STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

T.T., Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case No. 1.0409

DECISION NO. 38806

Appearances:

T.T., 2800 Loraine Avenue, Racine, Wisconsin, appearing on her own behalf.

Cara Larson, 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 November 13, 2020, Appellant T.T. filed an appeal with the Wisconsin Employment Relations Commission challenging her medical separation from the State of Wisconsin Department of Corrections. The matter was assigned to Examiner Raleigh Jones. A telephone hearing was held on February 4, 2021. The parties made oral argument at the conclusion of the hearing.

On February 10, 2021, Examiner Jones issued a Proposed Decision and Order affirming the medical separation. On February 15, 2021, T.T. filed objections to the Proposed Decision and Order. The State did not file a reply to T.T.'s objections on or before the deadline of February 22, 2021.

FINDINGS OF FACT

1. T.T. was employed by the State of Wisconsin Department of Corrections as a correctional sergeant at the Racine Youthful Offender Correctional Facility (RYOCF) and had permanent status in class when she was medically separated.

2. The Department of Corrections (DOC) is a state agency responsible for the operation of various correctional facilities, including RYOCF in Racine, Wisconsin.

3. In September 2019, T.T. went on medical leave for a variety of on-going medical issues. She was ultimately on medical leave continuously, and absent from work, for one year.

4. In August 2020, T.T.'s medical provider notified DOC that T.T. was unable to perform any work in any capacity.

5. Before it medically separated T.T.'s employment, DOC complied with Wis. Stat. § 230.37(2) and considered the accommodations referenced therein (i.e. transfer, demotion or part time employment).

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 Wis. Stat. § 230.44(1)(c).

2. The accommodations referenced in Wis. Stat. § 230.37(2) of transfer, demotion or part time employment were not viable here because T.T. could not perform any work in any capacity.

3. The State of Wisconsin Department of Corrections complied with Wis. Stat. § 230.37(2), Stats, before it medically separated T.T. from service.

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 T.T. by the State of Wisconsin Department of Corrections is affirmed.

Issued at Madison, Wisconsin, this 15th day of March, 2021.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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James J. Daley, Chairman

MEMORANDUM ACCOMPANYING DECISION AND ORDER

This is a medical separation case involving a State employee. Medical separation is an action taken to separate an employee from employment when the employee is unable to perform the essential functions of their position with or without reasonable accommodations due to medical impairment. Medical separation is not a disciplinary action. Medical separations for State employees are governed by Wis. Stat. § 230.37(2), 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 this language places a heavy burden on state agencies to retain employees with medical or physical infirmities, and explore a variety of alternatives short of dismissal, it nevertheless allows a state agency to medically separate an employee who is unable to perform the essential functions of their job due to medical reasons when efforts to provide a reasonable accommodation have been unsuccessful. *See*, for example, *Capozziello v. DOA*, Dec. No. 37764 (WERC, 10/18).

Beginning in September 2019, T.T. went on medical leave for a variety of on-going medical issues. Her medical leave was extended multiple times. Initially, she was on FMLA leave. After that leave was exhausted, she went on unpaid leave. She was ultimately on medical leave continuously, and absent from work, for one year.

In late March 2020, after T.T. had been on medical leave for seven months, DOC decided to obtain updated information about T.T.'s condition from her medical provider. To that end, it wrote T.T.'s medical provider a letter which said that DOC "is now at the point of reviewing Ms. T.T.'s ability or inability to work in her current position, or possible placement into an alternate position" with DOC. The letter then went on to ask the medical provider various questions about T.T.'s status. One question was whether T.T. currently had "the ability to safely perform the functions of a correctional sergeant" at RYOCF, to which he wrote "No, speaking-thinking impaired." Another question was whether there were "accommodations that might be considered that would make it possible" for T.T. "to return to work in her current position" to which he wrote "No." Another question was whether she currently had "the ability to perform the functions of a different type of position" with DOC, to which he wrote "No." Another question was what date do you expect T.T. "to be able to return to work with or without accommodations" to which he wrote "[p]erhaps August 1, 2020."

In early July 2020, DOC notified T.T. that her current leave of absence would expire on August 1, 2020. It also notified her that it wanted updated information on her condition from her medical provider. To that end, it wrote T.T.'s medical provider the same letter it had sent him in late March 2020. Regarding the question of whether T.T. currently has "the ability to safely perform the functions of a correctional sergeant" at RYOCF, he wrote "No, has cognitive and communication problems." Regarding the question of "are there accommodations that might be considered that would make it possible" for T.T. "to return to work in her current position" he wrote "No." Regarding the questions of whether T.T. currently has "the ability to perform the functions of a different type of position" with DOC, he wrote "No." Regarding the question of what date do you expect T.T. "to be able to return to work with or without accommodations" he wrote "October 1, 2020."

T.T.'s medical provider made the written responses noted on August 5, 2020. That same day, T.T.'s medical provider also completed a fitness for duty certification form for T.T. Therein, the medical provider wrote that T.T. was unable to work from July 1, 2020 to October 1, 2020. Under the category entitled Work Performance Limitations, he wrote: "⃠ work."

In mid-August 2020, staff from DOC's Office of Diversity and Employee Services (ODES) reviewed the facts in this matter with management from DOC's central office Medical Review Team (MRT). After their review of the matter was completed, they recommended that T.T. be medically separated. DOC's legal counsel subsequently approved that recommendation.

On August 25, 2020, RYOCF's warden sent T.T. a letter notifying her that DOC intended to medically separate her employment "based on the fact that you have been on continuous leave since August 2019, and the most recent medical documentation we received states you are unable to return to work as a correctional sergeant or in any other capacity at this time." The letter went on to set up a pre-medical separation meeting for September 8, 2020.

The meeting just referenced was held, as scheduled, on September 8, 2020. In that meeting T.T. was offered the opportunity to present additional information and mitigating circumstances. T.T. did not emphatically state that she would return to work on October 1. Instead, she said she would "probably" return to work in October, but that was not certain.

In a letter dated September 10, 2020, DOC medically separated T.T. from her employment at RYOCF effective that date "for medical reasons." The letter indicated this action "is based on the fact that you have been off on a medical leave since August 2019 and you have been unable to return to work." The letter then went on to refer to the meeting held September 8 and averred that "you were afforded the opportunity to respond to the reason for separation" and "did not present any mitigating documentation noting a reason why medical separation should not be pursued." Although this letter was dated September 10, 2020, it apparently was not sent that day. It is unclear when the letter was sent to T.T.

When evaluating State compliance with Wis. Stat. § 230.37(2) in *Capozziello v. DOA*, the Commission held that the State has the burden to prove three elements:

> (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
>
> (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.

Id., at page 3.

As to elements one and two, there is no question that T.T. suffered from an infirmity which caused her to be incapable to perform her work as a correctional sergeant, and as a result she was on medical leave and away from work for one year.

The crux of this case is whether DOC satisfied the third element of proof referenced above (i.e., that the specified alternatives were exhausted or unavailable and that separation was the last resort). The Commission finds that DOC satisfied that element here.

First, the record shows that DOC's Office of Diversity and Employee Services (ODES) is well aware of its statutory obligation to explore all reasonable alternatives before it medically separates an employee. The statute specifically references transferring, demoting or placing the employee in a part time position. All those options envision that the employee is capable of doing some work. However, when DOC made its decision in this matter, T.T. was not able to do any work. Her own medical provider had advised DOC in August 2020 that T.T. was unable to do any work in any capacity. It stands to reason that if someone is unable to do any work in any capacity, then transferring them to a different job, or demoting them, or making them part time is pointless and not worth attempting. Thus, this was not a situation where T.T. could be transferred to a different job with DOC, or be demoted to a lower ranking position such as a correctional officer, or be assigned to light duty, or simply work less hours. In order for any of those options/accommodations to be viable, T.T. had to be able to do some amount of work. However, she could not. Under these circumstances, the options/accommodations referenced in the statute were not viable here.

Next, it would be one thing if T.T. had been able to say at the September 8, 2020 meeting that she definitely was returning to work on October 1, 2020. However, she was not able to make that assurance and did not do so.

As noted earlier, Wis. Stat. § 230.37(2) allows a state agency to medically separate an employee who is unable to perform the essential functions of their job due to medical reasons when efforts to provide a reasonable accommodation have been unsuccessful. DOC established that was

the situation here. T.T. had been off work for a year and it was far from certain when she would be able to return to work. The Commission therefore finds that DOC complied with Wis. Stat. § 230.37(2) before it medically separated T.T. from employment.

Issued at Madison, Wisconsin, this 15th day of March 2021.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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James J. Daley, Chairman