appeal from Sieger v. DHSS, 90-0085-PC-ER, 11/8/91

STATE OF WISCONSIN CIRCUIT COURT LINCOLN COUNTY

JANICE SIEGER,

Petitioner

vs.

DECISION
Case No. 91CV199

WISCONSIN PERSONNEL COMMISSION AND DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondents

The petitioner appeals a decision of the Wisconsin State Personnel Commission finding that the Department of Health and Social Services did not violate the provisions of Wisconsin's Family Medical Leave Act. The petitioner is represented by Attorney Christine R. H. Olsen of the Wausau, Wisconsin law firm of Byrne, Goyke & Olsen, S.C. The Wisconsin Personnel Commission is represented by Attorney Stephen M. Sobota, Assistant Attorney General. The Department of Health and Social Services is represented by Assistant Attorney General David C. Rice.

The decision is affirmed.

The Wisconsin Supreme Court in the case of Jicha v. DILHR, 169 Wis. 2d 284, 485 N.W. 2d 256 overruled the Wisconsin Court of Appeals in MPIWi Machining Div. v. DILHR, 159 Wis. 2d 358, 464 N.W. 2d 79 and held that in cases such as this the decisions of a hearing examiner are those of the agency involved and "as such are governed by the same rules concerning agency discretion discussed above."

Therefore, the examiner's finding of fact will be upheld on appeal if supported by substantial evidence in the record. That

same standard is to be applied to the decision of the Commission. See MPI V. DILHR, supra, at page 365, Wisconsin Reports and Wis. Stat. sec. 227.57(6). See also Jicha v. DILHR, supra, at page 290, Wisconsin Reports.

In the Jicha case the Court stated that it has generally applied three levels of deference to the conclusions of law and statutory interpretation in agency decisions depending upon how much experience the agency has had with the particular type of case before it. There is ample evidence in the file that the hearing examiner and the attorneys themselves were somewhat "at sea" as to how to handle and interpret these cases. This was a case of first impression for the hearing examiner. (See transcript p. 621.)

I conclude that in this case the "lowest (de novo) level of review" should be applied.

The Commission concluded that the petitioner had not applied for a medical leave as that term is defined by the Family and Medical Leave Act. (See pgs. 26 and 27 of the final decision and order.) That conclusion is substantially supported by the record.

It is important to distinguish between the generic term "medical leave of absence" and a medical leave of absence as defined by the statute. It appears to me from the record that at times the Department involved treated medical leave as being available for things other than what could strictly be called leave for medical reasons. It appears that at times if a person needed a leave, they looked at what kind of time was still available in the various categories of leave that they had and used leave

somewhat interchangeably. It is also clear that even though some of Ms. Grant's co-workers, including nurses and medical doctors, felt that she was in need of a "medical leave" from her employment, their reasons for that and understanding of it did not fit the definition used in the statute.

Mr. Conway, who made the decision to discipline the petitioner because he felt she had taken an unauthorized leave, had come to this particular division in September of 1989. He was described by Ms. Sieger's lead worker, Anita Grand, as being a person who "went by the book with everybody". (See transcript p. 556.)

Ms. Sieger had been hospitalized in January or February of 1989 due to serious mental depression and this had been an authorized medical leave. Her co-workers had also shown concern for her in August of 1989 and had discussed her condition among themselves and even with her treating psychiatrist, Dr. Berg. Ms. Sieger had been spoken to by Mr. Ivan Imm, Director of the Bureau in which Ms. Sieger worked in August of 1989. He had expressed concern for her condition but assured her repeatedly that it had nothing to do with the performance of her job. (See transcript p. 290.)

I find it significant that when a medical leave was prescribed for her on December 20 of 1989 it reads "please excuse Jan from work 12/18 through 12/25 for medical reasons." (See Petitioner's Exhibit 25.)

On October 10 Dr. Berg wrote "I am recommending one week leave

of absence for Janice Sieger - thank you for your cooperation - ."

I agree that the intent of this statement is ambiguous.

Mr. Conway asked to speak to Dr. Berg so that he could find out something more about this request in order, as he says, to make an intelligent decision regarding it. Ms. Sieger did not object to this. Dr. Berg refused to speak to Mr. Conway and did not amplify or clarify her "recommendation" and, evidently, told Ms. Sieger that "they are playing mind games with you." When Ms. Sieger talked to Ms. Grand on Monday, October 16, Ms. Grand stated "well, it looks like she (Dr. Berg) is putting the ball in your court. What are you going to do about it", or words to that effect. Ms. Grand, who had been sympathetic to Ms. Sieger's situation and felt that she needed time off, apparently also told her that she needed the time to think things over and to not get trapped like she, Ms. Grand, was. (See transcript p. 293.)

Ms. Sieger herself was not very clear about the reason that this leave was being recommended. She did not say that she was unable to perform her employment duties but that she was tired and having trouble concentrating. (See transcript pgs. 271-273.) Anita Grand was not sure on Monday, the 16th, when Ms. Sieger planned to start this leave. (See transcript p. 483.)

The reasons that Dr. Berg would not discuss the matter further or apparently offer to clarify her position in any way are unknown. However, I believe that a strong inference can be drawn that if Dr. Berg, a treating psychiatrist, felt that it was medically necessary that her patient, Ms. Sieger, be off work for a week she would not

have quibbled over the fact that she felt somebody was "playing mind games" and would not have let her pride, if that was it, interfere with the proper and prompt treatment of her patient. Therefore, I find there is a strong inference that Dr. Berg was simply recommending some "time away" so that Ms. Sieger could sort things out, not that she felt that it was medically imperative that she be away from the job.

The statute said to be violated, and the basis for this claim, is Wis. Stat. sec. 103.10. Subsec.(4) of that statute defines medical leave. It defines it as "a serious health condition which makes the employee unable to perform his or her employment duties. . ."

The term "serious health condition" is previously defined as meaning "a disabling physical or mental illness, injury, impairment or condition involving any of the following:

> 1. Inpatient care in a hospital as defined in sec. 50.33(2), nursing home, as defined in sec. 50.01(3), or hospice.
>
> 2. Outpatient care that requires continuing treatment or supervision by a health care provider."

It is clear that inpatient care was not being prescribed nor was it needed at the time in question.

I also find that at that time, Ms. Sieger did not require "continuing treatment or supervision by a health care provider." She had been to see Dr. Berg on October 10. She also, evidently, saw her on October 16 on an "emergency" basis. There is nothing in the file showing that she saw Dr. Berg any other time during the

week's leave of absence that she took. It does not appear that she had been seeing Dr. Berg on a regular basis prior to October 10.

The Wisconsin Court of Appeals in the MPI case, supra, at page 371 of the Wisconsin Reports stated:

> "We further conclude that the phrase 'continuing treatment or supervision by a health care provider' is also ambiguous . . ."

It then concluded at page 372 of the Wisconsin Reports as follows:

> "We conclude that the term 'continuing treatment or supervision by a health care provider' in the FMLA contemplates direct, continuous and first-hand contact by a health care provider subsequent to the initial outpatient contact."

In that case the Court found that the employee did not require continuing treatment where she went to the emergency room and the treating physician instructed her to take medication four times a day. She was not told to return for a follow-up visit and therefore was not in a protected status under the act.

As testified by Ms. Sieger, on October 10 she and Dr. Berg identified certain "goals" for Ms. Sieger; they being considering whether to separate from her job, get some rest and exercise, continue to take her medication and finding someone to talk to about the decision regarding her job. (See transcript p. 273.)

There is no testimony that Dr. Berg had prescribed that Ms. Sieger come back to see her on a continuing and regular basis. At best it appears that it was left to a "as-you-feel-the-need" basis.

While other conclusions could be drawn from the evidence and its inferences, I find that the conclusion of the Commission is amply supported in the record.

Having reached this conclusion I find that it is not necessary to go into any other of the elements by which the petitioner claims the Department violated the act, except that of retaliation under Wis. Stat. sec. 111.322(2m). That is because what must first be established is that the leave being requested is one that comes within the definition of the act. If this cannot be established then any subsequent actions cannot be considered as violations of the act.

As to the alleged retaliation I find that the level of deference which should be given to the conclusions of law and statutory interpretation of the Personnel Commission should be the "great weight" level set out in Jicha v. DILHR, supra. This is because I find that in dealing with this statute (111.322(2m)) and the issues of discrimination in employment, the Commission is in an area of its expertise. As stated in the case of Phillips v. Wisconsin Personnel Commission, 167 Wis. 2d 205, 482 N.W. 2d 121, the Commission is the agency charged by the legislature with the administration of the Fair Employment Act, secs. 111.31 to 395, Stats.

In its decision the Commission carefully documented each of the areas of alleged retaliation and set out its reasons, from the record, for finding that there was no retaliation. Again, while there are potentially other inferences that could be drawn from some of the testimony and evidence in the record, the facts found and conclusions reached by the Commission are all supported by substantial evidence in the record and reasonable inferences that

can be drawn from that evidence. I therefore also affirm its decision in this respect.

Dated this 23rd day of April, 1993.

BY THE COURT:

J. Michael Nolan
Circuit Judge