

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

SUSAN RAKOWSKI, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT, Respondent.

Case ID: 303.0004

Case Type: PA

DECISION NO. 36912-B

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.

On April 11, 2017, we issued a decision concluding that the State of Wisconsin Department of Workforce Development's decision terminating Susan Rakowski was not based upon just cause and ordering her reinstatement together with a make whole award. On May 1, 2017, DWD filed a petition for rehearing challenging portions of the remedy awarded to Rakowski. Both sides submitted written argument. The Commission has considered that argument and issues the following:

DECISION AND ORDER DENYING PETITION FOR REHEARING

There is no dispute regarding the decision rejecting the termination of Rakowski. DWD concedes that the discharge was unlawful. DWD takes issue with a portion of our remedy directing the reinstatement of Rakowski to the position she held prior to the permissive transfer she had taken. Rakowski had accepted that transfer together with a one-year probation period. At the eleventh month of her probationary period, Rakowski was discharged. Rather than being returned to her previous position (or transferred to a comparable position), DWD discharged her from employment. From September 29, 2016, to date, Rakowski remains out of the employ of DWD.

Notwithstanding its clearly unlawful behavior, DWD argues that its right under Wis. Admin. Code § ER-MRS 15.055 to either return Rakowski to her previous position or to place her in a comparable position was violated when we directed her return to the position she held prior to the transfer.

The argument has several significant holes in it. The rule itself provides *inter alia*:

An employee so removed shall be restored to the employee's previous position or transferred to a position for which the employee is qualified in the same pay range or pay rate without a break in employment (emphasis added.)

Obviously here, there has been a significant break in employment. By its very terms, the rule DWD seeks to take advantage of has itself been violated by DWD. Had DWD followed the rule in question at the time it removed Rakowski from the probationary transfer, it would have had the option available under Wis. Admin. Code § ER-MRS 15.055. Instead, it chose an illegal course of conduct. Having conceded its wrongdoing, it wants a “do over.”

In a rather convoluted argument, it asserts that we have jurisdiction over discharges but not transfers and therefore have no ability to block DWD's “right” to transfer Rakowski. This is not a case involving a transfer – it is a challenge of a discharge. We have the inherent power to remedy a discharge without cause by awarding various equitable remedies such as back pay and reinstatement.¹ DWD is in effect arguing that we lack the authority to direct traditional reinstatement to a particular position because in this circumstance it could have transferred Rakowski had it chosen to do so. As we have stated, this is not a transfer case. Once DWD broke the rule they may not now rely on it.

There are circumstances where reinstatement is not an appropriate remedy but the employer is obliged to present evidence as to why reinstatement should not be ordered. *See gen. Sands, supra*. (detailing the reasons why reinstatement can be denied). Under those rare circumstances where reinstatement is denied the remedy is typically front pay. DWD has not suggested that alternative nor did it provide any evidence of the kinds of circumstances that would warrant the denial of reinstatement. Accordingly, we deny the petition for rehearing.²

Signed at the City of Madison, Wisconsin, this 30th day of May, 2017.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

Rodney G. Pasch, Commissioner

James J. Daley, Commissioner

¹ Both back pay and reinstatement are equitable remedies. *Sands v. Menards*, 328 Wis.2d 647, 787 N.W.2d 384 (2010) (reinstatement); *Salveson v. Douglas County*, 245 Wis.2d 497, 640 N.W.2d 182 (2001) (back pay).

² DWD also renews its argument that Rakowski's back pay should be limited to the period of time prior to the time she rejected an offer of reinstatement. There is no evidence that Rakowski turned down an unconditional unilateral offer of reinstatement.