STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CORDELL H. MANZ, Appellant

vs.

STATE OF WISCONSIN DEPARTMENT OF NATURAL RESOURCES, Respondent.

Case 29
No. 72765
PA(adv)-371

DECISION NO. 35022-A

Appearances:

Kyle H. Torvinen, Attorney, Torvinen, Jones, Routh & Torvinen, S.C., 823 Belknap Street, Suite 222, Superior, Wisconsin, appearing on behalf of Appellant Cordell H. Manz.

Douglas Thayer, Labor Relations Specialist – Chief, Office of the Secretary, Department of Administration, 101 E. Wilson Street, 10th Floor, P.O. Box 7864, Madison, Wisconsin, and Nicole M. Denow, Attorney, Department of Natural Resources, 101 South Webster Street, P.O. Box 7921, Madison, Wisconsin, appearing on behalf of Respondent Department of Natural Resources.

DECISION AND ORDER

Cordell H. Manz filed a timely appeal with the Wisconsin Employment Relations Commission disputing his termination from employment by his employer the State of Wisconsin Department of Natural Resources. Hearing in the matter was held on June 5 and 6, 2014, before Examiner Lauri A. Millot. The taped testimony from June 5, 2014 was lost and the matter was reheard on February 26, 2015. The examiner issued her proposed decision on October 15, 2015. Timely objections were filed by the Department of Natural Resources. The matter was fully briefed by the parties. On December 29, 2015, the Commission conferred with Examiner Millot regarding her credibility impressions. She concluded that her decision did not depend on credibility determinations.

Being fully advised in the premises, the Commission makes and issues the following:

FINDINGS OF FACTS

1. Appellant Cordell H. Manz was employed by the State of Wisconsin Department of Natural Resources, from November 2010 until his termination, as a full-time advanced wastewater specialist / ballast water inspector. Prior to that time, from 2002 to 2009, he worked in similar positions as a part-time employee of the Department.

2. Respondent State of Wisconsin Department of Natural Resources ("DNR") is an agency of the State of Wisconsin responsible for environmental protection; land, forestry, and water resource management; and outdoor recreation.

3. Heidi Schmitt-Marquez was hired by the DNR as a limited term employee in October 2010 and, in December 2012, she became a full-time, permanent wastewater specialist. She served a six-month probationary period.

4. On October 9, 2012, Schmitt-Marquez and Manz were in a State-owned vehicle during working hours and Manz sang a sexually graphic and explicit song. Schmitt-Marquez objected to the singing of the song.

5. On January 25, 2013, Manz attended a work-related conference in Stevens Point, Wisconsin. Following the conference and after working hours, while in the hotel bar, Manz again sang the song referenced in Finding of Fact 4 to a group of male and female coworkers.

6. On January 24, 2013, Manz hugged Schmitt-Marquez and another DNR employee as employees were leaving following the conference.

7. On April 9, 2013, Manz travelled with Schmitt-Marquez for purposes of attending a work-related conference. Manz made statements to Schmitt-Marquez that were graphic, sexually oriented, crude references to female genitalia.

8. The conduct described in Findings of Fact 5, 6 and 7 violated the DNR's Manual Code §§ 9121.06(4)(d), (e) and (n).

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 to review this matter pursuant to § 230.44(1)(c), Stats.

2. The State of Wisconsin Department of Natural Resources had just cause to terminate Cordell H. Manz pursuant to § 230.44(1)(c), Stats.

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

ORDER

The State of Wisconsin Department of Natural Resources' decision to discharge Cordell H. Manz is affirmed.

Signed at the City of Madison, Wisconsin, this 15th day of February 2016.

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

I. Was There Just Cause for the Discharge of Cordell H. Manz?

Cordell H. Manz was discharged for violating his employer's work rules. Those rules are designed to ensure a level of civility in the workplace and to prevent employees from engaging in conduct which could lead to actionable harassment claims. There was never any dispute that Manz engaged in the conduct in question. On two occasions he sang a song which he had authored as a teenager. That song contained graphically crude and obscene terminology that anyone would understand to be highly offensive. Manz engaged in a one-on-one conversation with a female coworker on work time in which he used other clearly offensive and crude language. Less serious (but nevertheless inappropriate in a business setting) was his actions in hugging female coworkers following a work-related conference.

