

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ELIZABETH WOOLEVER, Appellant,

vs.

UNIVERSITY OF WISCONSIN-SYSTEM, Respondent.

Case ID: 3.0036

Case Type: PA

DECISION NO. 38923-B

Appearances:

Elizabeth Woolever, 321 N. Pleasant Avenue, Jefferson, Wisconsin, appearing on her own behalf.

Kristin Johnson, System Legal Counsel, 1850 Van Hise Hall, 1220 Linden Drive, Madison, Wisconsin, appearing on behalf of the University of Wisconsin-System.

DECISION AND ORDER

On March 27, 2020, Elizabeth Woolever filed an appeal with the Wisconsin Employment Relations Commission asserting she had been discharged without just cause by the University of Wisconsin-System from her position at the University of Wisconsin-Whitewater. The appeal was assigned to Examiner Peter Davis.

Due to discovery disputes and witness availability issues, the parties waived the 120-day limit for Commission action set forth in Wis. Stat. § 230.445. Telephone hearings were held on August 28, November 17, and December 11, 2020. The parties thereafter filed written argument—the last of which was received March 19, 2021.

On April 5, 2021, Examiner Davis issued a Proposed Decision and Order affirming the discharge. On April 12, 2021, Woolever filed objections to the Proposed Decision. On April 16, 2021, the University filed a reply to the objections. On April 26, 2021, the Commission issued a Decision and Order affirming the discharge. On June 8, 2021, the Commission issued an Order denying a petition for rehearing filed by Woolever,

Woolever sought judicial review of the Commission's decision. On November 11, 2021, Jefferson County Circuit Court Judge William Hue issued a Memorandum Decision that affirmed the Commission's factual determinations as to Woolever's misconduct. However, as quoted below, that Decision also remanded the matter to the Commission for analysis of the applicable

statutory provisions that allow discharge as opposed to lesser progressive discipline in the context of Woolever's misconduct. Specifically, the Court's remand states:

- 1) Identifying which definition of just cause set forth by the Legislature in §230.34(1)(a) [S]tats, that it is applying the facts to;
 - a. Identifying, with particularity, which enumerated subsection setting forth specific acts, conditions or conduct the Legislature has defined as just cause (under §230.34(1)(a) 1-9 [S]tats.) if WERC is premising its decision thereupon,

or;

- b. If WERC is premising its decision on the first specifically defined just cause circumstance identified by the Legislature in §230.34(1)(a) [S]tats., (§230.04(13m) [S]tats.),
 - i. What standard for progressive discipline plan exist(s)(ed) that (was) is prepared by the applicable agency applicable to employees in classified service, as required by law.
 - ii. Whether said standard address [sic] progressive discipline for personal conduct and work performance that is inadequate, unsuitable or inferior, as required by law.
 - iii. Whether, as required by law, the standard allows 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.
- 2) Applying the facts to the provisions of law specified, reaching conclusions and a determination thereupon, under the burden of proof previously correctly applied.

Pursuant to the remand, the Commission makes and issues the following:

FINDINGS OF FACT

1. Elizabeth Woolever (herein Woolever) was employed by the University of Wisconsin-System (herein UW) as a Risk Management Specialist at the University of Wisconsin-Whitewater at the time of her discharge effective February 28, 2020. She had permanent status in class as of June 30, 2015.

2. On December 6, 2019, Woolever went into an unprovoked rage in a co-worker's office which included screaming within a foot of the co-worker's face and hitting the co-worker with a thrown envelope containing several keys.

3. Once the rage ended, Woolever did not leave work as requested by her supervisor but subsequently voluntarily left the office accompanied by law enforcement personnel who were called to the scene.

4. The rage left the co-worker understandably fearful for her safety and she took precautions in response. The rage disrupted the workplace.

5. During subsequent investigation of the December 6 incident, UW discovered that Woolever had called a different co-worker a "fucking cunt" during a conversation with a UW student worker Woolever supervised.

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 University of Wisconsin-System had just cause within the meaning of Wis. Stat. § 230.34(1)(a) to discharge Elizabeth Woolever.

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

ORDER

The discharge of Elizabeth Woolever is affirmed.

Issued at Madison, Wisconsin, this 28th day of December, 2021.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Electronically signed by James J. Daley

James J. Daley, Chairman

MEMORANDUM ACCOMPANYING DECISION AND ORDER

Wisconsin Stat. § 36.115 (6) provides in pertinent part:

All system employees holding positions in the classified . . . service of the civil service system under ch. 230 on June 30, 2015, who have achieved permanent status in class on that date, shall retain, while serving in the positions in the system, those protections afforded employees in the classified service under ss. 230.34 (1)(a) and 230.44 (1)(c) relating to demotion, suspension, discharge, layoff, or reduction in base pay.

Wisconsin Stat. § 230.34 (1)(a) states in pertinent part “[a]n employee with permanent status in class . . . may be removed, suspended without pay, discharged, reduced in base pay or demoted only for just cause.”

Wisconsin Stat. § 230.44 (1)(c) 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.”

Woolever had permanent status in class as of June 30, 2015 as an employee of the University of Wisconsin System and her appeal alleges that the discharge was not based on just cause.

UW System has the burden of proof to establish that Woolever 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). At the time of her discharge, Woolever had not previously been disciplined.

Wisconsin Stat. § 230.34 (1)(a) provides that it can be just cause to discharge an employee without imposing progressive discipline for any of nine listed types of misconduct. Pursuant to Wis. Stat. § 36.115 (6), the provisions of 230.34 (1)(a) are applicable to the UW System and Woolever. Two of the nine identified types of misconduct are listed at Wis. Stat. § 230.34 (1)(a) as:

1. While on duty, harassing a person.
2. While on duty, intentionally inflicting physical harm on another person.

The evidence establishes that on December 6, 2019, Woolever engaged in both of the above-listed types of misconduct. The Commission further concludes that her misconduct on that date constitutes just cause for her discharge.

On December 6, 2019, Woolever was upset that employee W had requested that she get some keys made. Woolever did not think it was part of her job to get the keys made and complained to her supervisor. Her supervisor directed her to get the keys made and Woolever did so. Shortly thereafter, Woolever entered a co-worker’s office and initiated a conversation focused on how or

whether she could improve her relationship with W. Without any provocation, Woolever then flew into a rage which included screaming within a foot of the co-worker's face and hitting the co-worker with a thrown envelope containing several keys. Once the rage ended, Woolever did not leave work as requested by her supervisor but subsequently voluntarily left the office accompanied by law enforcement personnel who were called to the scene. The rage left the co-worker understandably fearful for her safety and she took precautions in response. The rage also disrupted the workplace.

Woolever's raging at her co-worker clearly constitutes "[w]hile on duty, harassing a person" within the meaning of Wis. Stat. § 230.34 (1)(a) 1. Her action of hitting her co-worker with the envelope containing keys clearly constitutes "[w]hile on duty, intentionally inflicting physical harm on another person" within the meaning of Wis. Stat. § 230.34 (1)(a) 2. Either type of misconduct would be sufficient to establish just cause for discharge without imposing progressive discipline.

Woolever nonetheless argues that discharge was too severe a penalty because she is a long-term employee with a clean disciplinary record. She further contends that she was treated more severely than other UW employees who engaged in similar or more severe misconduct.¹ The Commission does not find her arguments to be a persuasive basis for rejecting the discharge.

While Woolever is a longer-term employee with a clean disciplinary record, her level of misconduct on December 6, 2019 was severe and of a type that the Legislature has specifically identified as allowing discharge without progressive discipline. Therefore, her length of service and clean record does not provide a persuasive basis for modifying the level of discipline.

Turning to Woolever's claim of disparate treatment, the Commission's analysis of such claims focuses on how the employer has treated similarly situated employees who have engaged in the same misconduct. *See Morris v. DOC*, Dec. No. 35682-A (WERC 7/15); *Pflum v. DOC*, Dec. No. 35067-B (WERC, 7/15). The employee asserting disparate treatment bears the burden of proof as to this assertion. *See Hulce v. DOC*, Dec. No. 37445 (WERC, 6/18).

Woolever focuses her disparate treatment claim on three other UW-Whitewater employees: Judah, Soliz, and Marino.

As to Judah, there is evidence that he swore at student workers he was supervising, and the only UW response was to note the need for improvement in his employee evaluation. Woolever's discharge was premised on far more serious misconduct and thus the lack of discipline for Judah does not warrant rejecting or modifying Woolever's discharge.

As to Soliz, he damaged an air conditioning unit by cutting the power cord and was not disciplined. While such conduct clearly provided a basis for discipline, the Commission's analysis of a disparate treatment claim focuses on whether the employer imposed different discipline for

¹ Woolever also asserts that she is being targeted because of what she views as whistleblowing activity at UW. There is no persuasive evidence to support this assertion. Woolever criticizes the quality of the investigation into her conduct. There was no relevant flaw in the investigation.

the same conduct. Because Soliz's conduct differs from that of Woolever, the UW decision not to discipline Soliz does not undermine the UW decision to discharge Woolever.

Lastly, Marino intentionally damaged a co-worker's car and was not formally disciplined. While such conduct clearly provided a basis for discipline, Marino's misconduct is sufficiently different from that of Woolever's so that a disparate treatment analysis is not applicable. While Marino may well have been acting out of rage, as was Woolever, the misconduct that the rage produced is substantially different.

Given the foregoing, Woolever's claim of disparate treatment is rejected and her discharge is affirmed.

Issued at Madison, Wisconsin, this 28th day of December, 2021.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Electronically signed by James J. Daley

James J. Daley, Chairman