

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

VALERIE KREGER, Appellant,

vs.

UNIVERSITY OF WISCONSIN SYSTEMS, UW – MADISON, Respondent.

Case 35
No. 73230
PA(adv)-427

DECISION NO. 35064-B

Appearances:

Valerie Kreger, P.O. Box 628582, Middleton, Wisconsin, appearing on her own behalf.

Amesia Xiong, Attorney, Department of Administration, Office of the Secretary, 101 East Wilson Street, 10th Floor, P.O. Box 7864, Madison, Wisconsin, appearing on behalf of University of Wisconsin Systems, UW – Madison.

DECISION AND ORDER

Valerie Kreger was discharged by the University of Wisconsin Systems, UW - Madison. She appealed her discharge to the Wisconsin Employment Relations Commission. Hearing on the discharge appeal was held in Madison, Wisconsin, on July 29 and 30, 2015, before Examiner Raleigh Jones. The parties filed briefs whereupon the record was closed on September 8, 2015. On September 28, 2015, Kreger filed an amended brief and on October 28, 2015, she filed an amendment to same.

On November 4, 2015, Examiner Jones issued a proposed decision affirming the discharge. Valerie Kreger filed objections on November 23, 2015, and the University of Wisconsin Systems, UW – Madison filed its response on December 3, 2015.

Being fully advised in the premises, the Commission makes and issues the following:

FINDINGS OF FACT

1. Valerie Kreger was employed as a Medical Program Assistant - Associate within the School of Medicine and Public Health, Department of Medicine, Division of Cardiology and had permanent status in class when discharged.

2. Due to Kreger's disruptive workplace behavior, the University of Wisconsin Systems, UW – Madison, decided to have Kreger undergo a fitness for duty exam pursuant to § 230.37(2), Stats., to ensure that she was able to perform her work duties.

3. On February 21, 2014, the UW placed Kreger on paid administrative leave because of her disruptive workplace behavior. Additionally, the UW directed her to participate in a fitness for duty exam with an independent medical consultant on March 6, 2014. Kreger reported to the scheduled exam, but refused to sign the medical release or participate in the exam. As a result, the exam was not conducted.

4. The UW subsequently directed Kreger to participate in a second fitness for duty exam on March 24, 2014. She did not attend that fitness for duty exam. Kreger did provide medical documentation which indicated that she had a medical condition which prevented her from participating in the exam. This medical excuse was accepted.

5. The UW subsequently directed Kreger to participate in a third fitness for duty exam on April 15, 2014. Kreger did not attend the third scheduled fitness for duty exam.

6. The UW told Kreger multiple times that her failure to attend the fitness for duty exam would result in her discharge.

7. On April 22, 2014, the UW discharged Kreger from her employment for insubordination by refusing, for a third time, to submit to a fitness for duty examination pursuant to § 230.37(2), Stats.

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

CONCLUSIONS OF LAW

1. The Wisconsin Employment Relations Commission has jurisdiction over this matter pursuant to § 230.44(1)(c), Stats.

2. The University of Wisconsin Systems, UW – Madison had just cause within the meaning of § 230.34(1)(a), Stats., to discharge Valerie Kreger.

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

ORDER

The discharge of Valerie Kreger by the University of Wisconsin Systems, UW - Madison is affirmed.

Signed at the City of Madison, Wisconsin, this 20th day of January 2016.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

Rodney G. Pasch, Commissioner

James J. Daley, Commissioner

MEMORANDUM ACCOMPANYING DECISION AND ORDER

Section 230.34(1)(a), Stats., provides in pertinent part the following as to employees of the State of Wisconsin:

An employee with permanent status in class ... may be removed, suspended without pay, discharged, reduced in base pay or demoted only for just cause.

Section 230.44(1)(c), Stats., provides that a State employee with permanent status in class:

... may appeal a demotion, layoff, suspension, discharge or reduction in base pay to the commission ... if the appeal alleges that the decision was not based on just cause.

Valerie Kreger had permanent status in class at the time of her discharge and her appeal alleges that the discharge was not based on just cause.

The State has the burden of proof to establish that the employee was guilty of the misconduct and whether the misconduct constitutes just cause for the discipline imposed. *Reinke v Personnel Board*, 53 Wis.2d 123 (1971); *Safransky v Personnel Board*, 62 Wis.2d 464 (1974).

It is clear the UW had the authority to order Kreger to participate in a fitness for duty examination. Section 230.37(2), Stats., says that the “appointing authority may require the employee to submit to a medical or physical examination to determine fitness to continue in service.” This statute expressly allows state entities to send an employee for examination when it has concerns about the employee’s behavior.

It is also clear that the UW’s decision to order Kreger to undergo a fitness for duty examination had a reasonable basis in fact. The basis was that two supervisors observed behavior by Kreger that they considered troubling and disruptive to the workplace. Their concerns about Kreger’s behavior were reasonable and justified the UW’s directive for Kreger to participate in a fitness for duty examination.

Kreger was provided more than adequate notice of the UW’s directive that she participate in a fitness for duty examination. For each of the written directives provided - on February 21, March 18, and April 7, 2014 - Kreger was explicitly told the reasons why the examination was being mandated, directed to attend on specific dates, and advised that should she fail to comply, she faced discipline up to and including discharge. In addition, Kreger had numerous in person and email conversations with the UW’s human resources about same.

Kreger provided no mitigating reasons for her refusing the directive to submit to the examination. Even after her initial refusal to complete the examination, the UW gave Kreger two more opportunities to comply with the directive. On the third occasion, Kreger again attempted to avoid complying with the directive by explaining that she had a toothache (which later needed a crown) and for which she made a dental appointment. Kreger's request to reschedule her fitness for duty exam so that she could attend a dental appointment instead was specifically denied by the UW. The reason it denied the request was because a dental appointment does not constitute a serious health condition. We concur with that decision. The UW then directed Kreger once more to participate in the fitness for duty examination on April 15, 2014 at 11:00 a.m. Kreger simply ignored the directive. Instead, she went to the dental office at 8:45 a.m. for an appointment which lasted 45 minutes. Then, at 11:45 a.m., Kreger had a second dental appointment which lasted 90 minutes. During that time period, Kreger made no attempt to appear for the 11:00 a.m. examination with Dr. Koziol for which she had been told time after time that she was required to attend.

Kreger was insubordinate when she failed to participate in the third fitness for duty examination. Employers have a legitimate interest in ensuring that employees follow the directives they are given. When employees fail to follow work directives, that conduct is obviously detrimental to the workplace environment.

Kreger's insubordination constituted just cause for her discharge.

Signed at the City of Madison, Wisconsin, this 20th day of January 2016.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

Rodney G. Pasch, Commissioner

James J. Daley, Commissioner