

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

GREG KEMPEN, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF HEALTH SERVICES, Respondent.

Case ID: 2.0159
Case Type: PA
Decision No. 40708

Appearances:

Greg Kempen, 1605 Drury Avenue, Eau Claire, Wisconsin, appearing on his own behalf.

David Makovec, 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 Health Services.

DECISION AND ORDER

On August 26, 2024, Greg Kempen (Kempen) filed an appeal with the Wisconsin Employment Relations Commission asserting that the State of Wisconsin Department of Health Services (DHS) had discharged him without just cause. The appeal was assigned to Commission Examiner Peter G. Davis.

Examiner Davis held a zoom audio recorded hearing on November 1, 2024. The parties thereafter filed written argument on November 15, 2024. On December 5, 2024, Examiner Davis issued a Proposed Decision and Order affirming the discharge of Kempen by the DHS. On December 10, 2024, Kempen filed objections to the Proposed Decision. The DHS did not file a response to the objections by the given deadline of December 16, 2024.

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

FINDINGS OF FACT

1. Greg Kempen, herein Kempen, was employed as a Resident Care Technician-Advanced in the Department of Health Services (DHS), Division of Care and Treatment Services, Northern Wisconsin Center (NWC) prior to being discharged. He had permanent status in class at the time of his discharge.
2. Kempen's discharge letter stated the following in pertinent part:

Specifically, on April 3, 2024, you exhibited aggressive and intimidating behavior at work. You made statements that were countertherapeutic, specifically referencing self-harm, using profanity, complaining about NWC, and complaining about being assigned to a “bad apartment” in the presence of clients. You expressed frustration with object aggression, including throwing your hat and a hula hoop, and feigning hitting your head against a wall, all of which are extremely harmful to the therapeutic environment for clients. Your role modeling of maladaptive behaviors such as posturing, swearing, expressing self-harming ideas, object aggression, and disregarding professional boundaries by complaining to clients about the facility, puts clients and their treatment progress in jeopardy.

3. Kempen engaged in the conduct detailed in Finding of Fact 2.

Based on the above and forgoing Findings of Fact, the Commission makes and issues the following

P 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 within the meaning of Wis. Stat. § 230.34(1)(a) to discharge Greg Kempen.

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

ORDER

The discharge of Greg Kempen by the State of Wisconsin Department of Health Services is affirmed.

Issued at Madison, Wisconsin, this 19th day of December 2024.

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.

Greg Kempen 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 Kempen was guilty of the alleged misconduct and that 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 State has met its burden.

Kempen worked with clients who are among the most impressionable, potentially aggressive mentally disabled citizens housed by the State. There is substantial evidence in the record from multiple employees that on April 3, 2024, Kempen engaged in a variety of behaviors in front of clients that jeopardized the clients' therapeutic progress. Significantly, after witnessing Kempen's use of profanity (fuck) feigned self-harm actions (pretending to bang head against a wall) and suicide-related remarks, several clients began to engage in more frequent self-harm behaviors and comments.¹

Kempen denies engaging in any of the alleged improper behaviors but acknowledges that he was in mental distress on April 3 due to the death of a close friend, and ultimately suffered a melt-down while other employees were attempting to calm a disruptive client. Thus, his denials are both self-serving and cover a time span when any recollection would be clouded by his mental state.

Having found that Kempen engaged in misconduct, the question then becomes whether the level of misconduct establishes just cause for discharge. Kempen was a short term (2 ½ years) employee with no formal discipline on his record at the time of his discharge. As its justification for skipping progressive discipline and moving directly to discharge, DHS points to both the

¹ There is also credible evidence in the record that several of Kempen's co-workers were afraid of him due in part to his angry outbursts on those frequent occasions when he had to work mandatory overtime. There is also testimony indicating that management concluded that discipline was needed due, in part, to the fear of co-workers. However, there is testimony that the decision to discharge Kempen was based on the therapeutic damage caused by Kempen's actions and there is no specific reference to co-worker fear in the discharge letter. Thus, the Commission's decision is based solely on misconduct referenced in Finding of Fact 2.

improper nature of the conduct itself and the damage it believes the conduct had on clients. DHS also emphasized that when balancing the risks posed by potential future misconduct by Kempen against the harm to Kempen created by discharge, it concluded among other matters that progressive discipline was not likely to minimize the likelihood of future misconduct by Kempen. In this regard, DHS noted Kempen's total denial of any misconduct and what it construes as an inability to self-reflect on how his behaviors may negatively impact both co-workers and clients. In the final analysis, the Commission concurs with the DHS' analysis of the risks posed by Kempen's continued employment and concludes there was just cause for his discharge.

Issued at Madison, Wisconsin, this 19th day of December 2024.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman