

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CLAIRE FRIED, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF AGRICULTURE
TRADE AND CONSUMER PROTECT, Respondent.

Case ID: 454.0002
Case Type: PA

DECISION NO. 37433

Appearances:

Michael J. Modl and Michael J. Westcott, Attorneys, Axley Brynelson, LLP, 2 East Mifflin Street, Suite 200, Madison, Wisconsin, appearing on behalf of Claire Fried.

Anfin Jaw, Attorney, Department of Administration, 201 East Wilson Street, 10th Floor, P.O. Box 7864, Madison, Wisconsin, appearing on behalf of the State of Wisconsin Department of Agriculture, Trade and Consumer Protection.

INTERIM DECISION AND ORDER

On December 4, 2017, Claire Fried filed an appeal with the Wisconsin Employment Relations Commission asserting that the State of Wisconsin Department of Agriculture, Trade and Consumer Protection (DATCP) had laid her off without just cause effective at the close of business on November 8, 2017. The scope of the appeal was subsequently limited to whether DATCP had improperly failed to provide Fried with displacement rights as an alternative to her layoff. The parties waived hearing and filed written argument by March 12, 2018.

Having considered the matter, the Commission concludes that Fried did have displacement rights, and DATCP did not have just cause to lay her off without providing her the opportunity to exercise that right.

FINDINGS OF FACT

1. Claire Fried had permanent status in class as an employee of the Department of Agriculture, Trade and Consumer Protection (DATCP) when she was laid off at the close of business on November 8, 2017.

2. Prior to her layoff, DATCP did not extend the displacement rights contained in Wis. Admin. Code § ER-MRS 22.08(3) to Fried.

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

CONCLUSIONS OF LAW

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

2. Wisconsin Admin. Code § ER-MRS 22.08(3) had not been repealed as of November 8, 2017.

3. The State of Wisconsin Department of Agriculture, Trade and Consumer Protection did not have just cause within the meaning of § 230.34(1)(a), Stats., to lay off Claire Fried without having extended Wis. Admin. Code § ER-MRS 22.08(3) displacement rights to her.

4. The position of the State of Wisconsin Department of Agriculture, Trade and Consumer Protection as to the layoff was substantially justified within the meaning of § 227.485(2)(f), Stats.

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

ORDER

1. The State of Wisconsin Department of Agriculture, Trade and Consumer Protection shall extend displacement rights to Claire Fried.

2. Claire Fried's request for fees and costs is denied.

Signed at the City of Madison, Wisconsin, this 30th day of March, 2018.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman

MEMORANDUM ACCOMPANYING INTERIM DECISION AND ORDER

Prior to July 1, 2016, § 230.34(2)(b), Stats., provided in pertinent part:

(b) The director shall promulgate rules governing layoffs and appeals therefrom and alternative procedures in lieu of layoff to include voluntary and involuntary demotion and the exercise of a displacing right to a comparable or lower class, as well as the subsequent employee right of restoration or eligibility for reinstatement.

Consistent with § 230.34(2)(b), Stats., Wis. Admin. Code § ER-MRS 22.08(3) was promulgated to provide employees facing layoff with “a displacing right.”

As part of 2015 Wisconsin Act 150, § 230.34(2)(b). Stats. was amended effective July 1, 2016, as reflected below to among other matters strike the reference to “a displacing right.”

(b) The director shall promulgate rules governing layoffs and appeals therefrom and alternative procedures in lieu of layoff to include voluntary and involuntary demotion ~~and the exercise of a displacing right to a comparable or lower class~~, as well as the subsequent employee ~~right of restoration or~~ eligibility for reinstatement.

Wisconsin Admin. Code § ER-MRS 22.08(3) remained unchanged at the time of Fried’s layoff, but the State asserts that the amendment to § 230.34(2)(b), Stats. removed displacement rights as an alternative to layoff. Fried contends that the pre-July 1, 2016 version of § 230.34(2)(b), Stats. authorized but did not create a displacement right. Once that right was created by administrative rule, Fried argues the right continued so long as the rule remained in place. Fried also notes that DATCP initially advised Fried that she had displacement rights.

Although Fried to some extent argues otherwise, the words deleted by the statutory amendment clearly convey a legislative intent to revoke the director’s authority to promulgate rules that provide displacement rights. But what was the legislative intent as to the status of rules already promulgated? Did the Legislature intend that Wis. Admin. Code § ER-MRS 22.08(3) continue to be in effect until repealed? Apparently, DATCP initially thought that to be true when it advised Fried post-July 1, 2016 that she continued to have displacement rights.

2015 Wisconsin Act 150 does not contain any language specifically addressing the status of existing administrative rules that had already been promulgated.¹ Given that silence and the plain meaning of “promulgate,” the Commission concludes that the Wis. Admin. Code

¹ While the State points to a Legislative Council memo in support of its position, Fried notes that the memo was issued after Act 150 was passed and thus cannot be viewed as persuasive legislative history. More importantly, *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 271 Wis. 2d 633 (2004), makes clear that the Commission’s analytical focus is to be on the statutory language itself (or the lack thereof).

§ ER-MRS 22.08(3) displacement right continues to be in effect until that rule is repealed.² Contrary to the State's argument, the plain language of Act 150 only ended the Director's right to create a displacement rule in the future but did not repeal the existing rule which contains displacement rights. Because Wis. Admin. Code § ER-MRS 22.08(3) was in effect when Fried was laid off, DATCP should have extended displacement rights to her. By failing to do so, DATCP lacked just cause to lay her off, and the State has been ordered to extend displacement rights to her. Because it is unknown what impact the exercise of those rights may have on other remedies that may be appropriate, this decision is an interim one pending any remedial hearing that might be appropriate. The interim nature of the ruling also provides the parties with the opportunity to engage in any settlement discussions that may be appropriate.³

Signed at the City of Madison, Wisconsin, this 30th day of March, 2018.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman

² While the State is taking action to repeal this rule, repeal had not occurred as of the date Fried was laid off.

³ While the State's position in this litigation has been rejected, it was substantially justified within the meaning of § 227.485(2)(f), Stats. Therefore, Fried's request for fees and costs has been rejected.