

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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MICHELLE L. MOSLEY, Appellant,

vs.

STATE OF WISCONSIN, DEPARTMENT OF HEALTH SERVICES, Respondent.

Case ID: 2.0023

Case Type: PA

DECISION NO. 36130-A

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**Appearances:**

Michelle L. Mosley, 3055 N. 58th Street, Milwaukee, Wisconsin, appeared on her own behalf.

Michael J. Gentry, Department of Administration, 101 E. Wilson Street, 10th Floor, P.O. Box 7864, Madison, Wisconsin, appeared on behalf of the State of Wisconsin, Department of Health Services.

**DECISION AND ORDER**

On October 19, 2015, Michelle Mosley filed an appeal with the Wisconsin Employment Relations Commission pursuant to § 230.44(1)(c), Stats., asserting that she had been discharged without just cause by the State of Wisconsin, Department of Health Services. The Commission assigned the appeal to Hearing Examiner Karl R. Hanson who conducted a hearing on February 16, 2016, in Milwaukee, Wisconsin, which was continued telephonically on February 19, 2016, in Madison, Wisconsin. The hearing was audio recorded and no transcript was produced. The parties filed written arguments, the last of which was received on March 4, 2016.

On April 21, 2016, Examiner Hanson issued a proposed decision concluding the State of Wisconsin, Department of Health Services had just cause to discharge Michelle Mosley. On May 19, 2016, Mosley filed objections to the proposed decision. The State of Wisconsin, Department of Health Services filed a response on May 27, 2016, and the matter became ripe for Commission consideration on May 31, 2016.

Being fully advised in the premises, the Commission makes and issues the following:

### **FINDINGS OF FACT**

1. Michelle Mosley was employed as an Income Maintenance Specialist - Advanced by the State of Wisconsin, Department of Health Services at its Milwaukee Enrollment Services (“Miles”) and had permanent status in class at the time she was disciplined.

2. The State of Wisconsin, Department of Health Services is an agency of the State of Wisconsin and operates Miles in Milwaukee, Wisconsin.

3. On June 25, 2015, Mosley called Miles thirty-seven minutes before her scheduled start time and notified her employer that she would be late to work.

4. On August 11, 2015, the State of Wisconsin, Department of Health Services terminated Mosley from her employment with Miles because Mosley’s call on June 25, 2015 was untimely pursuant to the State of Wisconsin, Department of Health Services’ rules, and this constituted her fourth attendance policy related violation in the past twelve months.

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 to review this matter pursuant to § 230.44(1)(c), Stats.

2. The State of Wisconsin, Department of Health Services had just cause within the meaning of § 230.34(1)(a), Stats., to discharge Michelle Mosley.

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

### **ORDER**

The appeal is dismissed.

Signed at the City of Madison, Wisconsin, this 22nd day of June 2016.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

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James R. Scott, Chairman

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Rodney G. Pasch, Commissioner

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James J. Daley, Commissioner

**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.

Michelle Mosley had permanent status in class at the time of her discharge and her appeal alleges that the discharge was not based on just cause.

The State has the burden of proof to establish that the employee was guilty of the misconduct and whether the misconduct constitutes just cause for the discipline imposed. *Reinke v Personnel Board*, 53 Wis.2d 123 (1971); *Safransky v Personnel Board*, 62 Wis.2d 464 (1974).

Prior to June 25, 2015, the State of Wisconsin, Department of Health Services (“DHS”) disciplined Mosley three times for attendance-related infractions of DHS’ work rules. She previously received: a written reprimand in lieu of a one-day suspension for an attendance policy violation on September 4, 2014; a written reprimand in lieu of a three-day suspension for an attendance policy violation on October 20, 2014; and a five-day suspension for an attendance policy violation on December 4 and 5, 2014. DHS utilizes a system of progressive discipline that is cumulative from the first violation until the employee is discipline free for twelve months. By June 25, 2015, Mosley was at the penultimate step in DHS’s progressive discipline track for attendance-related work rule violations.

On June 25, 2015, Mosley experienced an episode of a documented health condition. At the time, Mosley was approved to use Family and Medical Leave Act (“FMLA”) leave, up to four times per month, for a duration of one to two days per episode. Mosley called in to MilES as soon as she could to report that she needed to take FMLA leave on June 25, 2015. She called MilES thirty-seven minutes before her scheduled start time. DHS and MilES require employees to call MilES at least sixty minutes before a scheduled start time if the employee will be late or absent.

In a calendar year, DHS affords each employee three “freebies” for untimely attendance call-ins. An employee uses a freebie when she calls Miles within sixty minutes of her scheduled start time to report that she will be late or absent. An employee may escape discipline for an untimely attendance call-in if she provides medical verification of the absence.

Mosley’s call to Miles reporting her use of FMLA leave on June 25, 2015 was untimely.

Prior to June 25, 2015, Mosley used her three attendance call-in freebies. She was aware that DHS tracked her use of freebies and that she had used three in 2015. Mosley’s use of FMLA leave on June 25, 2015 was in excess of what was certified by her doctor and approved by DHS.<sup>1</sup> Mosley may have avoided discipline by obtaining medical verification related to her late call-in or by seeking modification of her approved FMLA leave. She did neither.

Mosley violated DHS and Miles attendance policies when she failed to call-in at least sixty minutes before her scheduled start time on June 25, 2015. Discipline was warranted. Mosley had been disciplined three times within the past twelve months for attendance infractions. Discharge was the next and final step in the system of progressive discipline employed by DHS. Discharge was not excessive discipline.

DHS had just cause to discharge Mosley from her employment at Miles.

Signed at the City of Madison, Wisconsin, this 22nd day of June 2016.

#### **WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

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James R. Scott, Chairman

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Rodney G. Pasch, Commissioner

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James J. Daley, Commissioner

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<sup>1</sup> Mosley is required to follow DHS’s attendance call-in policies when notifying her employer of FMLA leave usage, absent unusual circumstances. *See* 29 CFR § 825.303. The flare-up of an existing medical condition within sixty minutes of her scheduled start time may amount to an “unusual circumstance” contemplated by the federal regulations. Mosely took no action, however, to obtain approval for use of FMLA leave in excess of four episodes per month of one to two days each.