STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

STEVEN KRIESER, Appellant,

vs.

DEPARTMENT OF TRANSPORTATION, Respondent.

Case 41
No. 72528
PA(adv)-353

DECISION NO. 34696-A

Appearances:

Paul A. Kinne, Gingras, Cates & Luebke, 8150 Excelsior Drive, Madison, Wisconsin, appearing on behalf of Appellant Steven Krieser

Danielle Carne, Chief Legal Counsel, Office of State Employment Relations, 101 East Wilson Street, P.O. Box 7855, Madison, Wisconsin, appearing on behalf of Respondent Department of Transportation

On August 8, 2013, Appellant Steven Krieser was discharged from his unclassified position as Assistant Deputy Secretary of the Wisconsin Department of Transportation. On August 9, 2013, Krieser requested that he be restored to the civil service position he formerly held and, on August 13, 2013, that request was denied. He filed a timely grievance and proceeded through the various steps and, on October 24, 2013, he appealed the denial to the Wisconsin Employment Relations Commission. A hearing was held on March 13, 2014, and the parties submitted written argument in support of their positions. The decision in this matter is issued following the Commission's grant of final authority pursuant to § 227.46(3)(a), Stats.

FINDINGS OF FACT

1. In August 2013 Appellant Steven Krieser held the position of Assistant Deputy Secretary in the Wisconsin Department of Transportation ("DOT").

2. Krieser's position was in the unclassified service, and he had been appointed in August 2011.

3. Prior to being appointed to the Assistant Deputy Secretary position, Krieser held the position of Program Chief in the Division of Motor Vehicles of the DOT. That position was in the classified service.

4. Prior to moving to the DOT, Krieser spent 14 years working as a legislative aide in the Wisconsin Legislature. The work included assignments in both the Assembly and the Senate on behalf of Republican elected officials.

5. On the morning of August 8, 2013, Krieser had taken time off work and logged on to his personal Facebook page. He observed a posting from a friend, Joseph Handrich, the administrator of the Equal Rights Division of the Department of Workforce Development.

6. Handrich, a former member of the Assembly, was responding to a post made by State Representative Gordon Hintz who had posted a photograph of a derogatory bumper sticker he observed at a gas station. The bumper sticker stated "USA Illegal Immigrant Hunting Permit – No Bag Limit – Tagging Not Required."

7. The Facebook exchange included a response from State Representative Josh Zepnick, also critical of the bumper sticker, and included a generalized attack against Republicans and Governor Walker.

8. Krieser posted a lengthy commentary very critical of illegal immigrants referring to them as "criminals" and referencing "Satan."[1]

9. Zepnick posted an immediate response noting that Krieser was an official at the DOT.

10. Shortly thereafter Krieser had second thoughts about his posted commentary and attempted to delete the post.

11. Krieser reported to work later in the morning and received a call from Dan Bice, a reporter for the Milwaukee Journal Sentinel, inquiring about Krieser's post.

12. Bice solicited Krieser's view as to what he (Krieser) thought of how Governor Walker would "react" to the post and indicated that Bice would make that inquiry of the Governor.

13. At approximately 4:30 p.m. that afternoon, DOT Secretary Mark Gottlieb, asked Krieser for his resignation under threat of termination if he did not provide it, and Krieser agreed to resign.

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[1] A complete copy of the exchange is attached to this decision as Exhibit 1.

14. The following day, there was significant publicity surrounding the comments that Krieser made in his Facebook post, including stories in both major Wisconsin newspapers. The story was also picked up on national wire services.

15. The news stories generally reflected poorly on the current administration.

16. On August 9, 2013, Krieser requested that he be restored to the civil service position he held in August 2011.

17. On August 13, 2013, Krieser was advised that he would not be restored to his former position.

Based on the above and foregoing Findings of Fact, the Commission now makes and issues the following

CONCLUSIONS OF LAW

1. Krieser was appointed to an unclassified position by an appointing authority pursuant to § 230.33(1m), Stats.

2. Pursuant to § 230.33(1m), Stats., following his termination from the unclassified position, Krieser was entitled to restoration rights and reinstatement unless the reason for his termination would also be reason for his discharge from his former position in the classified service.

3. Krieser forfeited the aforementioned restoration rights when he engaged in conduct which would have warranted discharge from the position he had previously held in the classified service.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Commission now makes and issues the following

ORDER

That the Appellant's appeal of the denial of his restoration rights is dismissed.

Dated at Madison, Wisconsin, this 24th day of July 2014.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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James R. Scott, Chairman

MEMORANDUM DECISION

The facts in this case are almost entirely undisputed. There is no question that it was the Facebook commentary that resulted in the loss of Krieser's unclassified position and the subsequent refusal to restore him to his formerly held civil service position. The DOT does not contend that there were any other reasons for the decisions nor do they rely on any other purported deficiencies. It is also clear that Krieser's communication occurred on his own time and that he was using his personal computer. Likewise, his removal from the assistant secretary position is not at issue as there was no civil service protection attached to that position.

The parties have agreed that the issue is whether there was just cause for the decision to deny Krieser restoration to the position of DOT Program Chief. The DOT, in discharging Krieser and subsequently refusing to restore him, has focused on its determination that Krieser's Facebook post demonstrated extremely poor judgment. Krieser, in effect, acknowledged that error in judgment when he attempted to delete the post. In evaluating the severity of the poor judgment, it is important to recognize that Krieser was not merely disputing a friend's view but rather was inserting himself into a partisan discussion involving two Democratic officeholders and a former Republican officeholder. Additionally, Krieser himself was clearly identified as a partisan based upon his years of service as a legislative aide and the fact that he held a high level unclassified position in state government. While Krieser asserted that he was at least initially unaware of the participation of the two Assembly members, he certainly had to be aware that postings on social media are not private conversations. When asked whether he would have posted the comments if he had known of the presence of the two assemblymen, he did not indicate that he would not have done so.

High ranking civil servants may from time-to-time express controversial viewpoints on matters within their "jurisdiction." Certainly that would not be unusual and may well occur in the context of a discussion with legislators. On the other hand, the general expectation is that people in that category will not publicize their views on topics outside their domain. The reality is that a sliding scale exists in which the higher the position the more restrained the civil servant must be in expressing his viewpoint on matters, especially those that fall outside the job-related responsibilities. The worker behind the counter at the local motor vehicle office is generally free to express his views on any subject, in social media, blogs or letters to the editor. The number three person in the DOT does not enjoy that same level of freedom because, by virtue of the office he holds, his views command more attention. The problem is compounded if the employee is identified as a political partisan aligned with one party or another. It becomes an easy step for the media to imply and for the public to perceive that the comments reflect the position of the political party itself.

The test under § 230.37, Stats., requires that I determine whether "the reason for termination of the unclassified appointment would also be reason for discharge from the former position in the classified service." Presumably, the "just cause" standard applies and in this case, as noted, the parties agree that is the standard I should apply.

For guidance on the question whether the conduct here constituted "just cause," I turn to court decisions interpreting the scope of First Amendment rights of public employees and the limits that have been placed on the exercise of those rights. In 42 U.S.C. § 1983 First Amendment employment retaliation cases, the plaintiff must establish that (1) the speech addressed a matter of public concern and (2) that his First Amendment interest in speech outweighed the damage caused to the public employer's interest in promoting efficient public service. *See Waters v. Churchill*, 511 U.S. 661, 668, 114 S.Ct. 1878, 128 L.Ed.2d 686 (1994),

In contrast here, the State must prove that Krieser's speech, if made while employed as a DOT Program Chief, would have been sufficiently damaging to constitute just cause for his discharge. In a § 1983 claim, the employer need not provide proof of actual damage "to the extent that the disruption of the office and destruction of working relationships is manifest before taking action." *Connick v. Myers*, 461 U.S. 138, 152, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). In a case such as this, of course, all of the "evidence" is based upon the potential consequences. Like an employer in a § 1983 case, the State takes the position that Krieser's airing of his views on immigration along with the attendant publicity potentially damaged the DOT's ability to meet the needs of the people it serves.

The statute makes no specific reference to evidence of the potential consequences of actually transferring Krieser into the civil service position. We must assume that Krieser held the civil service position and then made the statement while holding the position. We must also assume that had Krieser been in the Program Chief position and engaged in the same course of conduct, the publicity would have been equal to that which was actually generated. It is clear that, as a Program Chief in the Bureau of Vehicle Services Dealer and Agent Section, Krieser would have held (and in the past did hold) a significant career executive position in the Division of Motor Vehicles. His position would have involved contact with the dealers, agents, consumers and other DOT employees, in addition to the thirty-six people he was directly supervising. There is no question given the publicity attached to his comments that he would quickly have been labeled as a "loose cannon." That publicity would have been painfully embarrassing to the people he supervised and caused those he served to question his judgment. The quality of the reporting of the incident, although questionable, no doubt contributed to a public perception that Krieser was out of the mainstream. When you make outlandish public pronouncements, the risk of unfavorable news accounts is high and Krieser was certainly aware of that risk from his staff service with the State Legislature. Again in the First Amendment retaliation context, when the statements of a public employee create significant media response with attendant damage to the public employer's reputation, that disruption is an element to be considered in balancing the rights of the employee against the needs of the agency. *Greer v. Amesqua*, 212 F.2d 358, 372 (7th Cir. 2000).

The media circus surrounding the comments would have also damaged Krieser's reputation with those he supervised as well as those the program served. As of this date, almost one year later, a simple Google search of the name "Steven Krieser" reveals four pages of reports over the incident and Krieser's discharge. (All internet materials as visited July 8, 2014.) It was not an incident that would quickly be forgotten.

It is fair to conclude that had Krieser been working as a Program Chief in the DOT, this incident would have been sufficiently disruptive to warrant his discharge under a just cause standard. I reach that conclusion based in part upon Krieser's employment history which essentially enhances the attendant publicity. While the conclusion is inherently speculative, that is the statutory direction and I conclude that the DOT has met it.

Dated at Madison, Wisconsin, this 24th day of July 2014.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman