

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ANTHONY WALKER, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0574

Case Type: PA

DECISION NO. 39922

Appearances:

Robert M. Mihelich, Attorney, 2665 S. Moorland Road, Suite 200, New Berlin, Wisconsin appearing on behalf of Anthony Walker.

David G. Makovec, Attorney, Department of Administration, 101 E. 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 February 28, 2023, Anthony Walker filed an appeal with the Wisconsin Employment Relations Commission asserting he had been discharged without just cause by the State of Wisconsin Department of Corrections (DOC). The appeal was assigned to Examiner Anfin Jaw. A telephone hearing was held on April 18, 2023. During the hearing Walker made a motion for Jaw to recuse herself. Jaw voluntarily withdrew from the matter citing the best interests of the parties moving forward.

The matter was re-assigned to WERC Chairman James J. Daley. The prior record was expunged, and the hearing started anew before Chairman Daley at the WERC offices in Madison, Wisconsin, on April 27 and 28, 2023 and May 15, 2023. The parties filed post-hearing argument on June 16, 2023, and Walker filed a response brief on June 21, 2023.

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

FINDINGS OF FACT

1. Anthony Walker (Walker) was employed by the State of Wisconsin Department of Corrections (DOC) as a Correctional Officer at the Racine Correctional Institution (RCI) and had permanent status in class when he was discharged.

2. RCI is a correctional facility in Racine, Wisconsin operated by the DOC, an agency of the State of Wisconsin.

3. On or about July 21 2022, Walker was approached by PIOC Hull and informed that a member of senior management at RCI, Corrections Program Supervisor (CPS) Jaqueline Heidit (Heidit), was having sexual intercourse with another PIOC.

4. Sexual intercourse between an inmate and an employee of the Department of Correction is non-consensual by definition and considered rape under the Prison Rape Elimination Act (PREA).

5. Correctional Officer Jovana Martinez was nearby when Hull informed Walker of the alleged conduct by Heidit and subsequently was informed directly by Walker of Hull's allegations.

6. Walker proceeded to inform Lieutenant McBride that she needed to speak to Hull but did not specify what the conduct or subject matter/purpose was, only that it was important.

7. Correctional Sergeant Latasha Wilson was present and observed Walker telling McBride that she needed to speak to Hull.

8. DOC skipped progressive discipline and discharged Walker citing Serious Acts of Misconduct #5: 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.

9. RCI Warden Wells admitted that Walker received disparate treatment in his discipline.

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 not have just cause within the meaning of Wis. Stat. § 230.34 (1)(a) to discharge Anthony Walker.

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

ORDER

The discharge of Anthony Walker by the State of Wisconsin Department of Corrections is rejected, and he shall be reinstated and made whole with interest.¹

Issued at the City of Madison, Wisconsin this 26th day of June 2023.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman

¹ See Wis. Admin. Code ERC 94.07.

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.

Walker had permanent status in class at the time of his suspension and his appeal alleges that the suspension was not based on just cause.

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

I. INTRODUCTION

On October 17, 2022, the Department of Corrections (DOC) discharged Correctional officer Anthony Walker (Walker) for the following:

Work Rule #2: Failure to comply with written agency policies or procedures.

Work Rule #3: Disobedience, insubordination, inattentiveness, negligence, failure or refusal to carry out written or verbal assignments, directions, or instructions.

DOC Additional Serious Acts of Misconduct #5: Gross negligence or conduct by an employee which causes a substantial risk to the safety and security of our facility, staff, the community or inmates, offenders or juvenile offenders under our care.

On or about July 21, 2022, Walker was “walking the yard”, a duty comprised of observing Persons In Our Care (PIOC’s) in the outdoor recreational area located at Racine Correctional Institute (RCI) along with Correctional Officer Jovanna Martinez (Martinez). During this time, PIOC Hull approached Walker and asked to speak to him privately. At that point Hull informed Walker that CPS Jaqueline Heidit (Heidit), a senior management official at RCI, was engaged in sexual intercourse with another PIOC. Hull was animated during this exchange. Walker finished the exchange stating that Walker would speak to his superiors regarding the allegation. After the exchange, Walker went over to Martinez who asked what Hull had been so animated about. Walker then proceeded to share the information with Martinez and stated that he was going to approach Lieutenant McBride (McBride) and Captain Edward Jones (Jones) with the information.

Walker proceeded to inform Lieutenant McBride that she needed to speak to PIOC Hull. McBride indicated that she would follow up with PIOC Hull as soon as possible.² Present at this discussion was Sergeant Latasha Wilson (Wilson). At that point, Walker believed he had met his obligations as to sending the issue “up the ladder” to be addressed by more senior level personnel.

No action was taken by RCI in regards to the Heidit matter until on or around July 29, 2022, when a PIOC relayed similar concerns to Treatment Specialist Phynell Branch who contacted her supervisor and was instructed to file a report which was submitted on July 31, 2022, thus commencing the official investigation into Heidit’s conduct resulting in her eventual discharge and subsequent criminal conviction.

The Prison Rape Elimination Act (PREA) has been implemented by DOC via Executive Directive #72 and sets the requirements relating to procedures required to be followed in the event of allegations of sexual relations between inmates and staff. DOC staff receive regular training in PREA on an annual basis and are assumed to be familiar with their duties and obligations under such. Relevant to Walker’s discharge is the following:

XIV. Reporting Sexual Abuse, Sexual Harassment and Retaliation

...

C. Staff Reporting

- 1) Staff members shall accept reports made verbally, in writing, anonymously, and from third parties; promptly document any verbal reports... and immediately report:
 - a. Any knowledge, suspicion or information regarding an incident of sexual harassment that occurred in a facility, whether or not it is part of the DOC:
 - b. Any incidents of retaliation against PIOC’s or staff who reported such an incident; and/or
 - c. Any staff neglect or violation of responsibilities that may have contributed to an incident or retaliation.
- 2) Reports shall be immediately reported to a supervisor who is not the subject of the allegation, unless reporting to such person compromises the safety of the alleged victim, witness(es) or reporter. In those instances, a private report shall be made to the PREA Office or submitted electronically via the DOC’s public website.³

² McBride testified that this exchange never occurred. It is worth noting that McBride suffered some work-related injury near contemporaneously to when the exchange was alleged and it is possible that given such her attention and memory may have been affected. The independent testimony of Wilson substantiating this conversation as having actually occurred as Walker represents is sufficient to allow the Commission to give credit to Walker’s version of the exchange.

³ Exhibit R5, Executive Directive #72, Sexual Abuse and Sexual Harassment in Confinement Prison Rape Elimination Act (PREA), pg. 12.

II. WAS THERE MISCONDUCT BY WALKER

The Commission is satisfied that Walker failed to meet his obligations under PREA. We find the testimony of Walker and Wilson credible and find that Walker did approach McBride and inform her that she needed to speak with PIOC Hull. However, under PREA the requirement is to specifically report knowledge or suspicion of sexual harassment that occurred at RCI.⁴ By his own testimony, Walker failed to establish that he satisfied his duties under PREA, instead urging McBride to speak to PIOC Hull without disclosing the nature or reason behind her needing to have that conversation.⁵ While Walker may have been under the impression that he had adequately satisfied his requirements and that the matter had been successfully “moved up the ladder”, there is no way for McBride to have understood the severity of the allegation or, specifically, that a PREA violation was being alleged. Given the fairly generic description by Walker of the need to speak to Hull, it would have been impossible for McBride to properly prioritize the seriousness of the allegation and her own subsequent obligations under PREA.

III. DISPARATE TREATMENT

The Commission finds that Walker was treated in a disparate manner and as such just cause is lacking to uphold his discharge.

Walker first argues that RCI as an institution systematically failed in their implementation of PREA requirements and obligations, from the Warden to every Correctional Officer and everyone in between. This argument may have merit, but the record is not ample enough for the Commission to reach that conclusion. To do so would require rampant speculation on the part of the Commission. While evidence was presented that best practices were lacking in regard to how the Heidit situation was handled internally, it does not reach to the level where we can make a determination as to total institutional failure.

⁴ Exhibit R5:

C. Staff Reporting

1) Staff members shall accept reports made verbally, in writing, anonymously, and from third parties; promptly document any verbal reports... and ***immediately report***:

a. Any knowledge, suspicion or information regarding an incident of ***sexual harassment*** that occurred in a facility, whether or not it is part of the DOC: (Emphasis added)

⁵ “So as we was walking the track and we got back to the recreation area, Lieutenant McBride was going in. Sergeant Wilson was there, and Sergeant Miles was there. And so when I got in, I said “McBride,” I said, “You got two inmates who want to talk to you about some serious stuff. They want to talk to you.”

She said, “What is it? What is it?”

I said, “They really want to talk to you.” I said, “***I don’t want to – I don’t want to go into details***, but they really want to talk to you about some stuff concerning staff here.” Hearing Transcript, Day 3, pgs. 11-12, lines 20-5 (*emphasis added*).

Of greater concern to the Commission is the record that was established concerning Officer Martinez. WERC has a long tradition of requiring that, for disparate treatment to be demonstrated, the comparison needs to be between similarly situated employees with similar conduct.⁶ As previously discussed, Martinez became aware of the allegation when Walker shared information that Hull had just relayed to him in the yard. Martinez had the same information as Walker did, was of the same rank, and did not report this to anyone. Martinez faced no discipline whatsoever for her failure to report the concerns Hull had reported to Walker despite nearly contemporaneous knowledge of such.

DOC argues somewhat persuasively that there are two reasons that Martinez's conduct is not similar for purposes of a disparate treatment analysis. First, DOC argues that Martinez came to this knowledge by hearsay, that it was not reported directly to her, but from Walker. Secondly is the argument that Martinez relied on Walker's representations that he was going to take care of reporting the matter "up the ladder" to McBride and Captain Jones, thus relinquishing her of an independent duty to report as she was conceivably under the impression that the matter had been "taken care of".⁷

However, under cross-examination Warden Wells, the appointing authority and a heavily influential decision maker in the disciplinary process, admitted that Walker was treated in a disparate manner from Martinez. The following testimony was given by Warden Wells under cross-examination:

Q: She [Martinez] needed to. She was required to report that [the Hull allegation], correct?

A: Yes.

Q: And she didn't, correct?

A: Not to my knowledge.

Q: And she was never investigated for that, correct?

A: She, to my understanding, was not investigated.

Q: And she was never disciplined for that, correct?

A: Do not believe so.

Q: Nothing. Nada nada. Nothing.

Q: So both of these individuals, Mr. Walker and Ms. Martinez, learned the same exact information on the same day, right?

A: In different ways.

Q: No. They're both aware of it. Doesn't matter how they're made aware of it, correct? Doesn't matter how they're made aware of it, isn't that true?

A: Yes

Q: So one of them is fired and the other one, not a scratch: correct?

A: That is correct.

⁶ See *Morris v. DOC*, Dec. No. 35682-A (WERC, 7/15).

⁷ Even absent the upcoming testimony of the Warden, it's troubling that Martinez received zero discipline at all. While DOC's arguments certainly mitigate the culpability and severity of Martinez's failure to report the allegation of the PREA violation, that would be an argument for a less severe level of discipline than was given to Walker, not a total absence of any consequence.

Q: Based on what you've just admitted today, do you think that Officer Martinez should be investigated for her PREA violation: yes or no? Yes or no, sir?

A: You know I...

Q: Answer the question.

A: I don't know how to answer that question because there's so much more to it. I – I really struggle with that.

Q: I'm sure you do, but it's pretty simple. You just admitted two individuals learned the same exact information on the same exact day, and they were treated completely differently. All right. And so you've just conceded that there was a PREA violation by Ms. Martinez.

Q: So my question to you, sir, as the warden of this facility, should Ms. Martinez be investigated for her violation of the PREA policy; yes or no?

A: She could have been, yes.

Q: She should have been; correct? Correct? Yes?

A: Yeah, I'm thinking about – I mean, based on the way you're stating it, yeah.

See Hearing Transcript, Day 2 pgs. 413-415, lines 19-25, 1-25, 1-21.

The testimony and admission of the Warden as to the disparate treatment of Walker obliterates any argument by DOC that would refute the presence of such. As a decision maker in the discipline that was levied against Mr. Walker, his admission is controlling that Walker was fundamentally treated in a disparate manner by being discharged as opposed to Martinez. This fundamental failure on the part of DOC alleviates the need for the Commission to further analyze the more general allegation of systematic disparate treatment at the institution that Mr. Walker alleges.

IV. CONCLUSION

Given the foregoing, it is concluded there was not just cause for the discharge of Walker and it is therefore rejected. Walker shall be reinstated and made whole consistent with this order.⁸

Issued at the City of Madison, Wisconsin this 26th day of June 2023.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman

⁸ Walker has also requested award of attorney fees. The Commission directs Walker to Wis. Admin. Code ERC 94.05 as well as relevant state statutes for the proper procedure and recoverable costs that he may request, which the Commission will take up as a separate matter if so submitted.