affirmed Preller v. UWHCB, 98-0151-PC-ER, etc., 8-18-98

STATE OF WISCONSIN **CIRCUIT COURT** **DANE COUNTY**
Branch 9

STEVE PRELLER,

Petitioner,

DECISION

vs.

Case No. 98CV2387

PERSONNEL COMMISSION,

Respondent.

The matter before the court is an administrative review of a Decision and Order of the State of Wisconsin Personnel Commission involving the discharge of Steve Preller, the complainant. The complainant contends that the employer violated the Family and Medical Leave Act (FMLA) by denying his leave request and retaliated against the complainant for exercising his rights unde the FMLA by his discharge.

FACTS

The Commission held three days of hearings in this matter. The court's review of the record, the Commission decision and the submittals of the parties presents facts that are for the most part straight forward and not contested. Preller, the complainant, petitioner was an employe of UW. Hospitals for nineteen years and at the time of his discharge was a Hospital Supply Clerk in the Materials Management Central Services unit. Preller was a union stewart and his employment was covered by the terms of a collective bargaining agreement.

Preller, at the time of his discharge, was six foot one inch and weighed 446 pounds while employed at UW Hospitals. He has suffered from and had been treated for three medical conditions. These are morbid obesity, sleep apnea and chronic lower back pain. The petitioner first experienced lower back pain in 1980 caused by a non work related incident. As a disability accommodation, in September 1995 the employer furnished an ergonomically suitable chair for the petitioner. The petitioner at variious times prior to his discharge had been treated by three different physicians for his three separate ailments. His most recent treatment for his back condition, prior to January, 1997, was in 1992.

The two disciplinary actions subject of this review occurred in the fall of 1996 and January of 1997. However, prior to this time, the petitioner has had extensive problems with tardiness and absenteeism in his job. In recent times Preller was disciplined as

follows:

7/27/95	Verbal reprimand
8/18/95	Verbal warning
11/10/95	Written reprimand
12/26/95	Verbal reprimand
3/15/96	Written reprimand
6/11/96	Two day suspension

On November 11, 1996, the employer notified Preller that he was suspended for five days for unexcused absences on 8-20-96, 10-3-96 and 10-4-96. In a letter to the petitioner the employer stated in part:

> While you refused to answer questions during this meeting, you stated you would submit written answers to my questions at a later date. I agreed to give you until 10-28-96 to respond to the investigation questions and provide mitigating information for consideration in making disciplinary decision. As I stated at the meeting, your 07/16/96 absence is excused due to staisfactory medical documentation provided by Employee Health Service. Your written answers did not provide any mitigating information (e.g. medical documentation, etc.) concerning your other unscheduled absences.
>
> The remaining three unschedluled absences are unexcused. The absence of 08/20/96 occurred following a day off and preceded another day off. This gave you three days off in a row. The absences of 10/03/96 and 10/04/96 were in conjunction with days off and approved leave time. These two dates preceded nine days off and therefore created eleven consecutive days off from work.

The petitioner provided an affidavit to the employer claiming the absences were due to his back problems, but this documentation was found to be unsatisfactory.

The incidents giving rise to the termination of the petitioner's employment were:

12/4/96	tardy 66 minutes	unexcused
11/26/96	unscheduled absence	unexcused
1/23/97	unscheduled absemce	unexcused
1/27/97	unscheduled absence	unexcused
1/28/97	unscheduled absence	unexcused

With the exception of the unexcused tardiness of 12-4-96, Preller furnished documentation to provide and substantiate that his absences should be excused because they were caused by his chronic lower back problem. The petitioner contacted Dr. Giesen, the Employee Health Service (EHS) and the Emergency Department (ED) On Novembeer 27, 1996, the complainant had telephone contact with Dr. Geisen and based on petitioner's representations, the doctor wrote on a form (petitione) "Off work 11/26 due to exacerbation of

low back pain." Preller did not see the doctor, nor did the doctor presecribe any course of treatment or any further visits with the doctor.

When the petitioner returned to see Dr. Geisen on February 12, 1997 to request his November 26th absence be treated under the FMLA, Preller had no complaints about his back and had no problems with his back since November, 1996.

The complainant did see Dr. Hla of EHS on January 27 complaining of mild distress from lower back pain. The Dr. recommmended the peitioner go home, rest, use ice and heat and take some over the counter pain medication. The doctor expected the patient to return to work the following day and that he should report to EHS to be cleared to work. The following day, the 28th, Preller called into EHS and reported to Ircink, the clinic manager that his back was still sore. Ircink wrote on a prescription form "Please excuse from work 1/28/97 due to back pain." Without consulting Dr. Hla, Ircink stamped Dr. Hla's name on the form. -

When Dr. Geisen examined the petitioner on Nowvember 27th, he diagnosed his condition as, "Periodic exacerbations of acute low bak pain and muscle spasms seconday to a prior back injury. Although the Dr. anticipated the condition to be recurring, he stated, "I don't feel it will lead to chronic or long-term pain.

Both Dr. Hla and Ircink shared the opinion that from their contacts with the petitioner relating to complaints about his back condition, they did not believe this was a serious health condition under the FMLA. The only request made by the petitioner to be covered under the FMLA concerned his 11-27-96 absence and this request was denied by the employer.

The Hospital's absenteeism and tardiness policy provided for a review of an employees's attendance and/or punctuality by a supervisor if any of the following occurred:

1. three unscheduled abasences of any length in any 12 week period, including for reasons of illness or personal business,

2. any zero sick leave balance,

3, the use of unscheduled leave under false pretenses,

4. a pattern of unscheduled absence in conjunction with:

- scheduled days off
- legal holidays
- weekends
- same days of the week

5. unscheduled absences:

- immediately following discipline

- after working a double shift
- after working overtime
- after having a leave request denied
- under any other suspicious circumstances as as determined by a department manager.

It was the policy of the employer that employes who had few absences and were not a problem were treated more leniently, but the rules were more strictly enforced against those who more frequently had unexcused absences. It also should be noted that supervisors varied in their enforcement of the policy in that some required written authorization before employees off for medical reasons could return from work. As noted in this case, supervisors could and should take into consideration mitigating circumstances to excuse some tardinesses and absences. Finally, it was the policy of the employer to pay sick leave even for unexcused medical absences.

The employer instituted its current absentism and tardiness policy in 1995 and all employees started at that time with a cleam slate. Since that time as reflected in the record, Preller had many tardinesses and unexcused absences and was repeatedly counseled and ultimately disciplined. The implementation of the absenteeism and tardiness policy provided that if an employe had three unexcused absences or three unexcused tardinesses in a twelve week period, then the employe was subject to review by his supervisor. This included a pre-disciplinary investigation (PDI) which provided the employe with an opportunity to furnish information in way of mitigation that could excuse any absence or tardiness by the supervisor. This occurred in each of the separate disciplinary actions which are under review. In point of fact, unexcused absences and tardinesses were expunged (excused) from Preller's record by this process.

STANDARD OF REVIEW

The scope of review of administrative agency actions is governed by sec. 227.57 stats and specifically subs. (5) and (6) which provide:

> (5) The court shall set aside or modify the agency action if it finds that the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action, or it shall remand the case to the agency for further action under a correct intepretation of the provision of law.
>
> (6) If the agency's action depends on any fact found by the agency in a contested case proceeding, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. The court shall, however set aside agency action or remand the case to the agency if it

> finds that the agency's action depends on any finding of fact that is not supported by substantial evidence in the record.

Guided by this criteria, the issues this court must decide are, did the agency properly interpret sec. 103.10(3) and (4) stats.? Secondly, was there substantial evidence in the record to support its decision?

In Harnischfeger Corp. v. LIRC, 196 Wis. 2d 650, 659 60 (1995) our Supreme Court stated:

> Instead, the central question is what standard of review the courts of this state should apply when called upon to evaluate an agency's interpretation of a statute. . . . As important, however, is the principle that courts should defer to an administrative agency's interpretation of a statute in certain situations. This court has applied three distinct levels of deference to agency interpretations: great weight, due weight and de novo review. See Jicha v. DILHR, 169 Wis. 2d 284,290(1992). Great weight deference is appropriate once a court has concluded that: (1) the agency was charged by the legislature with the duty of administering the statute: (2) that the interpretation of the agency is one of longstanding; (3) that the agency employed its expertise and specialized knowledge in forming the interpretation; and (4) that the agency's interpretation will provide uniformity and consistency in the application of the statute. See Lisney v.LIRC, 171 Wis. 2d 499, 505 (1992).

In applying this standard, the Court of Appeals in Barron Elec. Cooperative v. PSC, 212 Wis. 2d 752, 761 (1997) provided:

> Where great deference is appropriate, the Agency's interpretation will be sustained if it is reasonable even if an alternative reading of the statute is more reasonable. ....We also will pay great deference to an agency's interpretation "if it is intertwined with value and policy determinations" inherent in the agency's statutory decisionmaking function. Sterlingworth Condominium Ass'n v.DNR, 205 wis. 2d 702, 724 (Ct. App. 1996).

The second level of deference discussed in Harnischfeger, "due weight" deference, differs from great deference only in slight degree. According to the Supreme Court, it is appropriate: "when the agency has some experience in an area, but has not developed the expertise which necessarily places in in a better position to make judgments regarding the interpretation ot the statue than a

court." UFE Inc. v. LIRC, 201 Wis. 2d 274, 286 (1996). The deference accorded the agency in this situation "is not so much based upon its knowledge or skill as it is on the fact that the legislature has charged the agency with the enforcement of the statute in question."Id. Giving an agency decision due weight, we will also sustain the agency's interpretation if it is reasonable even if another interpretation is equally reasonable. We will not do so, however, if another inerpretation is more reasonable than the one employed by the agency. Id. at 287.

> ...We employ a de novo review only."when the issue before the agency is clearly one of first impression, or when (the) agency's position on (the) issue has been so inconsistent as to provide no real guidance." UFE, 210 Wis. 2d at 285.

The court in this instance accords due weight deference to the PC interpretation of sec. 103.10. I do so because under sec.103.10(12) the Commission is the exclusive agency to hear all complaints of alleged violations of the Act. The PC now has had 10 plus years of experience in administering and interpreting the act.

In terms of substantial evidence under sec. 227.57(6) the Court of Appeals in Cadott Education Ass'n v WERC, 197 Wis. 2d 46,52 (Ct.App 1995) stated:

> In this case, WERC issued both findings of fact and conclusions of law. This court must uphold an adminstrative agency's findings of fact if they are supported by relevant, credible and probative evidence upon which reasonable persons could rely; we may not substitute our own judgment in evaluating weight or credibility of evidence.

STATUTE

The statute involved is secs. 103.10(1)(g), (4) and (7) which provide:

> (g) "Serious health condition" means a disabling physical or mental illness, injury, impairment or condition involving any of the following:
>
> 1. inpatient care in a hospital, as defined in s. 50.33(2), nursing home, as defined in s. 50.01(3) or hospice.
>
> 2. Outpatient care that requires continuing treatment or supervision by health care provider.

(4) MEDICAL LEAVE (a) subject to pars. (b) and (c) an employe who has a serious health condition which makes the employe unable to perform his or her employment duties may take medical leave for the period during which he or she is unable to perform those duties.

(7) CERTIFICATION. If an employe request family leave for a reason described in sub. (3) (b) 3 or request medical leave, the employer may require the employe to provide certification as described in par. (b) issued by the health care provider or Christian Science practitioner of the child, spouse, parent or employe, which ever is appropriate.

(b) No employer may require cetification stating more then the following:

1. That the child, spouse, parent or employe has a serious health condition.

2. The date the serious health condition commenced and its probable duration.

3. Within the knowledge of the health care provider or Christian science practioner, the medical facts regarding the serious health condition.

4. If the employe requests medical leave, an explanation of the extent to which the employe is unable to perform his or her employment duties.

DECISION

What this case is not about is whether there was just cause under the collective bargaining agreement to discharge the petitioner (that was covered in the arbitration) or whether the petitioner was discriminated against because of his union affiliation and activity (that was covered by the WERC proceeding). The only issues before this court on review is whether the employer violated the WFMLA by failing to grant Preller medical leave for his absences from work in the fall of 1996 and the winter of 1997 and whether the employer retaliated against the petitioner for invoking the provisions of sec. 103.10.

Pivitol to the Commission decision is its statutory intepretation of "serious health condition" which requires "continuing teatment or supervision by a health care provider." The Commission looked to MPI Wi. Machining Div. v. DILHR, 159 Wis.2d 358(Ct. App 1990). This decision is helpful in two respects. First Id p. 370 the Court stated:

> The Wisconsin legislature did not include any durational requirement in the statute to be met before a "serious health condition" was seen as "disabling." We conclude that the broader definition of "disabling" as found in the dictionary, which includes incapacitation, or the inability to pursue an occupation or perform services for wages because of physical or mental impairment, directly reflects legislative intent in enacting this protective statute.

Preller fits the first part of this definition, in that, if to be believed, his absences were for brief durations.

Chairperson McCallum cited the second part of the definition from MPI Id p. 372:

> We conclude that the term "continuing treatment or supervision by a health care provider" in the FMLA contemplates direct, continuous and firsthand contact by a health care provider subsequent to the initial out patient contact.

Grounded on the case law, the court accords deference to the Commission and its interpretation of the statute.

Based upon its interpretation of the FMLA, the Commission basically concluded that the petitioner had not met his burden of proof that he had a serious health condition that required continuing and ongoing treatment or supervision by a health care provider. The peititioner did not have any ongoing treatment or supervision by Dr. Giesen who he claimed to be his physician. His contact with Dr. Geisen was telephonically and after the fact when he had already absented himself from work. His February 12, 1997 visit with Dr. Giesen related to an earlier absence from work and at the time of the visit the petitioner was suffering no back symptoms.
The only visit the petitioner had with a health care provider that was comtemporaneous with any back complaints was on January 27,1997 at the Emergency Department where he was seen by Dr. Hla. However, there was no follow up to this visit other than telephonic contact with the EHS staff.

The decision of the Commission is further buttressed by Dr. Giesen's testimony and that of Dr. Hla that the petitioner's back condition was not a serious medical condition. Furthermore, the petitioner did not seek any medical treatment for his back from 1992 until 1997. It was only when the petitioner faced disciplinary action because of his repeated absences and tardiness, that he made contact with Employee Health Service and the Emergency Department and this was after the fact (his absences). The petitioner with all of the past absences never availed himself of the FMLA for his back condition until he was in disciplinary

trouble. His own testimony is less than credible in that some of his unexcused time off and absences occurred in conjunction with scheduled days off.

There is substantial evidence in the record to uphold the finding of the Commission that the employer did not improperly deny the petitioner leave under the FMLA for his absences in the fall of 1996 and the winter of 1997.

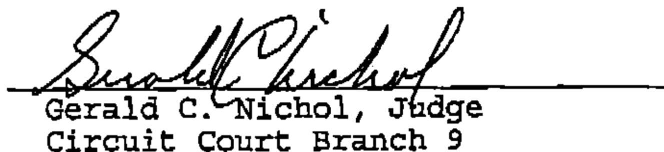
The court also finds that there is substantial evidence in the record to demonstrate that the employer did not retaliate against the petitioner for exercising his rights under FMLA. Although the petitioner can show that he exercised his rights under the FMLA and that the employer subsequently took action in the form of termination of his employment, there is no nexus to connect the two. As previously outlined, Preller failed to document that he had a serious medical condition which was subject to ongoing supervision and/or treatment by a health care provider. Therefore, his absences were unexcused. This formed the basis under a progressive disciplinary policy of the employer to terminate the petitioner's employment.

The court further finds that there is substantial evidence to show that the petitioner was treated no differently than other employes.

For the reasons above stated the decision of the Personnel Commission is affirmed.

Dated this 6th day of December, 1999.

BY THE COURT:



Gerald C. Nichol, Judge
Circuit Court Branch 9