Sawall.

3. Sawall is a prevailing party under § 227.485(3), Stats.

4. The DOC was not substantially justified in taking the position it took in these proceedings.

5. Sawall is entitled to an award of attorney fees and costs.

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

**ORDER**

1. That Appellant Andrea Sawall's one-day suspension is rejected. Sawall shall be made whole for all wages and benefits lost as a result of the suspension.
2. That Appellant Andrea Sawall's petition for fees and costs is granted in the amount of \$3,220.28.

Dated at Madison, Wisconsin, this 12th day of May 2015.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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James R. Scott, Chairman

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Rodney G. Pasch, Commissioner

**MEMORANDUM ACCOMPANYING DECISION AND ORDER**

On May 17, 2012, while on third shift, Appellant Andrea Sawall used the word “fuck” or “fucking” twice in a brief phone call with Lieutenant Terry Sawall. T. Sawall was A. Sawall’s supervisor and her husband. The DOC concedes that the use of profanity in RCI is common and rarely results in discipline.<sup>1</sup> In any event, A. Sawall’s profane comments made to her husband referenced another employee and his (in her judgment) inadequate work performance. Word of the comments spread to another sergeant in RCI who did not like A. Sawall and she filed an incident report approximately one week later. The report focused on another incident between the two and made passing reference to the May 17 comments. This incident report triggered a full blown investigation by the DOC. Three weeks after the incident, A. Sawall was interviewed by two DOC employees. She was asked whether she made two specific statements with the word “fucking” in the statements. She denied doing so. Two months later, she was again asked about specific statements she allegedly made during the very brief conversation she had with her supervisor/husband.

The DOC interviewed everyone involved and produced transcripts of the interviews. The DOC brought in an “outside the institution” employee to conduct the investigation. He concluded that A. Sawall’s “memory lapses” about specific language were not intentional and that no discipline was recommended, particularly in light of the fact that inappropriate language is “common in corrections.”

Notwithstanding that recommendation, the warden imposed a one-day disciplinary suspension for violating two work rules. The first of those rules, DOC Work Rule #12, does in fact prohibit using “profane or abusive language.” Everyone involved concedes that the use of profane language is commonplace at RCI. The language itself was not abusive because it was uttered between a sergeant (lead worker) and her supervisor who happened to be her husband. As a sergeant, A. Sawall was presumably obliged to share her observations, good or bad, about the employees she directed. Referring to someone as lazy is not abusive, it is descriptive.

If an employer maintains a work rule that is widely and commonly violated, it forfeits the right to suddenly, with no explanation, single one employee out for a violation. There can be no just cause for a violation of a rule that is frequently violated and never enforced.

As to the second rule violation, A. Sawall is accused of “failing to provide truthful, accurate and complete information when required.” We have in the past criticized DOC’s use of this rule as a “throw in” on virtually any situation where an employee’s version of events leading to discipline differs from another’s recollection. In other words, if DOC believes one employee’s version of events over another’s, the disfavored employee is accused of violating the truthfulness standard.

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<sup>1</sup> In fact, no evidence of any employee ever being disciplined for use of profanity was provided.

We believe there is no cause for that purported rule violation in this case. It is unreasonable to expect that someone who is asked about the use of two specific phrases three weeks after they were allegedly uttered to recall them with certainty.<sup>2</sup> Secondly, the use of profanity did not violate the rule because application of the rule has been forfeited by non-enforcement. There never should have been an investigation in the first place given the complete lack of enforcement of the rule. Whether A. Sawall intentionally lied or had a memory lapse is irrelevant. There was no basis for discipline to be imposed and no reason to conduct an investigation.

### Attorney Fees

The examiner awarded attorney fees to Sawall pursuant to § 227.485(3), Stats. The award was reduced by 20 percent based upon the examiner finding that there was just cause for a portion of the discipline meted out to Sawall.

We agree that the DOC's position was not substantially justified and that an award of attorney fees is warranted. We have increased the amount to be paid based upon our conclusion that there was no substantial justification for any discipline arising out of this incident to be imposed upon Sawall.

The DOC's initial argument is that we are barred from awarding attorney fees because the Wisconsin Human Resources Handbook, Chapter 430, includes a provision preventing us from doing so in any appeal. According to the DOC, our statutory authority to award fees under Chapters 227 and 230, Stats., has been "superseded" by Section 430.130 of the Handbook. In our view, the "repeal by reference" of our statutory authority is unlawful under *Milwaukee Journal Sentinel v. Department of Administration*, 2009 WI 79, 319 Wis.2d 439, 768 N.W.2d 700. We recognize that *Milwaukee Journal Sentinel* is not squarely on point; however, the principles set forth in that decision are equally applicable to the circumstances here. The issue of repeal by reference has not been briefed by either side and this is not the case that will finally resolve that issue.

The DOC also argues that its position in this matter was substantially justified and hence no attorney fee award should be made. Under § 227.485(1), Stats., we are directed to follow the case law developed under 5 U.S.C. § 504, the federal Equal Access to Justice Act which is very similar to our own law. The DOC's position is substantially justified if the discipline "has a reasonable basis in law and fact, that is, if a reasonable person could believe the position was correct." *Golembiewski v. Barnhardt*, 382 F.3d 721, 724 (7th Cir. 2004), citing *Marcus v. Shalala*, 17 F.3d 1033, 1036 (7th Cir. 1994).

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<sup>2</sup> The warden's letter imposing the discipline notes that A. Sawall acknowledged using the term "fucking lazy officer." He concludes that falsehoods were uttered because witnesses said A. Sawall used the term "fucking Reichenberger" and/or "the laziest fucking officer."

Here the action of the DOC disciplining a non-supervisory employee for commenting about a coworker's work ethic while using strong language is simply unsupported. It is difficult to imagine any large workplace where someone has never made a derogatory comment about a coworker. The arbitrariness of the discipline here is on its face obvious. We see this case as clearly warranting a conclusion that the DOC has failed to establish that its actions were substantially justified.

Dated at Madison, Wisconsin, this 12th day of May 2015.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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James R. Scott, Chairman

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Rodney G. Pasch, Commissioner