STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

R, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0264
Case Type: PA

DECISION NO. 37495-A

Appearances:

Sean Daley, Field Staff, AFSCME Council 32, N600 Rusk Road, Watertown, Wisconsin, appearing on behalf of R.

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

DECISION AND ORDER

On September 4, 2018, R filed an appeal with the Wisconsin Employment Relations Commission asserting he had been discharged without just cause by the State of Wisconsin Department of Corrections.

A hearing before Examiner Peter G. Davis was held on October 10, 2018, in Black River Falls, Wisconsin. The State argued orally at the conclusion of the hearing while R filed written argument on October 22, 2018. A transcript of the hearing was received on October 23, 2018. The record was closed on October 30, 2018, when the State advised it did not wish to file a response to R's written argument.

On November 5, 2018, Examiner Davis issued a Proposed Decision and Order modifying the discharge to reinstatement without backpay. On November 9, 2018, the State filed objections to the Proposed Decision and Order and R filed a response on November 11, 2018.

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

FINDINGS OF FACT

1. At the time of his July 2, 2018 discharge, R had permanent status in class and was employed as a Correctional Sergeant at the Stanley Correctional Institution by the State of Wisconsin Department of Corrections (DOC). R had worked for DOC for 16 years.

2. R has sole medical custody of a minor child who has a life-threatening health condition. On June 6 and July 5, 2017, and January 23, 2018, DOC approved R's Family and Medical Leave Act (FMLA) request for intermittent and scheduled leave related to that health condition for the period of May 29, 2017, through April 30, 2018. On November 8, 2017, R was advised he would be suspended for five days for two September 2017 late call ins for a scheduled shift. The late call ins were related to the care for his child. R did not appeal the suspension.

3. R's discharge was triggered by his April 26, 2018 failure to call in on a scheduled workday and his late call in on May 18, 2018. On April 26, 2018, R wrongly believed it was not a workday because he needed to accompany his child to a medical appointment for which he would use FMLA leave. On May 18, 2018, he was prevented from making a timely call because his spouse had damaged his cell phone. On June 25, 2018, R submitted an FMLA leave request covering all of 2018 which was never processed by DOC because DOC had already decided to discharge R.

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 Corrections did have just cause, within the meaning of § 230.34(1)(a), Stats., to discharge R.

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

ORDER

The discharge of R by the State of Wisconsin Department of Corrections is affirmed.

Signed at the City of Madison, Wisconsin, this 12th day December, 2018.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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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.

R 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 R 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).

I. Just Cause Based on R's Conduct.

R is a very sympathetic figure. He is entrusted with the responsibility of being the sole medical custodian for his child who suffers from a life-threatening disease. His spouse, who no doubt has been affected with the emotional burden of this ordeal, is not in a position to be of help in the matter and, it appears, actually hinders R's ability to do so at times. At a minimum in this case, R's spouse seems to have had involvement in the last incident causing the discharge by damaging R's cell phone, precluding R from being able to call in to report his inability to arrive at work in a timely manner.

It is often said that a judicial body should not confuse it's will for it's judgment. Such is the dilemma here as well. Sympathy does not create an affirmative defense against just cause being found in discipline. In this matter, R was disciplined several times for tardiness or no-show issues, with such discipline being progressive in nature. It was not his first violation of such. Additionally, it appears that DOC showed some leniency internally in disciplining R, allowing a few "freebies" in its enforcement of policy. There is no argument as to the alleged actions of R in this matter. The discipline was based on just cause and, given R's previous progressive disciplinary history, the discipline imposed was warranted.

II. Just Cause Based on Family and Medical Leave Act (FMLA) "Claims."

Problematic to the Commission are the "claims" of FMLA protections offered by R. While a successful demonstration of a FMLA violation could contribute towards a just cause evaluation

of the matter at hand, R failed to adequately demonstrate such a violation occurred within the record before us.

In order to establish a prima facie case of retaliation under the FMLA, an employee must demonstrate four things:

(1) The employee was engaged in an activity protected by the FMLA;
(2) The employer knew that the employee was exercising their rights under the FMLA;
(3) After learning of the employee's exercise of FMLA rights, the employer took an employment action adverse to the employee;
(4) There was a causal connection between the protected FMLA activity and the adverse employment action.

Donald v. Sybra, Inc. 667 F.3d 757, 761 (6th Cir. 2012) (quoting *Killian v. Yorozu Auto. Tenn. Inc.,* 454 F.3d 549, 556 (6th Cir. 2012).

It would appear that R was caring for his daughter in at least one of the incidents alleged, satisfying step one. DOC knew that R was exercising his FMLA rights by submitting paperwork and HCP guidelines for certification, satisfying the second step. DOC discharged R, an adverse action after the initial certification was granted and the second certification was pending, raising concern as to the third step. The final step requires a fact specific inquiry that we are unable to conclude upon with the information presented to us. The discharge certainly appears to be related to the FMLA activity, but absent DOC fully applying FMLA requirements, it is uncertain whether the activity in question is (or would have been) under FMLA protection.

There are two specific elements that are a cause of significant concern raised by R in this matter. R's five-day suspension may have been in violation of FMLA. If R had been successful in challenging that suspension, the current matter would not lead to discharge as the progressive nature of the discipline would have had this present infraction disciplined as a five-day suspension. However, R did not grieve that suspension at the time, thereby losing the ability to now have this body implement a post-decision review of the matter. Alternatively, R may have had the opportunity to still have the Commission review this element in it's equitable analysis on whether discharge was the appropriate outcome in this matter. However, R failed to properly develop within the record enough evidence for the Commission to objectively determine the merits of such an argument. Therefore, due to R's failures to challenge the prior suspension in both regards, we are currently precluded from using this element in our determination specific to just cause in this discharge.

The second area of great concern to the Commission is DOC's failure to process and recertify R's 2018 request for FMLA leave. DOC Human Resources Director Nicole Hager testified that, given the pending termination of R, she chose not to recertify his FMLA request. *See* Tr. p.22, lines 19-24. This is potentially problematic to DOC's position.

FMLA creates a substantial burden on the employer in matters of discipline. The frequency, duration, and cause of absences relating to FMLA requests are based on a health care providers' (HCP) best estimate based on their medical judgment at the time. An employer has an obligation to recertify an FMLA request in the event that circumstances have changed significantly.

29 CFR 825.308(c)(2). Therefore, not only did R likely have the right to have his request processed, but even if the FMLA certification being sought was not inclusive of the incident which caused his discharge, DOC arguably had the responsibility to ask R to recertify his certificate in the matter in case the HCP would expand their authorization to be inclusive of this incident. This process was essentially ignored in its entirety when Hager halted the processing of the FMLA request based on the decision to discharge R Additionally, there could be the argument that the recertification obligation existed on DOC relating to the initial certification that had expired, though this was also not explored by R in this proceeding.

The correct process for this matter may have been to discipline R pending the approval and subsequent recertification/review of his FMLA certification. *See generally Theiss v. Walgreen Company*, 6th Cir. No. 14-3892, 14-3933 Unpublished (2015), stating "But these corrective actions were provisional pending the processing of her request. She suffered no actual damages as a result of her filing for leave or taking numerous absences during the processing period."

However, the Commission is stuck in a state of speculation as to these matters. R did not adequately establish within the record enough evidence for the Commission to step in and use any of the preceding conjuncture as a basis for overturning the discipline imposed here. R danced magnificently close to the proverbial edge of this matter, enticing the curiosity of the Commission, yet did not go far enough in this record to establish such.[1] As a result, we are precluded from using this speculative discussion as a foundation to formulate a basis of relief in this matter.

III. Conclusion.

Misconduct formed the basis for just cause to be found to support R's discharge. R's progressive disciplinary history allows for the discharge to be the appropriate outcome of this matter, and R failed to adequately form a basis in the record for relief based on mishandling FMLA procedure and law.

Signed at the City of Madison, Wisconsin, this 12th day December, 2018.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James J. Daley, Chairman

[1] The Commission asked the parties to try to reach a settlement in this matter before a final decision was reached based on this very point. While this record does not adequately form the basis for the Commission to overturn the discipline, nothing precludes R from initiating a separate claim against DOC for FMLA interference. Such a process would allow for the further refinement of these issues in front of a determinative body that could very well give relief to R in the form of reinstatement and backpay. While the Commission cannot comment with authority as to the result of such a claim therein, given the potential merits of such a claim and what appears to be the questionable decisions of DOC's human resources in this matter, our neutral opinion reflects that all sides may have been better served had a compromise been negotiated successfully between the parties.