

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

AMANDA WATERMAN, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0147

Case Type: PA

DECISION NO. 36741

Appearances:

Amanda Waterman, W10095 State Hwy 82, Elroy, Wisconsin, appearing on her own behalf.

Andrea L. Olmanson, Attorney, Department of Corrections, 3099 E. Washington Avenue, Post Office Box 7925, Madison, Wisconsin, appeared on behalf of the State of Wisconsin Department of Corrections.

DECISION AND ORDER

On May 16, 2016, Amanda Waterman filed an appeal with the Wisconsin Employment Relations Commission, pursuant to § 230.44(1)(c), Stats., asserting that she had been suspended from her employment for three days without just cause by the State of Wisconsin Department of Corrections. The Commission assigned the appeal to Examiner Karl R. Hanson who conducted a hearing on August 22, 2016, in New Lisbon, Wisconsin.¹ The parties filed written arguments, the last of which was received on September 12, 2016.

On November 2, 2016, Examiner Hanson issued a proposed decision modifying the three-day suspension to a one-day suspension. The State filed objections and the matter became ripe for Commission consideration on November 28, 2016.

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

FINDINGS OF FACT

1. Amanda Waterman is employed by the State of Wisconsin Department of Corrections and had permanent status in class at the time she was disciplined.

¹ This matter was consolidated for purposes of hearing with two other appeals brought by Waterman against the Department of Corrections.

2. On October 22, 2015, Waterman said to another correctional officer “you must suck better dick than me” when she was sent to relieve him at his post in the New Lisbon Correctional Institution.

3. Waterman was disciplined with a three-day suspension on December 21, 2015, by the Department of Corrections for her October 22, 2015 conduct.

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 had just cause within the meaning of § 230.34(1)(a), Stats., to suspend Amanda Waterman for one day.

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

ORDER

The discipline received by Amanda Waterman is modified to be a one-day suspension instead of a three-day suspension. The State of Wisconsin Department of Corrections shall make her whole for lost wages and benefits.

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

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

Rodney G. Pasch, Commissioner

James J. Daley, Commissioner

MEMORANDUM ACCOMPANYING DECISION AND ORDER

Section 230.34(1)(a), Stats., provides in pertinent part the following as to certain employees of the State of Wisconsin:

An employee with permanent status in class ... may be removed, suspended without pay, discharged, reduced in base pay, or demoted only for just cause.

Section 230.44(1)(c), Stats., provides that a State employee with permanent status in class:

... may appeal a demotion, layoff, suspension, discharge or reduction in base pay to the commission ... if the appeal alleges that the decision was not based on just cause.

Amanda Waterman had permanent status in class at the time of her three-day suspension without pay and her appeal alleges that the discipline was not based on just cause.

The State has the burden of proof to establish that Waterman was guilty of the alleged misconduct and whether the misconduct constitutes just cause for the discipline imposed. *Reinke v. Personnel Bd.*, 53 Wis.2d 123 (1971); *Safransky v. Personnel Bd.*, 62 Wis.2d 464 (1974).

On October 22, 2015, Waterman was sent to relieve another correctional officer, Chris Towne, from his post at the New Lisbon Correctional Institution (“NLCI”). When she arrived, Waterman said “you must suck dick better than me” to Towne. She repeated a similar statement regarding Towne to a third correctional officer who called that post later looking for Towne.

Waterman admits she made the statement to Towne, acknowledges that the statement was inappropriate, and accepts that a one-day suspension is a reasonable level of discipline. DOC argues that a three-day suspension was not excessive due to the seriousness of Waterman’s statement.

DOC imposes discipline against employees based upon an executive directive that establishes a system of discipline for employee violations of work rules. Generally, DOC advances employees progressively through six steps of discipline, but DOC reserved the ability to skip levels of discipline for serious violations, some of which are enumerated. The enumerated serious offenses include misconduct such as theft, possession of drugs, lying to management, violations of criminal statutes, and sexual misconduct with offenders, inmates or juveniles. The enumerated serious offenses do not include sexual harassment or violations of non-criminal statutes.

The Commission is not constrained to adhere to DOC's system of progressive discipline. The Commission, however, prefers to not second guess state agencies with regard to the level of a suspension imposed when the agency has proven that misconduct occurred and that suspension of some form was warranted. A three-day suspension was nonetheless excessive in this case.

Waterman readily admitted what she said. She made no effort to dissemble or hide her conduct. She concedes that she engaged in misconduct and accepts that some form of discipline was warranted. Waterman argues that her misconduct did not rise to the level of "serious misconduct" and therefore under DOC's disciplinary policy, progressive discipline ought to have been followed.

The former NLCI warden testified that progressive discipline, a one-day suspension, was skipped in favor of a three-day suspension because he characterized Waterman's misconduct as serious. He testified that the misconduct was serious because it was – in his opinion – sexual harassment and the Prison Rape Elimination Act prohibits hiring or promoting employees who engage in sexual harassment. No further testimony, evidence, or argument was made by a witness or counsel regarding whether Waterman's single comment in the given circumstances does or may meet the legal definition of sexual harassment; nor did DOC make any argument regarding the applicability of the Prison Rape Elimination Act.

The warden's testimony necessarily begs one or more legal conclusions. There was no showing of what steps were taken to make any determination that Waterman's comment to Towne was sexual harassment. DOC failed to make any argument or cite law that would allow for such a conclusion on the record of this matter. Instead, in its brief, DOC concludes that Waterman's comment was sexual harassment because the warden testified that it was.

In its brief, DOC argues that Waterman's conduct was egregious because Waterman had been sent to diversity in the workplace training after harassing a different coworker regarding his religious beliefs. DOC argues that stronger discipline was necessary because if it did not "nip" Waterman's behavior in the "bud," Towne could sue DOC for ignoring sexual harassment. The warden, however, did not testify that this was a reason for the skip in progression. Additionally, DOC did not demonstrate that in these particular circumstances Waterman's misconduct amounted to sexual harassment that could lead to a potential claim against the agency by Towne.

The warden stated that, during his tenure as a warden, comments such as Waterman's variously led to verbal warnings, progressive discipline, or more severe discipline that skipped progressive steps, based upon the case then at hand. The warden testified in detail about only one case. An employee was disciplined for making sexually charged comments. The comments were made to an inmate in the presence of a female staff member who found them to be offensive. The employee received progressive discipline.

Waterman's statement was inappropriate for the workplace. Discipline was warranted. In this matter, DOC failed to prove why Waterman's conduct was more serious than any other

employee's work rule violation. They have similarly failed to prove that they treat similarly situated employees the same – skipping disciplinary steps for similar comments. To the contrary, it appears from the warden's testimony that a similarly situated employee received progressive discipline without skipping any steps.

DOC had just cause to suspend Waterman for one day, the next step for her in DOC's established system of progressive discipline.

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

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

Rodney G. Pasch, Commissioner

James J. Daley, Commissioner