

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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SUSAN RAKOWSKI, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT, Respondent.

Case ID: 303.0004

Case Type: PA

DECISION NO. 36912-A

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**Appearances:**

Susan Rakowski, W204 N7623 Lannon Road, Menomonee Falls, Wisconsin, appearing on her own behalf.

Cara J. Larson, Department of Administration, 101 E. Wilson Street, 10th Floor, Post Office Box 7864, Madison, Wisconsin, appearing on behalf of the State of Wisconsin Department of Workforce Development.

**DECISION AND ORDER**

On March 6, 2017, we issued a Decision and Order Denying Motion to Dismiss in this matter. In that decision, we held that evidence was needed before a jurisdictional ruling could be issued as to Rakowski's appeal of her termination from an Unemployment Benefit Specialist position during a probationary period. We further held that, even if we lacked jurisdiction over the probationary termination, Rakowski clearly had a viable claim as to her apparent discharge from State employment.

The parties thereafter provided exhibits and argument, the last of which was received on March 31, 2017. Having reviewed the evidence and argument, the Commission makes and issues the following:

**FINDINGS OF FACT**

1. In September 2015, Susan Rakowski had permanent status in class as an Employment Security Assistant 4 (pay schedule 02, range 12) within the Unemployment Insurance Division of the Department of Workforce Development.

2. Effective October 4, 2015, Rakowski accepted a permissive transfer (with a twelve-month probationary period) to an Unemployment Benefit Specialist position (pay schedule 12, range 64) within a different employing unit of the Unemployment Insurance Division of the Department of Workforce Development.

3. Effective September 29, 2016, Rakowski was terminated from the Unemployment Benefit Specialist position and discharged from State employment.

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

### **CONCLUSIONS OF LAW**

1. Pursuant to Wis. Admin. Code § ER-MRS 15.04, it was within the discretion of the State of Wisconsin Department of Workforce Development to impose the twelve-month probationary period referenced in Finding of Fact 2.

2. Because Susan Rakowski did not have permanent status in the Unemployment Benefit Specialist position on September 29, 2016, the Wisconsin Employment Relations Commission does not have jurisdiction pursuant to § 230.44(1)(c), Stats., to review her termination from that position.

3. Because Susan Rakowski did have permanent status in class prior to her October 4, 2015 transfer, the Wisconsin Employment Relations Commission has jurisdiction pursuant to § 230.44(1)(c), Stats., to review her discharge from employment with the State of Wisconsin.

4. The State of Wisconsin Department of Workforce Development did not have just cause within the meaning of § 230.34, Stats., to discharge Susan Rakowski.

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

### **ORDER**

The discharge of Susan Rakowski is rejected and the State of Wisconsin Department of Workforce Development shall immediately reinstate her to an Employment Security Assistant 4 position in Menomonee Falls, Wisconsin, with permanent status in class and make her whole for all lost wages, benefits, and seniority.

Signed at the City of Madison, Wisconsin, this 11th day of April 2017.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

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James R. Scott, Chairman

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Rodney G. Pasch, Commissioner

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James J. Daley, Commissioner

**MEMORANDUM ACCOMPANYING DECISION AND ORDER**

Appellant Susan Rakowski seeks review of her termination from an Unemployment Benefit Specialist position and of her discharge from State employment.

Our jurisdiction to review the Unemployment Benefit Specialist position issue turns on whether the termination occurred during a validly imposed probationary period. If it did, then Rakowski lacked the “permanent status in class” that is a prerequisite for our asserting jurisdiction under § 230.44(1)(c), Stats. Reviewing the record, we are satisfied that the Unemployment Benefit Specialist position was in a different employing unit than the Employment Security Assistant 4 position Rakowski previously held, and that DWD was within its rights under Wis. Admin. Code § ER-MRS 15.04 to impose a probationary period. It is clear that Rakowski was terminated from that Unemployment Benefit Specialist position during the probationary period. Given the foregoing, we do not have jurisdiction to review this termination.

As to Rakowski’s discharge from State employment, the State correctly acknowledges that we have jurisdiction pursuant to § 230.44(1)(c), Stats., and concedes that it lacked just cause for the discharge. The State further concedes that it has an obligation to reinstate Rakowski and to make her whole. Remaining for resolution are: (1) whether the State has previously made a reinstatement offer to Rakowski that tolled the State’s back pay obligation; and (2) what position should Rakowski hold upon reinstatement.

As to issue (1), the State cites *Anderson v LIRC*, 111 Wis.2d 245, 330 N.W.2d 594 (1983), for the proposition that a valid offer of reinstatement tolls back pay liability. However, *Anderson* makes clear that such a reinstatement offer must be “unconditional.” Here, the only offer we are aware of was made as part of a settlement discussion and had conditions attached. Therefore, the State did not make an “unconditional” offer of reinstatement, and Rakowski’s back pay entitlement has not been tolled.

As to issue (2), we have ordered Rakowski’s reinstatement into the Employment Security Assistant 4 position she held prior to her transfer.<sup>1</sup> Reinstatement to a previously held position is well within the norm of a standard make whole remedy where, as here, the employer did not have just cause to discharge an employee. This reinstatement also maximizes the opportunity for Rakowski to successfully re-enter State employment following a discharge that the State has not sought to justify and thus appears to have been based on gross negligence or malice.<sup>2</sup>

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<sup>1</sup> Because the State is not asserting a right to place Rakowski on probation upon reinstatement to the Employment Security Assistant 4 position, we need not address the issue of whether a probationary period could have been imposed if we had decided in our remedial discretion to reinstate Rakowski to a comparable position she had not previously held.

<sup>2</sup> If the State had honored the law and reinstated Rakowski immediately after her tenure in the Unemployment Benefit Specialist position ended, it would have had the option of reinstating her to the position she previously held or to a comparable position. However, the State discharged Rakowski instead of reinstating her and thereby lost the “comparable position” option.

Signed at the City of Madison, Wisconsin, this 11th day of April 2017.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

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James R. Scott, Chairman

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Rodney G. Pasch, Commissioner

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James J. Daley, Commissioner