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DISTRICT IV

March 4, 2011

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You are hereby notified that the Court has entered the following opinion and order:

2010AP1149

Virginia Allen v. WERC (L.C. # 2009CV523)

Before Lundsten, Sherman and Blanchard, JJ.

Virginia Allen appeals from an order affirming a decision of the Wisconsin Employment Relations Commission. The Commission upheld the Department of Corrections' decision to discipline Allen based on a finding that she intentionally touched another employee's buttocks. Allen argues that: (1) the evidence does not support the finding that she intentionally touched Jeff M's buttocks; (2) the violation was "objectively innocuous" and should not have resulted in any penalty; and (3) the Commission erred when it presumed that buttocks are within the zone of sexual privacy and when it concluded that "[i]ntentional and unwelcome touching in those areas would fall *ipso facto* within the directive's prohibition of 'physical contact of a sexual nature.'" Allen contends that she was denied her due process right to defend herself due

to that presumption. Upon our review of the record and the parties' briefs, we conclude at conference that the order should be summarily affirmed.

M█████ testified that Allen intentionally touched his right buttock after he made a joke. He believed the touching was intentional because she reached across her body to touch him, she offered no apology, Allen had a reputation for inappropriate touching based on another incident, and he believed that Allen was aware of his unusual sensitivity to being touched. M█████ did not report the incident for four months, but told another employee about it and made a contemporaneous journal entry.

Allen said that she did not remember the incident, but denied intentionally touching M█████. She also denied knowing that he was especially sensitive about being touched. She conceded that intentionally touching another person's buttocks would be inappropriate under the Department's policies and procedures.

The Commission found that Allen intentionally touched M█████'s buttocks. It based its finding on M█████'s description of the incident and Allen's failure to explain or apologize. The Commission indicated that its finding did not depend on M█████'s subjective conclusion based on his knowledge of Allen's reputation. The Commission concluded that Allen's conduct constituted harassment because "certain areas of the anatomy, including the buttocks, are presumptive zones of sexual privacy. Intentional and unwelcome touching in those areas would fall *ipso facto* within the directive's prohibition of 'physical contact of a sexual nature.'" The Commission further concluded that it was not necessary to delve into the state of mind of either

the person being touched or the person doing the touching in order to establish a violation of Executive Directive 7 and Work Rules 2 and 13.¹

The record supports the Commission's finding of intentional touching. The Commission's findings of fact must be affirmed if they are supported by substantial evidence. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Gateway City Transfer Co. v. Public Serv. Comm.*, 253 Wis. 397, 405-06, 34 N.W.2d 238 (1948) (citation omitted). When two conflicting views of the evidence may be sustained by substantial evidence, it is for the Commission, not this court, to determine which view of the evidence to accept. *See Robertson Transport. Co. v. Public Serv. Comm.*, 39 Wis. 2d 653, 658, 159 N.W.2d 636 (1968). M█████'s description of the incident provides an adequate factual basis for the Commission to find that the touching was intentional. Whether M█████'s perception was skewed by his knowledge of other incidents and his belief that Allen knew of his sensitivity to being touched are questions that relate to his credibility. The weight and credibility of the evidence are matters for the Commission, not for the reviewing court, to evaluate. *See Bucyrus-Erie Co. v. DILHR*, 90 Wis. 2d 408, 418, 280 N.W.2d 142 (1979).

The Commission properly exercised its discretion by imposing a penalty for Allen's actions. The Commission noted that touching M█████'s buttocks added fuel to existing conflict

¹ Work Rule 2 refers to a failure to follow policy or procedure, the policy in question being the Department's harassment policy set out in Executive Directive 7. That directive describes "sexual harassment" to include "unwelcome physical contact" and "unwelcome ... physical contact of a sexual nature." The guidelines state that the Department will not condone any form of conduct that might be considered abusive regardless of whether the conduct violates any state and federal laws. Work Rule 13 prohibits sexual harassment.

within the office. Allen had been disciplined twice before. The Commission appropriately concluded that some discipline must be imposed for this violation.²

Finally, the Commission properly concluded that unexplained, unwelcome, intentional touching of another employee's buttocks falls *ipso facto* within the prohibition of physical contact of a sexual nature.³ Neither the definitions set out in federal regulations nor the criminal sexual assault statute applies. It was not necessary for the Commission to determine whether Allen had a purpose that included sexually degrading, sexually humiliating, sexually arousing, or sexually gratifying anyone. *Cf.* WIS. STAT. § 940.225(5)(b). Regardless of the sex of the person touching or the person being touched, unwelcome intentional touching of a co-employee's buttocks is inappropriate workplace behavior and violates the work rules and executive directive.

Contrary to Allen's argument, she was not prohibited from defending herself against M█████'s accusations. The only presumption the Commission applied is that the buttocks are within a zone of sexual privacy. She was allowed to present evidence that the touching was unintentional. Her failure to present a credible defense, not any violation of her due process right to defend herself, led to the Commission's findings. She presented no innocent explanation or justification for touching M█████'s buttocks.

IT IS ORDERED that the order is summarily affirmed. WIS. STAT. RULE 809.21.

A. John Voelker
Acting Clerk of Court of Appeals

² Allen does not contend that the discipline was excessive, but only that her conduct did not justify the imposition of discipline.

³ We reach this conclusion regardless of the degree of deference to be accorded the Commission's decision. Therefore, we need not consider the parties' arguments regarding the correct level of deference.