

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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FRANK WESSELY, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF TRANSPORTATION

Case ID: 446.0018

Case Type: PA

DECISION NO. 37974-A

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**Appearances:**

Gard Strother, Attorney, Krekeler Strother, S.C., 2901 W. Beltline Highway, Suite 301, Madison, Wisconsin, appearing on behalf of Frank Wessely.

Stephanie Bloechl-Anderson, Attorney, Department of Transportation, 4822 Madison Yards Way, 9th Floor, Madison, Wisconsin and Cara Larson, Attorney, Department of Administration, 101 E. Wilson Street, 10th Floor, P.O. Box 7864, Madison, Wisconsin appearing on behalf of the State of Wisconsin Department of Transportation.

**DECISION AND ORDER**

On August 9, 2019, the Wisconsin Employment Relations Commission issued a Decision and Order concluding that the State of Wisconsin Department of Transportation had just cause to discharge Frank A. Wessely. The matter was subsequently remanded to the Commission for further proceedings by Dane County Circuit Court Judge Frank D. Remington. Thereafter the parties filed additional written argument, the last of which was received by the Commission on August 21, 2020.

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

**FINDINGS OF FACT**

1. At the time of his February 22, 2019 discharge, Frank Wessely had permanent status in class and was employed as an IS System Development Services Professional by the State of Wisconsin Department of Transportation (DOT). He was a full-time employee with DOT for about 21 years.
2. Prior to his discharge, Wessely had received disciplinary suspensions of one day and three days.

3. Wessely harassed a fellow employee by knowingly making false claims about the employee's on duty conduct to DOT supervisors/management and to law enforcement.

4. Wessely intimidated DOT supervisors/management by at least implicitly threatening to shoot a co-worker.

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 to review this matter pursuant to Wis. Stat. § 230.44(1)(c).

2. The State of Wisconsin Department of Transportation had just cause, within the meaning of Wis. Stat. § 230.34(1)(a) to discharge Frank Wessely.

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

### **ORDER**

The discharge of Frank Wessely by the State of Wisconsin Department of Transportation is affirmed.

Issued at the City of Madison, Wisconsin, this 12<sup>th</sup> day October, 2020.

### **WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

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James J. Daley, Chairman

**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.

Frank Wessely had permanent status in class at the time of his discharge and his appeal alleges that the discharge was not based on just cause.

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

The February 22, 2019 letter discharging Wessely details the conduct upon which DOT based its action. Aside from the question of whether Wessely was tripped by co-worker Kevin Scopoline, those facts are undisputed.

As to the alleged tripping, DOT has proven that Wessely was not tripped. Wessely's assertions as to the timing and location of the alleged event are disputed by the testimony of multiple witnesses and exhibits. Wessely's own testimony provided ample evidence of his ongoing animosity toward the co-worker who allegedly tripped him and thus provided a motive for his false accusation. It is undisputed Wessely then reported his false accusation to law enforcement and to DOT management. That false report generated law enforcement interviews with the innocent co-worker. One law enforcement contact followed the co-worker's receipt of a message from his son advising him that a police officer had called wanting to talk to him about a harassment complaint.

DOT concluded that Wessely's false accusation and the subsequent investigations it prompted violated Work Rules #1 (prohibiting "knowingly giving false information" and failing to "provide truthful . . . information"; #14 ("harassing") and #17 ("Making false, inaccurate or malicious statements about another person"). DOT also concluded that Wessely's conduct fell within the confines of Wis. Stat. § 230.34(1)(a)1., which prohibits "[w]hile on duty, harassing a person."

The Commission agrees with DOT's conclusions. It is self-evident that if Wessely's tripping claim was false, then he provided false information to law enforcement and DOT supervisors/management. It is further concluded that because Wessely was acting out of malice

toward the co-worker, his actions qualified as “harassing” and “malicious statements about another person.” While the Commission’s determination in *Wessely v. DOT*, Dec. No. 37974 (WERC, 8/19) as to Wis. Stat. § 230.34(1)(a)1. was rejected in a subsequent circuit court proceeding, the Commission continues to view its interpretation (and that of DOT) as correct.

As to those facts that are undisputed, on December 4, 2018, Wessely sent an email to his supervisor complaining about some alleged inappropriate horseplay from co-worker Martin. In the email was the comment “Maybe he forgot that I have a loaded handgun in my pocket also.” During subsequent questioning by DOT management, Wessely commented in part:

I usually carry a loaded handgun on me at all times, and I have the, uh, permit, and I have it on record with HR. And if things got bad enough, I would pull it out and use it.

. . .

Martin knows I have a handgun. Why would he do such a stupid thing to somebody whose carrying a handgun? . . . And I think people should, need to know that if Martin had went further with this, he could have got shot.

DOT concluded that Wessely’s comments about his handgun and its potential use violated: (1) Work Rule #14 (“Intimidating”); (2) the portion of the Concealed Carry policy which prohibits “referring to the concealed weapon, or referring to a weapon not on the employee’s person, with the intent to implicitly or explicitly threaten or intimidate another person.”; and (3) Work Rule # 2 (“Failure to comply with written agency policies and procedures.”). The Commission agrees with DOT’s conclusions.

Wessely’s comments clearly conveyed the threatening potential of Wessely shooting a co-worker.<sup>1</sup> There can be little doubt that supervisory and management employees privy to Wessely’s comments would find them intimidating. While Wessely makes much of the fact that his handgun related comments during meetings were prompted by questions he was obligated to answer truthfully, it was Wessely’s unsolicited December 4 email that necessitated the need for those questions. It is also clear that the vigor Wessely demonstrated when answering the questions would only enhance the credibility of the threats Wessely was conveying. Thus, it is clear Wessely’s comments violated Work Rule #14. As to Wessely’s “intent” to threaten or intimidate under the Concealed Carry policy, the Commission acknowledges that intent is a subjective concept which can be difficult to determine. However, it is difficult to fathom any other plausible basis for Wessely to have sent the December 4 email than an intent to threaten co-worker Martin. While the threat may never have been conveyed to Martin, it is the intent to threaten that violates the Concealed Carry policy.

At the time Wessely engaged in the above-discussed conduct, he had already received a one day and a three-day disciplinary suspension. The next step in the standard DOT disciplinary

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<sup>1</sup>While parts of Wessely’s commentary could be viewed as ambiguous as to his intent, when viewed as a whole there can be no doubt he was threatening Martin.

progression is a five-day suspension. Wessely contends that if the Commission concludes he engaged in misconduct, DOT's only option was to suspend him for five days. DOT asserts it had and properly exercised the option of skipping the five-day suspension step and discharging Wessely.

Section 230.04(13m), Stats. authorizes the Administrator of the Division of Personnel Management within the Department of Administration to establish disciplinary standards that:

. . . allow an appointing authority to accelerate progressive discipline if the inadequacy, unsuitability, or inferiority of the personal conduct or work performance for which the employee is being disciplined is severe.

The Commission has previously interpreted this statutory provision to allow discipline to "accelerate" to the level of discharge. *See Kaufert v. DOC*, Dec. No. 37989 (WERC 9/19). Consistent with that interpretation, the Commission has upheld the accelerated discharge of employees where the employee's conduct warrants such a result. *See Degner v. DOC*, Dec No. 38471 (WERC, 8/20); and *Hummelmeier v. DOC*, Dec. No. 38448 (WERC, 7/20). Thus, even if the employee's misconduct does not fall within the confines of the offenses listed in Sec. 230.34(1)(a), Stats., discharge is statutorily authorized for "severe" violations of the standards established by the Administrator. The Administrator's standards are found in Section 410.030 of the Wisconsin Human Resources Handbook. Work Rules #1, #2, #14 and #17 are all listed, and all were violated by Wessely. Further, there can be little doubt that Wessely's overall conduct was "severe."

Given the foregoing, even if it is determined that Wessely's misconduct does not fall within the confines of Wis. Stat. § 230.34(1)(a)1., the Commission concludes there was just cause for discharge.<sup>2</sup>

Issued at the City of Madison, Wisconsin, this 12<sup>th</sup> day October, 2020.

## **WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

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James J. Daley, Chairman

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<sup>2</sup>Alternatively, it can be concluded that Wessely's conduct set forth in Finding of Fact 3 provides just cause for a five day suspension (in light of the one and three day suspensions already on his record) and that the conduct described in Finding of Fact 4 then subsequently provides just cause for discharge.