

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RICKY J. DARROW, Appellant,

vs.

UNIVERSITY OF WISCONSIN SYSTEM, Respondent.

Case ID: 3.0030

Case Type: PA

DECISION NO. 37802

Appearances:

Ricky Darrow, 1488 County Road A, Edgerton, Wisconsin, appearing on his own behalf.

Matthew Lind, University of Wisconsin System, Office of General Counsel, 1852 Van Hise Hall, 1220 Linden Drive, Madison Wisconsin, appearing on behalf of the University of Wisconsin System.

DECISION AND ORDER

On November 21, 2018, Ricky Darrow filed an appeal with the Wisconsin Employment Relations Commission asserting he had been discharged without just cause by the University of Wisconsin System. The appeal was assigned to Examiner Raleigh Jones. A hearing was held on January 10, 2019, in Whitewater, Wisconsin. The parties made oral arguments at the hearing's conclusion. The Appellant filed a post-hearing brief on January 14, 2019. A transcript of the hearing was received on January 28, 2019.

On February 5, 2019, Examiner Raleigh Jones issued a Proposed Decision and Order affirming Ricky Darrow's discharge by the University of Wisconsin System. No objections were filed and the matter became ripe for Commission consideration on February 12, 2019.

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

FINDINGS OF FACT

1. Ricky Darrow was employed as a custodian at the University of Wisconsin-Whitewater and had permanent status in class when he was discharged.

2. The University of Wisconsin-Whitewater (UW-Whitewater) is part of the University of Wisconsin System.

3. Darrow used obscene language to denigrate and demean his supervisors and coworkers. Additionally, he used the terms “niggers” and “spics” in the workplace to describe Blacks and Hispanics. Further, Darrow made a sexually suggestive comment in the workplace about a female student.

4 Darrow was discharged for doing that.

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 § 230.44(1)(c), Stats.

2. The University of Wisconsin System had just cause, within the meaning of § 230.34(1)(a), Stats., to discharge Ricky Darrow.

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

ORDER

The discharge of Ricky Darrow by the University of Wisconsin System is affirmed.

Dated at Madison, Wisconsin, this 13th day of February, 2019.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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.

Ricky Darrow 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 University of Wisconsin System (UW-Whitewater) has the burden of proof to establish that Darrow 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 UW-Whitewater discharged Darrow for allegedly making various inappropriate statements in the workplace. The key word in the previous sentence is “allegedly” because Darrow denied making some of the statements attributed to him in the discharge letter. Thus, our first task here is to decide whether Darrow made the various statements attributed to him.

The Commission’s initial focus of inquiry concerns an interaction Darrow had with a coworker on October 2, 2018. On that date, Darrow was training a new coworker, Ramon Rocha. While he was doing so, Darrow opined to Rocha about a number of topics. Among the topics were his supervisors, his former coworkers at UW-Madison, his existing coworkers at UW-Whitewater, and students. Darrow’s comments on these topics upset and offended Rocha, and he later told his supervisor about it. That supervisor then told her supervisor about it, and that supervisor asked Rocha to write up an incident report, which he subsequently did. After human resources received the report, it commenced an investigation into Darrow’s conduct. That investigation uncovered other incidents which the Employer decided were relevant.

Here is Rocha’s account of the subjects Darrow opined on with him. One topic was Darrow’s supervisors. Darrow told Rocha that his supervisors were scared of him because he had gone to human resources and complained about them. Darrow told Rocha several times that because of that, human resources was on his side “100%.” Building on that premise, Darrow told Rocha that “these fuckers know better than to mess with me.” Another topic which Darrow opined on was his employment history with the University of Wisconsin System. Darrow told Rocha he had previously worked at UW-Madison, but he had transferred to UW-Whitewater. Darrow told

Rocha that the reason he left UW-Madison was because he had to work “with a lot of Mexicans,” and they were all “fucking lazy.” This statement was particularly offensive to Rocha because he (Rocha) is of Mexican descent. Another topic which Darrow opined on was his coworkers at UW-Whitewater. According to Rocha, Darrow called his female coworkers “fucking bitches” and his male coworkers “lazy fuckers.” Darrow then said, “I am the only one that really cleans and works hard and yet those fuckers mess with me.” Another topic which Darrow opined on was students. According to Rocha, Darrow called them “fucking students.”

Darrow denied making any of the statements attributed to him by Rocha. More specifically, Darrow characterizes Rocha’s written statement and his testimony at the hearing as inaccurate, exaggerated, and fabricated. The Commission finds otherwise and credits Rocha’s testimony. First, Darrow has an obvious stake in the outcome of this case; he is trying to get his job back. In contrast, Rocha’s stake is not as great; he did not administer the discipline being reviewed here. Second, no evidence was offered why Rocha would make up charges against Darrow and testify falsely against him. There was no showing of any animosity or bad blood between the two men. In fact, they did not even meet each other until the day in question. That being so, there is no apparent reason for Rocha to lie or fabricate his account of these matters. Third, following his first interaction with Darrow, Rocha initially did not say anything to anybody at work about what Darrow had said. Instead, Rocha kept the matters to himself for weeks before he shared them with a supervisor. In our view, Rocha’s credibility as a witness was enhanced, not harmed, by the fact he did not tell his supervisor about Darrow’s comments for weeks. Rocha knew if he filed a complaint against Darrow, it would be his word against Darrow’s, and Darrow had bragged that his supervisors were afraid of him and human resources was on his side “100%.” Under these circumstances, it took a great deal of courage for Rocha to ultimately come forward because he felt there could be adverse consequences to him for filing a complaint against Darrow. It would have been far easier for Rocha to keep quiet and not file a complaint against Darrow.

Having held that Darrow made the statements attributed to him by Rocha, the next question is whether those statements were appropriate for the workplace. They were not. Simply put, employees are not supposed to call their supervisors “fuckers,” or call female coworkers “fucking bitches,” or call male coworkers “lazy fuckers,” or call Mexican coworkers “fucking lazy,” or call students “fucking students.” While dropping a f-bomb is increasingly part of the common parlance, the words/phrases just referenced are still offensive and considered inappropriate in the workplace.

Next, the focus shifts to the other statements cited in the discharge letter that Darrow allegedly made to others. It is noted that at the hearing, Darrow focused his attention almost exclusively on Rocha’s testimony. By doing that, Darrow did not respond to all of the allegations made in the discharge letter. That was problematic for Darrow because it means those allegations he did not address were not rebutted.

One allegation contained in the discharge letter is that Darrow called Black students and coworkers “niggers” and Hispanic students and coworkers “spics.” At the hearing, Darrow indirectly acknowledged he used those terms in the workplace, but he attempted to minimize their significance with this distinction: he asserted he did not say those terms directly to the affected

people, but rather used those terms to coworkers (about the affected people). In Darrow's view, that is an important distinction. Suffice it to say the Commission disagrees.

These statements differ in this respect from the ones he made to Rocha. The statements he made to Rocha can fairly be characterized as obscenities involving sex-related taboo words. As previously noted, those words are considered offensive and therefore inappropriate in the workplace. While using obscenities and profanities in the workplace is one thing, there are words that are considered even worse, specifically racial slurs and epithets. That is because racial slurs and epithets target certain ethnic groups. They are considered highly offensive and derogatory. Words such as "niggers" and "spics" clearly fall into this category. Employees who use those terms in the workplace frequently lose their jobs. The reason for that is because employers which allow employees to use ethnic slurs and epithets in the workplace can be held liable for allowing it to occur.

Another allegation contained in the discharge letter is that Darrow made a sexually suggestive comment about a female student (specifically, "I bet she is something when she is on her knees") to a female coworker. Darrow did not rebut this allegation at the hearing. Making a sexually suggestive comment is similar to using ethnic slurs and epithets in this respect; employees who say them frequently lose their jobs. That is because employers which allow employees to make sexually suggestive comments in the workplace can be held liable for allowing it to occur.

The final allegation contained in the discharge letter is that Darrow referred to a developmentally disabled student worker as a "fucking fat ass." Darrow did not rebut this allegation either. That statement, which was made in front of the student worker, was also inappropriate.

By making the various inappropriate statements identified above, Darrow engaged in workplace misconduct. Employees are not supposed to use obscene, derogatory, and pejorative terms to describe their supervisors and coworkers. Additionally, employees are not supposed to use ethnic slurs and epithets in the workplace. Further, employees are not supposed to make sexually suggestive comments in the workplace. The Employer was certainly within its rights to decide that making those comments in the workplace constituted misconduct.

Next, Darrow contends that the investigation the Employer conducted here was flawed in these respects. The person who conducted the Employer's investigation herein was Connie Putland, the Assistant Director of Human Resources at UW-Whitewater. She is the appointing authority for hiring and firing staff at UW-Whitewater. As part of her job, Putland regularly conducts disciplinary investigations for employees at UW-Whitewater. According to Darrow, someone other than Putland should have performed the investigation herein. Darrow cited no legal support for his novel proposition, and the Commission finds it unpersuasive. Next, Darrow faults the investigation which Putland performed. Putland testified that she conducted the investigation herein the same way as all the others she has conducted, to wit: she reviewed the written complaint (that started the investigation); then she interviewed those employees who had knowledge of the facts; then she reached a conclusion based on the evidence; and then she wrote and signed a letter imposing disciplinary action on the employee. What Putland described, and did here, is a textbook

example of how disciplinary investigations are to be done. Simply put, there is nothing in the investigation that Putland performed here that raises any proverbial red flags.

The final question is whether the discipline imposed on Darrow was excessive. It is Darrow's position that even if he committed misconduct, he should have received a lesser penalty than discharge. The Commission concludes that discharge was appropriate under the circumstances. First, while the normal progressive disciplinary sequence is for employees to receive warnings and suspensions prior to discharge, that does not mean that all discipline must follow this sequence. Some offenses are so serious they are grounds for summary discharge even if the employee has not been previously disciplined. Here, the Employer considered Darrow's misconduct to qualify as serious misconduct, so it did not have to impose progressive discipline prior to discharge. When the plethora of Darrow's inappropriate statements are considered collectively as one overall act, it was grounds for summary discharge. Next, Darrow claims that other employees have engaged in more serious misconduct than him and were not fired for it. However, all Darrow did was make that claim; he did not prove it. He could have proven that claim with employee or employer testimony or through the use of information from personnel files. Since he did not do that, the claimed disparate treatment simply was not proven. In light of the above, the Commission concludes that the Employer had just cause to discharge Darrow.

Dated at Madison, Wisconsin, this 13th day of February, 2019.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman