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**DISTRICT IV**

October 6, 2022

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You are hereby notified that the Court has entered the following opinion and order:

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2021AP1630

Frank A. Wessely v. Wisconsin Employment Relations  
Commission (L.C. # 2020CV2325)

Before Kloppenburg, Fitzpatrick, and Graham, JJ.

**Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

Frank Wessely appeals an order affirming a decision by the Wisconsin Employment Relations Commission. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).<sup>1</sup> We affirm.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

The parties agree that on appeal we review the decision of the Commission, not the decision of the circuit court. The Commission determined that the Department of Transportation had just cause to discharge Wessely from his employment under WIS. STAT. § 230.34(1)(a). The Commission did so on the basis of two incidents. The Commission found that Wessely “harassed a fellow employee by knowingly making false claims about the employee’s on duty conduct to DOT supervisors/management and to law enforcement,” and that Wessely “intimidated DOT supervisors/management by at least implicitly threatening to shoot a co-worker.”

By statute, “[i]t is just cause to ... discharge ... an employee for work performance or personal conduct that is inadequate, unsuitable, or inferior, as determined by the appointing authority, but only after imposing progressive discipline that complies with the administrator’s standards under [WIS. STAT. §] 230.04(13m).” WIS. STAT. § 230.34(1)(a).

In turn, WIS. STAT. § 230.04(13m) requires the administrator of the Division of Personnel Management in the Department of Administration to

establish standards for progressive discipline plans to be prepared by all agencies and applied to all employees in the classified service. The standards shall address progressive discipline for personal conduct and work performance that is inadequate, unsuitable, or inferior. The standards established under this subsection shall allow 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.

Sec. 230.04(13m). In the Commission’s decision, it determined that this statute allows discipline to be accelerated to the level of discharge if the employee’s conduct is severe. The Commission referred to the several work rules that Wessely’s conduct violated, and it further stated that “there can be little doubt that Wessely’s overall conduct was ‘severe.’” Accordingly, it decided that

there was just cause for discharge, even though that was not the next step in progressive discipline for Wessely.

On appeal, the parties agree that the legal test for acceleration of discipline and discharge in this case is whether Wessely's conduct was severe. We assume, without deciding, that this is the proper test.

Wessely's briefs on appeal argue in part that his false report to police about a co-worker was not made while on duty. Therefore, he argues, the conduct was not "just cause" under a statute that specifically provides for discharge, without progressive discipline, for the conduct that is "[w]hile on duty, harassing a person." WIS. STAT. § 230.34(1)(a)1. In response, the Commission acknowledges that, in an earlier judicial review, the circuit court agreed with Wessely on this point. The Commission reaffirms that its most recent decision, now under review, was not based on that provision. Instead, the Commission viewed Wessely's false police report as unsuitable personal conduct under the general definition of "just cause" quoted above from WIS. STAT. § 230.34(1)(a). Nothing in that definition limits discipline solely to acts that the employee commits while on duty. Therefore, Wessely's argument that he was not on duty is irrelevant to this appeal, and we do not discuss it further.

We turn to the remainder of Wessely's arguments. Wessely is not disputing the findings of historical fact that he acted in the ways described in the Commission's decision. Instead, his opening brief argues mainly that the Commission erred by finding that his undisputed conduct supports the finding that he "intimidated DOT supervisors/management by at least implicitly threatening to shoot a co-worker." Wessely appears to argue that his statements were not

implicitly a threat to shoot a co-worker because he did not direct his words to the co-worker, or ask that they be communicated to the co-worker.

Second, Wessely asserts that there is “no evidence” that his conduct was severe. This assertion is not accompanied by a developed argument. The burden is on the party seeking to overturn the agency action, Wessely, to give reasons to grant relief on appeal, not on the agency to justify its action. *City of La Crosse v. DNR*, 120 Wis. 2d 168, 178, 353 N.W.2d 68 (Ct. App. 1984).

For Wessely to argue that the Commission’s finding of intimidation was erroneous, it is necessary for him to present a fact-specific discussion of his conduct. Severity is a highly fact-dependent concept. Instead, Wessely provides to this court only vague, partial descriptions of his conduct. Not until the brief of the respondent Commission do we learn specifically and completely what Wessely did and said, and the surrounding context. Without first explaining what his undisputed conduct was, Wessely’s brief does not establish that the agency finding was erroneous, or that his conduct was not severe, and therefore did not show that the agency erred.

Furthermore, Wessely’s opening brief contains no citations to the record. This is true for his description of the lengthy procedural history, the evidentiary record, and the Commission decision. As the Commission notes in response, this is contrary to the applicable briefing rules. *See* WIS. STAT. RULES 809.19(1)(d) and (1)(e). The absence of record citations makes the work of opposing counsel and this court more difficult, and is not acceptable. This violation of the rule makes Wessely’s counsel subject to a penalty under WIS. STAT. RULE 809.83(2).

In Wessely’s reply brief, he appears to suggest that omission of citations to the record is acceptable because there is no dispute about the underlying historical facts. If Wessely is

suggesting that only disputed facts must be supported by citation, that is not consistent with the rule or with the role that citations play in enabling the court to understand the case. Wessely's reply brief concludes with an "addendum/erratum" that asserts the omission of record citations was an unintended oversight, and then provides citations for certain historical facts about Wessely's conduct. However, this leaves a vast array of procedural and other facts unsupported and, in any event, came too late to be useful to the respondent.

We conclude that Wessely's substantive failure to show agency error and his failure to give proper citations to the record are sufficient bases to affirm. However, we also briefly address the substance of Wessely's arguments.

Regarding the finding that Wessely intimidated supervisors or management by threatening to shoot a co-worker, his argument appears to be that he did not threaten to shoot a co-worker because he made the threat only to supervisors or management, and did not ask that they communicate the threat to the co-worker. This argument is nonsensical. A threat to take a certain action is a threat regardless of whether it is made to the person who would be most directly affected by that action.

Regarding the conclusion that Wessely's conduct was not severe, we understand this to be an argument against the Commission's conclusion that the facts satisfied the applicable legal standard. We agree with the Commission that threatening to shoot a co-worker is severely unsuitable conduct for purposes of establishing just cause under WIS. STAT. § 230.34(1)(a) and accelerating discipline to discharge.

IT IS ORDERED that the order appealed from is summarily affirmed under WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*