

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JESSICA SCULLY, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF HEALTH SERVICES, Respondent.

Case ID: 2.0127

Case Type: PA

DECISION NO. 39803

Appearances:

David Benson, 1111 North Road, Mauston, Wisconsin, appearing on behalf of Jessica Scully.

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 15, 2022, Jessica Scully 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; S.M. (Case ID: 2.1025), L.P. (Case ID: 2.01276), and B.P. (Case ID: 2.0128). A consolidated telephone hearing was held on January 18, 2023, by Commission Examiner Anfin Jaw for Scully, S.M., L.P., and B.P. The parties submitted closing argument on January 24, 2023. Scully 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 Scully. 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. Jessica Scully is employed by the State of Wisconsin Department of Health Services (DHS) as a Psychiatric Care 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. On April 22, 2021, June 8, 2021, and July 22, 2021, on her state email, Scully received three 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. Scully 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.

5. DHS suspended Scully 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 Jessica Scully 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 Jessica Scully 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.

Scully 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 Scully 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 Scully, with her state email address, received three email communications from coworker J.G. on April 22, 2021, June 8, 2021, and July 22, 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." Scully did not stop or redirect J.G., or report the inappropriate language used by J.G. 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. Unquestionably, 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. Scully was interviewed in July 2022. During her investigatory interview, Scully acknowledged receiving the emails dated April 22, 2021, June 8, 2021, and July 22, 2021, but claimed that she did not recall reading the details of the emails, or remember reading any

attachment. She also denied any understanding of the word “CHOMO” (widely known prison slang for child molester) and claimed she had no idea what “glory holes” meant. When asked, she did admit that the team names contained in the April 22, 2021, email attachment were unprofessional and inappropriate. However, she further asserted that ‘babes with balls’ and ‘swinging dicks’ could be interpreted differently, not just inappropriately. 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 Scully continued to deny her understanding of “CHOMO” and “glory hole” at the hearing, credible testimony from multiple witnesses persuades the Commission that Scully 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. We find Scully’s testimony untruthful, self-serving, and not credible.

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

First, Scully 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, Scully asserts that she was on vacation and out on medical leave from June 18 through September 17, 2021, when the majority of inappropriate email communications about the golf outing were being exchanged by her coworkers over state email. While this may be true, there is no question Scully received the April 22, 2021, and June 8, 2021, emails which included the obscene language and sexually explicit team names. Therefore, Scully’s vacation and leave time does not lessen her liability for her failure to address or report the language or untruthfulness during the investigation and at the hearing.

Third, Scully explained that she was working as a COVID Coordinator and also performing her regular job duties as a Psychiatric Care Supervisor before going out on extended leave from June through September 2021. Due to her additional duties, she received a substantial number of emails daily, and if an email was not pertinent to her job, she did not read it. Again, Scully admitted receiving the April 22, 2021, and June 8, 2021, emails. Moreover, she indicated that she did not “recall” reading the emails but stated that ‘babes with balls’ and ‘swinging dicks’ could be interpreted differently. Here, her explanation implies that she did actually read the emails, including the team names. Thus, we are not persuaded that Scully should not be held accountable for her misconduct.

Fourth, Scully 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 Scully 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 Scully's misconduct, nor reduce her culpability.

Next, at the hearing, Scully 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 Scully's three-day suspension.

Lastly, the Commission turns to Scully'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; S.M., L.P., 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 Scully's, which is reflected in the five-day suspension issued to J.G. compared to Scully'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 Scully, 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 Scully, for failing to correct the behavior of staff and failing to report the inappropriate communications to human resources, as is required by policy (S.M., L.P., 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 policy violation to human resources. As S.M.'s, L.P.'s, and B.P.'s involvement were directly comparable in nature to Scully'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 Scully's misconduct. Consequently, Scully has failed to prove that there was disparate treatment in her discipline.

Having addressed Scully's defenses and found them unpersuasive, we find that Scully committed workplace misconduct for her negligence and failure to report the sexually inappropriate email communications and potential respectful workplace policy violation to human resources, along with her dishonesty during the investigation and, most importantly, at the hearing.

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. Surely, 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 no doubt, 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 Scully'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