The examiner correctly found that Manz violated the work rules. The error, however, was to go further and find that Manz' conduct did not meet the legal definition of actionable sex harassment.[1] While on its face that finding may be correct, the DNR was not required to prove that Manz' conduct violated the legal definition of sexual harassment. Employers often include, within their anti-harassment policy, the legal definition of actionable sexual harassment.[2] The inclusion of such a definition within the policy does not suggest that any conduct short of that definition is permissible in the workplace.

The practical effect of the examiner's decision would be to limit an employer to using discharge only in cases where the conduct is so egregious that it constitutes a viable sex harassment claim. That result is simply wrong. The employer's duty is to prevent the creation of a hostile work environment by acting promptly when it learns of misconduct. The employer need not wait until the conduct is "severe or pervasive" or until it "severely interferes with an individual's work performance" before taking remedial action. To hold otherwise would be to place the employer in the position of proving that the conduct violated Title VII of the Civil Rights Act of 1964 and/or the Wisconsin Fair Employment Act in order to establish just cause for a discharge.

The employer here viewed the four incidents as sufficiently clear violations of its work rules to warrant discharge. Would a lesser penalty have prevented a continuation of the remarkably poor judgment demonstrated by Manz? Perhaps it may have but we, like courts, do not sit as a super personnel department evaluating the means by which the employer chooses to meet its obligations under sex harassment case law. *Cf. Potts v. Rockledge Furniture LLC*, 534 F.3d 715, 724 (7th Cir. 2008).

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[1] Aside from the work rules, the DNR maintained a sex harassment policy which included the legal definition of sexual harassment.

[2] The "policy" recommended by the Equal Rights Division of the Wisconsin Department of Workforce Development is very similar to the DNR's policy. *See* ERD Publication 10449-P.

Unlike more mundane work rule violations, the conduct in this case had the potential for creating liability for the DNR under laws intended to end sexual harassment in the workplace. That potential justifies strong action on the part of the DNR. It carries the additional benefit of sending a clear message to all employees that such behavior will not be tolerated.

The examiner also concluded that there was a variety of evidence that mitigated the conduct of Manz. She concluded that Schmitt-Marquez did not clearly object to the song lyrics, that Manz was not a supervisor, that Schmitt-Marquez used the word "fuck" in conversation, that there was no touching or threats, etc. Some of the above facts might have relevance in a sex harassment proceeding but they are totally unrelated to the work rule violations at issue here. Those comments reflect the examiner's confusion over the import of the DNR's sexual harassment policy and its work rules. The fact that Schmitt-Marquez used the word "fuck" in her workday parlance may also violate the DNR's work rules. It does not, however, justify, excuse, or invite Manz' behavior.

Manz violated the DNR's work rules and was appropriately disciplined.[3]

II. Does the Character Evidence of the Participants Support Mitigation of the Penalty?

Manz elicited a host of character evidence from a variety of coworkers without objection by the DNR. The examiner apparently accepted at least some of that evidence in support of her decision. We reject it in its entirety for a variety of reasons.

First of all, character evidence is generally inadmissible. § 904.04(1), Stats. The DNR apparently chose not to object and as a result we have extensive evidence that Manz would "never" engage in offensive behavior if he knew that it was unwelcome. Additionally, character evidence was elicited to portray Manz as a "goofy" or "naïve" young man bent only on being one of the gang. All of this is irrelevant in terms of assessing whether there was just cause for a discharge. Similarly, and again without objection, evidence was received regarding the complaining employee's general character as well as her propensity for using strong language. Again, such evidence is of no relevance to the just cause question.

An evaluation of the degree of severity of the penalty imposed upon an employee should not depend on the employee's character or that of his accuser.

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[3] While our dissenting colleague labels us (by implication) as bluenoses, we would note that the language at issue here would more likely be uttered by an all-male group of 17-year-old adolescents rather than by a state agency professional in mixed company. There is nothing subjective about our assessment of the offensiveness of the behavior. If Manz was unable to discern that his utterances would be highly offensive to anyone, progressive discipline would not be the solution to his work-related misbehavior.

III. Is the Quality of the Pre-Termination Investigation Relevant?

Manz argues that the examiner's conclusions relative to the quality of the DNR's pre-termination investigation being inadequate were correct. We fail to see how an inadequate pre-termination investigation bears on the level of the penalty assessed for undisputed conduct.

Contrary to Manz' argument, the due process clause only requires notice and an opportunity to be heard prior to termination if a full-blown hearing is available after termination. *Hudson v. City of Chicago*, 374 F.3d 554, 560 (7th Cir. 2004).

Due process does not require a "thorough" investigation. Presumably, most employers will make adequate efforts in that regard knowing they may face a full hearing before the Commission. In any event, Manz had the opportunity to respond to the charges prior to the discharge. He has engaged in prehearing discovery and has vigorously contested the decision to terminate. We do not share the examiner's criticism of the DNR's timeliness or its thoroughness. Even if it were inadequate, the full scale, post-termination hearing cured any alleged defects. This is particularly true in light of the fact that the misconducted is largely undisputed.

While the record in this case is replete with "evidence" that provides no assistance in the decision making process, we are satisfied that Manz' termination was for just cause and fully warranted.

Signed at the City of Madison, Wisconsin, this 15th day of February 2016.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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James R. Scott, Chairman

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Rodney G. Pasch, Commissioner

DISSENTING OPINION OF COMMISSIONER JAMES J. DALEY

I respectfully dissent from the opinion reached by the Commission upholding the termination of Cordell H. Manz.

I agree with the Commission that the behavior of Manz was inappropriate and in violation of DNR Manual Code § 9121.06. However, after careful review of the behavior in question, I find it fails to rise to the level needed to support Manz' discharge.

Of the four incidents under review, three were displays of lewd and offensive behavior, while one allegedly involves inappropriate touching.

I. Lewd and Offensive Behavior.

Three incidents were similar in nature. The first involved the singing of an inappropriate song, the second involved an after-hours discussion among coworkers, including the singing of the same song, and the third involved a discussion of various sexual preferences.

Schmitt-Marquez's behavior in these circumstances is relevant in the review of this case. Subjective standards such as what is or is not obscene vary greatly depending on the culture and expectations of various participants in a conversation. The record reflects that Schmitt-Marquez was a willing participant and sometimes encourager of Manz.

In the initial incident, Manz asked for specific permission to share the inappropriate song to Schmitt-Marquez, accompanied with a warning as to the offensiveness of the song. Schmitt-Marquez agreed to hear the song and thus became a willing audience. Additionally, this was part of a larger conversation that Schmitt-Marquez participated in where she also made inappropriate and offensive comments, showing a perceived acceptance for the style of communication that was utilized by Manz. Manz' testimony did indicate that it was clear Schmitt-Marquez did not care for the song, but did not demonstrate that he perceived, or that she communicated, she was offended by it. Subsequent behavior by Manz strengthens the veracity of his claim as he halted other behavior when told that it was offensive, increasing the likelihood that if Schmitt-Marquez had indeed communicated this to Manz he would have stopped. Communicating that you disliked a song is not the same as communicating that you are offended.

In the second incident, Schmitt-Marquez was part of a larger group of DNR employees who, along with Manz, were all generally speaking in an offensive manner. While others may have been offended by his conduct, the incident occurred after work hours and in a public setting. After work hours create a different scope of review as none of the employees are being paid or are required to be present. Schmitt-Marquez was not required to be present at this event and her attendance was entirely voluntary. If she was offended she could have left. She did not. Additionally, as the record shows, others were speaking in a similar style which

presents issues of disparate treatment and selective enforcement against Manz in this regard as the record shows no one else was disciplined by DNR for implied similar behavior.

