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DANE COUNTY, WI
2019CV002377

BY THE COURT:

DATE SIGNED: March 4, 2020

Electronically signed by Frank D Remington
Circuit Court Judge

STATE OF WISCONSIN **CIRCUIT COURT** **DANE COUNTY**
BRANCH 8

FRANK A. WESSELY,
Petitioner,

Case No. 2019-CV-2377

vs.

[RE: WERC Dec. No. 37974]

WISCONSIN EMPLOYMENT RELATIONS COMMISSION , et al.
Respondent.

DECISION AND ORDER

Presently before the court is an action filed by Frank A. Wessely challenging the process and fact of his being discharged from his employment. The central issue presented in this case is the propriety of Mr. Wessely's termination, rather than some other form of progressive punishment. A Wisconsin state employee with permanent status in class may be discharged only for just cause. See Wis. Stat. § 230.34(1)(a). Under Wis. Stat. 230.34(1)(a), it is "just cause" to "discharge . . . an employee for work performance or personal conduct that is inadequate, unsuitable, or inferior, as determined by the appointing authority, but only after imposing progressive discipline that complies with the administrator's standards under s. 230.04(13m)." The statute further provides that "[i]t is just cause . . . [to] discharge an employee without imposing progressive discipline" for any of nine specified types of "serious" misconduct, including "while on duty, harassing a person." See Wis. Stat. § 230.34(1)(a)1.

Wessely was discharged for "serious" misconduct within the meaning of Wis. Stat. § 230.34(1)(a)1 by harassing a person "while on duty." Wisconsin Employment Relations Commission (hereafter "WERC") decided that The Department of Transportation (hereafter "DOT") had just cause to discharge Wessely because he filed a false police complaint against a co-worker, regarding a workplace incident, in order to harass and retaliate against the co-worker.

BACKGROUND

The background facts are only relevant to a complete understanding of the events leading up to the incident. Mr. Wessely has a history of being disciplined for behavior issues. A co-worker, Scopoline, had reported Wessely for inappropriate behavior towards a female co-worker. Wessely was disciplined for that behavior. Wessely then made an off hours report to the police that Scopoline had tripped him. After the police had decided not to investigate further, the DOT came to the conclusion that the report was fabricated based on Scopoline being in a meeting at the time of the alleged incident. The DOT determined this behavior was harassment and discharged Wessely.

There is no escaping the fact that Wessely's employment record with the DOT is spotted with disciplinary infractions. On October 24, 2016, he received a disciplinary letter suspending him for one day for violation of Rule #3: "Disobedience, insubordination, inattentiveness, negligence, failure or refusal to carry out written or verbal assignments, directions, or instructions." Wessely was "aware of the Work directive to not to take photographs of co-workers or events during business hours without prior supervisory approval." He "failed to follow this directive and took photographs of co-workers at the DOT multicultural event." R. 00258.

On January 12, 2017, less than a year later, Wessely received another letter of suspension. The suspension was the result of Wessely "wearing a t-shirt to work with the wording of 'Hillary for prison.'" Wessely "admitted the shirt could be offensive to others in the workplace so [he]

wore a sport coat to cover the shirt." He "had been warned in the past not to wear inappropriate clothing to work." Further, "a notice was sent to all employees on October 11, 2016, reminding employees about political activity in the workplace." R. 00259.

On February 26, 2018, Wessely received a disciplinary letter suspending him for three days. The letter stated that "On January 23, 2018, [Wessely] made an inappropriate comment and gestures regarding a fellow co-worker." R. 00261.

Around October 18, 2019, Wessely claimed that around 1:30 pm, "he was walking around a narrow corner approaching his desk and he felt something hit the bottom of his foot which caused him to stumble." Wessely accused Scopoline of trying to trip him. Wessely explained that "he felt immediate pain in this area of his body." R. 00277. The police officer concluded his report by saying that, "Based on the lack of evidence or witnesses associated with this allegation, this case will be closed with no included charges or citations." R. 00279.

The DOT conducted its own investigation. A fellow employee, Dave Sage, explained in a witness follow up interview with state employees that he and Scopoline were in a meeting at the time of the alleged tripping incident. R. 00472. He stated that he had never seen Scopoline tripping Wessely. R. 00473.

Wessely was interviewed several times. Previously to the present allegation of harassment, Wessely and co-worker Martin Hansberry had been involved in a physical altercation. In the interview process for the present allegation, Wessely was reminded of a statement he had made in an email to a superior about the situation, "maybe he forgot I have a loaded handgun in my pocket." R. 00484. Part of Wessely's explanation for this statement was that ". . . I think people should, need to know that if Martin had went further with this, he could have got shot." R. 00485.

The question before this court is whether it was appropriate for WERC to discharge Wessely either "without imposing progressive discipline" or by "accelerating progressive

discipline." That question turns on what the legislature meant when it provided for a process to forego progressive discipline for certain infractions done while "on duty". Based on the briefs and upon the language in the statutes, this court concludes that WERC could not find that Wessely was "on duty" for purposes of discharging him "without imposing progressive discipline." WERC was not permitted to "accelerate progressive discipline" to the point of discharge according to the language contained in the statutes.

ANALYSIS

Wisconsin Stat. § 230.34(1)(a), states in part that "[a]n employee with permanent status in class may be . . . discharged . . . only for just cause. It is just cause to . . . discharge . . . an employee for work performance or personal conduct that is inadequate, unsuitable, or inferior as determined by the appointing authority, but only after imposing progressive discipline that complies with the administrators standards under § 230.04(13m). . ." Wisconsin Statutes § 230.04(13m) requires that "[t]he administrator shall establish standards for progressive plans." Wisconsin Statutes § 230.04(13m) also allows that the authority shall be able to "accelerate progressive discipline" if the problem with the employee is "severe." Wisconsin Statutes § 230.34(1)(a) goes on to explain that ". . . It is just cause to . . . discharge . . . an employee without imposing progressive discipline for any of the following conduct: 1. While on duty, harassing a person. . ."

This court's scope of review is dictated by Wis. Stat. § 227.57(1), which states, "The review shall be conducted by the court without a jury and shall be confined to the record. . ." If there is substantial evidence to support the agency's decision, it must be affirmed. *State ex. Rel. Whiting v. Kolb*, 158 Wis. 2d 226, 233, 461 N.W.2d 816 (Ct. App. 1990); Wis. Stat. § 227.57. The court also must not accord deference to the agency's interpretation of the law. § 227.57(11). The court independently reviews an agency's interpretation of a statute and may give some "weight' to the experience, technical competence, and specialized knowledge of the administrative agency. See

Tetra Tech EC, Inc. v. Wisc. Dept. of Revenue, 2018 WI 75, ¶ 108, 382 Wis. 2d 496, 914 N.W.2d 21 (Wis. 2018).

This case clearly presents a clash between the statutory protection given to state employees as against the obligation of government agencies to protect employees from harassment and other workplace violations. Nothing in this decision should be construed to countenance any of Mr. Wessely's inappropriate behavior. Instead, this Court's judicial function is to merely interpret the law. And in doing so, this court has endeavored to respect the "solemn obligation of the judiciary to faithfully give effect to the laws enacted by the legislature . . ." *State ex rel. Kalal v. Circuit Court for Dane County*, 271 Wis.2d 633, 662, 681 N.W.2d 110, 123 (Wis. 2004). The court "assume[s] that the legislature's intent is expressed in the statutory language." *Id.* at 662, 124. The "purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect." *Id.*

The language used in statutes "is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." *Id.* The language "is read where possible to give reasonable effect to every word, in order to avoid surplusage." *Id.* In *Augsburger v. Homestead Mutual Insurance Co*mpany, the Supreme Court of Wisconsin referred to the idea that "[w]hen the legislature chooses to use two different words, we generally consider each separately and presume that different words have different meanings." 359 Wis.2d 385, 394, 856 N.W.2d 874, 878 (2014) (internal quotations omitted).

The first part of § 230.34(1)(a) states that "[a]n employee with permanent status in class . . . may be . . . discharge[d] . . . only for just cause." The second part delves into the requirement for progressive discipline that conforms to the standards under Wis. Stat. § 230.04(13m). The language in Wis. Stat. § 230.04(13m) allows the authority to "accelerate progressive discipline."

The third part of Wis. Stat. § 230.34(1)(a) states that discharge can be appropriate "without imposing progressive discipline" and lists nine categories where just cause would exist. The first category is "[w]hile on duty, harassing a person." Wis. Stat. § 230.34(1)(a)1. It is clear that to discharge an employee without "just cause" violates the statutes. It is also clear that Wis. Stat. § 230.34(1)(a) lists situations where "just cause" is present. Being "on duty" and "harassing" a person would be sufficient for discharge.

A. Wessely was not "on duty" for purposes of Wis. Stat. §230.34(1)(a)1.

The record amply demonstrates that WERC clearly established that Wessely's behavior met the definition of harassment. The record contains unmistakable evidence of inappropriate behavior. In the chairman's decision, the chairman referred to the claims made by Wessely as "false, inaccurate, and malicious and were intended to harass that coworker." R. 00503. That finding is well supported in the record.

If that was all the statutes required, this opinion would end here. But the law requires one step further, namely, a finding that the harassment was done "while on duty." The Oxford English Dictionary defines "on duty" as "engaged in the performance of one's appointed office, service, or task." *Duty*, OED.COM (last visited Feb. 12, 2020). This is contrasted with the definition of "off duty", which is defined as "the opposite of [on duty]; not officially engaged." *Id.* Therefore, these two words require a consideration of both the location of the harassment, and the relationship between the harassing behavior to the duties of the state employees involved.

Not every interaction two co-workers can be said to be in furtherance of their duty. The legislature did not modify the prohibited conduct to apply only "when at work" or "relating to work", but chose the word "duty". Wessely alleged Scopoline tripped him at work when he reported Scopoline to the police officer. Reporting a co-worker to police is not necessarily something a co-worker would do in pursuit of their job duties. Consider two examples. In the first,

a manager of an accounting firm notices that a co-worker has been embezzling from various clients. Calling the police would be entirely consistent with the manager doing their job protecting the interests of their employer. In the second, two co-workers go out for a night on the town. During the course of the evening one assaults the other. Calling the police in this situation would not be part the employee's job and would not be part of their "duty."

The Wessely/Scopoline dispute falls between these two extremes. Except nothing happened at work. Wessely apparently fabricated the entire event. The harassment took place outside of work hours. Wessely was not at work when he made the false police report and he specifically asked the police to avoid contacting Scopoline at work.

The Legislature could have easily eliminated the qualification of being "on duty". Wisconsin Statutes § 230.34(1)(a)7 states that there is good cause to terminate an employee without imposing progressive discipline when there is "[a] conviction of an employee of a crime or other offense subject to civil forfeiture, while on or off duty, if the conviction makes it impossible for the employee to perform the duties that the employee performs for the agency." There is no corresponding language in Wis. Stat. §230.34(1)(a)1.

The Wisconsin Employment Relations Commission's argues that "the statutory prohibition against harassing another person 'while on duty' does not literally require that the harassment occur during the work day." It further suggests that "[i]t suffices if the conduct allegedly violating the statute arises out of or involves on-duty conduct." A grammatical analysis of the structure of the sentence leads to the opposite conclusion.

The sentence simply reads: "while on duty, harassing a person." The dependent clause "while on duty" clearly modifies the act of "harassing a person." It really could not be clearer. And that simple construction seems to be consistent with the inference that the legislature intended that in offering extra protection to state employees, skipping progressive discipline ought to be

limited to actions taken during the work day while "on duty". Defining "on duty" strictly would further this legislative intent. As Wis. Stat. § 230.01(2)(d) states, "It is the policy of the state to ensure its employees opportunities for satisfying careers and fair treatment based on the value of each employee's services."

The Oxford English Dictionary definition of "on duty" similarly suggests that "on duty" means to be engaged in the performances of their service. Wessely was not engaged in his duty when he made the police report off hours. There is a deliberate separation between "on duty" and "off duty" present in Wis. Stat. § 230.34(1)(a)7. Clearly the legislature had intended for a distinction to be made, on or off duty. For these reasons, this court accords the statutory language its plain and logical reading and concludes that by not acting while on duty, Wessely should have been subjected to termination rather than further progressive discipline.

B. It is not appropriate to expand the list of conduct beyond what is explicitly stated in the nine categories in Wis. Stat. § 230.34(1)(a).

This court does not accept the WERC's additional alternative argument that the nine listed categories present in Wis. Stat. § 230.34(1)(a) are not the only circumstances where a state agency can bypass imposing progressive discipline. Wisconsin Statutes § 230.34(1)(a) contains a list. In keeping with *expressio unius est exclusio alterius*, the Supreme Court of Wisconsin has said of this canon of statutory construction that "[f]actually, there should be some evidence the legislature intended its application lest it prevail as a rule of construction despite the reason for and the spirit of the enactment." *Columbia Hospital Association v. City of Milwaukee*, 35 Wis.2d 660, 669, 151 N.W.2d 750, 754 (Wis. 1967).

The Wisconsin Employment Relations Commission focuses on Wis. Stat. § 230.04(13m). The WERC argues that "[H]ere, the legislature did not intend to prohibit appointing authority from discharging an employee for serious misconduct without first imposing progressive discipline, unless the serious misconduct fell squarely into one of the nine specified forms of misconduct

specified in Wis. Stat. § 230.34(1)(a)1-9." Def. Brief, Doc. 21, Pg. 11. It goes further and suggests "the legislature provided that an employee could be disciplined in compliance with the [Division of Personnel Management] administrator's progressive discipline standards and those standards permit an appointing authority to accelerate progressive discipline 'if the inadequacy, unsuitability, or inferiority of the personal conduct or work performance for which an employee is being disciplined is severe.'" *Id.* The internal quotation is from Wis. Stat. § 230.04(13m). Wisconsin Statutes § 230.04(13m) is ultimately not relevant.

Wisconsin Statutes § 230.34(13m) and Wis. Stat. § 230.34 use different language. Wisconsin Statutes § 230.04(13m) refers to "accelerating progressive discipline." Wisconsin Statute § 230.34 states "without imposing progressive discipline." This difference in language suggests that the legislature envisioned two different scenarios, otherwise it just would have provided language to the effect of "accelerating progressive discipline" in both statutes.

"Accelerating progressive discipline," would involve skipping steps of the progressive discipline, but not extending to actual discharge. "Without imposing progressive discipline" may be referring to a situation where actual discharge, or other statutory disciplinary action, is appropriate. Is discharge within the scope of "progressive discipline?" If discipline is a step along the path then the argument that behavior outside of the categories can be punished with discharge based on Wis. Stat. § 230.04(13m) is stronger.

Discharge is not simply a corrective disciplinary action. It may be illustrative to consider the language of the Wisconsin Human Resources Handbook 410.050 (hereafter "WHRH"), which outlines the progressive discipline. While it is not technically "law", the handbook helps explain what these words mean. There are four steps. The first three violations all result in longer suspensions. However, the fourth violation has "termination" listed under the "corrective disciplinary action" column. Administrative cases frequently use the sentence, "The parties

recognize the authority of the Employer to suspend, demote, discharge or take other appropriate corrective disciplinary action against employees for just cause." Jennifer Peshut, 2002 WL 34538958 (WI.Emp.Rel.Com.). The suggestion that terminating an employee is simply a course correction is inaccurate. A person is terminated from their job when all "corrective disciplinary action" has failed to solve the problem.

Wisconsin Statutes § 230.04(13m) does not imply the legislative intent of the statements in Wis. Stat. § 230.34(1)(a)1-9 in the way that the WERC suggests. The clear effect of these statutes as written establishes heightened protections to government employees, so the legislative intent actually cuts towards referring only to the nine listed categories.

C. These conclusions do not leave WERC powerless to discipline employees for off hours harassment.

The Wisconsin Employment Relations Commission can punish Wessely for harassing Scopoline. WHRH 430.030 explicitly allows the state to discipline co-workers for behavior that happened outside of work hours. WHRH 430.030 also makes it clear that harassment is a punishable offense. It would be well within the rights of WERC to discipline Wessely in a process commensurate with the discipline schedule as in WHRH 430.050.

CONCLUSION

The WERC did not have the statutory authority to discharge Wessely for his behavior in this case. Wessely was not "on duty" for purposes of being discharged without imposing progressive discipline. Wherefore, the decision and order of the WERC is set aside and the matter remanded back to the DOT for further proceedings consistent with this decision.

SO ORDERED.

This is a final decision for purposes of appeal.