

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ANDREA WILCOX, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0293

Case Type: PA

DECISION NO. 37967

Appearances:

Sean Daley, AFSCME Wisconsin Council 32, N600 Rusk Road, Watertown, Wisconsin, appearing on behalf of Andrea Wilcox.

Cara Larson, Department of Administration, 101 East 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 April 30, 2019, Andrea Wilcox filed an appeal with the Wisconsin Employment Relations Commission asserting she 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 June 11, 2019, in Wautoma, Wisconsin. The parties made oral argument at the conclusion of the hearing.

On July 16, 2019, Examiner Raleigh Jones issued a Proposed Decision and Order affirming the three-day suspension of Andrea Wilcox by the State of Wisconsin Department of Corrections. Wilcox filed objections on July 18, 2019. The State did not file a reply, and the matter became ripe for Commission consideration on July 24, 2019.

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

FINDINGS OF FACT

1. Andrea Wilcox is employed by the State of Wisconsin Department of Corrections (DOC) as a Probation and Parole Agent-Senior and had permanent status in class when she was suspended.

2. Wilcox has been repeatedly counseled about her lack of professionalism in the workplace. She has been repeatedly counseled to keep her workplace communications quiet, her volume down, and to watch her tone.

3. In April, 2018, Wilcox was suspended for one day for harassing, demeaning, and bullying a coworker.

4. On February 15, 2019, in response to a steel door slamming shut near her office, Wilcox shouted "I am sick and tired of hearing the fucking door slam," while aggressively slamming her open palm on a table.

5. DOC suspended Wilcox for three days for doing that.

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 § 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 Andrea Wilcox for three days but did have just cause to suspend her for one day.

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 Andrea Wilcox by the State of Wisconsin Department of Corrections is modified to a one-day suspension.

Dated at Madison, Wisconsin, this 9th day of August, 2019.

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.

Andrea Wilcox had permanent status in class at the time of her three-day suspension and her appeal alleges that the suspension was not based on just cause.

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

Wilcox was suspended for her verbal response to a door slamming shut near her office. When that happened, she uttered a profanity. Specifically, she shouted "I am sick and tired of hearing the fucking door slam," while aggressively slamming her open palm on a table. Wilcox had a continuing pattern of exhibiting non-professional behavior in the workplace, and DOC had addressed that pattern of unprofessional behavior with her on multiple occasions.

The Commission's consideration of this matter begins with a review of the decision in *Sawall v. DOC*, Dec. No. 34019-D (WERC, 2015). The appellant in that case – Andrea Sawall - is the same person as the appellant in this case (now with the last name of Wilcox). When that case arose, Sawall was working as a sergeant at the Redgranite Correctional Institution (RCI). She was disciplined for using profane language with another employee. Specifically, Sawall used the words "fuck" and "fucking" while denigrating a coworker to her supervisor (who happened to be her husband). She was suspended for one day. The Commission found that "the use of crude and profane language is commonplace at RCI and typically does not lead to the imposition of discipline." At the hearing, DOC conceded that point and acknowledged that profanity was common at RCI and rarely resulted in discipline, but nonetheless it suspended Sawall for her language. The Commission overturned the suspension.

In 2014, Wilcox became a probation and parole agent. Initially, she worked at the Probation and Parole Office in Montello. While there, she had conflicts with her coworkers. As a result, she decided to leave that office and transferred to the Wautoma office in December, 2017.

After Wilcox arrived at the Wautoma office, her new supervisor - Matthew Stake - was tasked with dealing with some of the personnel matters that had occurred while Wilcox was at the Montello office. Stake dealt with them by giving Wilcox two letters of expectation. The letter of expectation that is relevant here involved professionalism. That February 21, 2018 letter indicated that "the catalyst for this action is that on October 19, 2017, you were yelling at a coworker and using profanity." The record indicates that what Wilcox said in that instance was "I can't fucking believe this" The letter said that if Wilcox did not follow the expectations referred to in that letter, she would be subject to progressive discipline.

In April, 2018, Wilcox was suspended for one day for a pattern of behavior toward a coworker that occurred while she was in the Montello office. The suspension letter said that "between January 2017 through October 2017, you exhibited behavior in the workplace which was harassing, demeaning, and bullying" toward a coworker. Stake was not involved in this suspension, and the suspension notice was signed by DOC's administrator.

Following these actions, Stake met with Wilcox numerous times and counseled her about her lack of professionalism. Stake directed Wilcox to be more respectful of her coworkers.

On February 1, 2019, Stake heard Wilcox talking loudly and could tell she was upset. Stake thought Wilcox was disrupting the office because she was talking loud enough that most people in the office could hear her. Stake subsequently counseled Wilcox, as he had done repeatedly before, to keep her workplace communications quiet, her volume down, and to watch her tone.

It was in that context that the following incident occurred.

On February 15, 2019, at the start of the workday, a steel door slammed shut near Wilcox's office. When that happened, Wilcox shouted "I am sick and tired of hearing the fucking door slam," while aggressively slamming her open palm on a table. Employees in the offices nearby heard this and left their offices to investigate the disturbance. One of those who heard the commotion and left to investigate it was a supervisor. That supervisor subsequently filed a charge against Wilcox that she had acted inappropriately in the workplace.

Wilcox has repeatedly been counseled to comport herself professionally in the workplace. The fact that Wilcox has repeatedly been counseled establishes she had problems complying with same. It was in that context then that Wilcox acted out again on the day in question. Specifically, she shouted a profanity and aggressively slapped her open palm on a table. Her actions were problematic because she caused a scene and disrupted the workplace. That is not supposed to happen, and employees who do that can be disciplined for same. The Commission therefore finds that on the day in question Wilcox's conduct crossed the proverbial line of acceptable workplace behavior. Wilcox's behavior constituted workplace misconduct which warranted discipline.

Wilcox contends she was subjected to disparate treatment because the person who slammed the door (that caused her to react as she did) was not disciplined. The Commission does not view that as disparate treatment. Disparate treatment occurs when employees do the same thing (i.e. they engage in the same acts of misconduct) and are treated differently afterwards. Here, though,

the two employees did not engage in the same acts of misconduct. That being so, no disparate treatment was shown here.

With regard to the level of discipline imposed by DOC, the record shows Wilcox previously received a one-day suspension, and thus the three-day suspension would be the next in a progressive discipline schedule. However, given the nature of the circumstances surrounding the behavior of Wilcox, it is certainly difficult for the Commission to fully penalize an individual for an obscenity uttered in frustration and not directed at any one individual. Such discipline would normally give the Commission considerable pause in affirming. Yet, the Commission cannot be entirely dismissive of the fact that Wilcox's outburst was disruptive to the workplace, and she had previous discipline, letters of expectation, counseling, and warnings relating to similar behavior. As such, the Commission finds the actions of Wilcox culpable yet mitigated by the severity (or lack thereof) of the totality of her actions and deems a one-day suspension appropriate after giving thorough consideration in this matter.¹

Dated at Madison, Wisconsin, this 9th day of August, 2019.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman

¹ When the discipline imposed is modified pursuant to the Commission's authority under § 230.44(4)(c), Stats., the Commission is not bound to follow any disciplinary progression established by the employing agency. *Wholf v. DOC*, Dec. No. 36317 (WERC, 5/16); *Waterman v. DOC*, Decision No. 36741 (WERC, 12/16); *Nowak v. DOC*, Dec. No. 37951 (WERC, 6/19). Rather, as part of the exercise of its § 230.44(1)(c), Stats. just cause jurisdiction, the Commission has discretion to determine the appropriate level of discipline.