

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

FRANK WESSELY, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF TRANSPORTATION

Case ID: 446.0018

Case Type: PA

DECISION NO. 37974

Appearances:

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

Cara Larson, Attorney, Department of Administration, 101 East 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 April 15, 2019, Frank Wessely filed an appeal with the Wisconsin Employment Relations Commission asserting he had been discharged without just cause by the State of Wisconsin Department of Transportation. A hearing before Examiner Raleigh Jones was held on June 25, 2019, in Madison, Wisconsin. The parties made oral argument at the conclusion of the hearing. A transcript of the hearing was received on July 10, 2019.

On July 25, 2019, Examiner Raleigh Jones issued a Proposed Decision and Order affirming the discharge of Frank A. Wessely by the State of Wisconsin Department of Transportation. Wessely filed objections on July 30, 2019, and requested oral argument. The State did not file a reply, and the matter became ripe for Commission consideration on August 5, 2019. The request for oral argument is hereby denied.

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. In October, 2018, Wessely filed a police report against a coworker which alleged the coworker had tripped him at work. Following an investigation, the Wisconsin State Capitol Police closed the case with no charge or citation because of a “lack of evidence or witnesses associated with this allegation.” The claims which Wessely made in that police report were false, inaccurate, and malicious and were intended to harass that coworker.

3. DOT discharged Wessely.

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 State of Wisconsin Department of Transportation had just cause, within the meaning of § 230.34(1)(a), Stats., 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.

Signed at the City of Madison, Wisconsin, this 9th day August, 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.

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).

Wessely was discharged for his workplace behavior. Three separate matters are involved, but we need only discuss the first.

In January, 2018, Kevin Scopoline had reported to DOT officials that Wessely had made an inappropriate comment and gestures about a female coworker. When Wessely was asked about the matter, he denied making the comment and gestures attributed to him by Scopoline. DOT ultimately credited Scopoline (over Wessely's denial) and found Wessely did, in fact, make the comment and gestures Scopoline attributed to him. Wessely was subsequently suspended for three days for that conduct.

Wessely admitted he held a grudge against Scopoline for reporting that matter to DOT officials. During his pre-disciplinary meeting with DOT officials on January 31, 2019, he said the following: "Kevin Scopoline is a dirty son of a bitch. ... He lied during that, that thing with the Jell-O. He lied through his teeth. ... He's a liar. ... He lied through his goddamn, fucking teeth. It was a bullshit story. ... He is a liar. ... He's a bastard ... that son of a bitch should be swinging from 12 feet of rope for lying, like that, for trying to put my career in jeopardy – my, my fake career." Respondent Exhibit 25, pages 2, 4, 6. Wessely's own words make it crystal clear he harbored ill will toward Scopoline for reporting his conduct to DOT officials.

In October, 2018, Wessely filed a police report alleging that coworker Kevin Scopoline intentionally tripped him at work on October 18, 2018, at 1:30 p.m.

Following their investigation, the Wisconsin State Capitol Police closed the case with no charge or citation because of a "lack of evidence or witnesses associated with this allegation." DOT subsequently concluded that Wessely's claim against Scopoline was false and inaccurate. The Commission concurs with that finding. At the hearing, it was established that Scopoline was

not at his desk during the afternoon of October 18, 2018, because at that time Scopoline was running a staff meeting attended by numerous people in a different part of the building. It follows that Scopoline was not at his desk at 1:30 p.m. on that day as Wessely alleged in his police report and thus Scopoline could not have tripped him at that time. In light of that evidence, the Commission finds DOT substantiated that Wessely's claim that Scopoline tripped him at 1:30 p.m. on that date was false, inaccurate, and unfounded. The Commission further finds DOT substantiated that Wessely filed his police report against Scopoline to harass and retaliate against him.

Wessely asserts he cannot fairly be charged with a violation of Serious Misconduct Rule No. 1. That rule proscribes: "While on duty, harassing a person." Wessely contends he was off duty when he initially called the Capitol Police Department to make his complaint about Scopoline. Building on that premise, he maintains that Serious Misconduct Rule No. 1 is inapplicable here. The Commission disagrees. The complaint Wessely filed with the Capitol Police Department against Scopoline involved conduct that allegedly occurred during Wessely's workday. As such, it involved on-duty conduct, so the work rule just referenced applies herein. The time the complaint was filed is not controlling, however, the proposed time of the incident is.

DOT has a legal obligation to maintain a harassment-free workplace for its employees. To effectuate that goal, DOT has adopted work rules that, among other things, prohibit harassment and retaliation. Wessely violated those work rules when he filed a false police report against Scopoline.

DOT alleges other transgressions from Wessely relating to threatening comments made by him. It is unnecessary for the Commission to delve into these issues for purposes of rendering a decision in this matter.

The last question is whether the discipline imposed here (i.e. discharge) was excessive. The record shows that prior to the discipline imposed here, Wessely had received a one-day suspension in October, 2016, a three-day suspension in January, 2017, and another three-day suspension in February, 2018. Under DOT's progressive disciplinary "schedule," a five-day suspension normally follows a three-day suspension. In this case, DOT skipped the five-day suspension step and instead went to the next step which is discharge. The Commission finds that was permissible for these reasons. First, Wessely already had a substantial disciplinary history when he committed the misconduct involved here. Second, the misconduct involved here qualifies as serious misconduct, and DOT can discharge an employee who commits serious misconduct as Wessely did. The Commission therefore finds the severity of Wessely's misconduct supports the severity of the discipline imposed on him. Accordingly, Wessely's discharge is affirmed.

Signed at the City of Madison, Wisconsin, this 9th day August, 2019.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman