

notes, rough drafts, e-mails, interview notes, and other back-up information generated by Tim Ward during his investigation and development of his report of the subject incident was denied.

Whereupon, the sworn testimony of witnesses for both Appellee and Appellant was presented, along with exhibits. Joint exhibits 1 through 30 were admitted, incorporated herein and made a part hereof. Appellee's Exhibit 31 was admitted, incorporated herein, and made a part hereof for the limited purpose of showing a pattern of behavior by Appellant, and not as a prior discipline upon which Appellee relied when issuing the subject suspension. Appellant's Exhibit 34-1 through 34-4 are not authenticated, but are admitted, incorporated herein, and made a part hereof for whatever limited value they may have. Accordingly, after careful consideration of all evidence, testimony, and exhibits, the undersigned Administrative Law Judge issues the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

Appellant is an engineering intern IV and eight year employee with Appellee. On the morning of March 17, 2010, Appellant was standing at the work cubicle of co-worker Michael Jordan discussing work, when another co-worker and friend, Tad Dow, approached and asked Appellant if he was wearing green, since it was St. Patrick's Day. Appellant was not. They began a friendly, good-natured banter back and forth, with Mr. Dow saying that he did not want to hear Appellant's lame excuse for not wearing green and that he might have to pinch him. Appellant retorted that he was Scottish, not Irish and if Mr. Dow pinched him, he would have to hit him. The banter

turned into horseplay between the two, with Mr. Dow pretending to try to pinch Appellant and Appellant pretending to try to hit him.

In the midst of this horseplay, another employee, Alisha Barham, approached the two on her way to discuss a work matter with another co-worker. Overhearing the exchange between Appellant and Mr. Dow, Ms. Barham reached out and poked or pinched Appellant's arm.¹ Appellant responded loudly and angrily at Ms. Barham that it was not funny; that he had been assaulted; and he turned to walk away. Mr. Dow tried to calm Appellant and told him not to be such a "drama queen". Appellant turned back toward the astonished co-workers and yelled, "No! That was an assault, and I will not stand for it!" and marched off to report the "assault" to engineering manager Patrick Rosch.

Appellant's yelling caused co-worker Michael Jordon, seated in his cubicle, to stand up to see what was causing all the commotion. He testified that Appellant yelled "pretty loudly," an "8 on a scale of 1 to 10". Anyone anywhere nearby would have heard it. Alisha Barham appeared upset and confused by Appellant's outburst, he said. Debbie Segroves, another co-worker, testified that she was leaving the reception area to return to her office when she heard Appellant yelling, "This is an assault. I will not stand for it!" and saw Alisha Barham throw up her arms and reel back in surprise, looking shocked and alarmed at Appellant's reaction. Ms. Segroves testified that Appellant's outburst was very loud and disruptive, and shocked her, as well. Another co-worker, Florence Fields, was on her phone in a nearby office when she heard

¹ The evidence is inconclusive as to the severity of Ms. Barham's contact with Appellant. Appellant claims that she pinched him; she claims that she merely touched him. None of the witnesses who heard or saw the incident witnessed Ms. Barham touch or pinch Appellant.

Appellant shouting. Both she and the person on the telephone heard Appellant's outburst. (Joint Exhibit 9)

Shellie Chard-McClary, Director of the Water Quality Division, testified that she was in a closed-door meeting in her office when she heard yelling and stomping and left her office to see what was happening. She started past Patrick Rosch's office when she saw Appellant in the office talking with Mr. Rosch. Appellant told her that he had been assaulted and was "upset and angry about being violated." (Joint Exhibit 5) Ms. Chard-McClary suggested that Appellant go home and take "cooling off" leave, and if he felt that he had been assaulted, he should immediately contact the appropriate law enforcement agency. (Joint Exhibit 8) Appellant declined both suggestions. Ms. Chard-McClary assigned Tim Ward, Assistant Director of the Water Quality Division, to investigate the incident and make recommendations concerning what if any discipline should be issued, and to whom.

As a result of his investigation, Mr. Ward recommended that Appellant, Tad Dow, and Alicia Barham all be disciplined in accordance with the Progressive Discipline Administrative Procedures Manual for their respective roles in the incident. Since neither Mr. Dow nor Ms. Barham had any prior disciplinary actions, Mr. Ward recommended that each be given a coaching session by their direct supervisors. For his role, and because of his prior disciplinary record, Appellant was recommended to receive a 15-day suspension without pay. At the Pre-Disciplinary Hearing, Hearing Officer Wendy Caperton recommended a 7-day suspension without pay. On June 3, 2010 Executive Director Steven Thompson issued Notice of Suspension Without Pay to Appellant, suspending him for seven (7) working days due to misconduct,

insubordination, and conduct unbecoming a public employee, all in violation of Merit Rules. (Joint Exhibit 1) Appellant filed this appeal.

All witnesses agreed that Appellant was angry, inappropriately loud, and disruptive in his outburst. Appellant does not deny this, but in his appeal states, by way of mitigation, that he has an abnormal sensitivity to touch in his arms and hands as a result of the re-injury in 2009 of an old injury to his vertebrae. However, at the subject hearing Appellant presented no medical records, documentation or other evidence to support this assertion; and he never mentioned such sensitivity to touch at the Pre-Disciplinary Hearing (Joint Exhibit 2) or in his written statement of the incident (Joint Exhibit 5).

At the May 24, 2010 Pre-Disciplinary Hearing Appellant was represented by Clyde McClendon of the Oklahoma Public Employee's Association. When Hearing Officer Wendy Caperton gave the floor to Appellant to "tell [her] anything you would like to," Appellant read a prepared statement:

Ok, um, just a note of restatement. This disciplinary action came as a direct result of my reporting a violation of ODEQ policy and filed [sic] a formal grievance. I believe this disciplinary action is a violation of the Whistleblower Act, is retaliatory, and discriminatory.

Joint Exhibit 2, page 2

Appellant presented no evidence, documentation, or even explanation to support the assertion he made at the Pre-Disciplinary Hearing. After reading his statement, Appellant was asked if he had anything else. He did not. Appellant made no mention of having any sensitivity to touch.

In his March 17, 2010 e-mail statement of the incident which he sent to Ms. Chard-McClary, Appellant stated:

... she [Alisha Barham] just assaulted me. It was very painful and I yelled at her that it was not funny.

I was upset and angry about being violated. ...

I understand that there is a lot of horseplay here at work and I do not mind it. But I do draw the line when it comes to physical contact. I know that Alisha was horsing around, but she went too far. *She knew that I do not like to be touched and that I consider it a violation of one's own personal space.* I only ask that Alisha apologize for her actions.

Joint Exhibit 5 (*emphasis added*)

While he claims that Ms. Barham's "pinch" was painful, Appellant again makes no mention of any medical reason for his sensitivity to touch. On the contrary, Appellant attributes his dislike of being touched to his belief that it violates his personal space. He further testified at the hearing that he never told Ms. Barham of his sensitivity to touch.

In his e-mail statement made on March 17, 2010, Appellant asks only "that Alisha apologize for her actions." Two or three days after the incident, Ms. Barham, Mr. Dow and Appellant were together when Ms. Barham apologized to Appellant and asked if they were alright with each other. He indicated that they were. Yet, ten days later, on April 1, 2010, Appellant filed a grievance against Alisha Barham asking that she be discharged for her "malicious" "physical assault" on him that had created a "hostile work environment" for him, and led to his fear that she "will continue to harass and attack [him] here at work."² (Joint Exhibit 18) He further alleged gender discrimination, stating that if a male had attacked a female, he already would have been terminated or suspended. (Joint Exhibit 18)

Appellant's grievance was investigated by Division Director Shelli Chard-McClary and was granted. It was confirmed that Ms. Barham had touched Appellant (although

² He later changed his request for her discharge to a request that she be suspended without pay.

pinching was not confirmed), and that appropriate disciplinary action had been taken in accordance with the agency's Progressive Discipline Policy, although the specific action taken could not be revealed to Appellant. (Joint Exhibit 19) Appellant appealed the grievance to the Merit Protection Commission citing the agency's failure to address his gender discrimination claim. (Joint Exhibit 20) Although Appellee's Civil Rights Administrator had investigated the claim and found no evidence of discrimination, this finding was not included in the grievance response because the investigator believed, from talking with Appellant, that he had wanted to withdraw his gender discrimination claim. Appellee amended its grievance decision to include the discrimination finding, and Appellant's appeal was dismissed by the Commission. (Joint Exhibits 20 and 21)

Appellant claims that the seven-day suspension was too harsh compared with the discipline given to the other two employees involved. However, Appellee followed its Progressive Discipline Administrative Procedures Manual in determining the discipline administered. Unlike his two co-workers, Appellant had numerous prior disciplinary actions related to his continuing unacceptable behavior with co-workers:

- On November 13, 2007 Appellant received a Letter of Reprimand for misconduct, insubordination, and conduct unbecoming a public employee because of his inappropriate behavior toward his supervisor and a female co-worker while at a conference. (Joint Exhibit 11)
- Appellant's December 6, 2007 mid-year PMP indicated that Appellant had substantive issues regarding his workplace behavior that required behavior modification. (Joint Exhibit 12)

- Appellant's January 15, 2009 mid-year PMP indicated that Appellant had substantive issues regarding his workplace behavior that required behavior modification. (Joint Exhibit 13)
- On January 19, 2010 Appellant was suspended without pay for three (3) days for misconduct and conduct unbecoming a public employee because of his obscene gestures made toward a female co-worker. (Joint Exhibit 15) Pursuant to an MPC negotiated settlement, the three-day suspension was reduced to a one-day suspension without pay and Appellant was required to take Human Resource Development classes in Effective Communication, Team Building, Violence in the Workplace, and Managing Conflict. (Joint Exhibit 16)

Appellant has exhibited on-going problems with anger management and unprofessional behavior in the workplace, with numerous incidents over at least the past three years. Tad Dow, who describes himself as Appellant's best friend, indicated that Appellant does get angry and needs to be calmed down; and that Appellant has anger issues with women whom he perceives as taking advantage of him. Debbie Segrove indicated that she considers Appellant a friend, though he is not an easy friend to have. She describes Appellant as abrasive toward women, and sometimes tactless with them.

Appellant states in support of mitigation, however, that while he did get angry, he showed restraint by not using profanity or profane gestures toward Ms. Barham; nor did he use physical force against her. He further states that Appellee's response to the incident was overblown and overreacted; that the incident lasted less than 60 seconds; and that there was minimal disruption of the workday. This Administrative Law Judge

submits that, contrary to Appellant's assertion, it was Appellant's response to the uninvited touching that was overblown, overreacted, and totally disproportionate to the "violation of his personal space" which he alleged to have suffered at the hands of Ms. Barham.³

This Administrative Law Judge finds that the evidence in this case supports, by a preponderance of the evidence, the action taken by Appellee, Department of Environmental Quality, and just cause exists for the seven-day suspension without pay of Appellant for his behavior on March 17, 2010 in violation of Merit Rule 455:10-11-14, Misconduct, Insubordination, and Conduct Unbecoming a Public Employee.

CONCLUSIONS OF LAW

1. Any findings of fact that are properly conclusions of law are so incorporated herein as conclusions of law.

2. Merit Rule 455:10-11-14 states that a permanent classified employee may be suspended without pay for a period not to exceed sixty (60) calendar days for misconduct, insubordination, conduct unbecoming a public employee, and any other just cause.

3. Merit Rule 455:10-9-2 states that the Appellee bears the burden of proof in an adverse action and must prove by a preponderance of the evidence that just cause exists for the action taken.

4. The Oklahoma Department of Environmental Quality Administrative Procedures Manual (DEQ-APM), I. **Progressive Discipline**, provides that the policy is

³ Further, Appellant's over-the-top response spawned two separate investigations of the incident, along with a Civil Rights investigation, a Pre-disciplinary hearing and two proceedings before the Merit Protection Commission, all of which utilized numerous agency hours and resources.

designed to ensure consistency, evenhandedness, and predictability, along with flexibility where justified by aggravating or mitigating circumstances.

5. DEQ-APM, III.B. **Formal Discipline, Further Disciplinary Action**, provides that an employee may be suspended without pay for misconduct, insubordination, and conduct unbecoming a public employee; and further states that the circumstances of each case will determine the length and nature of the action imposed.

6. Appellee, Oklahoma Department of Environmental Quality, has met its burden to prove, by a preponderance of the evidence, that Appellant, Winfred Lusk, II violated Merit Rule 455:10-11-14, Misconduct, Insubordination, and Conduct unbecoming a public employee, and that just cause exists for his suspension without pay for seven (7) working days.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED by the undersigned Administrative Law Judge that the petition of Appellant is hereby **DENIED** and the suspension without pay is sustained.

DATED this 10th day of December, 2010.



Annita M. Bridges, OBA # 1119
Administrative Law Judge
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