STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RILEY CLIFFORD, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0112
Case Type: PA

DECISION NO. 36727

Appearances:

Ronald English, Attorney, Hippenmeyer, Reilly, Moodie & Blum, S.C., 720 Clinton Street, Post Office Box 766, Waukesha, Wisconsin, appearing on behalf of Riley Clifford.

Amesia Xiong and William Ramsey, Attorneys, Wisconsin Department of Administration, 101 East Wilson Street, 10th Floor, P.O. Box 7864, Madison, Wisconsin, appearing on behalf of the State of Wisconsin, Department of Corrections.

DECISION AND ORDER

On January 21, 2016, Riley Clifford filed a timely appeal with the Wisconsin Employment Relations Commission, pursuant to § 230.44(1)(c), Stats., asserting that he had been discharged without just cause by the State of Wisconsin Department of Corrections. The Commission assigned Danielle L. Carne to serve as hearing examiner. After a motion for consolidation with another appeal pending before the Commission was argued and denied, hearing in this matter was held on June 12, 2016, in Glendale, Wisconsin. The State made an oral argument at hearing; Clifford submitted a written argument; and the record was closed on September 12, 2016, when the State waived the opportunity to file a reply argument.

On October 12, 2016, Examiner Carne issued a proposed decision rejecting the discharge. The State filed objections and Clifford filed a request for fees and costs which the State opposed. The matter became ripe for Commission consideration on November 17, 2016.

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

FINDINGS OF FACT

1. The Department of Corrections is an agency of the State of Wisconsin which operates prisons and correctional facilities. One such facility is the Milwaukee Secure Detention Facility ("MSDF") located in Milwaukee, Wisconsin.

2. Starting in 2005, Riley Clifford became employed as a Correctional Officer at MSDF.

3. During a period of time of several years prior to 2012, Clifford and a group of coworkers engaged in a series of practical jokes. The pranks generally were of a sexual nature involving implications that the victim was gay.

4. In June of 2015, a male coworker who was not a part of the clique of pranksters had a sticker resembling a gay rights flag placed on his vehicle in the employee parking lot.

5. The coworker, believing that Clifford was responsible, played an elaborate prank on Clifford strongly implying that Clifford was gay.

6. Clifford filed a complaint with management about the prank and the coworker was terminated following an investigation.

7. During the course of the investigation, Clifford acknowledged that he was involved in pranks prior to 2012.

8. DOC conducted an investigation of Clifford and concluded that he violated DOC's harassment policy and discharged him.

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 Riley Clifford.

3. That the State of Wisconsin Department of Corrections' decision was not substantially justified in discharging Clifford within the meaning of § 227.485(5), Stats.

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

ORDER

1. The discharge of Riley Clifford is rejected. The State of Wisconsin Department of Corrections shall reinstate Clifford and make him whole for all wages and benefits lost as a result of the discharge.

2. That an award of fees and costs will be entered upon submission of proper documentation as specified herein.

Signed at the City of Madison, Wisconsin, this 13th day of February 2017.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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James R. Scott, Chairman

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Rodney G. Pasch, Commissioner

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James J. Daley, Commissioner

MEMORANDUM ACCOMPANYING DECISION AND ORDER

For a period of several years prior to the summer of 2015, Riley Clifford and a group of his fellow employee friends would occasionally play practical jokes on each other. The level of humor was equivalent to that of junior high males and Clifford was certainly the ring leader. None of the participants complained and the "activities" took place off duty but often involved employee vehicles parked in an attached facility. The themes were generally sexual including naked pictures of males placed on windshields or in sunroofs or cracked windows; hotdogs carved to look like penises placed on vehicle antennae or windshields. At times, employee's backpacks were stuffed with soap or tampons. At some time in 2015, a gay rights rainbow sticker was placed on vehicle bumpers.

In June of 2015, the gay rights sticker was placed on employee Brian Bitzer's vehicle. Bitzer took particular offense at the implied suggestion that he was gay. While not a participant in the Clifford group of pranksters, Bitzer was aware that Clifford was at the center of that circle. Bitzer apparently decided that Clifford needed a lesson in how to conduct a real practical joke. He set up a website with the address www.rileycliffordcomingout.com and proceeded to create cards recognizing Clifford's one-year anniversary of a gay relationship with another male and referencing the "coming out" on the website. The website itself referenced a party to be held in the future honoring the "event." The "cards" were widely disseminated throughout the facility and the website had over 2,000 hits in its first month.

Clifford did not accept the prank and chose to complain to management. DOC investigated finding that Bitzer was responsible and terminated him. During the course of the investigation, DOC learned that Clifford himself had been involved in several pranks over the years and they discharged him as well. Bitzer chose not to appeal but Clifford has. The examiner concluded that DOC lacked just cause for the discharge and we agree. Simply put, the termination decision was not supported by either facts or the legal basis for the action.

At the hearing in this matter, DOC explained the basis for its conclusion that Clifford had violated DOC's harassment policy. Deputy Warden Guillonta testified as follows:

> We felt strongly that he targeted the gay community with (not) only the sexually innuendos, the playing cards, the pride stickers and the male penis made out of a hotdog putting it on people's cars. He specifically targeted the gay community.

Tr.121-122. DOC's harassment policy prohibited "harassment" based upon a protected class status including sexual orientation. It defines harassment as "unwelcome conduct" which is "severe and pervasive" and which a reasonable person would find intimidating, hostile, or abusive. Clifford's practical jokes were not "unwelcome conduct." The employees who testified they had been the subject of (and in some cases participants in) the jokes thought them funny. They were not "severe or pervasive" nor was there any evidence that gays were singled

out or "targeted." While the jokes were juvenile and in poor taste, they did not create an intimidating, hostile, or abusive work environment.

In addition to the fact that the conduct in question did not violate the work rules that formed the basis for the termination the factual proof is weak. While Clifford and others acknowledged the pranks, all of the witnesses testified that the conduct had occurred three to five years prior to the investigation. While the state produced a number of coworkers, no one testified they were offended by the conduct.

While Clifford was charged with violating four different work rules, evidence at the hearing reflected the fact that DOC's anti-harassment policy as set forth in Executive Directive 5 was the real basis for the decision to terminate. That leaves us with a discharge in which the admitted conduct does not violate the policy used to justify the decision. If you are going to fire someone for harassment as you define it, it would be prudent to make sure you can prove the conduct violates the rule.

We also note that with the exception of the gay pride stickers the pranks occurred three to five years prior to the investigation. While some witnesses assumed that Clifford was behind the stickers, he denied that fact and there was evidence to contrary.

This is not to suggest that DOC could not have taken aggressive action to ban practical jokes of any nature even though they discovered the events years after the fact. The firing of Bitzer most likely would have sent a clear message but even a stern warning to Clifford might well have ended the practice. The decision to fire Clifford using a policy he did not violate simply went too far. Had these same pranks been directed at a gay coworker this would be an entirely different case. There simply was no evidence produced to suggest that the gay community was "targeted." At best, DOC misinterpreted its own policy resulting in the conclusion that there was no just cause for discipline imposed here.

ATTORNEY FEES

Counsel for Clifford prematurely submitted a request for fees in this matter apparently assuming he would prevail. DOC filed a brief in opposition and we therefore are in a position to attempt to resolve this issue.

Our ability to award attorney fees and costs in Chapter 230 discipline cases is limited by the provisions of § 227.485, Stats. A qualified prevailing party is entitled to costs unless the examiner "finds that the state agency which is the losing party was substantially justified in taking its position or that special circumstances exist that would make the award unjust."

To establish that its position was substantially justified, the state must demonstrate:

(1) a reasonable basis in truth for the facts alleged;
(2) a reasonable basis in law for the theory propounded; and
(3) a reasonable connection between the facts alleged and the legal theory advanced.

Sheely v. Wisconsin Department of Health & Social Services, 150 Wis.2d 320, 337, 442 N.W.2d 1 (1989). In evaluating the agency's position, it is appropriate to look at "the underlying government conduct at issue and the totality of the circumstances present before and during litigation." *Bracegirdle v. Department of Regulation and Licensing*, 159 Wis.2d 402, 425, 464 N.W.2d 111 (Ct. App. 1990). The case itself must have "sufficient merit to negate an inference that the government was coming down on its small opponent in a careless and oppressive fashion." *U.S. v. Thouvenot, Wade and Moerschen, Inc.*, 596 F.3d 378, 381-2 (7th Cir. 2010).[1]

I. IS A FEE AWARD WARRANTED?

Our discussion above demonstrates that DOC failed to meet the "substantially justified" standard. The facts themselves are not in dispute so the factual basis for DOC's actions is not in dispute. The legal basis for the actions is clearly erroneous as we have concluded and, as should have been obvious, Clifford's conduct did not violate the anti-harassment rule. On that basis alone a fee award is justified.

II. AMOUNT TO BE AWARDED.

The calculation of the fee award is controlled by § 814.245(5), Stats. In this case, we received what is essentially a lump sum request. We have no basis for determining the hourly rate or the amount of time spent on particular itemized work performed. The allowable hourly rate is determined by the statute with cost of living adjustments. We have the inherent task of determining reasonableness. On its face, the amount requested appears reasonable but we have no basis for determining that fact. While we could disallow the request based upon an inadequate submission, we do note the state has not objected to the amount or the lack of detail. Accordingly, we will direct Clifford's counsel to prepare and submit a detailed description of time spent per activity, together with the hourly rate, to the Commission within ten days of this order. If the state chooses to respond, they may do so within ten days thereafter. We will at that time issue an amended order awarding fees and costs.

[1] The statute itself is modeled after the Federal Equal Access to Justice Act and is read in conjunction with § 814.245, Stats. *Sheely* at 335.

Signed at the City of Madison, Wisconsin, this 13th day of February 2017.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

Rodney G. Pasch, Commissioner

James J. Daley, Commissioner