

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ANDREW WESNER, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0379

Case Type: PA

DECISION NO. 38790

Appearances:

Michael J. Kuborn, Attorney, APEX Accident Attorneys, LLC, 3475 Omro Road, Ste. 200, P.O. Box 2845, Oshkosh, Wisconsin appearing on behalf of Andrew Wesner.

Cara J. Larson, Attorney, Department of Administration, 101 East Wilson Street, 10th Floor, P.O. Box 7864, Madison, Wisconsin and Andrea Olmanson, Attorney, Department of Corrections, 3099 E. Washington Avenue, Madison, Wisconsin appearing on behalf of the State of Wisconsin Department of Corrections.

DECISION AND ORDER

On July 6, 2020, Andrew Wesner filed an appeal with the Wisconsin Employment Relations Commission asserting he had been discharged without just cause by the State of Wisconsin Department of Corrections (DOC). The appeal was assigned to Examiner Peter Davis and a telephone hearing was held on September 15, 17, 30 and October 1, 20, 21, and 27, 2020. DOC filed written argument of November 13, 2020 and Wesner did the same on November 16, 2020.

To allow for a reasonable time to review the lengthy record and file written argument, the parties agreed to waive the 120 day time limit created by Wis. Stat. § 230.445(3)(c)2.d., so long as the Commission issues its final decision as to the appeal on or before January 19, 2021.

On December 30, 2020, Examiner Davis issued a Proposed Decision and Order affirming the discharge. On January 4, 2021, Wesner filed objections to the Proposed Decision and Order. DOC did not file a response and the matter became ripe for Commission consideration on January 12, 2021.

Being fully advised on the premises and having considered the matter, the Commission makes and issues the following:

FINDINGS OF FACT

1. Andrew Wesner (herein Wesner) was employed by the State of Wisconsin Department of Corrections (DOC) as a Captain at the Redgranite Correctional Institution and had permanent status in class at the time of his June 9, 2020 discharge.
2. Wesner created a hostile and divisive work environment at Redgranite.
3. Wesner engaged in social media activity that negatively impacted the work environment at Redgranite.
4. Wesner was not discharged in retaliation for his use of internal DOC procedures that are available to raise workplace issues or for his support of others who used said procedures.

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 Wis. Stat. § 230.44 (1)(c).
2. The State of Wisconsin Department of Corrections had just cause within the meaning of Wis. Stat. § 230.34(1)(a) to discharge Andrew Wesner.

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

ORDER

The discharge of Andrew Wesner is affirmed.

Issued at Madison, Wisconsin this 19th day of January, 2021.

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.

Andrew Wesner 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 Wesner 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 Redgranite command structure consisted of a warden, deputy warden, security director, administrative captain, and several captains and lieutenants. Wesner was the administrative captain. When three command staff vacancies were filled by women instead of male colleagues and friends of Wesner, he began a campaign to discredit the security director and warden. As part of the campaign, he was openly critical of the job performance of the women, largely ignored them in the security office despite his training responsibilities, fixated on whether two of the three women arrived “late” for work, and speculated to co-workers that the women must have received their positions because they provided sexual favors to the security director. Wesner’s attitude toward one of the three women was summed up by his comment to a new male member of the command staff:

I fucking hate that bitch and I hope she leaves.

Wesner’s in office behavior was very disruptive to the efficient functioning of the prison’s supervisory staff. He expected other employees to support his negative view of the three female command staff and his campaign against the security director and warden. Those who did not justifiably feared retaliation from him.

While still employed by DOC, Wesner caused additional disruption by sending emails to DOC Secretary Carr, members of the Wisconsin Legislature and members of the media that were highly critical of the warden and security director.

While still employed by DOC, Wesner was active on social media demeaning current and former DOC employees (sometimes using embarrassing details as to events in their personal lives) and attacking DOC procedures. His social media activity was viewed by Redgranite employees and negatively impacted the work environment.¹

Given the foregoing, it is clear that Wesner engaged in a very significant level of misconduct. The question then becomes whether there was just cause for discharge.

Although Wesner had not previously been disciplined, Wis. Stat. § 230.04(13m) 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 Wis. Stat. § 230.34(1)(a), 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 #2, #14 and #25 are all listed, and all were violated by Wesner. Further, there can be little doubt that Wesner’s overall misconduct was “severe.” Given the foregoing, it is clear that discharge was a statutorily authorized penalty for Wesner’s misconduct and that just cause existed for DOC to so act.

When reaching this conclusion, the Commission has considered and rejected Wesner’s view that his discharge was DOC’s illegal effort to retaliate against him for his efforts to root out what he perceived as significant issues at Redgranite. Instead, it is clear the discharge was based on the massive nature of his misconduct summarized herein.

¹Wesner argues that he could not be disciplined for his social media activity because he was not “on duty” at the time, was never warned to stop, and there was no DOC policy specifically addressing social media activity. This argument is rejected. Any reasonable employee would know that demeaning fellow employees on social media was conduct that might subject the employee to discipline given the obvious negative impact on the workplace.

Wesner also appears to believe that his social media activity was constitutionally protected and thus that he could not be disciplined for same. While the interplay between free speech rights and social media content can be legally complex, the Commission is satisfied that Wesner’s social media activity was not constitutionally protected and thus he could be disciplined for same.

Furthermore, even if Wesner had not engaged in social media activity, his other misconduct warranted his discharge under the just cause standard.

Issued at Madison, Wisconsin this 19th day of January, 2021.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman