

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JASON P. CARLSON, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0175

Case Type: PA

DECISION NO. 36922

Appearances:

William E. Morgan, Murphy Desmond S.C., 33 E. Main Street, Suite 500, Post Office Box 2038, Madison, Wisconsin, appearing on behalf of Jason Carlson.

Cara J. Larson, Department of Administration, 101 E. Wilson Street, 10th Floor, Post Office Box 7864, Madison, Wisconsin, appeared on behalf of State of Wisconsin, Department of Corrections.

DECISION AND ORDER

On September 12, 2016, Appellant Jason Carlson filed an appeal with the Wisconsin Employment Relations Commission, pursuant to § 230.44(1)(c), Stats., asserting that he had been discharged from his employment without just cause by the State of Wisconsin Department of Corrections. The Commission assigned the appeal to Hearing Examiner Karl R. Hanson who conducted a hearing on December 29, 2016, and January 5, 2017, in Black River Falls, Wisconsin.¹ The parties filed written arguments, the last of which was received by the Commission on February 14, 2017.

On March 21, 2017, Examiner Hanson issued a Proposed Decision and Order upholding the discharge. Carlson filed objections and the matter became ripe for Commission consideration on May 1, 2017.

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

¹ A hearing was originally scheduled for October 24, 2016, and then December 9, 2016. These hearing dates were adjourned due to Carlson's last minute engagement of counsel and then change of counsel on the eve of hearing.

FINDINGS OF FACT

1. Jason Carlson was employed by the State of Wisconsin Department of Corrections for over twenty years and had permanent status in class at the time he was discharged from his employment.

2. In the months prior to May 2016 (when he was placed on administrative leave), Carlson harassed and demeaned two of his coworkers at Jackson Correctional Institution.

3. Carlson was discharged from employment with the Department of Corrections on June 20, 2016, for the misconduct referenced in Finding of Fact 2.

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 discharge Jason Carlson.

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

ORDER

The discharge of Jason Carlson is affirmed.

Signed at the City of Madison, Wisconsin, this 15th day of May, 2017.

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.

Jason Carlson had permanent status in class at the time he was discharged from his employment with the Department of Corrections (“DOC”), and his appeal alleges that the discharge was not based on just cause.

The State has the burden of proof to establish that Carlson 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). The courts have equated this burden to a reasonable certainty by the greater weight or clear preponderance of the evidence. *Reinke v. Personnel Bd.*, *id.*; *Hogoboom v. Wis. Personnel Comm.*, Dane County Circuit Court, 81-CV 56669, 4/23/84; *Jackson v. State Personnel Bd.*, Dane County Circuit Court, No. 164-086, 2/26/79.

At the time of his discharge, Carlson had worked at DOC for over twenty years. During that time he received favorable performance evaluations and received no adverse disciplinary action. In the summer of 2015, Carlson was promoted to the rank of correctional sergeant. A correctional sergeant functions as a lead worker, but does not supervise or manage other DOC employees. Carlson agrees that a lead worker is to set a positive example for others.

On or about May 2, 2016, Correctional Officer Dana Sendelbach called Carlson to report that an inmate forgot his identification card in the toolbox kept in Carlson’s work area. When she ended the phone call, Sendelbach was visibly upset and reluctantly met Carlson to retrieve the identification card. Sendelbach told her coworker, Correctional Sergeant Mark Weiss,² that in response to her inquiries about the identification card Carlson said something similar to, “I’d like to get into your toolbox.”

Weiss reported this to a supervisor. DOC subsequently placed Carlson on paid administrative leave and started an investigation into allegations of inappropriate conduct by Carlson.

² Weiss was not called to testify in this matter. He sent an email to a supervisor on May 2, 2016, reporting Sendelbach’s conversation with Carlson and how it appeared to affect her.

The identification card incident was not Carlson's first inappropriate or sexually demeaning incident with Sendelbach. When she was looking for housing closer to Jackson Correctional Institution ("JCI"), Carlson helpfully forwarded her information regarding rental properties available in the area. He also inappropriately commented to her that he could not rent her a room because, "he could not trust himself around her." On another occasion, Carlson suggested to Sendelbach that she should be his mistress.

When the two of them traveled to hospitals to guard inmate-patients, Carlson would rate female nursing staff on a 1 to 10 "hot or not scale" for Sendelbach.³ This made her uncomfortable. He would further ask Sendelbach how many beers it would take for her to "do" male hospital staff that crossed their path. Carlson repeatedly asked Sendelbach how many times she thinks about sex in a day and how many times she thinks about sex while walking through the mall.

In an episode seemingly straight out of an old prevention of sexual harassment in the workplace training course, Carlson asked to borrow Sendelbach's pen. She gave him a pen, he purposefully dropped it, and then asked her to pick it up. He laughed with another male officer as she squatted to pick it up. Carlson does not deny the incident occurred. Instead, he says that, while he does not remember it, if it occurred it would have only happened because they were joking around. He adds that he "wouldn't do it to demoralize her or anything."

All of these interactions made Sendelbach uncomfortable. But, she did not feel comfortable reporting Carlson's behavior.⁴ Sendelbach disliked working with Carlson because of his behavior. At times when they were assigned to work together, Sendelbach sought to spend time alone in a guard tower. Carlson argues that, because Sendelbach did not avail herself of every opportunity to work in the guard tower to get away from him, she must not have been too troubled by the interactions. He argues that her failure to do so after one incident in particular is telling. It is, however, not necessary for Sendelbach to remove herself from Carlson's presence at every opportunity to validate her claims of discomfort.

Similarly, it is not necessary for Sendelbach to be a saint. Carlson and another witness, Correctional Officer Jason Abbott, recount vulgar, profane, and sexually provocative conversations that Sendelbach willingly engaged in. That is not a defense to Carlson's inappropriate behavior, nor does it mitigate the seriousness of his conduct. *See Manz v. DNR*, Dec. No. 35022-A (WERC, 2/2016). It is, in fact, "of no relevance to the just cause question." *Id.* Engaging in such behavior at all carries the risk of sanction for Carlson. Carlson does not get to decide where mutual participation in inappropriate conversations ends and harassment or demeaning behavior begins. Carlson was wrong the moment he engaged in inappropriate conversation and behavior, regardless of Sendelbach's past conversations with him or anyone else. The fact that he accepted such risk and continued his course of conduct to the point that

³ Carlson would also ask Correctional Officer Rigoberto Rodriguez-Infante, "Would you?" when pictures of female country music stars appeared on his computer's changing photo gallery. Both Carlson and Rodriguez-Infante understood the question to mean, "would you have sex with her?"

⁴ DOC characterizes this discomfort as fear of retaliation by Carlson. But Sendelbach was not the only person uncomfortable coming forward. None of the witnesses reported their concerns until questioned by management and then provided their statements reluctantly. DOC may be wise to examine what that says about JCI employee faith and trust in management as well.

Sendelbach was subjectively uncomfortable does not alter the conclusion that his conduct was objectively demeaning and harassing from the start.⁵

Sendelbach was not the only target of Carlson's demeaning and harassing conduct. Just before Correctional Officer Betsy Laufenberg's boyfriend returned from an overseas business trip, Carlson said to her, "I bet you can't wait to get that dick." He did so while sitting with his feet spread apart on his desk and thrusting his hips. Carlson admits that he made the statement but equivocates regarding the gesticulation. He testified that it does not sound like something he would do and that he does not remember doing it. Laufenberg recalls Carlson's hip thrusting and that an inmate was nearby during this interaction. She is rightly troubled by the potential problems created for her and JCI if an inmate overhears such comments and observes the associated body movement. Although he cannot definitively remember whether or not he moved his hips, Carlson says that no inmate was present. Laufenberg's testimony is much more credible than Carlson's self-serving recollections. Correctional Officer Chad McCune also witnessed the interaction and his testimony was substantially similar to that of Laufenberg.⁶

DOC proved that Carlson engaged in the behavior discussed above. The behavior demeaned and harassed Sendelbach and Laufenberg based on their gender. DOC is right to proscribe such behavior. Unlike more mundane work rule violations, Carlson's repeated conduct had the potential to create liability for DOC under laws intended to end sexual harassment in the workplace. This potential justifies strong action by DOC. Even after taking into account his years of service and positive work history, DOC had just cause to discharge Carlson from employment for his behavior recounted above. This carries the added benefit of sending a clear message to all employees at JCI that such behavior will not be tolerated.

Carlson argues this level of discipline should be mitigated due to the sophomoric climate that appears to exist at JCI.⁷ DOC's policies and the JCI warden are emphatic that behavior such as that exhibited by Carlson is not tolerated in any form. Nonetheless, the testimony received at hearing shows that vulgarity is widely used among the staff. This seems to be accepted on the specious premise that the job is difficult and the staff needs latitude to make the best of it. Possessing a difficult or stressful job is not an excuse for demeaning or harassing one's coworkers.

⁵ Regardless of the point in time at which Sendelbach felt demeaned or harassed, DOC, as an employer, has the right to prohibit demeaning and harassing behavior. DOC generally has an obligation to notify its employees what is "over the line" in a situation where the conduct may be a "close call" under its work rules. Here, Carlson's behavior was so far over any line of acceptable conduct that Carlson cannot reasonably claim he needed notice regarding where the line was drawn. DOC has the right to assess Carlson's behavior in light of when it objectively *may* become a problem, not just when it subjectively and *actually* becomes a problem for a particular victim.

⁶ McCune appeared visibly upset with Carlson at the time he testified; his testimony was nonetheless credible.

⁷ Allowing a vulgar work climate to develop at JCI may affect DOC's level of potential liability exposure in other forums. That does not diminish Carlson's level of responsibility for his own demeaning and harassing conduct tested under the just cause standard applicable here. A pervasively vulgar work climate may be a sufficient mitigating factor to prevent DOC from having just cause to discipline an employee for using vulgarity. Carlson makes this argument. He argues that due to the vulgar climate at JCI, he should not be disciplined for using the word "dick in conversation." Carlson, however, mischaracterizes the reason for his discipline. He was not disciplined for using the word "dick" while talking with Laufenberg. He was disciplined, in part, for using that word within a lewd sentence and with an accompanying gesture to demean Laufenberg and harass her based on her gender.

Despite any vulgar work environment, a reasonable person ought to know that Carlson's behavior was wrong. Carlson's failure to appreciate this, despite his years of work history and role as a lead worker, tends to show that progressive discipline would not correct Carlson's behavior or protect DOC from potential liability created by it.

Carlson correctly argues that DOC has not proven all of the allegations contained in its discharge letter. DOC did not prove that Carlson was responsible for creating or spreading rumors about a relationship between Sendelbach, a young officer, and McCune, one of Carlson's contemporaries. The record shows that Carlson responded to a question from Sendelbach about the rumor. Sendelbach took Carlson's tone to be lecturing and unwelcome. There is no evidence, however, that it was demeaning, harassing, or an exercise of poor judgment.

Similarly, the allegations about racially inappropriate comments made by Carlson were not proven in the record of this matter. One alleged victim, Correctional Officer Rigoberto Rodriguez-Infante, testified that nothing inappropriate transpired between himself and Carlson. That testimony is at odds with what Rodriguez-Infante previously told other staff members and DOC's investigators. Nonetheless, the preponderance of the evidence does not show that Carlson demeaned or harassed Rodriguez-Infante or exercised poor judgment while interacting with him. Additionally, no satisfactory evidence was received to find that Carlson referred to a black correctional officer and/or a member of his family as a gorilla.

Other allegations against Carlson were proven. DOC, however, did not have just cause to discipline Carlson for them. It is inappropriate and an exercise of poor judgment for Carlson to repeatedly talk about another correctional officer's head and house exploding. But, DOC's supervisors were aware of this conduct for some time and did nothing to stop it. DOC's acquiescence to such behavior from Carlson without sanction results in DOC forfeiting just cause to discipline him now. Similarly, DOC forfeited just cause to discipline Carlson for recounting a story about causing another correctional officer to gag on a banana while making a lewd comment. A supervisor witnessed the incident without any admonishment to Carlson. In the years since it occurred, he claims to have recounted the story about twenty times. Also, when Carlson told Captain Sheldon Best that the security director had the backbone of a jellyfish, Best did not reprimand Carlson. Subsequently, when Best served as one of the investigators in this matter, the allegation found its way into Carlson's discipline.

Carlson argues that the Commission must take into account that others at JCI received less severe discipline for misconduct. He offered uncorroborated hearsay from Correctional Officer Denise Olson that, at some time in the past, Correctional Officer Scott Harbridge was not disciplined for repeatedly intimidating a female DOC employee. Olson's testimony lacked sufficient detail and reliability to allow for a comparison. She made no assertion that Harbridge's conduct was demeaning or harassment of a sexual nature.

Former Correctional Officer David Oestreich testified that as a probationary employee he received a letter of reprimand for making a comment about "sucking dick" to a female employee. This occurred about the same time that some of Carlson's misconduct occurred. Oestreich's misconduct is distinguished from Carlson's in that it occurred once, not repeatedly, he admitted that he was wrong to make his statement, and he did not have the years of training and maturity that should have prevented Carlson's behavior.

Unlike Oestreich, Captain Corey Rahlf, a longtime DOC employee certainly should have had the appropriate training and maturity for his position. In the Spring of 2016, Rahlf, who previously achieved the rank of captain, worked at JCI on a probationary transfer. He remained a captain, but failed his probationary transfer and received progressive discipline after two incidents at JCI. In the first, he told a subordinate officer that he “didn’t give a fuck” about an issue that the officer brought to his attention. In the second, he told a female DOC employee that if one sat close enough to a certain female employee one could smell her crotch.

The latter comment was demeaning. Rahlf was sanctioned for two, comparatively isolated violations. One of Rahlf’s violations is comparable here. Rahlf’s probationary transfer ended unfavorably and he received progressive discipline⁸ for the violation of a work rule related to demeaning an employee indirectly. It is not excessive that DOC skipped progression and discharged Carlson for a series of demeaning and harassing misconduct that was directed at two employees personally.

Despite the deficiencies in DOC’s original allegations, the misconduct that DOC proved Carlson engaged in related to Sendelbach and Laufenberg, described above, is sufficient to warrant discipline. DOC had just cause to discharge Carlson. Given the repeated nature of his misconduct, and Carlson’s role as a lead worker who truly ought to know better while setting an example for others, termination was not excessive discipline.

Signed at the City of Madison, Wisconsin, this 15th day of May, 2017.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

Rodney G. Pasch, Commissioner

James J. Daley, Commissioner

⁸ Carlson argues that Rahlf did not receive progressive discipline. App.Br.14. Rahlf, however, testified that in addition to unfavorable termination of his probationary transfer, he received progressive discipline in the form of a letter of reprimand in lieu of a three-day suspension. Tr.Vol.2 at 30:3-5; 34:1-8.