

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JASEN PROBST, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF HEALTH SERVICES, Respondent.

Case ID: 2.0054

Case Type: PA

DECISION NO. 37492

Appearances:

Matthew Davis, Representative, 1023 Witzel Avenue, Oshkosh, Wisconsin, appearing on behalf of Jasen Probst.

Anfin Jaw, Attorney, Department of Administration, 101 E. Wilson Street, 10th Floor, P.O. Box 7864, Madison, Wisconsin, appearing on behalf of the State of Wisconsin Department of Health Services.

DECISION AND ORDER

On July 9, 2018, Jasen Probst filed an appeal with the Wisconsin Employment Relations Commission asserting he had been discharged without just cause by the State of Wisconsin Department of Health Services. The appeal was assigned to Examiner Raleigh Jones. A hearing was held on August 21, 2018, in Oshkosh, Wisconsin. The parties made oral arguments at the hearing's conclusion. A transcript of the hearing was received on September 4, 2018.

On September 21, 2018, Examiner Raleigh Jones issued a Proposed Decision and Order affirming the discharge of Jasen Probst. On September 26, 2018, Probst filed objections to the proposed decision. DHS did not file a response and the matter became ripe for Commission consideration on October 21, 2018.

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

FINDINGS OF FACT

1. Jasen Probst was employed as a psychiatric care technician – advanced at the Wisconsin Resource Center and had permanent status in class when he was discharged.
2. The Department of Health Services (DHS) is a State agency and operates the Wisconsin Resource Center located in Winnebago, Wisconsin.

3. DHS has a work rule that requires employees to call in a minimum of 60 minutes before the start of a shift if they will not be reporting to work.

4. On April 17 2018, Probst was scheduled to start work at 2:00 p.m. That day at 1:47 p.m., he called in sick.

5. Probst's call in on April 17, 2018 reporting his absence was untimely and violated DHS's call-in work rule.

6. Probst also called in sick the next day, April 18, 2018. As a result of his absences on April 17 and 18, 2018, Probst missed 8 hours of work each day (16 hours total). When Probst missed those two days at work, he did not have enough sick time left to cover those absences. His absences those two days were considered unauthorized and unexcused.

7. Probst was discharged for his late call in on April 17, 2018 and for not having enough sick leave to cover his absences on April 17 and 18, 2018.

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 Jasen Probst.

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

ORDER

The discharge of Jasen Probst by the State of Wisconsin Department of Health Services is affirmed.

Signed at the City of Madison, Wisconsin, this 16th day of October, 2018.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman

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.

Jasen Probst had permanent status in class at the time of his discharge and his appeal alleges that the discharge was not based on just cause.

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

Prior to April 17, 2018, DHS disciplined Probst four times for attendance related infractions of DHS work rules. He previously received: a written reprimand for an improper absence notification on January 16, 2016; a written reprimand in lieu of a one-day suspension for an improper absence notification on March 2, 2016; a three-day suspension for an unauthorized absence on February 24, 2017; and a five-day suspension for an unauthorized absence on January 12, 2018. DHS utilizes a system of progressive discipline that is cumulative from the first violation until the employee is discipline-free for twelve months. By April 17, 2018, Probst was at the penultimate step in DHS's progressive discipline tract for attendance-related work rule violations. The next step under the system of progressive discipline used by DHS was discharge.

It was in that context that Probst had attendance issues again on April 17 and 18, 2018.

On April 17, 2018, Probst called in sick at 1:47 p.m. for his 2:00 p.m. shift. DHS has a work rule that requires employees to call in a minimum of 60 minutes before the start of a shift if they will be late or absent. This work rule allows the institution to find a replacement, hold staff over, and/or reassign staff in order to provide coverage for all posts. Probst also called in sick the next day (April 18, 2018). As a result, he was absent from work for 8 hours each day (16 hours total). When employees want to use sick leave to cover an absence, they have to have sufficient sick leave accumulated to cover the absence. They cannot use other types of paid leave to cover the absence. Probst did not have sufficient sick leave accrued to cover his absences on April 17 and 18, 2018.

DHS's discharge letter faults Probst for two things: his late call in on April 17 and not having enough sick leave to cover his absences on April 17 and 18, 2018.

As to the first matter, there is no question that Probst's call in that day was untimely. Probst was scheduled to start a shift at 2:00 p.m. At 1:40 p.m., he called in and told a supervisor he had hurt his back shoveling snow, and as a result, he was unable to get (his car) out of his driveway. Probst then asked the supervisor if someone from work could be sent to his house to help him shovel, to which the supervisor responded in the negative. Seven minutes later (i.e. 1:47 p.m.), Probst called back again and told the same supervisor he was sick and was not coming into work. Per DHS's call-in work rule, Probst was supposed to report his absence 60 minutes prior to the start of his shift. In the context of this case, that meant he was supposed to call in by 1:00 p.m. That did not happen; instead, he called in sick at 1:47 p.m.

Probst violated DHS's call-in work rule when he failed to timely report his absence on April 17, 2018. His call in that day was untimely, so discipline was warranted.

As to the second matter, it has already been noted that Probst was absent on both April 17 and 18, 2018. He missed eight hours of work each day. DHS payroll records show that when Probst missed those two days of work, he did not have sufficient sick time left to cover those absences. When an employee does not have enough accrued sick time to cover an absence, then the absence is considered leave without pay. All leaves without pay require pre-approval. Probst did not have pre-approval to be absent without pay on April 17 and 18, 2018, so discipline is also warranted for that.

Several weeks after the incidents referenced above occurred, Probst requested that he be allowed to use FMLA leave, and that it be applied retroactively to excuse his absences on April 17 and 18, 2018. DHS declined to do that. DHS's decision passes muster with the Commission for the following reasons. First, the record shows that in 2015, 2016, and 2017, Probst was coached and counseled by DHS's Human Resources (HR) Director on the appropriated method of requesting and using FMLA leave. As a result, Probst was aware of the various steps involved in taking FMLA leave. Specifically, he knew that if he wanted to use FMLA leave to cover an absence, he had to follow certain proscribed steps. Probst did not do that here. Second, the HR Director credibly testified that DHS does not typically approve FMLA leave retroactively unless there are unique and extenuating circumstances (such as an unexpected medical condition which precluded the employee from calling in). DHS concluded that the absences involved here did not qualify as unique or extenuating circumstances. No evidence was presented by Probst which would allow the Commission to find otherwise. Third, while the record shows that DHS has previously allowed Probst to retroactively use FMLA leave to cover absences, when that happened he had approval for FMLA leave on file with DHS's HR Department. At the time of the absences involved here though, Probst did not have approval for FMLA leave on file with DHS's HR Department. His previous approval for FMLA leave had expired and he had not renewed it. It was Probst's responsibility to renew it in a timely fashion if he wanted to use FMLA leave for a serious health condition. The FMLA leave paperwork that Probst filed after his April 17 and 18, 2018 absences did not accomplish that. Finally, when Probst's medical provider subsequently filed a completed FMLA certification form on Probst's behalf, DHS concluded that the documentation was not sufficient for the purposes of determining FMLA leave approval. No evidence was offered by Probst which would allow the Commission to find otherwise. Given the foregoing, the Commission concludes that DHS offered legitimate non-discriminatory reasons why it did not allow Probst to use FMLA leave to cover his absences in question.

The last question which is addressed is whether the discipline imposed here was excessive. As was noted at the beginning of this discussion, the record shows that prior to the discipline imposed here, Probst had received a written reprimand, a written reprimand in lieu of a one-day suspension, a three-day suspension, and a five-day suspension. The last two suspensions were within the past 15 months. All this prior discipline was for attendance related infractions. This prior discipline establishes that Probst had chronic attendance problems. This pattern repeated itself on April 17 and 18, 2018, when Probst, once again, had attendance infractions. Given his substantial disciplinary history at the time of his misconduct on April 17 and 18, 2018, the next step for Probst in the DHS standard disciplinary progression was discharge. Given Probst's standing in the disciplinary progression, the Commission concludes there was just cause for Probst's discharge.

Signed at the City of Madison, Wisconsin, this 16th day of October, 2018.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman