STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DAWN DEGNER, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0360
Case Type: PA

DECISION NO. 38471

Appearances:

Charles Hertel, Attorney, Dempsey Law Firm, 210 N. Main Street, Oshkosh, Wisconsin, appearing on behalf of Dawn Degner.

Cara Larson, Attorney, 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 April 21, 2020, Dawn Degner filed an appeal with the Wisconsin Employment Relations Commission asserting she had been discharged without just cause by the State of Wisconsin Department of Corrections. The appeal was assigned to Examiner Raleigh Jones. A telephone hearing was held on July 21, 2020. The parties made oral argument at the conclusion of the hearing.

On August 12, 2020, Examiner Jones issued a Proposed Decision and Order affirming the discharge. No objections were filed, and the matter became ripe for Commission consideration August 18, 2020.

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

FINDINGS OF FACT

1. Dawn Degner was employed by the State of Wisconsin Department of Corrections as a correctional officer at the Dodge Correctional Institution (DCI) and had permanent status in class when she was discharged.

2. The Department of Corrections (DOC) is a state agency responsible for the operation of various correctional facilities, including DCI in Waupun, Wisconsin.

3. Degner sent and received dozens of sexually explicit emails on her state computer. That is proscribed conduct.

4. DOC discharged Degner for the conduct referenced in Finding 3.

5. Degner shared her computer login and password with her husband who also works at DCI. While that is proscribed conduct, in this instance it was justified.

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 over this appeal pursuant to Wis. Stat. § 230.44 (1)(c).

2. The State of Wisconsin Department of Corrections had just cause within the meaning of Wis. Stat. § 230.34(1)(a) to discharge Dawn Degner.

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

ORDER

The discharge of Dawn Degner by the State of Wisconsin Department of Corrections is affirmed.

Issued at Madison, Wisconsin, this 19th day of August, 2020.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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James J. Daley, Chairman

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.

Dawn Degner had permanent status in class at the time of her discharge and her appeal alleges that the discharge was not based on just cause.

The State has the burden of proof to establish that Degner 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).

Degner admits to the following. From December 2018 to July 2019, Degner and Jason Nowicki had a consensual affair. During that time period, both worked at DCI. Their relationship ended when Degner's husband, who also works at DCI, informed Nowicki's wife of same. While the affair was on-going, Degner and Nowicki had sexual contact during work hours on several occasions. To do that, they would go to secluded places in the facility that did not have cameras. Additionally, during that same time period, the two exchanged frequent non-work related emails with each other during work hours. Degner used both her state and personal email accounts for her email exchanges with Nowicki, while Nowicki used just his state email account for his email exchanges with Degner. Collectively, the two exchanged over 2000 emails during that time period. While the content of some of those emails was innocuous, those innocuous emails are not involved in this matter. Instead, the emails involved here are those that were sexually explicit in nature. In dozens of emails, the two discussed acts of a sexual and intimate nature which occurred while on and off duty and sometimes in front of inmates. Specifically, they discussed acts of hugging, kissing, oral sex and touching of genitalia both over and under clothing. Additionally on two occasions, Degner and Nowicki exchanged sexual photographs. Degner once sent a photograph of her breasts (which were covered by a bra) from her personal email address to Nowicki's work email. Nowicki once sent a photograph of his exposed penis while he masturbated. Nowicki sent that photograph to Degner on his work email.

In October 2019, a female correctional officer notified management that Nowicki may have sexually harassed Degner and other female correctional officers when he was serving as an EAP Peer supporter. After it received that complaint, DOC placed Nowicki on administrative leave and started an investigation into how he had comported himself while serving as an EAP Peer

Supporter. Although Degner was not the complaining party, she was interviewed as part of the employer's investigation. In her interview, Degner was less than forthcoming about the true extent of her previous relationship with Nowicki (which, as previously noted, had ended in July 2019). Consequently, the Employer's investigation focused on Nowicki's conduct while he was an EAP Peer Supporter. During that investigation, Nowicki admitted he had hugged and kissed Degner without her consent following an EAP meeting. Following that admission, DOC management considered Degner to be a victim of Nowicki's sexually harassment, and a possible victim of a sexual assault. On November 7, 2019, the DCI warden sent an email to Degner asking if she wanted to speak to a detective about her possible sexual assault by Nowicki following an EAP meeting. Degner declined that invitation and did not speak to a detective.

On January 2, 2020, DOC discharged Nowicki for sexual harassment. His discharge letter provided in pertinent part:

> While on duty on or about October 2018 or November 2018, you hugged and kissed a female correctional officer following the completion of an Employee Assistance Program meeting where you were acting in the role of Peer Supporter. These actions were not solicited by the female officer, and she reported having talked to you about these unwanted actions, for which you apologized. You admitted to hugging and kissing this female officer after an Employee Assistance Program (EAP) meeting. You acknowledged that this was in violation of EAP protocols and these actions go against the EAP Supporter Code of Ethics, which you signed agreement to on November 26, 2013. Additionally, you were negligent in providing appropriate support for another employee who was seeking assistance through the EAP. Moreover, you admitted to attempting to kiss another female officer while both of you were on duty without her consent. This incident occurred sometime on or about February 2019. In regard to the second incident, you state in your interview "I never thought about it. It was a reaction. I felt sorry for her. I took advantage of the situation. This is something I do." Per Executive Directive #5, Sexual Harassment can include, but is not limited to, conduct of a sexual nature or unsolicited and unwelcome sexual advances. Your actions clearly violated Executive Directive #5.

Degner was the "female correctional officer" in the first incident referenced in Nowicki's discharge letter. At the time Nowicki was discharged, DOC considered Degner to be a victim of Nowicki's sexual harassment. DOC was unaware of any other relationship between the two.

After Nowicki was discharged, DOC decided to investigate Degner's emails with Nowicki. In doing that, DOC uncovered the 2000 emails already referenced. As previously noted, DOC management was unaware of same and their content when it discharged Nowicki in January of 2020. After reviewing the content of those emails, DOC concluded that even if Degner was initially a victim of Nowicki's sexual harassment following an EAP meeting, the two later began a consensual sexual relationship. DOC further concluded that while Nowicki sent Degner sexually explicit emails, Degner had done likewise and sent sexually explicit emails to Nowicki. DOC also concluded that Degner was a willing participant in those email exchanges.

On March 16, 2020, DOC discharged Degner. Her discharge letter provided in pertinent part:

> On or about December 2018 to July 2019, you participated in frequent, non-work related email exchanges with a co-worker during working hours. You utilized both your private and personal email accounts to make these exchanges. You sent and received emails which included text or photographs that were vulgar, pornographic or sexual in content. These emails also discussed acts of a sexual nature or intimate nature which occurred while on duty and sometimes in front of inmates and other staff. You stated that the physical contact at work was unwanted, for fear of getting caught. However, you admitted to referencing these instances of contact via email to be flirtatious. Per Executive Directive (ED) 50, it is prohibited to view, send, attempt to send, solicit, retain, or store material that could be considered offensive, obscene, defamatory, or otherwise intimidating or hostile. ED 50 also establishes that using profanity or vulgarity in email is prohibited.
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In some disciplinary cases, our first task is to decide whether the employee did what they are charged with doing. Here, though, we do not need to do that because Degner admits that she did what she was charged with doing in the discharge letter (i.e. exchanging sexually explicit emails with Nowicki). As a practical matter, she had no choice but to admit it because the Employer obtained hard copies of all the emails that she wrote and sent to Nowicki, and all the emails that he wrote and sent to her. Thus, all their emails and photographs were recorded for posterity. Given their existence in hard copy format, she was hard pressed to deny the existence of same.

The Commission has no trouble deciding it was misconduct for Degner to send and receive sexually explicit emails on her state computer. Simply put, work computers are not supposed to be used for that purpose. Lest there be any question about it, DOC has a work rule which expressly proscribes such conduct (i.e. Executive Directive 50).

Degner offers a number of defenses which she contends should excuse and/or mitigate her conduct. We address them next.

First, Degner sees herself as the victim in this case, with Nowicki being the sole guilty party. Thus, she points the proverbial finger of blame at Nowicki for what happened here. To support her contention, Degner relies on the fact that in November 2019, the warden sent her an email asking if she wanted to speak to a detective about her possible sexual assault by Nowicki following an EAP meeting. That is true; the warden did send her an email making that inquiry. However, in relying on that email, Degner ignores that fact that when the warden sent his email making that inquiry, he did not know that Degner and Nowicki had an affair and exchanged dozens of sexually explicit emails. After DOC subsequently learned of same, DOC changed their position

about Degner being a victim (of Nowicki's possible sexual assault), to being a willing participant in a sexual relationship with him.

Second, Degner characterized Nowicki - from whom she is now estranged – as a sexual predator who preyed on her for sexual purposes. To support that premise, she notes that it was Nowicki who first hugged and kissed her following an EAP meeting where she essentially "bared her soul" to him when he was acting as her Peer Supporter. She avers that she did not know at the time that he was, in reality, a sexual predator who was grooming her for a sexual relationship. The Commission has no reason to dispute that description of Nowicki. He comes off in this workplace drama as a despicable man who preys on vulnerable women. In his discharge letter, the Employer quotes some of Nowicki's own words and uses them against him. Most notable in this regard was Nowicki's admission that "this is something I do." However, even if Nowicki is a sexual predator, and he was the one who initially pressed Degner for a sexual relationship, and he was the one who initially sent Degner sexually explicit emails, all those things do not get Degner off the proverbial hook. Here is why. Degner is still responsible for her own actions. What we are referring to, of course, is that Degner later willingly participated in a consensual physical relationship with Nowicki. As part of that relationship, Degner sent Nowicki sexually explicit emails (just as he sent them to her). Degner's claim at the hearing that her relationship with Nowicki was not consensual lacks support in the record, especially when one reviews the dozens of emails that she sent to Nowicki that were sexually explicit. Additionally, it is noteworthy that she sent Nowicki a photograph of her breasts. As for the photograph that Nowicki sent her of his penis as he masturbated, she told investigators that she was not offended by his doing that because, in her own words, "we were involved at the time."

Third, as Degner sees it, there was an imbalance of power between her and Nowicki which needs to be considered. What she is referring to is that when their relationship started, she was a new (and thus probationary) correctional officer, while Nowicki was a sergeant. While it might appear to an outsider that Nowicki's higher rank gave him control over Degner's employment, in reality that was not the situation. That is because sergeants at DCI are simply lead workers. As such, they do not control things like wage increases, disciplinary actions or job security for correctional officers. That being so, the Commission finds that even if there was an imbalance of power between Nowicki and Degner in their relationship, that is not a basis to excuse Degner's misconduct.

Finally, Degner notes that Nowicki's discharge letter did not mention the emails that the two exchanged. She sees that omission as significant. The Commission does not for this reason: when DOC discharged Nowicki in January 2020, it relied on the information it had at the time (i.e. that Nowicki had sexually harassed women while he was acting as a Peer Supporter in the EAP program). While it turned out that Nowicki had engaged in other misconduct with Degner, DOC did not know that at the time. Specifically, DOC did not know of the existence of the 2000 emails and their explicit sexual content. Thus, it was only after Nowicki was discharged that DOC learned of their existence and their content. While Degner disputes that, her claim that DOC knew of their existence and their content when it discharged Nowicki was not substantiated.

Having addressed those defenses and found them unpersuasive, we find that Degner committed workplace misconduct when she exchanged dozens of sexually explicit emails with Nowicki. In so finding, we are aware that Degner now regrets her involvement with Nowicki and the emails she exchanged with him. That regret is understandable. However, her regret does not somehow wipe the proverbial slate clean. Degner is still responsible for her workplace misconduct and can be disciplined for same.

Degner's discharge letter also made a second charge against her which has not been referenced above. When the Employer was conducting their investigation of Degner's conduct, it discovered that she gave her computer login and password to her husband (who also works at DCI) so that he could access her computer account. That is proscribed conduct. However, we find that in this instance, it was justified because a supervisor told Degner to have a co-worker log into her computer account to sign her up for overtime when she was on vacation and away from work. Given that supervisory directive, we find it was not misconduct for Degner to share her computer login and password with her husband.

The focus now turns to the level of discipline imposed here. Degner contends her discipline should have been less severe than discharge. She notes in this regard that she was never disciplined prior to this matter. Thus, in this case, the Commission is tasked with deciding whether discharge was an excessive punishment for Degner's misconduct.

In prior cases where the Commission overturned a discharge, one reason it did so was because the charges made against the employee were not substantiated. While in this case the second charge made against Degner was not substantiated, that finding does not affect the outcome here because the second charge was minor when compared to the other charge (i.e. exchanging the sexually explicit emails). That charge, which was the main charge, was substantiated. Since the main charge was substantiated, the Commission lacks that objective basis for overturning the discharge. Next, it is noteworthy that DOC recently discharged another employee at DCI for sending one sexually inappropriate email. That comparable supports DOC's decision to impose that same punishment here. Finally, it is noted that when the Commission has reduced discipline, one reason it did so was because the employee was a long-term employee. That is not the situation here, though, because Degner was a relatively short-term employee with less than two years with DOC. Therefore, the Commission lacks that objective basis as well for overturning the discharge.

When an employee commits serious misconduct, as Degner did, it logically follows that their discipline can likewise be serious. Here, Degner's misconduct warranted a skip in the normal progressive disciplinary sequence. Thus, DOC was not obligated in this instance to suspend Degner; it could discharge her.

In so finding, the Commission has considered Degner's claim that she was subjected to disparate treatment and punished more harshly than other DOC employees. An employee who raises a disparate treatment claim has the burden of proving that contention.

Degner offers two situations that occurred at DCI to buttress her claim of disparate treatment. The first involved Audie Ritschke. Ritschke sexually harassed an employee by telling

other employees in an email exchange that he had romantic feelings for another officer. Ritschke received a letter of expectation for doing that. While Degner wants to use that case as a comparable, the Commission finds that the Ritschke case cannot be considered a true comparable to Degner's because the facts are so different. Degner, of course, sent dozens of sexually explicit emails on her state email. Ritschke, in contrast, did not do that. That factual difference distinguishes Degner's situation from Ritschke's. The second involves Martinez Cook. The record shows that Cook was discharged for sending an email to another officer indicating which other employees they found attractive. Following their discharge, Cook approached the Warden and was encouraged to re-apply for a position after a year had passed, albeit at a different institution. Degner's use of this example strengthens DOC's case and does not show disparate treatment. Cook was discharged for behavior that was less than that which Degner now stands before us on. The fact that, as alleged, the Warden encouraged Cook to re-apply for a position involves a post-employment action and did not alter Cook's discharge. Neither Ritschke nor Cook was found to have committed acts that threatened the safety and security of the institution to the extent as those actions committed by Degner. We therefore find that Degner did not show she was subjected to disparate treatment in terms of the punishment she received.

Given the fact that Degner was not subjected to disparate treatment, and the fact that she was not a long-term employee, and the fact that her misconduct was serious, the Commission finds discharge was not excessive punishment under the circumstances.

The Commission therefore finds that DOC had just cause to discharge Degner.

Issued at Madison, Wisconsin, this 19th day of August, 2020.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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James J. Daley, Chairman