

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ROXANN MCGREGOR, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0419

Case Type: PA

DECISION NO. 38936

Appearances:

Roxann McGregor, N6091 Westview Court, Fond du Lac, Wisconsin appearing on her own behalf.

Anfin Jaw, Department of Administration, 101 E. Wilson Street, 10th Floor, P.O. Box 7864, Madison, Wisconsin appearing on behalf of the State of Wisconsin Department of Corrections.

DECISION AND ORDER

On December 14, 2020, Roxann McGregor filed an appeal with the Wisconsin Employment Relations Commission asserting she had been suspended for three days without just cause by the State of Wisconsin Department of Corrections (DOC). The parties waived the 120-day time limit for issuance of the Commission's decision set forth in Wis. Stat. § 230.445(3)(c)1.

A telephone hearing was held on April 26, 2021 by Commission Examiner Peter G. Davis. The parties made oral argument at the end of hearing and the record was supplemented with additional evidence and argument later that day.

On May 3, 2021, Examiner Davis issued a Proposed Decision and Order affirming the suspension. On May 10, 2021, McGregor filed objections to the Proposed Decision and Order. DOC did not file a response by the deadline of May 17, 2021.

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

FINDINGS OF FACT

1. Roxann McGregor, herein McGregor, is employed by the State of Wisconsin Department of Corrections as a Correctional Sergeant at the Dodge Correctional Institution. She had permanent status in class at the time of her October 2020 suspension.

2. Immediately prior to receiving a COVID nasal swab test, McGregor threatened to hit a member of the National Guard in the face if she felt any discomfort.

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 suspend Roxann McGregor for three days.

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

ORDER

The three-day suspension of Roxann McGregor is affirmed.

Issued at the City of Madison, Wisconsin, this 25th day of May, 2021.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman

MEMORANDUM ACCOMPANYING DECISION AND ORDER

Section 230.34(1)(a), Stats., states in pertinent part:

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.

McGregor had permanent status in class at the time of her suspension and her appeal alleges that the suspension was not based on just cause.

The State has the burden of proof to establish that McGregor 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 evidence establishes that on the day in question, McGregor was returning to work after having received distressing medical news. The evidence also establishes that McGregor had no prior notice of the National Guard COVID testing that was to occur that day and that a fellow employee greeted her with “go get violated” before she proceeded to the testing site. While waiting in line to be tested, she observed or heard of other employees who had experienced discomfort due to the nasal swab nature of the COVID testing being conducted. Given the foregoing, it is clear that McGregor was emotionally on edge as she approached the testing site and was heard saying something along the lines of “I don’t know why I have to do this fucking shit.”

What happened during McGregor’s interaction with the National Guard person who would be conducting the COVID nasal swab test is in dispute. Two National Guard personnel testified that McGregor threatened to hit the tester in the face if she experienced any discomfort. McGregor denies making that threat and instead asserts that after one nostril had been swabbed, she said it felt like she had been punched in the face. A co-worker testified that he did not hear McGregor make a threat.

The Commission credits the testimony of the National Guard witnesses. Unlike McGregor, they have no incentive to be less than truthful. Unlike McGregor, they were not in an agitated state of mind at the time of the interaction and thus are more likely to have an accurate recollection of what occurred. Unlike McGregor’s co-worker, they have no potential workplace allegiance that might influence their testimony. Therefore, it is concluded that McGregor made the threat.¹

¹ McGregor notes that witnesses provided slightly different versions of what was said and argues those distinctions warrant a conclusion that no threat was made. The Commission disagrees. Whatever the precise language used, witnesses were consistent in their testimony that a threat was made.

It is undisputed that as she left the testing site, McGregor loudly said “fuck you” after the National Guard tester told her to “have a nice day.”

Given the foregoing, it is concluded that McGregor engaged in workplace misconduct.

To the extent McGregor questions the training of the National Guard members conducting the test, there is no persuasive evidence of inadequate training. Even if there were such evidence, it would in no way justify the threat in question.

Turning to the issue of whether there was just cause for a three-day suspension, McGregor contends that the discipline she received was not consistent with that received by other employees who engaged in comparable misconduct. To some extent, McGregor makes this argument on the assumption that her admitted use of profanity is the only misconduct at issue. Obviously, it is the threat to the National Guard tester that forms the primary basis for the discipline and thus must be the focus of any disparate treatment analysis. In that regard, McGregor presented testimony from a co-worker who asserted that he had been assaulted by another employee at work and no formal discipline had been imposed. Supplemental evidence shows that DOC investigated the matter and concluded that there had been a short verbal confrontation between two employees who dislike each other, and one employee made minimal contact with the other in a bubble doorway. No formal discipline was imposed on either employee. While one employee remains convinced he was assaulted, DOC concluded otherwise. A disparate treatment analysis is based not on what an employee believes occurred but rather on what DOC concluded occurred and what, if any, discipline was imposed.

McGregor also presented a series of exhibits relating to discipline that was or was not imposed by DOC for various types of workplace misconduct. None of the exhibits relate to a physical threat to a member of the public while on duty. Therefore, McGregor has not presented any evidence of a disparate DOC disciplinary response to conduct comparable to her misconduct.

McGregor also points to her clean disciplinary record and 15 years of DOC employment when arguing that the discipline was excessive. While lengthy service and a clean record can be mitigating factors as to the level of discipline that is appropriate under a just cause analysis, those factors do not warrant a reduction in the level of discipline imposed here. A physical threat to individuals performing a service for DOC employees is serious misconduct. With or without the related profanity, the just cause standard is not violated by the imposition of a three-day suspension. In reaching this conclusion, the Commission acknowledges that McGregor’s agitated state on the day in question clearly was a contributing factor as to all of the conduct in question. Nonetheless, DOC has a strong interest in maintaining a workplace where those present to provide an important service are not threatened with harm and McGregor compromised that interest.²

Given the foregoing, the three-day suspension is affirmed.

² To the extent McGregor asserts that more than a single threat was needed before this DOC interest was compromised and inappropriate harassment occurred, she is clearly mistaken.

Issued at the City of Madison, Wisconsin, this 25th day of May, 2021.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman