

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ELIZABETH KRAFT, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF HEALTH SERVICES, Respondent.

Case ID: 2.0018

Case Type: PA

DECISION NO. 36140

Appearances:

Sean Daley, Field Representative, AFSCME Wisconsin Council 32, P.O. Box 19, Ashippun, Wisconsin, appearing on behalf of Elizabeth Kraft

William H. Ramsey, Department of Administration, 101 E. Wilson Street, 10th Floor, Post Office Box 7864, Madison, Wisconsin, appearing on behalf of State of Wisconsin Department of Health Services

DECISION AND ORDER

On May 29, 2015, Elizabeth Kraft filed an appeal with the Wisconsin Employment Relations Commission pursuant to § 230.44(1)(c), Stats., asserting that she had been disciplined without just cause by the State of Wisconsin Department of Health Services. The Commission assigned the appeal to William C. Houlihan who conducted a hearing on September 9, 2015, in Winnebago, Wisconsin. The parties filed post-hearing briefs, which were received and exchanged by November 2, 2015.

On December 21, 2015, Examiner Houlihan issued a proposed decision concluding that the Department of Health Services did not have just cause to discipline Elizabeth Kraft. Timely objections were filed by the Department of Health Services. The matter was fully briefed by the parties and became ripe for Commission consideration on January 21, 2016.

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

FINDINGS OF FACT

1. Elizabeth Kraft is employed as a Library Services Assistant by the State of Wisconsin Department of Health Services at its Wisconsin Resource Center in Winnebago, Wisconsin. She had permanent status in class at the time of her suspension.

2. The Department of Health Services, which operates the Wisconsin Resource Center in Winnebago, Wisconsin, is an agency of the State of Wisconsin.

3. On February 20, 2015, Kraft sent the following email to her coworkers:

In support of the Badgers, (and since the Packer season is done)
Tom M. and I decided that we should all wear Badger red on
Fridays until March Madness is over.

4. On March 26, 2015, Kraft was given a one-day suspension, without pay, for sending the email referenced in paragraph 3 above.

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

CONCLUSIONS OF LAW

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

2. The State of Wisconsin Department of Health Services did not have just cause, with the meaning of § 230.34(1)(a), Stats., to discipline Elizabeth Kraft.

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

ORDER

The one-day suspension in this matter is rejected and the State of Wisconsin Department of Health Services is directed to remove the discipline in question from Elizabeth Kraft's record and to make her whole for all lost wages and benefits.

Signed at the City of Madison, Wisconsin, this 9th day of March 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 certain 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.

Elizabeth Kraft had permanent status in class at the time of her suspension and her appeal alleges that the suspension 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).

The events giving rise to this dispute had their origin in an exchange which occurred on, or about, February 13, 2015. That exchange is summarized by a statement taken from Sara Krouse, a lead worker who was present and participated.

2/13/2015
11:40 am
B Side Breakroom

I, Sara Krouse, was in the B side breakroom with Todd Quinette, CTRS, heating up my food. Jim O'Keefe entered the room and greeted us and asked me why I was wearing red, stating perhaps it was for valentines [sic] day. I half heartedly agreed that it was women's heart month and I was sure the badgers were playing somewhere, uncomfortable with my male supervisor commenting on my clothes.

Jim responded "this might date me" and proceeded to explain that any woman wearing red on a Friday was easy. I responded I had

not heard that ever, feeling very humiliated and more uncomfortable as a woman wearing red on a Friday.

Todd Quinette responded, turning the attention back on himself by talking about visiting Amsterdam and traveling. It appeared to me it was an attempt to move away from Jim's line of conversation.

Jim continued to talk about red light districts and strip clubs, detailing an experience he had of visiting East Dubuque while in town for a conference and going to the strip clubs only to find the Bears Football team also in the audience.

Luckily Chema Paba entered the breakroom and the conversation was stopped and I made my exit as quickly as possible.

Krouse's statement was taken by Craig Blumer, Clinical Director, during the investigation he conducted of the referenced conversation. O'Keefe had a discipline history which included inaccurate reporting of work, including failure to work hours for which he was paid, excessive sick leave use, and engaging in loud, physically aggressive behavior toward a coworker.

Following the investigation, Blumer talked to O'Keefe about the incident, indicating that it was inappropriate. The exchange was reflected in O'Keefe's evaluation, though he was not disciplined. At some point in time, O'Keefe was placed on a Plan of Improvement and elected to demote from his supervisory position. O'Keefe testified that the matter was mentioned, but not cited as a reason for the Plan of Improvement.

Kraft works in the same unit as did Krouse who was her lead worker. O'Keefe supervised both of them. Kraft was aware of the O'Keefe / Krouse exchange when she sent the February 20, 2015 email. Krouse, who was copied on the email, sent an email to certain individuals asking if the Kraft email had anything to do with her incident with Jim. That inquiry was forwarded to Blumer.

Blumer conducted an investigation which largely consisted of interviewing a number of employees of the Wisconsin Resource Center. Six of the employees interviewed made no connection between the O'Keefe incident and the Kraft email. Kraft denied that she was attempting to get at Jim or that there was a connection between the email and the prior incident. Blumer investigated Tom M. and concluded that there was no basis to conclude that he intended the email to reflect upon the prior incident or the individuals involved.

Blumer's conclusion that Kraft was attempting to cause injury or ridicule to O'Keefe and / or Krouse came from two investigatory interviews. Blumer interviewed Rebecca Schultz.

His notes indicated that Schultz had talked with Kraft and asked what the email was all about. She indicated that Kraft responded “If anybody asks it’s because we’re supporting the Badgers.” According to Schultz, Kraft then winked. Schultz is further quoted to have said the following: “I just knew that was her motive. I also heard her talking in the hallway and say, ‘If anyone asks me about it, we can just say we’re supporting the Badgers.’”

Blumer conducted a second interview with Schultz. His notes of the interview consist of the following:

Told if anyone harasses her we will attempt to fire them.

I asked her for details of what was said. She said Libby said she was trying to get Jim. She and Sara don’t get along, but I think she may have even been trying to support Sara, that she meant no malice towards her with this. She told me the real reason was to get at Jim.

Schultz denied telling Blumer that Kraft had ever indicated that she was trying to get Jim.

Blumer also interviewed Mary Davies. Davies indicated that she had asked Kraft if there was a hidden meaning to the email. She reported that Kraft replied, “‘No, of course not.’ But, she said it with a smile.”

Both Schultz and Davies indicated they thought the email was intended as an effort to get at Jim. Both indicated that they regarded Kraft as either supportive of Krouse or not intending to get at Krouse.

Krouse did take offense. She had an email exchange involving Bryan Bartow who is the Director of the Wisconsin Resource Center. On February 24, 2015, Krouse identified individuals who had knowledge of the situation and might be willing to provide a statement. It was determined that there would be a staff meeting to address the matter, and that Krouse would provide a statement. Krouse prepared the following statement:

While the incident with Jim was difficult, this red campaign is even more hurtful and sad for me. As many people have been talking about it, not one person has asked me if I am okay. I feel alone and unsupported by my department. Sadly while this behavior is the usual for our department, this cruel joke on [J]im, and unintentionally me, or perhaps intentionally, is not appropriate. I ask that if you have any information that brings the origins of this to light, that you come forward because silence is giving permission to this bullying.

I don't have to say the last part but it may spur people to come forward.

It is not clear to us what the reference to "information that brings the origins of this to light" means. Krouse was copied on the original email. Krouse did not testify at the hearing.

Kraft was given a one-day suspension on March 26, 2015. The basis and rationale for the discipline is articulated in the discipline letter.

March 26, 2015

Elizabeth Kraft
Wisconsin Resource Center
Winnebago, WI 54985

Dear Ms. Kraft:

This is official notification of a one-day suspension for violation of Department of Health Services Work Rule #1, #2 and #5 which state:

"All employees of the Department are prohibited from committing any of the following acts:

- 1) Disobedience, *insubordination*, inattentiveness, negligence, or *refusal to carry out written or verbal assignments, directions, or instructions*;
- 2) Abusing, striking, or *deliberately causing mental anguish* or injury to patients, inmates or *others*;
- 5) Disorderly or illegal conduct including, but not limited to, the use of loud, profane, or abusive language; horseplay; gambling; *or other behavior unbecoming to state employee.*"

On February 13, 2015, your co-worker was the subject of an inappropriate comment that was made by your supervisor, regarding her red attire she was wearing that day. The supervisor made an inappropriate comment to your co-worker that in the past "any woman wearing red on a Friday was easy." Your co-worker was greatly offended by this comment and followed the appropriate channels to make a complaint to management. On February 20, 2015 you sent an email to the entire education

department, with the exception of the two supervisors, with the subject line; “Wear Red”. Your email stated “we should all wear Badger red on Fridays until March Madness is over.” Many staff in the education department was aware of the previous incident that had occurred with your co-worker and supervisor. Many of those staff questioned you regarding the intent of your email and whether or not there was a “hidden meaning”.

A pre-disciplinary meeting was held on March 12, 2015. Present at the meeting was Dr. Craig Blumer, Clinical Director, Sue DeHaan, Program Supervisor; Paul Nieman, personal representative and you. At this meeting you admitted that you were aware of a “situation” in which your supervisor made an inappropriate comment to your co-worker regarding women wearing red. However, you denied that your email was directed at your co-worker. You admitted that at least two staff members asked you if your email meant anything other than supporting the Badgers. By your own admission you made no attempt to correct impressions that the email had hidden meaning. Your comment that your email was solely to raise morale is not credible. The email that you sent on February 20, 2015 was clearly sent by you to cause embarrassment, frustration and mental anguish to your supervisor and your co-worker.

Kraft had a written reprimand in her file for “[e]xcessive personal use of computer; failure to carry out work assignments.”

Kraft has a history of inviting coworkers to wear colors in support of teams or workplace events. The record contains examples of her efforts to have coworkers wear colors from 2009 through 2013. She denied that she had an ulterior motive in sending the email. Kraft explains the statements attributed to her by Schultz and Davies as efforts to have her memorandum read for its plain meaning.

DHS rejected Kraft’s claim that she was not intending to bring harm to anyone. The discipline letter describes her behavior as “highly unprofessional and mean spirited.”

It is not at all clear that the preponderance of the record supports the conclusion reached relative to Kraft’s motives. Assuming that DHS got it right, the discipline imposed is hard to reconcile with the reaction to O’Keefe.

O’Keefe was a supervisor. In fact, he was Krouse’s supervisor. He had a far more substantial disciplinary history than appears to be the case for Kraft. O’Keefe’s remarks appear to have been intended as playful. They were not received that way by Krouse or by the

institution. There is nothing subtle about O'Keefe's remarks. There is no question as to hidden meaning. There are many workplaces where such remarks would simply be allowed to pass as failed efforts at humor. The Wisconsin Resource Center is not such a place. Blumer regarded O'Keefe's comments as an inappropriate sexual comment. Mary Klemz, Deputy Director of the Wisconsin Resource Center, indicated that O'Keefe's remarks were absolutely inappropriate and reflected poor judgment. Bartow regarded O'Keefe's remarks as reflecting extremely poor judgment and poor taste.

Bartow regarded Kraft's actions as harassing. He did not come to the same conclusion relative to O'Keefe's comments. We find that conclusion puzzling. O'Keefe was Krouse's supervisor. The remarks caused Krouse to feel both uncomfortable and humiliated. She conveyed those feelings to higher management. Krouse's complaint about Kraft's email prompted a full investigation and discipline.

O'Keefe was not disciplined for his remarks. There was testimony that he was placed on a Plan of Improvement and that he subsequently was demoted. Nothing in the record suggests that the "red on Friday" remarks played a meaningful role in that decision. The determination not to discipline O'Keefe was explained by his reaction to being confronted with his actions. O'Keefe acknowledged his actions, was contrite, and offered to speak with and apologize to Krouse. Krouse declined the opportunity to have a reconciliation meeting.

Krouse was hurt by Kraft's email. Based upon her reactions to the O'Keefe comments and the Kraft email, Krouse appears to be a somewhat fragile individual. From the record it is difficult to understand how she could feel such pain from the Kraft email. However, Krouse did express that she was wounded by the "red campaign." She took her sense of outrage to the management of the Wisconsin Resource Center which acted.

We believe DHS has manufactured a mountain out of the proverbial mole hill. The Kraft email is not, on its face, conduct that warrants discipline. Several leaps of faith and inferences are required to find a disciplinable offense. There is nothing in the record that supports a finding that the email was intended to be critical of Krouse or to ridicule her. The sole indication that Krouse was an unintended victim of the email was her rather bizarre statement, which on its face appears either irrational or the product of some personal animosity or need for drama. It is unclear why DHS could not have employed the same approach toward Kraft that was used with O'Keefe; sit her down and tell her that her email had caused someone to be upset.

There is no indication in the record that O'Keefe was upset about the Badger red email. This leaves us with the rather extraordinary result that O'Keefe, whose comments started all this and were far more egregious, escapes discipline. Kraft, whose email is on its face as innocent as it gets, is given a one-day suspension. The treatment is disparate, rising to the level of perverse. O'Keefe's remarks were considered grossly inappropriate by every manager. He

suffered no discipline. Kraft was disciplined because her email was perceived as an affront to O'Keefe and to Krouse. It is an irrational conclusion as regards Krouse.

The preceding comments are the observations of the examiner previously served upon DHS and Kraft which we adopt. Following service of the proposed decision, DHS chose to appeal this matter and we feel obliged to add our comments.

An outsider might imagine a scenario like this taking place amongst a group of squabbling middle schoolers. The reality is that it is difficult to discern how a group of busy government employees would have the time or the inclination to devote to a matter of such triviality. The absurdity is then compounded by a baseless appeal to the Commission. Perhaps the management responsible for this fiasco could wear sackcloth and ashes for a day, which would offend no one.

Signed at the City of Madison, Wisconsin, this 9th day of March 2016.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

Rodney G. Pasch, Commissioner

James J. Daley, Commissioner