

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ROBERT J. MICHEL, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF HEALTH SERVICES, Respondent.

Case ID: 2.0117

Case Type: PA

DECISION NO. 39746

Appearances:

William E. Morgan, Attorney, Murphy Desmond S.C., 33 E. Main Street, Suite 500, Madison, Wisconsin, appearing on behalf of Robert J. Michel.

David G. Makovec, Attorney, 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 Health Services.

DECISION AND ORDER

On July 14, 2022, Robert J. Michel filed an appeal with the Wisconsin Employment Relations Commission asserting he had been discharged without just cause by the State of Wisconsin Department of Health Services.

A telephone hearing was held on October 4, 2022, by Commission Examiner Anfin Jaw. The parties made oral argument at the end of the hearing. On October 14, 2022, Examiner Jaw issued a Proposed Decision and Order affirming the discharge of Robert Michel by the State of Wisconsin Department of Health Services. Michel filed a response to the Proposed Decision on October 21, 2022. The State did not file a reply by the deadline given of October 28, 2022.

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

FINDINGS OF FACT

1. Robert J. Michel (Michel) was employed by the State of Wisconsin Department of Health Services (DHS), as a Power Plant Operator-Senior at the Mendota Mental Health Institute (MMHI) and had permanent status in class when he was discharged.

2. The Department of Health Services (DHS) is a state agency responsible for the operation of MMHI, a psychiatric hospital located in Madison, Wisconsin.
3. In 2021, Michel failed to follow power plant safety protocols and procedures.
4. In 2020 and 2021, Michel repeatedly blurted out “cock and balls” to coworkers in the workplace, even after being told to stop.
5. In 2020, Michel exposed his genitals to coworkers in the workplace.

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 Health Services had just cause under Wis. Stat. § 230.34(1)(a) to discharge Robert J. Michel.

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

ORDER

The discharge of Robert J. Michel by the State of Wisconsin Department of Health Services is affirmed.

Issued at Madison, Wisconsin, this 7th day of November, 2022.

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.

Robert J. Michel 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 Michel 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).

As a Power Plant Operator-Senior for MMHI, Michel performed a variety of semi-skilled duties essential to the operation of a large institutional power plant, a 24/7 operation. A large part of Michel's duties included maintaining the operation of boilers and related plant equipment. Maintaining correct water levels and steam pressures were essential, as well as checking boiler related equipment on an hourly basis to ensure its continued efficient and proper functioning. The MMHI power plant is high in coal utilization but has natural gas and oil burning capabilities as well. The plant has turbine and diesel driven generators capable of operating in parallel with the local utility. Michel's direct supervisor was Ron Van Buren, the Assistant Superintendent of Mendota Power Plant. The Mendota Power Plant Manager and Superintendent is Dan Stormer.

In October 2021, Stormer reported to management and MMHI Human Resources that Michel was failing to perform his job duties, violating safety protocols, and had exposed his genitals to coworkers. On multiple occasions in 2021, Michel was turning off boiler and other equipment alarms that are required to be on for the safe operation of the power plant. He failed to sign the boiler systems inspection logbook and did not provide a shift report at the end of each shift as required. In 2021, Michel also fed cheerios to mice in the electrical power system equipment, which could have serious and disastrous consequences to the large voltage electrical equipment. Additionally, in 2020, Michel wore pants with a hole in the crotch area without underwear and exposed his genitals to coworkers, making them uncomfortable. Finally, on numerous occasions, Michel proclaimed "cock and balls" in the workplace and in front of coworkers, and continued to do so, even after a handful of staff told him to stop.

DHS conducted an investigation into the matter and concluded that Michel's conduct violated multiple work rules. On May 4, 2022, DHS discharged Michel. The discharge letter Michel received states in relevant part:

This is official notice that your employment as a Power Plant Operator in the Department of Health Services (DHS), Division of Care and Treatment Services, Mendota Mental Health Institute (MMHI) is **terminated** effective May 4, 2022, for violation(s) of DHS Human Resources Policy and Procedure (HRPP) 703: Respectful Workplace Policy and the following State of Wisconsin Work Rules:

- #2: Failure to comply with written agency policies and procedures. Specifically, DHS HEPP 703: Respectful Workplace Policy.
- #3: Disobedience, insubordination, inattentiveness, negligence, failure or refusal to carry out written or verbal assignments, directions, or instructions.
- #4: Failure to observe all health, safety and sanitation rules and practices, including failure to report accidents which involve injuries or damage to state property.
- #14: Intimidating, interfering with, harassing, demeaning, treating discourteously, or bullying, or using profane or abusive language in dealing with others.
- #16: Engaging in unauthorized activities while on duty including, but not limited to, gambling, operating a personal business, soliciting, playing games, horseplay or disorderly conduct or other disruptive or unsafe behavior.
- #22: Unclean, unkempt, inappropriate dress or grooming which adversely affects proper performance of duties or the image of the employer.

It was also determined the serious misconduct detailed below constitutes violation of Wis. Stat. § 230.34(1)(a)[#1], which states, “While on duty, harassing a person.”

Specifically, you engaged in behaviors as a Power Plant Operator that created a safety and security risk to the Power Plant. These behaviors are as follows:

- On October 14, 2021, you did not sign the inspection logbook as required, but instead placed a note in the inspection logbook that stated, “I was here”. The inspection logbook is a safety check of the boiler systems and loss of steam would result in loss of heat and hot water to MMHI and Center [sic] Wisconsin Center (CWC). This would affect patient care and food service for MMHI and CWC.
- You turned off the off-line boiler alarm multiple times in 2021, specifically in July 2021 and on October 20, 2021. By turning off the off-line boiler alarm, the low water alarm could lead to a boiler exploding and causing severe damage or death as well as a loss of steam to CWC and MMHI.
- There was a low water level in the drum tank when you were relieved for your shift. The drum tank uses water at a slow rate and there is no reason for a low water level at the state of the next shift.
- You disabled the yar-way alarm numerous times. The Yar-way alarm is a

water column alarm, which, if disabled, will not let the Power Plant Operator know the volume of water to boiler.

- In 2021, you fed mice in the switch gear box by giving the mice cheerios. You admitted to feeding mice cheerios. If mice were to chew through the large voltage electrical equipment, it could be catastrophic to staff as well as patients that require equipment for breathing, and could disable the security fences and gates.
- You do not give [a] shift report at the end of every shift as required. Not passing on information could lead to serious consequences to CWC, MMHI, and Power Plant staff.
- On November 7, 2020, you wore pants with a large hole in the crotch, had no underwear on, and your genitals were exposed. Your scrotum and penis were exposed, and staff were uncomfortable with your exposure.
- You blurted out “cock and balls” numerous times in the workplace. Staff asked you to stop blurting out “cock and balls”, but you continued to say it.

These behaviors exhibited by you are concerning as the power plant is vital to CWC and MMHI campuses and can have dire consequences to the campuses, patients, and staff if the power plant responsibilities are not performed accurately and seriously.

Additionally, according to DHS HRPP 703: Respectful Workplace Policy and Complaint Process harassment is defined as “unwelcome and/or inappropriate verbal, physical, or visual conduct that creates a hostile, intimidating or offensive working environment or work-related event; unreasonably interferes with an individual’s work performance; or otherwise adversely affects an individuals [sic] employment or employment opportunities.” Also, sexual harassment is defined as, “a type of harassment in which the conduct is sexual in nature, regardless of whether the conduct is directed at members of the opposite or same sex. Sexual harassment includes unwelcome sexual conduct or language that is offensive to the target or would otherwise be offensive to a reasonable person. Examples of sexual harassment include unwelcome sexual advances or requests for sexual favors, derogatory comments on the basis of gender, sexual orientation or gender identity; suggestive or obscene jokes or comments of a sexual nature; physical harassment; and visual or written conduct of a sexual nature.” As an employee, you are responsible for discouraging and refraining from participating in any conduct that violates this policy. However, you violated this policy as you engaged in harassment and sexual harassment when you exposed your genitals to staff and staff were uncomfortable with your exposure. You also blurted out “cock and balls” numerous times in the workplace, and staff asked you to stop, but you continued to say it. DHS is committed to promoting a respectful workplace and does not tolerate conduct or behavior that is harassing.

While these behaviors are from 2020 and 2021, it should be noted that these behaviors were not communicated to MMHI Human Resources until approximately October 2021. When communicated to MMHI Human Resources, it was

determined to initiate an investigation as the alleged behaviors presented a safety and security risk to MMHI, CWC, staff, and patients. As well, Power Plant Operator Michel submitted a respectful workplace complaint in accordance with DHS HRPP 703: Respectful Workplace Policy and Complaint Process on October 15, 2021 and received a disposition letter regarding his complaint on March 14, 2022. Therefore, due to witnesses' vacations, investigator's vacations, Power Plant Operator Michel's respectful workplace complaint, the COVID-19 pandemic, and the seriousness of the alleged behaviors, the investigation spanned over 6 months to provide a fair, complete, and thorough investigation.

An investigatory meeting was held on December 10, 2021. You were provided the opportunity to have a representative present, but declined. Management was represented by Peter Scheckel, Management Services Director and Warren Mauer, Crafts Worker Supervisor. During this meeting, Management asked you a series of questions related to the alleged misconduct. In response you said you do sign the logbook as required. You also admitted you placed a note in the inspection logbook that stated, "I was here." You also admitted that you have been spoken to previously about signing the logbook by the manager. When asked about boiler alarms, you stated that at certain times you have to turn off the alarms. You stated you don't remember the specific incident on July 26, 2021. When questioned about an employee you trained who stated you told him "I just turn alarms off" you stated, "I don't know". While still discussing boiler alarms and their importance you stated, "there may be times that I forgot to turn alarms back on." When you were questioned about the DA tank water levels you stated that staff were out to get you and you have never been disciplined for it. You denied ever shutting off a Yar-way alarm for a boiler that was online. You admitted to feeding the mice for entertainment and didn't think about the effect on the machinery or the Power Plan. [sic] Additionally, you stated that you did not knowingly wear pants with a large rip in them and denied not wearing underwear. When asked if you have followed proper procedure and policy in the Power Plant you responded with "for the most part".

A pre-disciplinary meeting was held on January 19, 2022. You attended with your representative William Morgan, and Management was represented by Peter Scheckel, Management Services Director and Warren Mauer, Crafts Worker Supervisor. During this meeting Management reviewed the findings of their investigation and provided you the opportunity to refute those findings, along with the ability to provide any mitigating information. In response you stated you only wear two pairs of jeans to work, and you checked them the other day and there were no holes. You also admitted to feeding the mice and that no one ever said anything to you about it. Also, you stated there are times when you are stuck in the switch gear room, so your signature is not always on the logbook. Furthermore, you stated there are numerous reasons why alarms are shut off and you would not do it to an online boiler. No information was provided that mitigates not taking disciplinary action.

A pre-disciplinary meeting, to include the potential for termination, was held on April 28, 2022. You attended with your representative William Morgan, and Management was represented by Clayton Friedland, Building and Grounds Superintendent and Michael Goldade, Building and Grounds Supervisor. During this meeting Management reviewed the findings of their investigation and provided you the opportunity to refute those findings, along with the ability to provide any mitigating information. In response you denied stating “cock and balls” and that your co-worker is always trying to get you in trouble. No information was provided that mitigates not taking disciplinary action.

Based on the information provided, it has been concluded that you did violate Work Rules #2, #3, #14, #16 and #22, in addition to Serious Misconduct #1. After careful consideration, based on the egregiousness of your misconduct the decision has been made to terminate your employment.

The Commission finds that Michel’s exposure of his genitals and obscene “cock and balls” comments in the workplace and in front of coworkers constituted conduct that falls within the definition of “While on duty, harassing a person” under Wis. Stat. § 230.34 (1)(a) 1. While Michel denied wearing pants with holes, not wearing underwear, exposing his genitals, and ever blurting out “cock and balls,” credible testimony from multiple witnesses persuades the Commission otherwise. Furthermore, by failing to follow safety protocols as a Power Plant Operator-Senior, by turning off equipment alarms, not signing the inspection logbook, and feeding mice cheerios, Michel also engaged in other misconduct worthy of discipline.¹

Turning to the question of whether there was just cause to discharge Michel, the Legislature determined in Wis. Stat. § 230.34 (1)(a) 1. that:

It is just cause to remove, suspend without pay, discharge, reduce the base pay of, or demote an employee without imposing progressive discipline for any of the following conduct:

1. While on duty, harassing a person.

Because Michel engaged in the conduct referenced in Wis. Stat. § 230.34 (1)(a)1., it is clear that, although Michel had not previously been disciplined, the State was not obligated to utilize progressive discipline in response to Michel’s misconduct. The Commission concludes that the genital exposure “cock and balls” related conduct would in and of itself provide just cause for discharge, but Michel’s other misconduct provides further support for that level of discipline. Therefore, Michel’s discharge is affirmed.

¹ Michel asserts that DHS’ investigation was initiated in retaliation after Michel filed a Respectful Workplace Complaint against coworker R.M. and Van Buren. The Commission finds no merit in this argument, as neither R.M. nor Van Buren made the decision to discipline or terminate Michel. More importantly, whatever provoked the investigation does not negate the misconduct that was discovered.

Issued at the City of Madison, Wisconsin, this 7th day of November, 2022.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman