

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

KYLE DEMERS, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0582

Case Type: PA

DECISION NO. 39941

Appearances:

Kent Demers, W12698 County Road AS, Brandon, Wisconsin, appearing on behalf of Kyle Demers.

Nicole Porter, 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 Corrections.

DECISION AND ORDER

On May 1, 2023, Kyle Demers 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 (DOC). The matter was assigned to Hearing Examiner Katherine Scott.

A hearing was held on July 25, 2023, in Waupun, Wisconsin, by Examiner Katherine Scott. The parties submitted written arguments on July 31, 2023. On August 7, 2023, Examiner Scott issued a Proposed Decision and Order, affirming the three-day suspension of Kyle Demers by the DOC. The parties did not file objections to the Proposed Decision by the deadline given of August 14, 2023.

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

FINDINGS OF FACT

1. Kyle Demers (Demers) is employed by the State of Wisconsin Department of Corrections (DOC), as a sergeant at Waupun Correctional Institution. He had permanent status in class when he was suspended.

2. On June 19, 2022, Demers told a Hispanic subordinate “Do you not understand English? Do you need me to say it in Mexican?”
3. Following an investigation, the DOC suspended Demers for three days for harassment and failure to comply with agency policies.

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 Corrections had just cause within the meaning of Wis. Stat. § 230.34(1)(a), to suspend Kyle Demers 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 Kyle Demers by the State of Wisconsin Department of Corrections is affirmed.

Issued at Madison, Wisconsin, this 24th day of August 2023.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman

MEMORANDUM ACCOMPANYING DECISION AND ORDER

Wisconsin Stat. § 230.34(1)(a), provides in pertinent part the following as to certain employees of the State of Wisconsin: “[a]n employee with permanent status in class . . . may be removed, suspended without pay, discharged, reduced in base pay or demoted only for just cause.”

Wisconsin Stat. § 230.44(1)(c), 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.”

Kyle Demers 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 Demers was guilty of the alleged misconduct and that the misconduct constituted just cause for the discipline imposed. *Reinke v. Personnel Bd.*, 53 Wis.2d 123 (1971); *Safransky v. Personnel Bd.*, 62 Wis.2d 464 (1974).

Demers was employed as a correctional sergeant at Waupun Correctional Institution (WCI). On June 19, 2022, he was working with and supervising Correctional Officer Bridgett Prosper. Prosper was tasked with giving inmates their medication but failed to do so. Demers became frustrated with Prosper, and their conversation became heated. It culminated with Demers saying “Do you not understand English? Do you need me to say it in Mexican?” to Prosper, who is Hispanic. Prosper speaks English fluently and without an accent, so Demers cannot have meant this sincerely.

Demers denies that he said anything of this nature to Prosper. His account is supported by Officer Danika Cantu, who was present during the interaction. However, Cantu is Demers’s girlfriend, and the two live together. Therefore, Cantu has the potential to be a biased witness. In contrast, Prosper’s account is supported by Correctional Officer Jerome Bailey, an impartial witness. Bailey credibly testified that Demers asked Prosper whether she spoke English and whether he (Demers) would need to repeat himself in Mexican.

Demers argues that since his girlfriend, Cantu, is Hispanic, he cannot discriminate against Hispanic people. However, having friends or romantic partners of a particular race or protected class does not preclude someone from using racially derogatory language. Further, Demers has a history of making incendiary racial comments in the workplace. In 2017, Demers received a one-day suspension for threatening to “lynch” another employee. *See Respondent’s Exhibit 8*, pg. 15.

Demers argues that he lost his temper because Prosper wasn’t doing her job properly. Even if this were true, Prosper’s job performance is irrelevant to this discipline. Demers’s duty as a supervisor is to deal with employees who aren’t doing their jobs properly, and he should be able to do so without losing his temper or using racially derogatory language. Furthermore, there is no type of employee misconduct or underperformance that would justify a supervisor using racially derogatory language towards a subordinate.

Demers argues that Prosper's claim is less trustworthy because Prosper initially said she didn't want to file a claim and waited over two months before filing a Respectful Workplace Complaint. However, it is common for employees to wait to file complaints, and the timing of the complaint has no bearing on the veracity of Prosper's claim.

Demers further argues that Prosper retaliated against him by filing this claim. He says that WCI employee Rodney Reynolds encouraged Prosper to file a complaint against Demers after Demers's girlfriend, Cantu, filed a complaint against Reynolds. Even if the complaint was a form of retaliation, the concern of the Commission is limited to whether there is a factual basis for the discipline regardless of the motivations behind its exposure. As discussed prior, the factual basis does exist and therefore Demers' argument regarding retaliation is moot.

Lastly, Demers argues that he was already disciplined because his interaction with Prosper was written up as a "job instruction." WCI has a system in which minor employee transgressions are entered into a shared spreadsheet, and employees are sent a follow-up email. After the incident on June 19, Demers's supervisor, Captain Ryan Hintz, made an entry which said Demers "spoke to Officer Prosper in a non-professional way" and that Demers, Prosper, and Hintz had discussed the incident afterwards. *See* Appellant's Exhibit 1. However, WCI Warden Randall Hepp credibly testified that "job instructions" are not considered formal discipline and do not negate the possibility of formal discipline, such as the three-day suspension later given to Demers following an investigation.

Wisconsin Stat. § 230.34(1), provides in pertinent part:

It is just cause to remove, suspend without pay, discharge, reduce the base pay of, or demote an employee without imposing progressive discipline for any of the following conduct:

1. While on duty, harassing a person.

Demers' heated on-duty remark to a Hispanic co-worker clearly falls within the scope of the misconduct addressed by Wis. Stat. § 230.34(1), and incorporated by DOC in Executive Directive 5, wherein "Harassment" is defined as:

unwelcome verbal, physical, or visual conduct that is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive.

Viewed in the context of Wis. Stat. § 230.34(1) and the definition of "harassment" found in Executive Directive 5, Demers's remark and its impact on his co-worker persuades the Commission that there is just cause for the imposed skip in progression to the three-day suspension. Therefore, the suspension is affirmed.

Issued at Madison, Wisconsin, this 24th day of August 2023.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman