

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ERSKINE JUDE, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0608

Case Type: PA

DECISION NO. 40252

Appearances:

Sandra G. Radtke, Attorney, Radtke Law Office, LLC, 15850 W. Bluemound Road, #200, Brookfield, Wisconsin, appearing on behalf of Erskine Jude.

Nicole Porter, 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 November 21, 2023, Erskine Jude filed an appeal with the Wisconsin Employment Relations Commission asserting he had been suspended for five days without just cause by the State of Wisconsin Department of Corrections. The appeal was assigned to Commission Examiner Katherine Scott Lisiecki.

A Zoom hearing was held on January 25, 2024, by Examiner Katherine Scott Lisiecki. The parties made oral arguments at the end of the hearing. On February 9, 2024, Examiner Scott Lisiecki issued a Proposed Decision and Order modifying the five-day suspension to a three-day suspension. Jude and the DOC filed objections to the Proposed Decision on February 14, 2024.

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

FINDINGS OF FACT

1. Erskine Jude (Jude) is employed by the State of Wisconsin Department of Corrections (DOC), as a correctional sergeant at Racine Correctional Institution (RCI). He had permanent status in class when he was suspended.

2. Jude and correctional sergeant J.A. had a consensual sexual relationship for many years.
3. On December 20, 2022, J.A. emailed Jude stating that she wanted to be left alone. However, she called Jude and engaged in a sexual relationship with him after sending the email.
4. On February 21, 2023, J.A. emailed Jude stating that she wanted to be left alone. Jude's March 5 email was unwelcome, and J.A. did not reply to it.
5. On April 18, 2023, J.A. emailed Jude stating that she wanted to be left alone. However, she continued to reply to Jude's emails, call him, and engage in a sexual relationship with him after sending the email.
6. Following an investigation, DOC suspended Jude for five days for harassment while on duty and failure to comply with agency policies.

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 suspend Erskine Jude for five days.

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

ORDER

The five-day suspension of Erskine Jude by the State of Wisconsin Department of Corrections is rejected. Jude shall immediately be made whole with interest.¹

Issued at Madison, Wisconsin, this 7th day of March 2024.

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., 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.

Erskine Jude 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 Jude 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).

Jude was employed as a correctional sergeant at Racine Correctional Institution (RCI). Jude had a romantic relationship with J.A., a correctional sergeant at the Racine Youthful Offender Correctional Facility (RYOCF).

Their relationship had been going on for several years when, on December 20, 2022, J.A. ended an email to Jude by writing: “Now, good day just leave me alone from here on out, obviously I’m nothing more to you than a villain in a uniform.” Exhibit R-8, pg. 53.

However, Jude stated that J.A. called him twice on February 6, 2023, and twice on February 15, 2023. Exhibit R-8, pg. 91.

Jude initiated an email exchange on February 20, 2023 (“Wat up?”) to which J.A. promptly replied (“Hey”). Exhibit R-8, pg. 39. They discussed their relationship ending. The long email exchange concluded on February 21, 2023, with J.A. writing: “So, with that being said please just move on and leave me alone because you haven’t learned anything from me not speaking to you.”

J.A. testified that, around this time, she blocked Jude’s number. She testified that she did not tell Jude that she had blocked his number, and Jude testified that he was unaware that she had done so.

On March 5, 2023, he wrote: “U working?” Exhibit R-8, pg. 40. J.A. did not reply.

On April 18, 2023, Jude emailed J.A. Exhibit A-107, pg. 8-12. They had the following exchange:

Jude: Wats the word?

J.A.: Hi

Jude: Hello!?

J.A.: I still don't really wanna talk to you honestly I'm good. I have a lot going on and I doubt you can relate to it with your lack of emotional support. My Range is fine has it's [sic] issues like any other vehicle but nothing I can't handle. I saw your s [sic] one day hope it's nice, hope fully [sic] you [sic] enjoying it.

The exchange continues as they discuss their relationship. J.A. makes it clear their relationship is over but does not conclude the email exchange by asking Jude to stop contacting her.

On April 25, 2023, Jude wrote: "What 5-letter word typed in all capital letters can be read the same upside down?" Exhibit R-8, pg. 43. J.A. did not reply. *Id.*

Jude credibly testified that J.A. called him on May 13 and June 3. Jude further credibly testified that J.A. came over to his house and had sex in May.

On May 28, 2023, J.A. filed a Respectful Workplace Complaint alleging that Jude had harassed her by calling and sending unwanted emails. Exhibit R-8, pg. 26.

The DOC defines harassment as "unwelcome verbal ... or visual conduct that is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive." Exhibit R-8, pg. 82. It includes examples such as "derogatory, offensive, or unwelcomed comments, including jokes, epithets, slurs and negative stereotyping" or "a pattern of unwelcomed, intimidating, or abusive behavior." *Id.*, pg. 117.

The nature of Jude and J.A.'s fractious, tumultuous relationship makes it challenging to determine whether Jude's emails were, in fact, unwelcome. After J.A. told Jude to leave her alone on December 20, she called him several times and then replied to his February 20 email. Therefore, his February 20 email was not unwelcome.

In her February 21 email, J.A. made it clear that she did not want further contact.

However, although Jude's April 8 email ("Wats the word?") could be considered unwelcome, J.A. replied to it. J.A. began the exchange by saying "I still don't really wanna talk to you" but proceeded to continue to reply to Jude, confusing the situation. Her phrasing could be interpreted as frustration with Jude, rather than a clear and unambiguous demand that he cease all communications. J.A. did not conclude that email exchange by asking Jude to stop emailing her. In fact, Jude credibly testified that she called him and had sexual relations with him after that email exchange. Therefore, Jude's April 25 email (the riddle) was not unwelcome.

Further, Jude's emails were not derogatory or offensive. They contained no jokes, epithets, slurs, or negative stereotyping. His emails cannot be construed as intimidating or abusive. They were, in the light most favorable to DOC, unwelcome. Sending a short and benign – albeit

unwelcome – email in the context of J.A.’s inconsistent responses and a continuing, consensual sexual relationship is not behavior that is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive.

The exchanges between these two from December of 2022 through May of 2023 are best characterized as an on-going relationship which, at worst, was tumultuous, yet overall consensual. J.A. never created a clear and unambiguous notice to Jude that his behavior should stop given her overall demeanor and actions, despite some communications that on their surface would suggest such. This is due to J.A.’s continual re-engagement with Jude, including a continued consensual sexual relationship. To use more simple language: Jude was getting mixed signals, which varied from “I don’t want contact” to that same person instigating contact and engaging in consensual sex. It would be impossible to know what J.A.’s true wishes were considering the 180 degree difference between one interaction to another. In *Knox v. DOC*, Dec. No. 37291 (WERC, 01/18) we found that for harassment the person accused must be respectful and attentive as to the other employees willingness to engage in conversations. Failure to do so may result in a finding supportive of harassment. The record demonstrates that Jude could have reasonably believed that J.A. was a willing participant in such discussions.

Given the foregoing, the five-day suspension of Erskine Jude by the State of Wisconsin Department of Corrections is rejected. Jude shall immediately be made whole with interest.

Issued at the City of Madison, Wisconsin, this 7th day of March 2024.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman