STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CHRISTA MORRIS, Complainant,

vs.

DEPARTMENT OF CORRECTIONS, Respondent.

Case 226
No. 72198
PA(adv)-347

DECISION NO. 35682-A

Appearances:

Jim Parrett, Field Representative, Wisconsin State Employees Union, AFSCME Council 24, N14436 - 17th Avenue, Necedah, Wisconsin, appearing on behalf of Appellant Christa Morris.

Jim Underhill, Director-Bureau of Labor Relations, Office of State Employment Relations, 101 East Wilson Street, 4th Floor, Madison, Wisconsin, appearing on behalf of Respondent Department of Corrections.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Christa Morris was discharged by the State of Wisconsin, Department of Corrections. She appealed her discharge to the Wisconsin Employment Relations Commission. Hearing on the discharge appeal was held in Boscobel, Wisconsin, on December 9, 2014, before Examiner Raleigh Jones. On April 28, 2015, Examiner Jones issued a proposed decision concluding that the discharge was for just cause. No objections to the proposed decision were filed and the matter was ripe for Commission consideration on May 29, 2015.

Having reviewed the record, the following findings are made.

FINDINGS OF FACT

1. Respondent Department of Corrections (DOC) is a state agency responsible for the operation of adult correctional facilities, including the Wisconsin Secure Protection Facility (WSPF) located in Boscobel, Wisconsin.

2. Appellant Christa Morris was employed as a correctional officer for thirteen years until her discharge on May 9, 2013.

3. Morris was discharged for violating various work rules. More specifically, she brought a personal cell phone into WSPF.

4. On March 25, 2013, supervisors confronted Morris and inquired as to whether she had a cell phone on the premises. Morris denied that she did.

5. During the course of the subsequent investigation, Morris took steps to conceal the cell phone.

6. Later that same day, staff located Morris' cell phone concealed under some boxes in the break room.

7. During the course of the day, Morris had repeatedly denied that she had her cell phone on the premises.

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

CONCLUSIONS OF LAW

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

2. By her conduct described above, Morris violated DOC work rules, and, accordingly, there was just cause within the meaning of § 230.34(1)(a), Stats., for the discharge.

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

ORDER

Pursuant to § 230.44(4)(c), Stats., the discharge of Christa Morris is affirmed.

Signed at the City of Madison, Wisconsin, this 15th day of July 2015.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

Rodney G. Pasch, Commissioner

James J. Daley, Commissioner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

There are a variety of reasons why persons incarcerated in penal institutions are barred from having cell phones. One way to limit the risk of prisoner access to cell phones is to limit the employees who work at the facility from bringing their personal cell phones into the institution (or at least into the areas where prisoners might access them). That limitation is a hard and fast rule of the DOC; violation of which results in punishment of varying degrees. Here Morris clearly broke the rule and then proceeded to engage in a pattern of deception that aggravated the initial offense. Morris repeatedly denied the violation and then "passed" the phone to a coworker in order that he could conceal the phone on the premises. Subsequently, management found the concealed cell phone in the breakroom hidden under some boxes.

Morris had been sent home earlier that same day and apparently had pangs of regret over her previous acts of deception. Morris phoned Lt. Esser and told him that she had brought the cell phone into the institution and that she had hidden it in the breakroom. Any hope that her sudden disclosure would gain good will was dashed by the fact that Esser had already found the phone. If anything, Morris' "disclosure" made it worse as she once again avoided the truth. Morris of course had not hidden the phone in the breakroom; that was the work of her coworker. The DOC had an employee who violated a clear rule, lied about the rule violation, involved a coworker in an attempt to deceive, and finally lied in an attempt to shield the coworker. All of this culminated in the discharge of Morris and in our judgment a decision supported by ample just cause.

Morris argues that others brought cell phones into the institution (both the facility she worked at and other prisons) and received lesser discipline. We have long recognized that disparities in discipline may, under certain circumstances, undermine an assertion that just cause exists. Underlying that position is the notion that if an employer treats one employee significantly more harshly than a similarly situated coworker there must be something other than the misconduct itself that caused the disparity. The argument is also made with regard to lesser penalties but is of less consequence in those matters. We are far more willing to defer to management's discretion when the disparity is between discipline short of discharge.

We have no statutory obligation to require consistency in treatment. The principle no doubt grows out of the traditional contractual grievance arbitration process. Generally, labor arbitrators require that "all employees who engage in the same type of misconduct must be treated essentially the same, unless a reasonable basis exists for variations in the assessment of punishment." *See gen.* How Arbitration Works, Elkouri and Elkouri, 6th ed., pp.995-99.

The concept of disparate treatment in discipline is also a frequent issue in employment discrimination litigation. Court decisions in that area have provided extensive guidance on how to apply the disparate treatment analysis. In labor arbitration cases the group within which to make comparisons is typically the bargaining unit or some smaller group within the bargaining

unit. The employment discrimination analysis focuses on employees who are "similarly situated" and that term is defined to include employees who "had the same supervisor, were subject to the same employment standards and engaged in similar conduct." *Mayors v. General Electric Co.*, 714 F.3d 527, 528 (7th Cir. 2013).

In our cases we have never clearly specified the "groups" from which the comparables are drawn. We believe the appropriate "group" would be employees subject to the same rules or standards and with the same decision maker applying those rules. If the agency, however, creates a policy pledging consistency of treatment within a larger group, we will accept that designation. Consistent treatment of employees in terms of discipline has the virtue of providing fair notice of the types of misdeeds and the type of work record that will result in discharge. It also fosters a belief that the employer is fairly applying its rules and making fair and equitable decisions consistent with due process.

In addition to making comparisons between employees within a specified group, the comparison must involve the same misconduct occurring under similar circumstances. If for example an employee is discharged for theft, we will examine comparable treatment of employees disciplined for theft. We will not compare a discharge for theft with, for example, discipline for fighting or insubordination. The decision as to the gravity of certain offenses is that of the employer not those charged with "just cause" determinations. The term "similar circumstances" also requires that the employees have similar work records. An employee who has worked his way through the progressive discipline regimen will not be compared to someone with a good record who commits the same offense.

Finally, we turn to the burden of proof. While the state as the employer bears the overall burden of proof it is not obliged to prove consistency of treatment. An employee who asserts that his conduct should be excused or his discipline reduced because comparable coworkers were treated more favorably has the burden of proving that contention. Employees pursuing § 230.44, Stats., appeals are entitled to the full range of discovery available in civil matters and are in a position to obtain that type of information. After presenting evidence of disparate treatment involving similarly situated employees the burden will shift back to the state to rebut the claimed disparity.

In any event, in this case, none of the purportedly comparable situations come anywhere close to being similar to the conduct Morris engaged in. Her discharge was fully warranted.

Signed at the City of Madison, Wisconsin, this 15th day of July 2015.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

Rodney G. Pasch, Commissioner

James J. Daley, Commissioner