

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RAYMOND MARCIULIONIS, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0257

Case Type: PA

DECISION NO. 37499

Appearances:

Sean Daley, Field Representative, AFSCME Council 32, N600 Rusk Road, Watertown, Wisconsin, appearing on behalf of Raymond Marciulionis.

Anfin Jaw, 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 July 17, 2018, Raymond Marciulionis filed an appeal with the Wisconsin Employment Relations Commission asserting he had been suspended for three days without just cause by the State of Wisconsin Department of Corrections. The appeal was assigned to Examiner Raleigh Jones. A hearing was held on August 29, 2018, in Black River Falls, Wisconsin. The parties made oral arguments at the hearing's conclusion.

On October 11, 2018, Examiner Jones issued a Proposed Decision and Order rejecting the three-day suspension of Raymond Marciulionis by the State of Wisconsin Department of Corrections. Objections were untimely filed, and the matter became ripe for Commission consideration on October 17, 2018.

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

FINDINGS OF FACT

1. Raymond Marciulionis is employed as a probation and parole agent with the Division of Community Corrections in the Wisconsin Department of Corrections (DOC). He is a 23-year DOC employee and had permanent status in class at the time of his suspension.

2. On April 4, 2018, Marciulionis was advised in writing that he was suspended for three days for what he said to a coworker in a conversation.

3. While the word “boobs” was used in a conversation between Marciulionis and a female coworker, Marciulionis did not use that word.

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 to review this matter pursuant to § 230.44(1)(c), Stats.

2. The State of Wisconsin Department of Corrections did not have just cause, within the meaning of § 230.34(1)(a), Stats., to suspend Raymond Marciulionis for three days.

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

ORDER

The three-day suspension of Raymond Marciulionis by the State of Wisconsin Department of Corrections is rejected.

Signed at the City of Madison, Wisconsin, this 13th day of November, 2018.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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.

Raymond Marciulionis 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 Marciulionis 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. BACKGROUND.

DOC suspended Marciulionis for what he said to female coworker Christina Holtz when the two traveled together in a car. They were the only occupants in the car. Marciulionis has been a probation and parole agent with DOC for 23 years. Holtz has been a probation and parole agent with DOC for about a year. On October 16, 2017, they traveled together to be interviewed for a position on a DOC committee known as the POSC Use of Force Committee (POSC). Marciulionis is a long-time POSC trainer. On October 24, 2017, they traveled together again to POSC training. On both occasions they talked about work, specifically whether Holtz would get appointed to the POSC. Holtz initially dismissed the likelihood that she would be a viable candidate for the POSC because of her lack of experience. In response, Marciulionis told Holtz it was his understanding the DOC administrator who oversaw the POSC wanted to get more female trainers on the POSC . Because of that, Marciulionis opined he thought Holtz' gender was an advantage and Holtz would be assigned to the POSC. At some point in the conversation, the word "boobs" was used. Who said it is disputed, although Holtz admitted she made a joke saying she should have a t-shirt made that said, "Boobs Matter." What is also disputed is whether Marciulionis told Holtz that, if she was offered the position on the POSC, she should turn it down because of her gender and lack of experience. Holtz was ultimately selected for the POSC.

The suspension letter characterizes the comments that Marciulionis made to Holtz in the aforementioned conversation as "demeaning and discourteous behavior" in violation of Work

Rule #14¹. Specifically, DOC faults Marciulionis for the following conduct. First, “you suggested this coworker should turn down the position, if it were offered, based on her gender and lack of experience.” Second, “her female anatomy was also brought up, referenced by you indicating something to the effect of she would only be selected for the position because she has ‘boobs.’”

II. ANALYSIS.

In a recent decision, the Commission stated:

When employees engage in conversations in the workplace, they can discuss topics that run the gamut from the mundane to the controversial. If they discuss the latter though, they obviously run the risk that their comments might be viewed by those hearing them as inappropriate. They should thus enter into such conversations, if they do at all, warily, attentive, and respectful to the willingness of others to be engaged in such.

Jennifer Knox v. State of Wisconsin Department of Corrections, Dec. No. 37291 (WERC, 1/18), p.4.

While Marciulionis denies he told Holtz if she was offered the position on the POSC she should turn it down because of her gender and lack of experience, it is assumed for the purpose of discussion that he did. Building on that premise, the question to be decided is whether that statement – if made – constituted “demeaning and discourteous behavior” within the meaning of DOC Work Rule #14 and, per *Knox*, what was the willingness of the other party to be subject to such statements.

The Commission concludes the statement, if uttered as alleged, does not facially constitute language that is “demeaning and discourteous.” While DOC considers it to be self-evident that the alleged statement crossed the proverbial line of acceptable workplace conversation, that conclusion is not self-evident to the Commission.

A. Opinions, Intent, and Implied Consent.

Certainly an employee can have an opinion about who should fill an open position or who is qualified to fill a position. DOC has failed to adequately demonstrate the context of the alleged statement in a way that shows a demeaning or discourteous intent.

¹ Work Rule #14 is a group of categories that DOC uses to define offensive workplace speech and conduct. The rule focuses on subjective standards to define the prohibited action. While this approach has issues that will be touched upon later in this decision, it is worth noting that an employer also is free to establish and advise employees of specific enforceable standards for language use and then to discipline employees for violating same in a non-disparate fashion. While this objective test would remove some of the problems inherent in this matter, it is important to note that such an approach is not without its own particular issues in enforcement and regulation and not necessarily a preferred method for employers to utilize.

Marciulionis allegedly stated two reasons for recommending that Holtz turn down the position (experience and gender), but the Commission finds the alleged statements in truth be one statement that is subsequently qualified. The alleged statement Marciulionis really communicated was that lack of experience was a problem (in his opinion) and, due to this, any preference given to gender in the process should not trump the inexperience of a candidate. Marciulionis apparently had reason to believe that the POSC was trying to expand its membership composition in a manner to be more inclusive of women, an effort gaining increasing momentum in today's society across multiple industries and in different facets. Holtz was a woman. It would follow that her chances would be elevated for selection as a result. However, given Holtz had a mere year of experience, this could reasonably cause a veteran such as Marciulionis concern that the benefit of gender in the selection process could not adequately replace the experience one should have for such a position. It could also be inferred that such alleged comment by Marciulionis was protective of Holtz; she would be overwhelmed by the position given her inexperience. Additionally, even if Holtz considered that alleged statement to be demeaning and offensive, her subjective opinion regarding same is insufficient to prove that Marciulionis violated Work Rule #14. In *Knox*, the Commission further opined:

The intent of a communication, while not exculpatory, is an element which can be used in determining if a work rule violation occurred. If perception became the exclusive controlling element, work rule violations would always be determined by the recipient of a communication, creating a subjective stratosphere based on each recipient's threshold or appetite for conversation. The disparate implementation of discipline that could potentially occur would not only create a litigation avalanche but more importantly create such a high level of uncertainty amongst employees as to the expectations and allowances for inter-workplace communication as to effectively create a zone of silence in all matters. This is not an ideal outcome nor one that either employers or employees would likely desire.

Id., p.4.

The Commission concludes that, even if Marciulionis made the statement attributed to him, there is no credible evidence he intended it to violate any portion of Work Rule #14. In addition, there is the question of whether Holtz provided implied consent for Marciulionis to make the alleged comment. What is clear from the record is Holtz admitted to making at least one comment regarding same. When Holtz made the comment "Maybe I should just get a t-shirt that says 'Boobs Matter'" in a joking/deflecting manner, several factors get triggered in this analysis.

It is worth revisiting the dissent in *Manz v. State of Wisconsin Department of Natural Resources*, Dec. No. 35022-A (WERC, 2/16), that is reinforced by *Knox*; namely, the element of implied consent to otherwise potentially offensive speech. In *Manz*, the speech at issue was actively encouraged by the other party who later claimed offense. The majority in *Manz* failed to correctly analyze the context of the situation and wrongly concluded that the discipline should be

upheld. *Knox* effectively rejected the rationale of the majority in *Manz*. In *Knox*, discipline was upheld because the audience to the grievant clearly stated that they found the conversation to be demeaning and requested it be stopped, yet it persisted after this clear and unambiguous request for it to be halted. In the present case, Holtz not only failed to object, but joked back with Marciulionis in a manner that demonstrated acceptance of Holtz' own alleged use of the term now offered to be offensive in nature. Consent towards the content of the discussion was at worst implied, but appears actual and overt to the Commission.

B. Disparate Treatment and Subjective Determination of Meaning.

More importantly, while not brought up directly by either party, is the issue of disparate treatment towards Marciulionis by DOC. Holtz has admitted to making a statement containing the word "boobs" as previously stated. If Marciulionis made this alleged offensive statement and warranted discipline for such, it would follow that Holtz would also be guilty and face a similar consequence. *See Christa Morris v. Department of Corrections*, Dec. 35682-A (WERC, 7/15). The Commission questions DOC selectively finding a word so onerous when stated by one party to warrant discipline yet permissible for another's use without any concern demonstrated.

Of course, such strict adherence to an objective disparate treatment test would prove problematic on numerous fronts. It would follow that DOC has chosen to implement a "subjective" standard in its implementation of Work Rule #14. What does not follow is that Marciulionis' alleged statement crossed a threshold that Holtz' confirmed statement did not. Subjective standards in turn create subjective analysis. Some of our language's most guttural and offensive words can, in the right context, be considered as neutral, an expression of artistic license, or (incredibly) endearing. And the word at issue here should not be confused with the worst English as a collective language has to offer.² As such, intent and context become paramount in a fact-finder attempting to discern the speaker's goal in saying the words in question. DOC has failed to adequately address the alleged and confirmed usages of this term in a manner that would allow the Commission to adequately differentiate between the usage by both parties under examination.

² Further underscoring DOC's lack of understanding of this concept was another statement attributed to Marciulionis. During an unrelated training exercise where he was demonstrating a physical restraining move to a coed classroom, Marciulionis made a comment that the women needed to "put the girls away." DOC seems to offer this as similar behavior by Marciulionis in his past to underscore the allegation made in the present. Introduction of this past event in argument and subsequent inferred condemnation suggests that DOC's view of proper interpersonal communication lies somewhere between the satire of Vonnegut and the dystopia of Orwell. In fact, such reliance shows the absurdity of DOC's position. Such a comment bears no inappropriateness in that context and was merely a way of communicating that women participating in such a physical move needed to be cognitive of the fact that their breasts may inhibit the move being done properly. Would the employer discipline an instructor for telling his all male class to "watch the boys" in a restraining move that would expose an attack to genitalia? The Commission is skeptical that it would.

C. The Credibility of the Witnesses and Reply to DOC's Late Objection to the Examiner's Proposed Decision and Order.

DOC submitted an objection to the proposed decision of Examiner Jones. The objection was not timely filed so it will not be considered by the Commission. However, if the Commission were to consider it, the response would entail the following.

DOC reasserts that just cause exists to sustain the discipline of Marciulionis, stating reliance on the alleged statement of Marciulionis and the shock/hurt experience by Holtz as a result of such. DOC further states the real issue isn't the word that was used, but on the alleged harassing and demeaning behavior Marciulionis is accused of.

Marciulionis is an employee with 23 years of experience and no significant disciplinary history. Holtz refers to Marciulionis as a friend, mentor, and other terms of endorsement to his character. Holtz' credibility in this case was severely undercut by the testimony of Christopher Reetz, an unwilling witness in this matter who was a former coworker and partner with Holtz. The testimony of Reetz was compelling and, when given the opportunity, DOC chose to not cross-examine the witness. Particularly in that context, the Commission finds the testimony of Reetz to be credible.

Even absent the testimony of Reetz, the admitted actions of Holtz in the course of this exchange, as well as the reasoning stated above, would preclude just cause being found in this discipline.

DOC also states that Examiner Jones placed too high of an emphasis on the term "boobs" being used and not the overall elements of harassing and demeaning behavior exhibited by Marciulionis. Given the notice by DOC to Marciulionis makes reference to both the term used as well as the nature of the statement, Examiner Jones correctly responded to the issues that DOC chose to articulate in the disciplinary letter given to Marciulionis and the emphasis demonstrated by DOC during the hearing of those same issues.

III. CONCLUSION.

The Commission finds that DOC simply did not meet its burden to prove that Marciulionis used the word "boobs" during the conversation in the car with Holtz, and, had he, that it was a violation of Work Rule #14. Because DOC failed to prove that Marciulionis engaged in misconduct via his conversation with Holtz, his suspension is rejected. Marciulionis should be made whole in all regards³.

³ The Commission has not been asked specifically to reinstate Marciulionis to his previous position as an instructor, which he apparently was removed from as a result of this suspension. It is unclear whether the Commission has the authority to specifically reinstate him to that position, but it is strongly suggested that DOC do so assuming Marciulionis still wants to perform in that function.

Signed at the City of Madison, Wisconsin, this 13th day of November, 2018.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman