STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

SHYKIRA SANDERS, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0509
Case Type: PA

DECISION NO. 39423

Appearances:

Shykira Sanders, 3045 86th Street, Apt. 207, Sturtevant, Wisconsin, appearing on her own behalf.

William Ramsey, Attorney, Wisconsin Department of Administration, P. O. Box 7864, Madison, Wisconsin, appearing on behalf of the State of Wisconsin Department of Corrections.

DECISION AND ORDER

On January 21, 2022, Shykira Sanders 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 (DOC).

A telephone hearing was held on April 7, 2022 by Commission Examiner Peter G. Davis. DOC made oral argument at the conclusion of the hearing and Sanders filed written argument on April 9, 2022.

On April 29, 2022, Examiner Davis issued a Proposed Decision and Order rejecting the discharge and reinstating Sanders without back pay. On May 4, 2022, DOC filed objections to the Proposed Decision and on May 9, 2022, Shykira Sanders filed a reply to the objections.

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

FINDINGS OF FACT

1. At the time of her discharge, Shykira Sanders, herein Sanders, was employed by the State of Wisconsin Department of Corrections (DOC) as a Correctional Officer at the Racine Correctional Institution. She had permanent status in class.

2. Sanders had social media posts that would reasonably have been understood to indicate she smoked marijuana and was a gang member.

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 did have just cause within the meaning of Wis. Stat. § 230.34 (1)(a) to discharge Shykira Sanders.

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

ORDER

The discharge of Shykira Sanders by the State of Wisconsin Department of Corrections is affirmed.

Issued at Madison, Wisconsin, this 19th day of May, 2022.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

_____
James J. Daley, Chairman

MEMORANDUM ACCOMPANYING DECISION AND ORDER

Section 230.34(1)(a), Stats., states in pertinent part:

> 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.

Sanders 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 Sanders 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 discharge letter Sanders received states in relevant part:

> This letter is to formally notify you that effective November 19, 2021, your employment as a Correctional Officer with the Department of Corrections, Division of Adult Institutions at Racine Correctional Institution is being terminated.
>
> This action is being taken because you were found to be in violation of Department of Corrections Work Rule(s):
>
> WR #2 Failure to comply with written agency policies or procedures.
>
> WR #3 Disobedience, insubordination, inattentiveness, negligence, failure or refusal to carry out written or verbal assignments, directions, or instructions.
>
> > Serious Misconduct: Gross negligence or conduct by an employee which causes a substantial risk to the safety and security of our facilities, staff, the community or inmates, offenders or juvenile offenders under our care.
>
> WR #25 Engaging in any outside activities (including violations or convictions of criminal or other laws) which may impair the employee's independence of judgment or impair the employee's ability to perform his/her duties as an employee of the state.

This termination is being imposed based on the following conduct:

On August 31, 2020, Racine Correctional Institution (RCI) became aware of you being involved in off duty misconduct involving the inappropriate use of the Social Media platforms, “Facebook” and “Snapchat”. On Facebook, you used the name of "Phatmama Hudson" and a Snapchat account of "Shykiraaa”. You displayed comments and pictures on these accounts that referenced gang involvement and your use of an illegal drug. Your inappropriate comments, included, "bluntedddddd & breakfast I'm starving" and "One like I'm getting FUCK AS DRUNK". On August 16th, your post stated, "I be out in the hood like on the Rec field at Rci looking around waitin for some to pop off I gotta chill." There were also multiple pictures of rolled blunts and you smoking these blunts. In addition, you included a video of a dollar bill crumpled up with what appears to be marijuana inside and rolling papers next to it. In the video, you can be heard saying, "somebody come roll for me". Further, you posted plans to engage in a physical altercation with an individual. You also posted, "I am a [sic] original 12th street gang member. If you don’t no {sic} me I guarantee you no {sic} my moms". Additionally, you violated work rules by bringing your personal cell phone into the institution and wearing an Apple Watch at RCI that allowed you to receive text messages at work.

This behavior is in violation of Executive Directive 87 (Social Media) and DAI Policy 300.00.04 (Devices with Activated Cellular/Wireless Capabilities – Access in DAI Facilities). As a Correctional Officer, it is expected that you behave as a role model for Persons in Our Care (PIOC) and represent the DOC as a professional. Engaging in behaviors that include illegal drug use/possession, condoning potential assaultive behaviors and claiming to be involved in a gang is counterproductive to PIOC rehabilitation, is egregious and rises to the level of serious misconduct. Your posts could be deemed negative towards the DOC, tend to impair DOC’s work environment, impair relationships with DOC partners, and impair the public trust. Even if you are not actually a gang member or associated with gang members, your posts indicate that you are, which is completely incompatible with employment as a security professional. Other security staff will see you as someone who cannot be trusted or relied upon, and may conclude that you are the sort of person who will relay confidential Security Threat Group (STG) information to STG members, both within, and without, the institution. Your postings and behavior are completely inappropriate and cannot be tolerated.

Although you do not have previous discipline, Executive Directive 2 – Employee Discipline, indicates “The Department may impose a more severe level of discipline, up to and including discharge, for serious acts of misconduct.[”] Employees who are found to have engaged in serious misconduct may be terminated as an initial level of discipline, depending on the serious [sic] of the behavior. Your behavior rises to the level of serious misconduct. The totality of your behavior causes a substantial risk to the safety and security of PIOCs and staff

> members at RCI. Therefore, you have left me no choice than to terminate your employment.

Sanders admits she made the social media posts in question and acknowledges that some level of discipline short of discharge was warranted. While she commendably takes responsibility for her misconduct, the Commission is persuaded that the security and public perception concerns cited in the discharge letter do establish just cause for her discharge unless any of the three defenses she raises warrant a different result.[1] In that regard Sanders contends that: (1) the investigation was tainted by misconduct of one of the DOC investigators; (2) she made the posts before she was trained as to the new DOC social media policy; and (3) other DOC employees have engaged in misconduct similar or worse than hers and received far less discipline.

As to the allegedly tainted investigation, it is true that a DOC employee engaged in investigation-related misconduct that led to his resignation. However, because Sanders admits that the postings that led to her discharge were hers, any misconduct by an investigator has no impact on the facts the Commission confronts when determining if there was just cause for discharge.

As to the timing of the postings, it is true that they were made prior to the date Sanders was trained on the DOC social media policy. However, DOC points out that Sanders could have but did not remove the postings after the training and before they were discovered, and that some of the posting would have subjected Sanders to discipline even if no social media policy existed. Therefore, the Commission does not find this argument to be persuasive.

Lastly, the Commission turns to Sanders' contention that she was disciplined more harshly than other DOC employees who engaged in the same or worse misconduct. In this regard, Sanders cites six examples.[2] The evidence presented at hearing revealed that two of the six DOC employees she cites were discharged (employee M who was driving while intoxicated and had a loaded gun) or resigned during the investigation (employee S who was intoxicated and pointed a loaded gun at another driver). Thus, for the purposes of analyzing Sanders' claim, only four examples remain where lesser discipline was imposed by DOC.

In *Morris v. DOC*, Dec. No. 35682-A (WERC, 7/15), the Commission detailed how it would analyze claims such as the one Sanders makes here. The Commission stated:

---

[1]The Commission rejects the DOC contention that Sanders engaged in misconduct via the post comparing the stress of the job to the stress Sanders feels when out in a less than safe part of Racine. Clearly, her job is stressful and expressing that reality is not misconduct.

The Commission also rejects the cell phone component of the rationale for Sanders' discharge. The record reflects that the issue of cell phone possession had previously been addressed with Sanders by DOC at RCI. As to the issue of wearing a digital watch that could receive text messages, it is apparent that any such misconduct played no significant role in the level of discipline imposed.

[2]Sanders also points to the previously discussed DOC employee who resigned due to misconduct occurring during her investigation. Those unique circumstances take this additional example out of the same context as the other six. In any event, the resignation places that employee in the same posture as Sanders (i.e., is an example of someone whose employment ended as a consequence of misconduct) and thus is not an example of a DOC employee who received lesser discipline than Sanders.

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.

The first example cited by Sanders is a January 2017 media account of DOC employee K (who is identified as a DOC captain) who was arrested for driving while intoxicated after a highway crash. DOC suspended employee K (a Sergeant at the Milwaukee Secure Detention Facility) for one day in March 2017 for violating Work Rule #25 which prohibits "Engaging in any outside activities (including violations or convictions of criminal or other laws) which may impair the employee's independence of judgment or impair the employee's ability to perform his/her duties as an employee of the state." The Commission has previously overturned discipline in its entirety for DUI convictions of DOC employees absent a showing of a nexus between the duties of the employee and the consequences of a DUI arrest and conviction. *See LePage v. DOC*, Dec. No. 39276 (WERC, 12/21). Without the record before us we are unable to conclude whether the discipline imposed on K was correctly administered. As such, for purposes of determining disparate treatment between K and Sanders, we cannot find that the employees were similarly situated. Additionally, their conduct was sufficiently different as to not allow the comparison to hold in this instance.

The second example cited by Sanders is a March 2020 media account of DOC employee B (who is not identified in the account as a DOC employee) being arrested for firing a gun out of a car. DOC suspended employee B (a Correctional Officer at the Racine Secure Detention Facility) for one day in August of 2020 for violation for Work Rules 1 and 25 and Serious Acts of Misconduct Rule 1. The conduct in question of B, while clearly raising questions as to the level of discipline imposed, is not sufficiently similar to allow for a disparate treatment analysis.

The third example cited by Sanders is a media account of the May 2017 arrest of DOC employee CK for felony possession of marijuana and misdemeanor possession of drug paraphernalia which led to a one-day suspension by DOC. If Sanders discharge were based solely on her heavily inferenced marijuana posts, the Commission would likely agree that disparate treatment exists. However, the severity of Sanders' claim of gang membership is of a significantly more serious nature than the marijuana usage and conduct of CK.

The fourth example cited by Sanders is a September 2020 Facebook post by the same employee CK showing a drawn figure urinating on a Black Lives Matters sign with the comment "Piss on BLM".

DOC suspended CK in December 2020 for one day for violation of the DOC Social Media policy. The suspension letter cited the fact that the post was seen by several staff members who were offended, that CK's Facebook profile listed him as a State employee, and that the post conflicted with DOC's mission and vision.

The proposed conclusion of the Commission hearing examiner noted that the last instance was most closely aligned with Sanders current behavior and relied upon such to support a finding of disparate treatment. Ultimately, the choice of CK to post an anti-BLM post is not sufficiently similar social media conduct for the Commission to support a finding of disparate treatment in this case.[3]

It is true that in instances of discharge the Commission gives additional scrutiny in making the determination as to whether disparate treatment took place. It is also true that it is sometimes an act in futility to understand why DOC occasionally allows lesser discipline for acts that raise a substantial concern as to the employee's prospect of continued employment. However, in this matter the conduct cited is not sufficiently similar to justify the finding of disparate treatment in a way that would allow the discipline to be modified. Sanders statement of gang membership shared on a social media platform is sufficiently different and of greater severity than the cited examples provided so as to not allow for a finding of disparate treatment. Therefore, the discharge of Sanders is affirmed.

Issued at Madison, Wisconsin, this 19th day of May, 2022.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

_____

James J. Daley, Chairman

[3] The "Piss on BLM" posting of CK is arguably political speech. That discipline was not grieved so there is no record available or argument offered to make a determination as to whether that discipline was correctly administered, but there certainly is at a minimum an argument to be made that CK's speech had Constitutional protection afforded to it that Sanders' posts do not. While discussion was made as to the result of that speech, namely potential blowback from both co-workers and inmates towards CK, such arguments are speculative, incidental, and from a Constitutional perspective, perhaps irrelevant. Note the Commission recognizes the important difference between potential political speech and racist violent speech which we have held to be grounds for supporting discharge in certain circumstances. *See Washetas v. DOC,* Dec. No. 39272 (WERC, 11/21).