

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

STACY MARTINSON, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF HEALTH SERVICES, Respondent.

Case ID: 2.0125

Case Type: PA

DECISION NO. 39801

Appearances:

Matthew Martinson, 15281 Hercules Road, Tomah, Wisconsin, appearing on behalf of Stacy Martinson.

David Makovec, Attorney, 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 Health Services.

DECISION AND ORDER

On November 14, 2022, Stacy Martinson 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 Health Services (DHS).

The parties stipulated to a consolidated hearing with three other Appellants suspended for three days by DHS; L.P. (Case ID: 2.1026), J.S. (Case ID: 2.0127), and B.P. (Case ID: 2.0128). A consolidated telephone hearing was held on January 18, 2023, by Commission Examiner Anfin Jaw for Martinson, L.P., J.S., and B.P. Martinson submitted closing argument on January 23, 2023. The Respondent submitted closing argument on January 24, 2023. Martinson filed a written reply on January 25, 2023. The Respondent also filed a written reply on January 26, 2023.

On February 28, 2023, Examiner Jaw issued a Proposed Decision and Order, affirming the three-day suspension of Martinson. The parties did not file objections to the Proposed Decision by the deadline given of March 6, 2023.

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

FINDINGS OF FACT

1. Stacy Martinson is employed by the State of Wisconsin Department of Health Services (DHS) as an Institution Unit Supervisor at Sand Ridge Secure Treatment Center (SRSTC) and had permanent status in class at the time of her suspension.

2. SRSTC is a secure treatment center in Mauston, Wisconsin operated by DHS, a state agency of the State of Wisconsin. SRSTC houses Wisconsin's Sexually Violent Persons Program.

3. Between April and August 2021, on her state email, Martinson received at least seven inappropriate and unprofessional email communications from coworker J.G. related to the planning and organization of a non-work-related golf outing. These emails were laced with sexual innuendos and obscene language.

4. Martinson responded via her state email to two of the emails.

5. Martinson did not report the inappropriate language and misuse of state email to J.G.'s direct supervisor, her own chain of command, or human resources, as required by policy.

6. DHS suspended Martinson for three days for negligence and failing to report the inappropriate conduct and potential respectful workplace policy violation to human resources.

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 Health Services did have just cause within the meaning of Wis. Stat. § 230.34(1)(a) to suspend Stacy Martinson 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 Stacy Martinson is affirmed.

Issued at Madison, Wisconsin, this 13th day of March, 2023.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman

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.

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

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

It is undisputed that Martinson, with her state email address, received approximately seven email communications between April and August 2021, for the planning and organization of a non-work-related golf outing. The emails were ridden with sexual innuendos, along with inappropriate and obscene language. The offensive content included, the name of the outing, "CHOMO Open," reference to "glory holes," team names: "The Swingin' Dicks," "Fore Players," "4 Guys, 1 Cup," "Babes w/ Balls," "Fore Skins," "Noc'ers," "Chicks w/ Sticks," "2 Putt Sluts," and "Guys w/ Saggin' Ball Bags & a Girl," as well as a can koozie prize featuring child molester and pedophile, Herbert the Pervert, from the tv show Family Guy. Martinson responded via her state email to two of the emails related to the event in July 2021. Martinson did not stop or redirect J.G. or report the inappropriate language and improper use of state email to human resources.

According to DHS Human Resources Policy and Procedure (HRPP) 703, DHS members of management are held to a higher standard and must maintain a workplace that is free from bullying, discriminatory, harassing and/or retaliatory behaviors. They are responsible for reporting all instances of such inappropriate behaviors to human resources as soon as possible. Certainly, DHS has an interest and reasonable expectation that its supervisory staff promote and maintain a respectful workplace and report any communications in violation of that goal.

DHS conducted an investigation into the emails after management received a Respectful Workplace complaint from an employee in November 2021. Given the large number of staff involved in the email exchanges and chains, the investigation was referred to the Division of Personnel Management (DPM) at the Department of Administration. DPM began conducting investigatory interviews in May 2022. The delay was due to workload and other personnel turnover issues. Martinson was interviewed in May and July 2022. During her investigatory interviews,

Martinson claimed she did not know what “CHOMO” meant (widely known prison slang for child molester) and that she did not receive any formal training on identifying slang terms. She also stated that she only scanned the emails and that she did not consider any of the language used as inappropriate or unprofessional. Further, she asserted that she was unfamiliar with the tv show Family Guy and the character Herbert the Pervert. Finally, she told the investigator that she did not see the relevance of whether the emails and terms were appropriate or professional because the golf outing was not work related. It should be noted that the CHOMO Open in 2021 was the second annual CHOMO Open. Presumably, there were inappropriate emails being exchanged among staff on state email related to organizing the first annual golf outing in 2020.

While Martinson did not testify at the hearing, she continued to argue that she did not know what the term “CHOMO” or “glory hole” meant, that the Department did not offer any training on slang terminology, that she only scanned the emails because she receives hundreds of emails each week and, was unaware of the Family Guy character. We find Martinson’s self-serving arguments unconvincing and not believable. Not only did she respond using her state email to two of the inappropriate emails in July 2021, but credible testimony from multiple witnesses persuades the Commission that Martinson and her coworkers who participated in the golf outing were fully aware of the meaning of “CHOMO,” as well as the grossly inappropriate nature and sexually laced theme of the event.

Martinson offers the following defenses to excuse and/or mitigate her conduct.

First, Martinson cites the delay in the investigation. There was about a six-month delay between when management was first made aware of the emails to when DPM conducted its first investigatory interview. Given the number of staff involved and DPM’s credible explanation regarding the delay, the Commission finds that the delay was not unreasonable under the circumstances.

Second, Martinson asserts that the investigation was improper and that her *Loudermill*¹ and due process rights were violated when the Department provided only five minutes between the investigatory meeting and the pre-disciplinary meeting. Yet, evidence and testimony established that Martinson was provided twenty-four hours’ notice of an investigatory interview and the pre-disciplinary meeting per the Wisconsin State Employee Handbook. Additionally, the January 18, 2023, hearing served as the post-disciplinary administrative procedure and thus satisfies the due process requirements under *Loudermill*.

Third, Martinson contends that she was already issued a written job instruction in May 2022, related to the inappropriate emails, and therefore, to receive discipline after the job instruction is “double jeopardy.” DHS explained that the May 2022 email communication letter was issued to staff to address the planning and organization of a rumored third annual golf outing in 2022. At that point, the investigation of the 2021 emails was pending and management wanted to prevent any further inappropriate email communications on state email and state computers. Therefore, Martinson’s double jeopardy argument is not persuasive.

¹ *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985).

Fourth, Martinson argues that she and her fellow coworkers who were involved in the golf outing were being retaliated against by S.B, the individual who filed the initial complaint about the emails. S.B. was the subject of a separate Respectful Workplace complaint, and therefore allegedly had a desire to retaliate by filing her own complaint. However, the Department has an obligation to investigate any report or allegation of potential misconduct, especially those which fall under its respectful workplace policy, regardless of when or how it is reported. Ultimately, whatever provokes an investigation does not negate any misconduct that is discovered. Additionally, S.B. was not involved in the decision to discipline Martinson, and is no longer employed with the Department. Under the circumstances, we find that S.B.'s alleged motivation in reporting the behavior does not change Martinson's misconduct, nor reduce her culpability.

Next, at the hearing, Martinson raised a disparate treatment claim related to coworker T.S., who posted and made inappropriate and offensive comments on Facebook referencing SRSTC. However, no evidence was presented that the communication was made on state time, with a state email, or a state computer. Furthermore, T.S. is not a supervisor. When SRSTC management became aware of the posts, T.S. was given a verbal reprimand and directive to not do it again. Here, the misconduct is not similar and therefore, T.S.'s lack of discipline cannot be compared to Martinson's three-day suspension.

Lastly, the Commission turns to Martinson's contention that she was unfairly grouped together with other DHS employees who were also disciplined for their degrees of involvement in the inappropriate emails. During the hearing, it was established that J.G. received a five-day suspension; L.P., J.S., and B.P. received three-day suspensions; B.H. initially received a three-day suspension but was reduced to a one-day suspension; R.J. and C.T. received one-day suspensions, and M.K. received a Letter of Expectation.

To address the differences in the level of discipline imposed, Ann Moran, appointing authority and Director of SRSTC, credibly explained that the differences were based on the different levels of involvement in the emails.

First, non-supervisory staff member J.G. was found to be the primary organizer of the golf outing, as he authored the majority of the communications by sending 92 inappropriate emails to approximately 37 coworkers using his state email and state computer. J.G. was issued a five-day suspension for serious workplace misconduct, misuse and abuse of state email and state computers, as well as failing to provide truthful and accurate information when required. Based on the seriousness of J.G.'s misconduct, the Department skipped progressive discipline. Plainly, J.G.'s misconduct was more egregious than Martinson's, which is reflected in the five-day suspension issued to J.G. compared to Martinson's three-day suspension.

Second, two other non-supervisory staff, R.J. and C.T. who were found to be co-organizers of the event, though to a much lesser extent than J.G., were issued one-day suspensions. As non-supervisory staff, R.J. and C.T. are not similarly situated to Martinson, as they are held to a lower standard and do not have a duty to report potential violations of the respectful workplace policy. Thus, the Department followed progressive discipline and issued one-day suspensions.

Third, other supervisory staff that were included on the communications received three-day suspensions, similar to Martinson, for failing to correct the behavior of staff and failing to report the inappropriate communications to human resources, as is required by policy (L.P., J.S., B.P., and B.H.). B.H.'s three-day suspension was subsequently reduced by DHS management to a one-day suspension due to mitigating circumstances. Specifically, B.H. addressed his concerns with J.G. and instructed J.G. to stop sending the inappropriate communications. B.H. was found to have failed to report the inappropriate conduct and potential respectful workplace policy violation to human resources. As L.P.'s, J.S.'s, and B.P.'s involvement were comparable in nature to Martinson's, all were appropriately issued three-day suspensions.

Finally, supervisor M.K., received only one email referring to the "CHO" Open, with no attachments, team names, or references to any inappropriate sexual innuendos. The Department explained that the threshold warranting discipline was based on the entire term, "CHOMO." Therefore, M.K. was issued a non-disciplinary Letter of Expectation. Clearly, M.K.'s conduct is not comparable to Martinson's misconduct. Consequently, Martinson has failed to prove that there was disparate treatment in her discipline.

Having addressed Martinson's defenses and found them unpersuasive, we find that Martinson committed workplace misconduct for her negligence and failure to report the sexually inappropriate email communications and potential respectful workplace policy violation to human resources.

The Commission is troubled by the gross recklessness and moral dereliction of the staff involved in the golf outing to think that the type of lewd language used over state email was at all appropriate or professional, particularly considering the population served at SRSTC. The facility provides specialized treatment services for people committed under Wisconsin's Sexually Violent Persons Law or Wisconsin Statutes Chapter 980. The fact that the golf outing was not work related has no bearing on whether the language used in the communications and failure to report the conduct is worthy of discipline. Without question, the offensive language used in the emails could not only have an impact on the public's perception of SRSTC and its employees but could also have an impact on treatment goals of the center and its safety and security. The emails, had they fallen into the wrong hands, could harm the credibility and rapport of the staff involved, or even have the potential to be used in a nefarious way by the patients to manipulate staff with the threat of disclosure. The type of risk created by the language, terms, and imagery contained within the email communications would undoubtedly, reasonably be said to have a tendency to impair the employer's operations if they became public or were to fall into the hands of the patients.

Given the foregoing, there was just cause for Martinson's three-day suspension, and it is therefore affirmed.

Issued at Madison, Wisconsin, this 13th day of March, 2023.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman