

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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TINA KLEMMER, Appellant,

vs.

DEPARTMENT OF HEALTH SERVICES, Respondent.

Case 92  
No. 73186  
PA(adv)-409

DECISION NO. 35043

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**Appearances:**

Sean Daley, Field Representative, AFSCME Council 24, AFL-CIO, P.O. Box 19, Ashippun, Wisconsin, appearing on behalf of Appellant Tina Klemmer.

Laura Amundson, Labor Relations Specialist - Senior, Office of State Employment Relations, 101 East Wilson Street, 4th Floor, P.O. Box 7855, Madison, Wisconsin, appearing on behalf of Respondent Department of Health Services.

**ORDER GRANTING MOTION TO DISMISS**

Tina Klemmer, an employee of the Department of Health Services, was disciplined in December 2013. She filed a grievance which was denied at each step of the grievance procedure. Klemmer has appealed to the Wisconsin Employment Relations Commission, and a motion to dismiss based upon lack of subject matter jurisdiction has been made and briefed. After reviewing same, we issue the following:

**ORDER**

The motion to dismiss is granted and this matter is dismissed.

Dated at the City of Madison, Wisconsin, this 19th day of June 2014.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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James R. Scott, Chairman

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Rodney G. Pasch, Commissioner

**MEMORANDUM ACCOMPANYING ORDER GRANTING MOTION TO DISMISS**

According to Tina Klemmer, on October 23, 2013, she was told by her supervisor that the magenta streaks she has applied to her hair to accent the maroon tips was unacceptable attire at the Winnebago Mental Health Institute. She was told to rectify this fashion faux pas within seven days or else she would be placed on administrative leave and disciplined. Klemmer complied and at a personal cost of seventy dollars remedied the hirsute rule violation. Apparently, she also received a written reprimand but is quick to note she does not seek our review of that action. Rather, Klemmer characterized this chain of events as “constructive discipline,” a concept we are unfamiliar with.

We know that constructive discharge occurs when an employee is forced to resign because his working conditions became unbearable and he has no reasonable alternative but to resign. *Pa. State Police v. Suders*, 542 U.S. 127, 149, 124 S.Ct. 2342, 159 L.Ed.2d 204 (2004). Similarly, an employee may suffer a constructive demotion when an employer has made conditions so unbearable that a reasonable person would be compelled to accept a demotion rather than remain in a position. *Lavalais v. Village of Melrose Park*, 734 F.3d 629, 635 (7th Cir. 2013). To our knowledge, no court has recognized a concept labeled as “constructive discipline” to identify something other than a discharge or demotion.

Our jurisdiction over disciplinary matters in state civil service appeals is limited to “demotion, layoff, suspension, discharge or reduction in base pay” if based upon a claimed lack of just cause. § 230.44(1)(c), Stats. We do not review directives from supervisors regardless of reasonableness nor do we have any role in the fashion realm. Accordingly, the motion to dismiss is granted.

Dated at the City of Madison, Wisconsin, this 19th day of June 2014.

## WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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James R. Scott, Chairman

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Rodney G. Pasch, Commissioner