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PERB
102361

STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

SCOTT ILLINGWORTH, Appellant, and STATE OF IOWA (IOWA DEPARTMENT OF TRANSPORTATION), Appellee.	CASE NO. 102361 PROPOSED DECISION AND ORDER

Appellant, Scott Illingworth, filed a state employee disciplinary action appeal with the Public Employment Relations Board ("PERB") pursuant to Iowa Code section 8A.415(2)(*b*) and PERB rule 621—11.2. Illingworth appeals the third-step response of the Iowa Department of Administrative Services (DAS) denying the appeal of his termination.

Illingworth worked as a Training Specialist 1 for the Iowa Department of Transportation (DOT). Illingworth alleges the State did not have just cause to terminate his employment on May 20, 2019. The State asserts that Illingworth's termination was supported by just cause.

A closed evidentiary hearing was held on September 22 and 23, 2020. Peter Sand represented Illingworth. Anthea Galbraith and Annie Myers represented the State. The parties submitted post-hearing briefs on November 20, 2020. After considering the evidence and the arguments of the parties, I propose the following:

FINDINGS OF FACT

Illingworth's Background

Illingworth lived in Florida during his early life and into his professional life. He worked as a sales territory manager for a grocery products industry company for nine years. He then worked as a food broker with a different company in Florida for two years. These positions required extensive sales activity. Illingworth received training on interpersonal communications for the purposes of his position.

Illingworth then began working as a presenter for real estate training. He worked as a presenter for roughly fifteen years. This resulted in a move to California. This position required travel and again required him to work with people.

After moving to California, Illingworth began working for First Transit, a private company under public contract with a large governmental entity. He began as a metro transit driver with this company around 2005 and was promoted to the road supervisor position. In that position he trained and supervised a 60-bus fleet of paratransit buses. Illingworth worked for this company for seven or eight years.

Illingworth then moved to Iowa to be closer to family. He began his professional career in Iowa working at Waste Management for roughly three years.

During Illingworth's lengthy professional history he never had a complaint about his behavior in the workplace. Due in part to his professional history,

Illingworth feels he is a very friendly person and tries to be relaxed and humorous in the workplace.

Illingworth's Position at DOT

Illingworth began working for the State of Iowa, Department of Transportation, Office of Employee Services (DOT-OES) in May 2017. Illingworth worked as a Training Specialist 1 on the DOT-OES safety team. A training specialist ensures the DOT maintains compliance with regulations and the necessary training of employees. In this position, Illingworth had the responsibility of providing training to internal customers of the DOT, primarily related to safety, including DOT safety initiatives. Illingworth was also tasked with disbursing information to the customers.

During Illingworth's tenure at DOT, Todd Sadler supervised Illingworth, but Tim Carey worked as the health and safety team lead. Thus, Illingworth worked more closely with Carey. The DOT-OES team also consisted of roughly five interns at any given time, some of which were assigned to the safety team. Illingworth worked with these groups of interns. Illingworth stated that compared to the main office of DOT where he worked, the atmosphere at the field garages was more relaxed and the employees could tease each other. Illingworth claims the main office engaged more in office politics.

Illingworth worked at DOT for approximately two years prior to his termination. During that time, his supervisors evaluated his performance. On his November 2017 evaluation, management noted that "Scott is a team player and has been actively getting to know other members of the team. Scott has done

a great job working with the interns, mentoring on safety-training/practices." The next evaluation again stated, "Scott has done a good job providing direction and guidance to interns." Illingworth met expectations in his evaluations.

During Illingworth's time at DOT he also acknowledged receipt of DOT work rules in 2019 and completed sexual harassment training three times.[1] This training contained the State of Iowa Policy Prohibiting Sexual Harassment.

In April 2018, Sadler called a meeting with Illingworth and Carey. Sadler told Illingworth he heard about a comment Illingworth made during a new supervisor/leadership academy presentation that Illingworth presented. When on a break, Illingworth had commented on a female employee's pants. Sadler and Carey recall[2] that Illingworth said his comment on the woman's attire was not intended to have a sexual connotation.[3] The parties disagree on whether Sadler told Illingworth that he should refrain from commenting on any employees' attire or this particular employee's attire. Regardless, the meeting put Illingworth on notice that commenting about a coworker's attire could be a problem. As a directive from the meeting, management required Illingworth to take the sexual harassment training again, roughly a month after his previous viewing of the training. This resulted in Illingworth completing sexual harassment training three times in two years. This directive to redo sexual

[1] Illingworth completed the trainings on March 19, 2018, April 20, 2018, and February 28, 2019.
[2] Carey wrote his account of the meeting roughly a year after the event occurred. This written account was completed during Illingworth's suspension, but prior to his termination.
[3] The parties disagree on the details of Illingworth's comment. However, the details are inconsequential as it is clear from the context of the conversation and the direction coming out of the conversation that management was concerned Illingworth's comment carried a sexual connotation.

harassment training indicates management did discuss whether Illingworth's comment was inappropriate and sexual in nature, regardless of Illingworth's recollection.

The instant case arose after a group of mostly young female coworkers and interns went to DOT management with allegations that Illingworth touched them inappropriately and made comments of a sexual nature.[4]

Allegations of Inappropriate Physical Conduct

Multiple complainants testified that Illingworth would rub their back in a circular motion or touch their shoulders or arms. However, not all of the complainants felt these touches were inappropriate.

AS-TS1[5] stated Illingworth would rub her back three to four times as a greeting. This type of greeting began at her interview. AS-TS1 said Illingworth would rub her back or put a hand on her shoulder about once a week for a total of about twenty times. AS-TS1 did not like it when Illingworth touched her like this, but said she "didn't have any ill feelings." AS-TS1 claimed these back rubs were suggestive in that Illingworth's hand would rub over bra straps, which may make the encounter more uncomfortable.

Two other employees and one intern stated they may have had physical contact with Illingworth, but nothing they believed to be inappropriate. AE-HRA[6]

[4] The parties, out of concern for the employees involved, used aliases rather than the employees' names. The undersigned will seek to similarly use pseudonyms when possible.
[5] AS-TS1 started at DOT as an intern in December 2017. By March 2019, prior to Illingworth's termination, the State hired AS-TS1 as a Training Specialist 1 on the training and development team.
[6] AE-HRA worked as a Human Resource Associate for DOT-OES since June 2018 and at all times relevant to this hearing.

testified that Illingworth briefly patted her forearm, but it was not sexual in nature, and she did not think any of Illingworth's physical conduct toward her was inappropriate. MN-HRA[7] said that Illingworth had touched her arm or shoulder, but not inappropriately. RS-Intern[8] said Illingworth never touched her in a way that made her feel uncomfortable.

Two other interns stated that Illingworth's physical attention toward them did make them uncomfortable. H.R.-Intern[9] stated that when Illingworth would rub people's backs it would make you feel uncomfortable, although he did this to her five times or less. AS-Intern[10] stated that Illingworth touched her on the shoulder multiple times throughout the day. One day in winter 2019, AS-Intern said Illingworth touched her shoulder more than five times in one day in a way that made her uncomfortable. AS-Intern was also in a group picture with Illingworth in which she was on her knees in the front and he was standing behind her. He placed his hand on her shoulder or the top of her back for the picture and that unsettled her and made her uncomfortable. Illingworth stated he was standing close to AS-Intern because the photographer told them to get closer. Additionally, since he was standing behind her and she was on her knees, he put his hand on her back to steady himself as he was concerned about falling over her legs.

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[7] MN-HRA started as a Human Resource Associate with DOT in August 2017 and worked in that role until August 2019.
[8] RS-Intern worked as an intern for DOT-OES starting in February 2019. Her job responsibilities focused on the area of workers' compensation.
[9] H.R.-Intern worked as an administrative intern for DOT beginning in November 2018.
[10] AS-Intern worked as a health and wellness intern with DOT from January 2018 through May 2019.

AS-Intern also had one other incident in which physical contact with Illingworth made her uncomfortable. Again, AS-Intern was in a group picture and her phone was in the way. AS-Intern stated that Illingworth said he would take care of it and grabbed the phone and put it in her back pocket, touching her at or near her buttocks. Illingworth claims the phone was already in AS-Intern's back pocket, but was falling out so he pushed it back in to her pocket in a reflexive manner. Regardless, Illingworth touched or was near to touching AS-Intern's buttocks.

One other complainant also claimed Illingworth's physical conduct made her uncomfortable. KR-SC[11] alleged Illingworth stood shoulder to shoulder with her in an elevator when there was plenty of space for him to refrain from touching her. She claimed he tried to get in the elevator with her on other occasions and she avoided him. She also contended he would hang on her cubicle and stare at her in a way she found creepy. Several other complainants in this case stated that KR-SC had told them about Illingworth's behavior, but no one claimed to have witnessed it.

KR-SC's allegations in this case are subjective and difficult to characterize. Further, no other employee or intern complained about Illingworth engaging in this type of menacing behavior. Unlike the other complainants, KR-SC did not testify. As KR-SC was not present to testify or be cross-examined about the unique allegations, no other evidence in the record suggests that anyone

[11] KR-SC worked as a staffing coordinator at DOT-OES. She started with the State of Iowa in 2008 and joined the DOT in 2010. KR was near retirement at the time of the incidents alleged in this case.

witnessed this behavior towards KR-SC, and no other evidence suggests that Illingworth engaged in this type of pattern of behavior, I give her allegations no weight. *See Harrison and State of Iowa (Dep't of Human Servs.*), 05-MA-04, at 11 (internal citations omitted) ("Where a discharge case turns on the credibility of witnesses to alleged misconduct who are not present to testify at the hearing, arbitrators generally refuse to credit hearsay written statement by the absent witnesses and find them to be insufficient to support the discharge.").

Illingworth generally stated that he did have physical contact with his coworkers such as a pat on the back for being a good teammate, but the physical contact did not go further than that. With the exception of AS-Intern, it appears that Illingworth's physical conduct was incidental to the complaint at issue and the discomfort of the employees and interns whom filed this complaint. AS-TS1 specifically said she did not think as much about the physical contact as she did about the comments Illingworth made.

Allegations of Sexual Comments, Jokes, or Innuendos

AE-HRA stated Illingworth would tell inappropriate jokes about females and some were sexual in nature, whereas others were just about females in general. She claimed that he made these types of jokes and comments 50-60% of the time she worked with him, but she did not work with him often. AE-HRA said Illingworth's jokes made her uneasy. MN-HRA also stated that Illingworth has made inappropriate comments since she started. She did not feel that he was hitting on her when he was making these jokes. Rather, she characterized his comments as him making a joke or trying to be funny, but it was not funny.

H.R.-Intern also stated that Illingworth joked around about sex. AS-Intern, H.R.-Intern, and AE-HRA all testified that no one else in the office acted the way Illingworth did.

Additionally several employees and interns claimed that Illingworth made other non-sexual, but still inappropriate, jokes or comments. These jokes or comments ranged from comments about alcohol to political or ethnic jokes.

The complainants detailed several specific incidents or sexual comments that made them uncomfortable. MN-HRA stated that when she was crossing her name off a calendar using black marker, Illingworth offered her a pen. She said she would just use her marker and he said, "Once you go black, you never go back." MN-HRA was shocked and speechless. Illingworth denied making this statement. MN also recounted an incident in which Illingworth was carrying jugs of water for coffee and said, "Nice jugs, but I can't say that anymore." Illingworth admitted partially to the encounter, but recalled that he actually said "Oh, it's nice they filled the jugs, but I can't say that." Illingworth claimed he meant that it was nice the interns filled the jugs of water. The reason why he added that he cannot say that is because the DOT employees were instructed not to ask interns to do menial tasks such as filling the jugs of water.

MN-HRA also had another encounter with Illingworth that made her uncomfortable. MN-HRA, AE-HRA, and Illingworth drove from Ames to Ankeny for a motor vehicle division wellness fair. MN-HRA claimed Illingworth made very inappropriate sexually oriented jokes in the car including a sexual joke about a sailor. AE-HRA also clarified that when she stated that Illingworth told sexual

jokes 50-60% of the time she worked with him, this was the main incident to which she was referring.

AE-HRA, MN-HRA, and Illingworth also went to a restaurant during this outing. MN-HRA claimed that at the restaurant Illingworth referred to her and AE-HRA, both of whom are substantially younger than Illingworth, as his "younger wives." MN-HRA contended that Illingworth continued joking about this throughout the lunch which made both her and AE-HRA very uncomfortable. MN-HRA claimed that Illingworth was older and intimidating and so she and AE-HRA played along. AE-HRA did not mention this restaurant incident specifically in her investigatory interview, but at hearing, testified that Illingworth referred to her and MN-HRA as his mistresses during this meal.

Illingworth claimed he did not make sexually oriented jokes in the car, and in fact, cannot tell a joke as he does not remember them. He does admit he may have commented on the drive-time radio and it is possible the radio commentary was sexual in nature. Illingworth also claimed he did not refer to AE-HRA and MN-HRA as his "younger wives" or "mistresses," but instead called them his "work wives." MN-HRA vehemently refuted this claim in testimony stating that she knows what a work wife means and would not have been offended if that is what Illingworth said, but she knows he did not call them that. She testified she is still "disgusted" by the situation.

AS-Intern also listed at least three comments from Illingworth that she felt were inappropriate. She stated that Illingworth called her cute. She also stated that Illingworth made a comment about her boyfriend being lucky. Finally, AS-

Intern also stated that prior to her spring break trip to Florida Illingworth asked her if she had her bikini ready. These comments made her uncomfortable. Illingworth claimed he did tell AS-Intern to "Be sure to pack your bikini. It's bikini season already." He also stated his comment about AS-Intern's boyfriend was meant as a compliment for her and her high moral character. AS-Intern claimed she would not be comfortable being alone with Illingworth and his touching especially made her uncomfortable.

AS-TS1 also cited a couple instances of particular comments by Illingworth that she found inappropriate. AS-TS1 and Illingworth sat near each other. Illingworth had a fan in his office and AS-TS1 would point the fan towards herself or borrow it. If AS-TS1 would say "It's hot in here" Illingworth would reply, "Well, so are you." AS-TS1 also contended Illingworth made five to ten comments such as "You don't need the fan" or "You're hot. You don't need a fan anyway." AS-TS1 said that Illingworth's comments did not make her uncomfortable enough to report it as it was not directly offensive to her. However, she did believe Illingworth should not be making those comments. Illingworth claimed when he had these conversations with AS-TS1 he literally was commenting on her body temperature as she was always running around and was always hot. Generally AS-TS1 stated that Illingworth's behavior toward her made her uncomfortable a couple of times, but not always.

AS-TS1 also recounted another incident with HR-Intern. AS-TS1 and H.R.-Intern were standing in the hall waiting for a meeting when Illingworth came over with his hand out for a fist bump. He fist bumped both at once and then said,

"oh yeah, three way." Illingworth claimed he did not intend for this to have a sexual connotation.

Illingworth's comment that led to the filing of the complaint at issue was directed at H.R.-Intern and RS-Intern. H.R.-Intern and RS-Intern were standing with a couple of other people in the grass talking about the weather during a fire drill. This fire drill occurred on a cold day on April 18, 2019. H.R.-Intern was wearing sandals and RS-Intern had a dress on that went to her knees. Illingworth looked at H.R-Intern and asked if her toes were cold. Both RS-Intern and H.R.-Intern contended Illingworth then looked at RS-Intern and commented about the wind going up her dress and then said "that's male privilege." Although H.R.-Intern stated she was not sure exactly what Illingworth meant by his statement she said it made both she and RS-Intern feel uncomfortable. RS-Intern said it made her feel awkward, uncomfortable, out of place, and taken aback. Illingworth contended he did comment that he got to wear pants and shoes and said they must be cold, but he did not say anything about "male privilege." RS-Intern testified she is positive Illingworth did say "male privilege." RS-Intern further explained that if Illingworth had merely mentioned that he was wearing pants and shoes she would not have been offended as it would not have been inappropriate.

RS-Intern stated that initially when working with Illingworth he was nice and welcoming, but after hearing things about him and seeing them for herself, she was on guard and on edge for what was going to happen.

After Illingworth's statement at the fire drill, H.R.-Intern and RS-Intern went to AS-TS1 within minutes and recounted Illingworth's statement. AS-TS1 worked with the interns often and had told them she would be their voice and would speak to management for them if they came to her with something that made them uncomfortable. Thus, AS-TS1 went to Janet Kout-Samson, the Employee Relations Officer, about the fire drill incident. She also touched base with Dana McKenna, the team lead. AS-TS1, H.R.-Intern, AS-Intern, and RS-Intern all emailed McKenna with various complaints that day.

Although Illingworth generally contended he either did not say the above comments, or what he said was misinterpreted, I find differently.

The comment about "male privilege" to RS-Intern and H.R.-Intern particularly demonstrates the credibility of the witnesses and inversely, Illingworth's lack of credibility. The two interns both state they heard Illingworth use the term "male privilege" when speaking of the wind going through RS-Intern's dress. Because of the sexual and inappropriate nature of the comment, the two interns reported what he had said to AS-TS1 within minutes of the encounter. On the same day, all three then wrote emails to McKenna detailing the conversation. The two interns heard the comment, and almost simultaneously reported the comment so there would not be the same problem with recall that Illingworth might have. Additionally, if the two interns were going to coordinate a fabrication of what Illingworth said, it would take more time to do so then the mere minutes before they reported Illingworth's comment to AS-TS1.

Additionally, the complainants were often cross examined on their recollection of Illingworth's comments versus Illingworth's recollection of his own comments. Despite not knowing what Illingworth claimed happened in these conversations, the complainants were generally consistent in their recollection and assertion of what was actually said. For instance, MN-HRA credibly testified that she would not have been offended had Illingworth referred to her as his "work wife" rather than his "younger wife." However, she remained vehement in her assertion that he referred to her as his younger wife and carried the joke so far as to disgust her. AE-HRA also heard that same comment and testified that Illingworth referred to them as his "mistresses." Neither version of the witnesses' recollection, "younger wife" or "mistresses," would carry the same innocuous connotation as "work wife." Therefore, although not entirely consistent, I find the testimony to be consistent enough to be credible.

Further, the nature of the comments as detailed by the witnesses leads to a pattern of Illingworth making sexual, even if non-threatening, jokes. These jokes generally were not directed at an individual in a predatory way, however, these approximately nine specific examples of comments Illingworth made in the roughly two-year tenure of Illingworth's position at DOT demonstrate his pattern of making mild sexual jokes. He admitted to making a comment about a bikini to AS-Intern, and the comment about AS-Intern's boyfriend. He also admitted to the three-way comment said to AS-TS1 and H.R.-Intern. He admitted to saying something about AS-TS1 being hot all the time. The testimony leads me to find

Illingworth did use the term "male privilege" during the fire drill and referred to two younger female employees as his "younger wives."

If only one or two comments were at issue, Illingworth's version of events may be more believable. However, there are roughly nine specific comments at issue and these comments were said to six different people. Illingworth's assertion that all six witnesses misheard the comments or were unable to perceive the intention behind the comments is unconvincing.

I do not find Illingworth's version of the comments made to be credible. For the above reasons, I find the complainants' testimony credible about the comments Illingworth made and the sexual nature of those comments.

Investigation

The State placed Illingworth on administrative leave on April 19, 2019. The letter, signed by Sadler, did not provide a detailed reason for the administrative leave.[12] The letter provided the reason for the administrative leave was due to an impending investigation related to Illingworth's possible violation of DOT work rules/policies and/or State of Iowa policies.

DOT turned the investigation over to DAS-Human Resources Enterprise (DAS-HRE). The investigator, Chris Peden, began interviewing witnesses on April 24, 2019. She interviewed eight people, which included Illingworth. Except for her interview of Illingworth, which took place in person on April 30, 2019, the rest of the interviews were conducted by phone.

[12] Although Sadler signed the letter placing Illingworth on administrative leave, he had no part in the decision to terminate Illingworth's employment. Sadler left employment at DOT prior to the DOT's receipt of the investigative report.

During her interview of Illingworth, Peden did not name any of the complainants. However, Peden did ask specific questions about the comments the complainant's alleged Illingworth made. She also asked him about some of the physical conduct that was alleged. Illingworth generally denied the comments. He did admit to touching AS-Intern on the back during the group picture and the conversation about her boyfriend being lucky, although he claimed he told her she should tell her boyfriend he is lucky so he will respect her. Illingworth told Peden he believed the complaints were generationally based.

DAS-HRE issued the investigative memorandum on May 10, 2019. In this report, DAS-HRE summarized the findings of the investigation, but did not provide a recommendation as to discipline. DAS-HRE sent the report to DOT Director Mark Lowe.

In the report, DAS-HRE determined the complaint that Illingworth violated the State of Iowa Policy Prohibiting Sexual Harassment was founded. The report stated that Illingworth engaged in unnecessary and unwanted physical contact with women that made them feel uncomfortable. The report also stated that Illingworth made jokes, remarks, or innuendos that were sexual in nature or about women in general.

DOT's Discipline Determination

After DAS-HRE gave DOT the report, management reviewed the report, appendices, and recordings/interviews. Management looked at Illingworth's file, the note concerning Illingworth's meeting with Sadler and Carey one year previous, Illingworth's training, and comparable discipline of similarly situated

employees. The one comparable discipline DOT found was an employee of six or seven years that violated the same policy and was discharged, although he was allowed to resign in the grievance process. Management developed an internal written summary of this information.

The DOT management team consisting of Linda Anderson, the interim bureau director in employee services, Lee Wilkinson, the administrative services division director, Kristy Emmons, the DAS Personnel Officer, and an employee relations officer, either Janet Kout-Samson or Dana McKenna. This management team recommended summary discharge after determining it was warranted by just cause. Management approved the recommendation for discharge, and this was also approved by the DOT director and the attorney general's office. Management concluded Illingworth violated the policy and his behavior was intentional. DOT found progressive discipline was not appropriate in this circumstance because of the serious nature of sexual harassment, due to the numerous incidents, and the fact that Illingworth's conduct was intentional.

Anderson and Wilkinson conducted a *Loudermill* meeting with Illingworth on May 20, 2019. Illingworth admitted to saying things that may have offended someone, and said that was unfortunate. He further stated that he could not tell how someone might perceive his behavior as he is friendly by nature. He further added that he is "an opinionated person, and I believe we're raising an entire generation of victims that think everything that happens is a trigger. And what is considered by my generation to be benign, regular conversation is being interpreted as something entirely different." The State also assured Illingworth a

letter he had sent to the DOT director on May 2, 2019, was considered when making the discipline decision. In that letter Illingworth stated he never intentionally or maliciously intimidated anyone or attempted to intimidate anyone.

DOT terminated Illingworth's employment on May 20, 2019. Anderson signed the discipline letter. The letter provided the State terminated Illingworth's employment "as a result of your violation of the State of Iowa Policy Prohibiting Sexual Harassment." The letter further added that Illingworth violated the policy "by your behavior of unwelcomed physical contact and inappropriate comments you made to female co-workers on multiple occasions."

After Illingworth's termination he was quoted in a newspaper article issued October 16, 2019. The newspaper article related to the spike in the number of sexual harassment cases committed by State of Iowa executive branch employees. Illingworth was quoted as saying "When they weaponized the #MeToo movement, if they want you out, they can take you out. It's a modern day scarlet letter and it makes it impossible for me to keep working in public administration anywhere." He also discussed again a generational difference and stated that interns were triggered by him saying things like, " 'Hi, how are you doing, that's a nice outfit.' Literally patting someone on the back for doing a good job was considered inappropriate touching."

Illingworth filed the present appeal with PERB on August 30, 2019.

CONCLUSIONS OF LAW

Illingworth filed this appeal pursuant to Iowa Code section 8A.415(2), which states:

> 2. *Discipline Resolution*
>
> *a.* A merit system employee . . . who is discharged, suspended, demoted, or otherwise receives a reduction in pay, except during the employee's probationary period, may bypass steps one and two of the grievance procedure and appeal the disciplinary action to the director within seven calendar days following the effective date of the action. The director shall respond within thirty calendar days following receipt of the appeal.
>
> *b.* If not satisfied, the employee may, within thirty calendar days following the director's response, file an appeal with the public employment relations board . . . If the public employment relations board finds that the action taken by the appointing authority was for political, religious, racial, national origin, sex, age, or other reasons not constituting just cause, the employee may be reinstated without loss of pay or benefits for the elapsed period, or the public employment relations board may provide other appropriate remedies.

DAS rules provide specific discipline measures and procedures for disciplining employees. Those rules are as follows:

> 11—60.2(8A) Disciplinary actions. Except as otherwise provided, in addition to less severe progressive discipline measures, any employee is subject to any of the following disciplinary actions when the action is based on a standard of just cause: suspension, reduction of pay within the same pay grade, disciplinary demotion, or discharge . . . . Disciplinary action shall be based on any of the following reasons: inefficiency, insubordination, less than competent job performance, refusal of a reassignment, failure to perform assigned duties, inadequacy in the performance of assigned duties, dishonesty, improper use of leave, unrehabilitated substance abuse, negligence, conduct which adversely affects the employee's job performance of the agency of employment, conviction of a crime involving moral turpitude, conduct unbecoming a public employee, misconduct, or any other just cause.
>
> . . . .

> 60.2(4) Discharge. An appointing authority may discharge an employee. Prior to the employee's being discharged, the appointing authority shall inform the employee during a face-to-face meeting of the impending discharge and the reasons for the discharge, and at that time the employee shall have the opportunity to respond. A written statement of the reasons for the discharge shall be sent to the employee within 24 hours after the effective date of the discharge, and a copy shall be sent to the director by the appointing authority at the same time.

The State bears the burden of establishing that just cause supports the discipline imposed. *Phillips and State of Iowa (Dep't of Human Res.)*, 12-MA-05 at App. 11. The term "just cause" when used in section 8A.415(2) and in administrative rule is undefined. *Stockbridge and State of Iowa (Dep't of Corr.)*, 06-MA-06 at 21 (internal citations omitted). Determination of whether management has just cause to discipline an employee requires a case-by-case analysis. *Id.* at 20.

When determining the existence of just cause, PERB examines the totality of the circumstances. *Cooper and State of Iowa (Dep't of Human Rights)*, 97-MA-12 at 29. The Board has stated the just cause determination "requires an analysis of all relevant circumstances concerning the conduct which precipitated the disciplinary action, and need not depend upon a mechanical, inflexible application of fixed 'elements' which may or may not have any real applicability to the case under consideration." *Hunsaker and State of Iowa (Dep't of Emp't Servs.)*, 90-MA-13 at 40. Although just cause requires examination on a case-by-case basis to determine just cause, the Board has declared the following factors may be relevant to the just cause determination:

> While there is no fixed test to be applied, examples of some of the types of factors which may be relevant to a just cause determination,

> depending on the circumstances, include, but are not limited to: whether the employee has been given forewarning or has knowledge of the employer's rules and expected conduct; whether a sufficient and fair investigation was conducted by the employer; whether reasons for the discipline were adequately communicated to the employee; whether sufficient evidence or proof of the employee's guilt of the offense is established; whether progressive discipline was followed, or not applicable under the circumstances; whether the punishment imposed is proportionate to the offense; whether the employee's employment record, including years of service, performance, and disciplinary record, have been given due consideration; and whether there are other mitigating circumstances which would justify a lesser penalty.

Hoffmann and State of Iowa (Dep't of Transp.), 93-MA-21 at 23. The Board has also considered how other similarly situated employees have been treated. *Kuhn and State of Iowa (Comm'n of Veterans Affairs)*, 04-MA-04 at 42.

PERB has determined the presence or absence of just cause rests on the reasons stated in the disciplinary letter. *Eaves and State of Iowa (Dep't of Corr.)*, 03-MA-04 at 14. Iowa Code section 8A.413(19)(*b*) and DAS rule require the State to provide the employee being disciplined with a written statement of the reasons for the discipline. *See Hunsaker and State of Iowa (Dep't of Emp't Servs.)*, 90-MA-13 at 46, n.27. In order to establish just cause, the State must demonstrate the employee is guilty of violating the work rule, policy, or agreement cited in the termination letter. *Gleiser and State of Iowa (Dep't of Transp.)*, 09-MA-01 at 17–18, 21.

In the termination letter, the DOT claimed it terminated Illingworth's employment for violations of the State of Iowa Policy Prohibiting Sexual Harassment. That policy states in relevant part:

> Iowa Code section 19B.12 defines sexual harassment as "persistent, repetitive, or highly egregious conduct directed at a specific

> individual or group of individuals that a reasonable person would interpret as intentional harassment of a sexual nature, taking into consideration the full context in which the conduct occurs, which conduct threatens to impair the ability of a person to perform the duties of employment. . . ."
> . . . .
> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when . . . such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.
> . . . .
> Although unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature are examples of unacceptable conduct in the workplace, unlawful sexual harassment is not dependent on whether offensive acts or comments were sexual in nature, but whether the acts or comments are directed at a person because of his or her sex. Sexual harassment can be committed by both men and women. And, it may occur between members of the opposite sex, or between members of the same sex.
> Examples of sexual harassment, include, but are not limited to:
>
> . . . .
> - Actions such as cornering, patting, pinching, touching or brushing against another person's body that are sexual in nature.
>
> . . . .
> - Jokes, remarks, or innuendos that are sexual in nature or based on real or perceived sexual orientation or gender identity about another person, or about men or women in general.

The State policy prohibiting sexual harassment asserts the State's commitment to providing a workplace free from sexual harassment. The policy avows that allegations of sexual harassment will be taken seriously.

Illingworth asserts the policy is so broad that innocent statements about the weather can lead to a finding of sexual harassment. I disagree.

Although the policy encompasses many different types of conduct, the policy as applied in this case is not so broad as to be meaningless. Similar to other state and federal law and jurisprudence sexual harassment that would violate the policy does not encompass isolated, minor incidents or comments. However, continued inappropriate behavior can amount to sexual harassment that would be violative of the policy. *See State v. Watkins*, 914, N.W.2d 827, 843 (Iowa 2018) (stating that "simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the employment conditions to create an abusive working environment. A hostile work environment is a cultural phenomenon and a series of individual episodes of inappropriate behavior eventually can amount to a hostile environment.") (internal citations omitted)).[13]

In the instant case, the State has demonstrated Illingworth engaged in repetitive behaviors, directed at a group of young female coworkers and interns. A reasonable person would interpret his multiple comments and actions as intentional harassment of a sexual nature, and that his actions affected the other employees and interns in such a way as to threaten their ability to perform their duties of employment.

First, Illingworth repeatedly touched young female coworkers and interns in the office. At least one of the female interns testified that his physical attention

[13] The State's policy discusses both a "hostile work environment" and the language of Iowa Code § 19B.12, which states that the misconduct "threatens to impair the ability of a person to perform the duties of employment."

made her uncomfortable and she did not want to be alone with him.[14] With this particular intern, Illingworth repeatedly touched her on the back and shoulder area and he put her phone in her back pocket, touching at or near her buttocks. Illingworth's actions were not isolated. His conduct was repetitive physical behavior that a reasonable person would interpret as intentional harassment of a sexual nature and it threatened to impair at least one person's ability to do her job.

Illingworth also repeatedly made jokes and comments of a sexual nature to or around young female employees and interns. These comments related to women's clothing, women's bodies, and sex. Although his comments were not highly egregious in nature, they were repetitive. Generally, Illingworth's comments were not obscene, but they were also not acceptable for his workplace.

Although Illingworth claims these comments were not sexual in nature, as noted above, I do not find Illingworth's version of the facts to be credible. Illingworth made comments about interns' clothing. He asked a young female intern about taking a bikini on vacation and told another intern the wind going up her skirt was "male privilege."[15] Illingworth commented on female bodies to multiple young female coworkers. Illingworth told one young female coworker she was always hot and made a comment about "jugs" to or around another young female coworker.[16] Illingworth also made comments about sex. He made a remark to one young female coworker that "once you go black you never go

[14] AS-Intern
[15] AS-Intern and RS-Intern.
[16] AS-TS1 and MN-HRA.

back," which is a saying that generally has a sexual connotation.[17] He used the term "three-way" when fist bumping a young female coworker and an intern.[18] He described two young female coworkers as his "younger wives" while eating at a restaurant on a work-related trip.[19]

A reasonable person would interpret Illingworth's comments as intentional harassment of a sexual nature given the circumstances. Illingworth may believe his comments were innocuous. However, commenting on coworkers' clothing, the female body, and sex in the given context was not inoffensive. His comments were not merely shop talk. Illingworth testified that joking around was not done in the central office in which he worked. Other coworkers also testified that no one else in the office acted or spoke in such a manner.[20] Knowing those parameters, Illingworth still made jokes and comments that offended his coworkers. A reasonable person would find these types of comments, given the context, intentional harassment of a sexual nature.

Further, these comments threatened to impair the ability of his female coworkers and the interns to fulfill the duties of their employment. These female coworkers and interns testified that Illingworth's behavior and comments made them feel uncomfortable. One of the interns, who had only been with the DOT for a couple of months, stated that based on what she had heard, seen, and witnessed, she was on guard and on edge around Illingworth waiting to see what

[17] MN-HRA.
[18] AS-TS1 and H.R.
[19] MN-HRA and AE-HRA.
[20] AS-Intern, H.R.-Intern, and AE-HRA.

was going to happen.[21] Another coworker testified at the time of the hearing that she was still disgusted by at least one of Illingworth's comments to her.[22] An isolated incident of such comment or behavior may not threaten to impair someone's work ability, but multiple incidents, even multiple incidents with different people, have a greater effect to threaten to impair the ability of a person to perform the duties of employment. *See Flippin and State (Dep't of Nat. Res.)*, 14-MA-13, at App. 15-16 (finding no violation of the sexual harassment policy because Flippin's misconduct was isolated in nature and interfered with his coworker's work only briefly on one occasion). One coworker, whom Illingworth did not work with often, claimed that 50% to 60% of Illingworth's comments were sexual in nature. This repetitive conduct and the noted discomfort of his coworkers demonstrate his behavior threatened to impair the ability of others to perform their duties of employment.

Illingworth's behavior, both physical and verbal, threatened to impair others' ability to do their jobs because they wanted to avoid being alone with him, or were uncomfortable with his topics of conversation. His physical actions and comments may be appropriate for other settings, and may be welcome by other people. However, his actions and comments were not acceptable in his workplace.

The State has also shown Illingworth had notice of the State's rules and the expected conduct. Illingworth knew that sexual harassment was prohibited.

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[21] RS-Intern.
[22] MN-HRA.

He had received the training on sexual harassment three times in his two years of employment. This training contained the text of the policy as well as examples of such prohibited conduct. Additionally, management had spoken to Illingworth about his comments a year prior to his termination.[23] The recall of management when drafting the document describing the conversation and testifying about the conversation that took place in April 2018 was likely spotty as a significant period of time had passed. Nonetheless, based on the testimony of both Illingworth and management as well as the note in Illingworth's file, management clearly talked to Illingworth about a specific comment he made about a female coworker's clothing. Management clearly expressed concern about the comment being sexual in nature since they required Illingworth to take the sexual harassment training again. This conversation should have served as a warning to Illingworth that his jokes or comments that he believed to be harmless were not always viewed as such, and his behavior could have disciplinary consequences.

The State has established the investigation into Illingworth's conduct was fair and sufficient. During Illingworth's investigatory interview, the investigator asked about specific incidents as well as general conduct, and Illingworth had the opportunity to respond. Management again gave Illingworth an opportunity to respond to the allegations during the *Loudermill* interview. Illingworth also

[23] Illingworth claims this prior notice shows management's bias as the note to his file about this conversation was created and placed in his file almost a year after the conversation. However, the two people involved in the conversation were not part of the decision to terminate. I do not find this argument persuasive.

drafted a memorandum to management, which makes it clear he understood the basis for the investigation. The evidence in the record demonstrates the investigation was fair and sufficient.

The record is devoid of evidence the State treated Illingworth disparately from similarly situated employees. When determining discipline, management did compare Illingworth's violation to that of another employee. That employee violated the same rule and had been with the State for a longer period of time. The State also terminated the employment of this other employee.[24]

The record does not include whether the other employee's conduct at issue was more or less severe than Illingworth's conduct. Without this information it is unclear whether this other person was actually similarly situated to Illingworth as the severity of a person's violation of the sexual harassment policy can vary widely. *See, e.g.*, *Flippin and State of Iowa (Dep't of Nat. Res.)*, 14-MA-13, at 2-4 (discussing the range of appropriate discipline for misconduct related to sex). However, the record also does not show that someone acted in a manner similar to Illingworth and received less or no discipline.

In this case the State chose not to use progressive discipline. Given the circumstances, the State has shown that progressive discipline was not appropriate.

Progressive disciple is a system where measures of increasing severity are applied to repeat offenses until behavior is corrected or it becomes clear that it

[24] Ultimately, this other employee resigned in lieu of termination due to settlement in the grievance procedure.

cannot be corrected. *Stein and State of Iowa (Iowa Workforce Dev.)*, 2020-PERB-102304, at 22 (quoting *Phillips and State of Iowa (Dep't of Corrections)*, 98-MA-09 at 14). PERB has recognized that progressive discipline is used because the purpose of employee discipline is to correct an employee's behavior rather than simply to punish the employee. *Stein,* 2020-PERB-102304, at 21. The system of progressive discipline appropriately fulfills this purpose by addressing employee behavior over time through escalating penalties. *Id.* at 21–22 (quoting Norman Brand, *Discipline and Discharge in Arbitration* at 57 (BNA Books 1998)). Employers impose some penalty less than termination to convey the seriousness of the employee's behavior, but yet to afford the employee an opportunity to improve. *Id.*

When determining the appropriate discipline and the use or absence of progressive discipline, PERB considers the circumstances of the case. *Hoffmann and State of Iowa (Dep't of Transp.)*, 93-MA-21, at 26. Progressive discipline may be inapplicable when the conduct underlying the discipline was a serious offense. *Phillips and State of Iowa (Dep't of Human Servs.)*, 12-MA-05 at App. 1, 13, 16-18. When determining the appropriate type of discipline given the circumstances, PERB examines the severity and extent of violations, position of responsibility held by the employee, employee's prior work record, and whether the employer has developed a lack of trust and confidence in the employee to allow the employee to continue in that position taking into account the conduct at the basis of the disciplinary action. *Phillips and State of Iowa (Dep't of Corr.)*,

98 H.O. 09 at 15; *Estate of Salier and State of Iowa (Dep't of Corr.)*, 95-HO-05 at 17.

In the range of potential sexual misconduct, Illingworth's behavior is not nearly as severe as other incidents of sexual harassment. *See Flippin and State of Iowa (Dep't of Nat. Res.)*, 14-MA-13, at 2–4. However, his behavior was not isolated, but was repetitive and impacted several employees. Illingworth engaged in this behavior at the office, which even he stated was not a place where people joked around. Additionally, Illingworth's behavior was aimed at least three different interns. Illingworth was not a supervisor, but yet his behavior and actions were directed at interns who generally would not be on the same hierarchical level as full-time employees. Illingworth also worked as a trainer for DOT's human resource department. By the nature of his job, Illingworth needed to internally serve as a representative for the department and management needed to be able to trust his interpersonal communication skills. Although Illingworth had no prior discipline and good evaluations, he worked at DOT for only two years. Based on his conduct, position, and limited time at the agency, DOT seemingly developed a lack of trust and confidence in Illingworth's ability to remain in his position.

Illingworth had been at the DOT less than two years, had prior notice of the DOT's concern about his behavior, and did not appear to be apologetic for his actions. Although Illingworth may not have intended to make people feel uncomfortable, he intentionally engaged in behavior that made others uncomfortable. When confronted with the effect of his actions, Illingworth

pondered about the "criminalization" of normal language. Illingworth's inability to reflect on his own actions demonstrates that his behavior would not improve with discipline. Understandably, DOT did not feel progressive discipline could correct Illingworth's unacceptable behavior.

Based on the above, the State has demonstrated why progressive discipline is inapplicable in this case. The State has shown just cause to terminate Illingworth's employment. I consequently propose the following:

ORDER

Illingworth's state employee merit appeal is DISMISSED.

The costs of reporting and of the agency-requested transcript in the amount of $1,741.75 are assessed against the Appellant, Scott Illingworth, pursuant to Iowa Code section 20.6(6) and PERB rule 621—11.9. A bill of costs will be issued to the Appellant, Scott Illingworth, in accordance with PERB subrule 621—11.9(3).

The proposed decision and order will become PERB's final agency action on the merits of Illingworth's appeal pursuant to PERB rule 621—9.1 unless, within 20 days of the date below, a party files a petition for review with the Public Employment Relations Board or the Board determines to review the proposed decision on its own merits.

DATED at Des Moines, Iowa this 7th day of January, 2021.

/s/ Amber DeSmet

Administrative Law Judge

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