STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ANDREW J. TOMASZEWSKI, Appellant,

vs.

STATE OF WISCONSIN, DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0001
Case Type: PA

DECISION NO. 35077-B

Appearances:

James C. Koppelman, Attorney, Schmitt & Koppelman, S.C., 1029 E. Main Street, P.O. Box 176, Merrill, Wisconsin, appearing on behalf of Andrew J. Tomaszewski.

William H. Ramsey, Deputy Legal Counsel, Department of Administration, 101 E. Wilson Street, 10th Floor, P.O. Box 7864, Madison, Wisconsin, appearing on behalf of the Department of Corrections.

DECISION AND ORDER

On July 31, 2014, Andrew J. Tomaszewski filed an appeal with the Wisconsin Employment Relations Commission pursuant to § 230.44(1)(c), Stats., asserting that the State of Wisconsin, Department of Corrections had discharged him without just cause. Hearing on the matter was held in Merrill, Wisconsin, on September 24, 2015, before Examiner Lauri A. Millot. Following the hearing the parties filed briefs, whereupon the record was closed on February 24, 2016. To expedite disposition of this matter, the Commission has assumed direct jurisdiction over the appeal and reviewed the record.

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

FINDINGS OF FACT

1. At the time of his discharge, Andrew J. Tomaszewski was a Supervising Youth Counselor at the Copper Lake / Lincoln Hills School and had permanent status in class.

2. The Department of Corrections (DOC) is a State agency responsible for the operation of juvenile detention facilities. Copper Lake / Lincoln Hills School is a juvenile detention facility located in Irma, Wisconsin.

3. On April 19, 2014, Tomaszewski placed his hands on the shoulders of a female kitchen worker and kissed her on the back of the neck.

4. The contact was not of a sexual nature.

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 Corrections did not have just cause within the meaning of § 230.34(1)(a), Stats., to discharge Andrew J. Tomaszewski.

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

ORDER

The discharge of Andrew J. Tomaszewski is modified to a five-day suspension and the State of Wisconsin, Department of Corrections, shall reinstate Tomaszewski and make him whole for all lost wages and benefits less interim earnings. Any wage loss incurred during the period from December 1, 2014 through September 24, 2015 shall be excluded from the calculation.

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

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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James R. Scott, Chairman

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Rodney G. Pasch, Commissioner

James J. Daley, Commissioner

MEMORANDUM ACCOMPANYING DECISION AND ORDER

Andrew J. Tomaszewski, a 24-year employee with the Department of Corrections with an otherwise unblemished record, was discharged as a result of a brief contact with fellow employee Daisy Kubitschek. Tomaszewski, who was in uniform, approached three food service workers who were seated at a break table in the kitchen area. He asked the group who made the marinara sauce that had been served at dinner. Kubitschek acknowledged that she made the sauce and she concluded that Tomaszewski was about to complain that it was too spicy. She also put her head in her hands and slumped slightly forward. As a new employee on probation, Kubitschek was concerned and her posture reflected the anticipated criticism. Contrary to Kubitschek's concerns, Tomaszewski complimented her on the sauce and thanked her for her efforts. At the same time, he approached her from behind, put his arm on her shoulder, and lightly kissed her on the neck. Tomaszewski apologized soon thereafter and again the following day. Kubitschek did not consider the contact to be of a sexual nature. The only factual dispute for us to resolve is whether there was actual contact between Tomaszewski's lips and Kubitschek's neck. Kubitschek as well as the two witnesses say it was a kiss. Tomaszewski says it was not a kiss. The dispute may be more semantic than actual.

In any event, DOC believed discharge was appropriate and relied on three purported rule violations. DOC concluded that Tomaszewski violated Rule #2, which is a general prohibition against the violation of any written policy or procedure, including executive directives and administrative directives; Rule #6, falsification of records, including failure to provide truthful, accurate and complete information; and Rule #13, prohibition of harassment.

We can easily dispose of two of the three. We rarely see a DOC termination that does not involve a "failure to provide truthful, accurate and complete information" claim. It has become a standard "throw-in" on virtually any disciplinary matter. Any time there is a factual dispute between the accused and any witness or supervisor that is resolved against the appellant, he or she is charged with the violation of this rule. We have criticized this practice in the past. *See Sawall v DOC*, Decision No. 34019-D (WERC, 5/2015). While it is important for employees to be truthful in the performance of their duties, witnesses can differ in their interpretation and observations. Not every factual dispute is evidence of an intentional falsehood. Certainly employers often are required to resolve factual disputes between employees and supervisors. Accepting the supervisor's word and imposing discipline should not automatically result in a charge of intentional falsehood by the employee. This case is illustrative. Tomaszewski does not apparently believe that brushing one's lips against another person's neck constitutes a "kiss." Two witnesses and the recipient believed that it did. There is no proof that Tomaszewski intentionally lied and accordingly we reject the conclusion that he did lie. DOC relied on its determination that Tomaszewski intentionally lied as the sole basis for what it considered "a serious act of misconduct." This conclusion resulted in the decision to skip the progressive disciplinary process and terminate Tomaszewski. In light of our rejection of the "falsification" conclusion, we necessarily reject the decision to terminate Tomaszewski.

Harassment / Sexual Harassment

Rule #13 provides as follows:

> Harassment, including but not limited to harassment based on protected status (race, gender, religion, etc.), towards employees, the public, inmates, juveniles or offenders.

Neither the termination letter nor the brief of DOC specifies whether DOC concluded that Tomaszewski engaged in "harassment" or "sexual harassment." Perhaps from a disciplinary prospective the difference is not significant but DOC does define the actions differently.

According to DOC Executive Directive 7 (Resp. Ex.10), harassment is defined as:

> Harassment: Offensive verbal, physical or graphic conduct constitutes harassment when this conduct: 1) has the purpose or effect of creating a hostile, intimidating or offensive working environment; 2) has the purpose or effect of unreasonably interfering with an individual's work performance; or 3) otherwise adversely affects an individual's employment opportunities. Harassment is such offensive behavior when linked to protected status (race, sex, age, etc., for example.)

There is nothing in the record to suggest that Tomaszewski's contact with Kubitschek meets this definition.

We next turn to the definition of sexual harassment contained in Executive Directive 7:

> "Sexual harassment" includes unwelcome sexual advances, unwelcome physical contact, or unwelcome verbal or physical conduct of a sexual nature. "Unwelcome verbal or physical conduct of a sexual nature" includes, but is not limited to, the deliberate, repeated making of unsolicited gestures or comments, or the deliberate display of offensive sexually graphic materials which is not necessary for business purposes. Sexual harassment also includes general derogatory comments about either females or males.

Curiously, DOC's definition of sexual harassment partially mirrors the definition contained in a portion of the *Wisconsin Fair Employment Act*, § 111.31, et seq., Stats., with one notable difference. Section 111.32(13), Stats., reads in part:

> "Sexual harassment" means unwelcome sexual advances, unwelcome requests for sexual favors, unwelcome physical contact of a sexual nature or unwelcome verbal or physical conduct of a sexual nature.

The definition of sexual harassment contained in the directive includes "unwelcome physical contact" but omits the term "of a sexual nature" which is included in the statutory definition. This leads to conclude that at DOC any physical contact between employees regardless of intent is considered sexual harassment. We suspect most DOC employees are unaware that any unwelcome physical contact constitutes sexual harassment. Strictly speaking, Tomaszewski's actions did constitute unwelcome physical contact and accordingly the rule was violated.

The problem with incorporating legal definitions of sexual harassment from either the Wisconsin Fair Employment Act or Title VII of the Civil Rights Act of 1964 is that they define the level of conduct needed to prove that one has an actionable sex harassment claim. The interest of the employer is to prevent harassing behavior of a sexual nature before it develops into a viable claim. There is no doubt that the simple "peck in the neck" incident here would not support a valid employment discrimination claim. *Hilt-Dyson v. City of Chicago*, 282 F.3d 456 (7th Cir. 2001) (supervisor giving female employee unwelcome back rubs on two occasions does not state Title VII claim). Nevertheless, DOC does not want the conduct to persist to the point of developing into a claim and has a valid purpose in taking action to prevent conduct which might eventually lead to a sex harassment claim.

In our judgment, a five-day disciplinary suspension would have been more than adequate to alert all employees at the facility that this type of physical contact should not occur. Tomaszewski knew he made a mistake and apologized repeatedly. Kubitschek, the victim, had no interest in pursuing a complaint (someone else notified the manager) and did not consider the conduct sexual in nature.[1]

Remedy

In rejecting the discharge, we necessarily require reinstatement and back pay. Per our order of May 15, 2015, the back pay calculation shall exclude any wage loss occurring during the period from December 1, 2014 through September 24, 2015.

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

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

Rodney G. Pasch, Commissioner

[1] DOC might be wise to redraft their sexual harassment directive to more accurately define what types of conduct are barred from the workplace.

James J. Daley, Commissioner