STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

KRISTINE ANDERSON, Appellant,

vs.

DEPARTMENT OF SAFETY AND PROFESSIONAL SERVICES, Respondent.

Case 4
No. 72691
PA(adv)-357

DECISION NO. 34656-A

Appearances:

Saul C. Glazer, Axley Brynelson, L.L.P., 2 E. Mifflin Street, Suite 200, Madison, Wisconsin 53703, appearing for the Appellant.

Michael Soehner, Labor Relations Specialist – Chief, Wisconsin Office of State Employment Relations, 101 East Wilson Street, 4th Floor, P.O. Box 7855, Madison, Wisconsin 53707-7855, appearing for the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Appellant Kristine Anderson appeals the Department of Safety and Professional Services' decision to dismiss her from employment pursuant to § 230.37(2), Stats. The matter was assigned to Commission Chairman James R. Scott, pursuant to a grant of final authority, as specified in § 227.46(3)(a), Stats. A hearing was held before the Wisconsin Employment Relations Commission on December 10, 2013, and the parties submitted written argument in support of their respective positions. On the basis of the record and the arguments of the parties, the Examiner issues the following final decision of the Commission.

FINDINGS OF FACT

1. Appellant Kristine Anderson ("Anderson") was employed as a paralegal in the Department of Safety and Professional Services ("DSPS"), an agency of the State of Wisconsin, from September 2010 through August 2013.

2. Anderson had an undergraduate degree from the University of Wisconsin-Madison and received a law degree from the University of Wisconsin Law School in 1998. She is licensed to practice law in Wisconsin.

3. Prior to becoming a paralegal at DSPS, Anderson worked as a staff attorney in various branches of the Dane County Circuit Court.

4. Anderson was initially assigned to a position as a paralegal with DSPS within the Division of Board Services. She worked in that area from September 2010 to September 2012. Her primary responsibility was in the administrative rule processing area, including drafting rules and related documents.

5. In September 2012, as a result of reorganization within DSPS, she was assigned as a paralegal with the Board Counsel Team. Her supervisor was Jeanette Lytle.

6. In her new position, Anderson became responsible for providing assistance to department attorneys who in turn provided legal counsel to the numerous boards and bodies within the DSPS. Anderson was also responsible for preparing and mailing various legal documents generated by the boards that are part of the DSPS.

7. Anderson did not receive any specific training for her new position but, because she was a licensed attorney, it was assumed she could handle the paralegal duties without additional training. Her official job description did specify that a license to practice law in Wisconsin was required.

8. Anderson was evaluated by Lytle for the period from September 18, 2012 through March 18, 2013, and rated as unsatisfactory. She demonstrated a variety of problems including frequent errors and failing to adequately prioritize tasks.

9. Anderson was placed on a formal three-month performance improvement plan ("PIP").

10. Shortly after the PIP was in place, Anderson informed Lytle that she had some health issues which were impacting her job performance. Lytle encourage Anderson to raise the issue with human resources at DSPS.

11. The day before the expiration of the PIP, Anderson formally notified DSPS of a request for accommodation for her disability, Attention Deficit Hyperactivity Disorder and depression. She submitted medical reports from her physician.

12. Both the physician and Anderson believed that if Anderson had additional time to complete tasks, beyond the normal 40-hour workweek, she would succeed.

13. Anderson was classified as "non-exempt" under the Fair Labor Standards Act, 29 U.S.C. § 201 et seq. ("FLSA"), by DSPS. If Anderson's position was correctly classified as "non-exempt," the DSPS could not permit her to work more than 40 hours per week without paying her overtime compensation.

14. The DSPS did employ some paralegals in exempt status. It made no inquiry, nor did it seek outside legal opinion, as to whether Anderson's job could be treated as "exempt" from the FLSA overtime arguments.

15. Had Anderson been classified as "exempt" from the FLSA, she could have lawfully been permitted to work more than 40 hours per week without additional compensation.

16. On July 23, 2013, Brenda Sedmak contacted Anderson's physician seeking additional clarification regarding potential accommodations for Anderson's "medical condition." She subsequently learned that the physician was on vacation until August 5, 2013.

17. On July 29, 2013, Anderson was transferred to a paralegal position at 80 percent time doing essentially the same work she had been doing. The DSPS treated it as an "accommodation."

18. Anderson's PIP was extended from July 29 to August 30, 2013.

19. Sometime after August 5, 2013, Anderson's physician contacted the DSPS to address the accommodation issue and he was advised that no further information was required.

20. On August 30, 2013, Anderson was medically separated from employment because, in the judgment of the DSPS, she could not perform the job satisfactorily with the accommodation which had been made.

21. The DSPS determined that the termination was for medical reasons and not for "delinquency or misconduct."

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 matter pursuant to §§ 230.44(c) and 230.45(a), Stats.

2. The Department of Safety and Professional Services failed to meet the requirements of § 230.37(2), Stats., when it separated Kristine Anderson from service.

3. The Department of Safety and Professional Services failed to establish just cause for the § 230.37(2), Stats., separation of Kristine Anderson.

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

ORDER

The medical separation of Kristine Anderson is rejected.

Dated at Madison, Wisconsin, this 28th day of March 2014.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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James R. Scott, Chairman

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This is a case arising under § 230.37(2), Stats., which provides as follows:

> When an employee becomes physically or mentally incapable of or unfit for the efficient and effective performance of the duties of his or her position by reason of infirmities due to age, disabilities, or otherwise, the appointing authority shall either transfer the employee to a position which requires less arduous duties, if necessary, demote the employee, place the employee on a part-time service basis and at a part-time rate of pay or as a last resort, dismiss the employee from service. The appointing authority may require the employee to submit to a medical or physical examination to determine fitness to continue in service. The cost of such examination shall be paid by the employing agency. In no event shall these provisions affect pensions or other retirement benefits for which the employee may otherwise be eligible.

While the provision has been part of the civil service law for many years, there is scant case law to guide agencies or this Commission. What little precedent that is available is confusing and inconsistent. Prior to July 2003, the State Personnel Commission had jurisdiction over civil service disputes arising under § 230.37(2), Stats., and it had jurisdiction over state employee employment discrimination claims arising under the Wisconsin Fair Employment Act, § 111.31 et seq., Stats. Typically, § 230.37(2), Stats., issues arose in or alongside of disability discrimination claims. This led to some confusion over who had the burden of proof. For example, in *Tews v. Public Service Commission*, 89-0150-PC-A (1990), the Personnel Commission placed the burden of establishing physical or mental incapabilities on the employee under § 230.37(2), Stats. In *Jacobsen v. Department of Health and Social Services*, 91-0220-PC (1992), the Personnel Commission (and the Dane County Circuit Court) placed the burden on the employer. Again, in both situations, the employee had parallel disability discrimination claims arising out of the same incident.

With the transfer of claims under § 230.37(2), Stats., to this agency, the discrimination claims went to the Department of Workforce Department, Equal Rights Division, and there have been no substantive decisions involving § 230.37(2), Stats., issued by this Commission. Consistent with the fact that the state bears the burden of proof on civil service discipline and discharge cases, I believe it is appropriate that they bear that burden in matters arising under § 230.37(2), Stats.

I have a separate concern over the question whether the just cause standard even applies to matters such as this claim. Neither party disputes that it applies, and the Personnel

Commission in its decisions, as well as affirming courts, have assumed its applicability. Certainly, a "dismissal from the service" under § 230.37(2), Stats., is not a disciplinary discharge. Here, the employing agency in its termination letter specifically disclaimed any suggestion of discipline ("this termination is for medical reasons and is not due to delinquency or misconduct"). The customary "just cause" standard as applied in discipline / discharge cases simply doesn't fit. The state argues the traditional just cause standard reciting all of Anderson's shortcomings as a paralegal, perhaps forgetting that this was in their own words a medical termination. Anderson, in turn, argues this case as a "failure to accommodate" her disability, a rubric more commonly associated with disability discrimination claims.

Lest I appear too critical of the parties' arguments, I originally framed the issue as a cross between "just cause" and the inability to perform the job. That no doubt contributed to the parties' confusion and certainly did not add anything to their respective analyses. In the end, all is not lost as there are few factual disputes, and the case comes down to an application of law to fact.

In my view, the burden of proof on the state in a § 230.37(2), Stats., discharge/separation case is to prove as follows:

> (1) That the employee suffered from an infirmity;
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> (2) That the infirmity caused the employee to be incapable or unfit for the efficient and effective performance of the duties of the position held by the employee; and
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> (3) That the employer could not transfer, demote, or place the employee in a part-time position and that as a last resort, the employer had no alternative but to separate the employee.

Both sides essentially agree on elements one and two. The third element, as I frame it, is limited to the "accommodations" set forth in the statute with the important (and in this case dispositive) direction that the separation be a "last resort."

As to element number 1, Anderson disclosed her infirmity to her employer rather late in the day. She had been placed on a PIP in March 2013 following an unsatisfactory six month evaluation in her new position with a new supervisor. In the last stages of the PIP, which was not going well, Anderson produced a report from her physician that she suffered from Attention Deficit Hyperactivity Disorder ("ADHD") and depression. Anderson requested accommodation in the form of being able to spend more time performing her duties without an increase in compensation. The request was denied. The DSPS chose not to utilize the services of a physician of its choosing as provided in § 230.37(2), Stats. It did communicate with Anderson's physician with a written request for additional information, but when it learned he was on vacation until August 5, 2013, that avenue was not pursued. When he returned from

vacation, the physician contacted the DSPS and was told the matter was resolved and he need not respond to the July 23, 2013 inquiry.

Clearly, Anderson's infirmity affected her ability to perform her duties. It is unquestionable that capable paralegals and legal assistants are critical to an attorney's success whether in a public or private practice. Anderson's supervisor, Jeanette Lytle, was overseeing the work of 30 people in a difficult operational environment. She needed dependable work product from her staff. Anderson was fully aware that her performance was not up to snuff, and she and her doctor believed it was attributable to her infirmities. The DSPS has not disputed that contention, and it relinquished its right to do so at the time by not seeking an additional medical evaluation.

This brings us to the third element of proof by which DSPS must establish that the specified alternatives were exhausted or unavailable and that separation was the last resort. It is the failure of proof in this regard that serves as the DSPS's downfall. When Anderson first raised the issue of working more hours without additional compensation, the DSPS dismissed it out of hand, reasoning that Anderson's job was not exempt from overtime requirements under the Fair Labor Standards Act, 29 U.S.C. § 201 et seq. ("FLSA"). Instead, the DSPS proposed a "transfer" which involved a 20 percent reduction in workload with a matching 20 percent reduction in work time. The result was that Anderson, who could not complete 40 hours of work in 40 hours, was directed to complete 32 hours of work in 32 hours. Of course, along with the hours reduction came a 20 percent reduction in pay. The "transfer" took effect on July 29, 2013, and Anderson was medically separated on August 30, 2013.

No consideration was given to reducing her workload without a reduction in hours. Likewise, no consideration was given to expanding her hours of work beyond 40 per week and reducing her pay rate to adjust for the additional work time.

After formally disclosing her disability and requesting an accommodation, Anderson (and her physician) suggested that she be permitted to work more than 40 hours per week. She offered to work the additional time without additional compensation. The DSPS correctly viewed this as a potential problem under the FLSA. Anderson was classified as a non-exempt employee and as such was entitled to time and one-half for hours worked over 40 per week. An employee cannot waive their right to receive overtime compensation.

The problem here is that the DSPS denied Anderson's request with little analysis even though some paralegals at the DSPS were classified as exempt under the FLSA. In the judgment of Sedmak, the human resources staff person addressing the Anderson matter, Anderson was not an exempt professional because she did not exercise independent judgment. She distinguished the exempt paralegals by noting that they worked in the litigation section and "acted as attorneys." That overlooks the fact that Anderson's paralegal description required that she be "licensed to practice law in Wisconsin." App. Exs.A-6, A-7. Anderson, of course, was a graduate of the University of Wisconsin Law School and an attorney licensed to practice

law in Wisconsin. The obvious question is why the DSPS would require a law degree from someone for a job not requiring independent judgment or discretion.

Had the DSPS made further inquiry into Anderson's potential for being classified as an exempt "professional," they may have found that the Department of Labor regulations provide that paralegals with an "advanced specialized degree in other fields" who apply that advanced degree to their work product may qualify for exemption. 29 C.F.R. 541.301(e)(7).

Prior to moving into the position as Board Counsel Team paralegal, Anderson had functioned satisfactorily as a paralegal in the Division of Board Services. Following, the reorganization in September 2012, Anderson was moved out and two remaining paralegals were classified as Administrative Rules Coordinators. Sedmak was asked why the DSPS did not consider moving Anderson into one of those two positions and placing the other individual in Anderson's slot. Sedmak's response was that Anderson lacked the background in administrative rules drafting and experience. Anderson's job description (App. Ex.2) reflected that she was the "subject matter expert for the development and administration of the rule-making process for the Division," and she served as the DSPS's liaison with all other entities involved in development of administrative rules "from inception through the promulgation process." Anderson's resume reflects that she was identified as an Administrative Rules Coordinator for the two years prior to becoming a member of the Board Counsel Team. App. Ex.1.

To be sure, job descriptions and resumes do not always accurately identify actual skills and abilities. The DSPS did not, however, provide any evidence other than Sedmak's "off the cuff" analysis as to why Anderson was not at least considered for return to her former position.

In the end, it is relatively easy to conclude that the DSPS did not consider the separation to be a "last resort." The combination of the timing of events together with *de minimus* concern for alternatives leads to the conclusion that the DSPS's thought process was not designed to treat the medical separation as a last resort. On June 17, 2013, one day before her PIP was up, Anderson formally disclosed her disability. Lytle had by that time concluded that Anderson had not improved and she intended to discharge her. In the ensuing month, the DSPS ruled out Anderson's request for accommodation of extra hours. The opinion of Anderson's physician was sought but when he was not immediately available his views were ignored. Instead, the DSPS proceeded with its "80% solution" on July 29, 2013. Four weeks later, Anderson was medical separated from the DSPS. Clearly the "80% solution" had not worked and, according to Lytle, the same problems continued.

Reference to separation as a "last resort" implies that the employer will exhaust all reasonable alternatives as set forth in the statute before separating the employee. The DSPS has failed to establish that it did so in the case of Anderson.

This decision and order returning Anderson to her previous position is not premised upon my conclusion that her job performance was satisfactory. Had this been a regular § 230.44, Stats., discharge for cause, I may well have sustained a termination. It also should not be interpreted as a finding that any duty the DSPS may have had under either the Wisconsin Fair Employment Act or the Americans with Disabilities Act, has not been satisfied.

Finally, Anderson also made a collateral argument that her supervisor, Jeanette Lytle, was the cause of her problems. I reject that approach in its entirety. I conclude that Lytle was a hardworking, dedicated employee facing a heavy workload and appropriately demanded strong performance from her subordinates. In state service, as in most employment settings, one does not have the option of selecting their supervisors. Blaming those persons for individual failures is rarely warranted or successful.

Dated at Madison, Wisconsin, this 28th day of March 2014.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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James R. Scott