

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MICHAEL E. ROBINSON, Appellant,

vs.

President, UNIVERSITY OF WISCONSIN SYSTEM, Respondent.

Case 10
No. 63797
PA(adv)-45

Decision No. 30989-B

Appearances:

Nola J. Hitchcock Cross, Murray & Cross, Attorneys at Law, 845 North 11th Street, Milwaukee, Wisconsin 53233, appearing on behalf of Michael E. Robinson.

Joely Urdan, University Legal Counsel, Office of Legal Affairs, University of Wisconsin-Milwaukee, P.O. Box 413, Milwaukee, Wisconsin 53201-0413, appearing on behalf of the University of Wisconsin System.

RULING ON MOTION FOR COSTS AND FINAL ORDER

The Commission issued an Interim Decision and Order in this matter on February 18, 2005, modifying Respondent's decision to discharge Michael Robinson from his position as Custodial Services Supervisor. The Commission concluded that discharge was excessive and modified the level of discipline to a demotion and 30-day suspension without pay.

Mr. Robinson has filed a request for costs pursuant to Sec. 227.485, Stats. The final argument relating to Robinson's request was received on March 23, 2005.

Dec. No. 30989-B

ORDER

Appellant's request for fees/costs is denied. The Interim Order issued on February 18, 2005, is adopted as the Final Order in this matter.

Given under our hands and seal at the City of Madison, Wisconsin, this 18th day of April, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

Parties:

Michael E. Robinson
2612 North 40th Street
Milwaukee, WI 53210

Kevin Reilly
President, UW System
1720 Van Hise Hall
1220 Linden Drive
Madison, WI 53706

University of Wisconsin (Robinson)

MEMORANDUM ACCOMPANYING RULING ON MOTION AND FINAL ORDER

The Commission addresses Mr. Robinson's request for costs pursuant to Wisconsin's Equal Access to Justice Act (EAJA), as found in Sec. 227.485, Stats. The criteria for applying the EAJA are set forth in Sec. 814.245, Stats., which provides in part:

(3) . . . [I]f an individual . . . is the prevailing party in any action by a state agency or in any proceeding for judicial review under s. 227.485(6) and submits a motion for costs under this section, the court shall award costs to the prevailing party, unless the court finds that the state agency was substantially justified in taking its position or that special circumstances exist that would make the award unjust.

As noted in *BRENON v. UW*, CASE NO. 96-0016-PC (PERS. COMM. 6/23/98), AFFIRMED, *BOARD OF REGENTS v. STATE PERSONNEL COMM.*, 2002 WI 79, 254 Wis. 2d 148, 646 N.W.2d 759:

The Commission must determine then whether respondent's position was "substantially justified." *SHEELY v. DHSS*, 150 Wis. 2d 320, 442 N.W.2d 1 (1989). Under *SHEELY*, to satisfy the "substantially justified" burden respondent must demonstrate (1) a reasonable basis in truth for the facts alleged; (2) a reasonable basis in law for the theory propounded; and (3) a reasonable connection between the facts alleged and the legal theory advanced.

Appellant first filed his request for costs during the period after the designated hearing examiner had issued her proposed decision and order pursuant to Sec. 227.46(2), Stats., but before the entire Commission had the opportunity to consider the matter. The proposed decision would have found that Appellant did not engage in the alleged misconduct of having sexual relations with a co-worker in Appellant's office while in work, but not pay, status. After considering the objections to the proposed decision, the Commission rejected this view, found that Mr. Robinson had engaged in the alleged sexual misconduct and found that in doing

so he had violated an administrative code provision prohibiting disorderly conduct as well as two work rules. The Commission's February 18, 2005 Interim Decision affirmed Respondent's disciplinary action in all respects except the level of discipline imposed: the Commission ordered that Robinson be demoted rather than discharged. After the Commission issued its Interim Decision, Robinson renewed his motion for costs without modification to reflect the different conclusions reached in the examiner's proposed decision and the Commission's decision.

In light of the fact that the Appellant is a prevailing party solely on the question of the appropriate level of discipline, the only question relevant at this point is whether Respondent had a substantial basis for its decision to discharge Mr. Robinson rather than demote him. While the Commission did not ultimately agree there was just cause for discharge, the Dissent offers clear support for the view that Respondent's discharge action was "reasonable," relative to a lesser discipline, for the purpose of determining whether Robinson is entitled to costs under the EAJA: "I believe that, despite Appellant's long history of employment with Respondent, had he engaged in the activity complained of, termination is the appropriate disciplinary action." Nothing in the record evidenced any other decisions by Respondent relating to the imposition of discipline that were inconsistent with the discharge set forth in the letter of discipline issued to the Appellant.

Given the reasonable basis for the level of discipline originally imposed by Respondent, Robinson's motion for costs must be denied.

Dated at Madison, Wisconsin, this 18th day of April, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

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