The final incident also shows Schmitt-Marquez as an active participant in the offensive discussion. This incident occurred after the previous two incidents and the allegation of inappropriate touching. The record supports that Schmitt-Marquez was not required to be in a vehicle with Manz but instead volunteered to accompany him. It is troubling to understand how Manz could have had the impression that his behavior was offensive specific to Schmitt-Marquez considering not only the prior incidents that showed her to be a willing participant but also her willingness to have further contact with him during this trip. Likewise, the credibility of Schmitt-Marquez is affected. If Schmitt-Marquez had been as offended as she claims, it is unlikely that she would have volunteered to be trapped in a vehicle with Manz for two hours and subjected to further behavior that she would find offensive.

II. Inappropriate Touching.

The touching in question was a "hug." The record supports that hugs were given to multiple DNR employees by multiple DNR employees. To create a subjective analysis of what kind of "hug" is appropriate versus what is not is surely a road the DNR and the Commission both have very little interest in traversing. Again, issues regarding disparate treatment and selective enforcement against Manz create difficulties in sustaining a discharge based on this conduct.

III. Summary.

The actions of Manz were inappropriate and in violation of the DNR Manual, however, discharge is not the appropriate level of discipline. Schmitt-Marquez was never the subject of the inappropriate conversations, merely a participant, and one that gave the appearance of willingness to engage in such discussion. Offensiveness is the most subjective of definitions and, as has been often noted, what is offensive to some is to others art.[4] While no one is confusing Manz with Picasso, the point is still valid. Manz appeared to be genuinely surprised that Schmitt-Marquez was offended by his conduct.

[4] Society's view on what is and is not offensive is constantly evolving. In 1946, Disney produced "Song of the South," a movie that is considered offensive by today's standards. The Beatles wrote songs highly suggestive of and promoting drug usage which are now considered classics and today taught to children in music lessons. In the world of "rap" music, many songs produced in the 1980's were considered offensive at the time of release but are now considered mainstream classics. This in turn has created a move towards more provocative lyrics which, as time goes on, will likely be looked at more fondly by future generations. The cycle repeats itself. The standard changes over time from a macro-societal view and can only further be challenging to fit under definitions when looking at the interaction of two individuals, creating much importance on whether the communication was accepted, encouraged, or promoted. To assume offensiveness or to substitute the Commission's own feelings on the subject raises the risk of targeting marginal speech that could be offensive to some but not all.

The purpose of progressive discipline is to communicate that an employee's behavior is problematic and give the employee an opportunity to remedy the problem. Progressive discipline may be skipped in events where the conduct is severe enough to warrant it. Manz made a series of lewd comments that were, after the fact, reported as offensive by another employee. His actions lack the seriousness of behavior that typically involves the skipping of disciplinary steps. DNR's argument over concerns of future potential liability is grossly overstated. Any level of discipline commensurate with the seriousness of infraction following a first occurrence would help insulate the DNR from liability. Discharge was excessive in this regard. Manz showed a willingness to halt his behavior when someone showed a level of uncomfortableness, and the record supports that he would have responded well to a disciplinary action short of discharge.

It is important to note that Schmitt-Marquez was not the intended victim of any sexual harassment or otherwise targeted by Manz in his lewd verbalizations. Additionally, there is some concern over the timeline of behavior by Manz even when viewed in the light most favorable to Schimtt-Marquez. The first incident occurred six months prior to her reporting any offense at the statements made, and the "hugging" incident three months prior. Again, the credibility of Schmitt-Marquez's statement as to her subjective discomfort is diluted by the delay in reporting the incidents. Furthermore, the delay in reporting further took away from Manz any opportunity he had for notice of how his behavior may be affecting a coworker and his subsequent ability to remedy and reform.

Manz should have received discipline in this matter. A written warning in the first instance would have sufficed to alert Manz that his behavior was unacceptable to the DNR and his coworker. However, prior to the letter of discharge received by Manz, no one had directly communicated that his behavior was offensive. Discipline should have been progressive for a first offense and allowed Manz the opportunity to correct his behavior.

Signed at the City of Madison, Wisconsin, this 15th day of February 2016.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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James J. Daley, Commissioner