

**COURT OF APPEALS
DECISION
DATED AND FILED**

DECEMBER 2, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 97-1538

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

JANICE E. SIEGER,

PLAINTIFF-APPELLANT,

v.

**WISCONSIN PERSONNEL COMMISSION AND WISCONSIN
DEPARTMENT OF HEALTH AND SOCIAL SERVICES,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Lincoln County:
J. M. NOLAN, Judge. *Affirmed.*

Before Cane, P.J., Myse and Hoover, JJ.

PER CURIAM. Janice Sieger appeals a judgment affirming an order of the Wisconsin Personnel Commission rejecting her claim under Wisconsin's Family Medical Leave Act (FMLA). Sieger contends that the Department of Health and Social Services violated the FMLA by denying her

medically necessary leave in October 1989 and unlawfully retaliated against her after she filed grievances. The commission found that the requested leave was not medically necessary and that the DHSS did not retaliate against her for exercising her rights under the FMLA. Because substantial evidence supports the commission's findings, we affirm the judgment.

The commission's findings are conclusive unless we conclude that they are not supported by substantial evidence in the record. *See* § 227.57(6), STATS. As the trier of fact, the commission may reject the testimony of an expert witness that it finds unbelievable. *See E.F. Brewer Co. v. DILHR*, 82 Wis.2d 634, 636-37, 264 N.W.2d 222, 222 (1978).

In an earlier appeal,¹ we remanded the matter for a finding by the commission on whether Sieger's requested leave was medically necessary. The commission heard testimony from Sieger's treating psychiatrist, Dr. Mary Berg, that the leave was medically necessary. Dr. Ken Robbins contradicted Berg's assessment, testifying that when a psychiatrist recommends that a patient take off time from work, he or she bases that recommendation on the existence of certain symptoms, establishes the goal of the leave including the elimination of the target symptoms, documents the starting date for the leave, and prescribes that the leave begin immediately if the recommendation is based on a diagnosis of depression. Because Dr. Berg failed to observe any of these professional norms, Dr. Robbins concluded that the prescription for one week's leave did not comport with the usual and customary medical practices.

¹ *Sieger v. Wisconsin Personnel Comm'n.*, 181 Wis.2d 845, 512 N.W.2d 220 (Ct. App. 1994).

The commission chose to accept Dr. Robbins' analysis. The commission's problem with Dr. Berg's assertion that the leave was medically necessary is supported by several facts. Although Sieger contends that she was unable to work for one week due to a medical necessity, she was able to attend classes and take an exam during that week. Dr. Berg did not prescribe a leave when Sieger's depression was more severe based on her belief that Sieger had no more medical leave available. Dr. Berg's willingness to prescribe leave only if her patient has sick time available indicates that the prescription was not based on medical necessity, but on other factors. In addition, the commission noted that Dr. Berg changed two variables at once when she recommended leave from work at the same time she took Sieger off Prozac. This unusual practice supports Dr. Robbins' conclusion that medical leave was not necessary. Finally, the commission disbelieved Dr. Berg's analysis based on her lack of documentation regarding the symptoms and their intensity, and the lack of an explanation as to why medical leave would address the targeted symptoms.

Because DHSS reasonably concluded that Sieger took unauthorized and unnecessary leave, the discipline it imposed and the procedures it employed to scrutinize her absences from work do not violate the FMLA. Specifically, the one day suspension from work and the special procedures employed for requesting and reporting sick leave cannot be viewed as unlawful retaliation for exercising her rights under the FMLA.

Sieger alleges that DHSS retaliated against her by revising her position description to a seventy percent position, denying her reimbursement for tuition for seven of eight course credits, changing her work hours, demanding excessive documentation for a course she took and revising an expense voucher to reflect only expenses authorized by DHSS. In order to make a prima facie case for

retaliation, Sieger had to show that she engaged in protected activity, that DHSS took adverse action against her, and that a causal link exists between the protected activity and the adverse action. *See Acharya v. Carroll*, 152 Wis.2d 330, 340, 448 N.W.2d 275, 280 (Ct. App. 1989). DHSS may rebut this evidence if it can establish a non-retaliatory reason for its actions. *Id.* The question of an employer's motivation is a question of fact. *St. Joseph's Hosp. v. Wisconsin ER Bd.*, 264 Wis. 396, 400-401, 59 N.W.2d 448, 450-51 (1953). The commission's findings of fact must be affirmed if they are supported by substantial evidence. *See Chicago, M., St. P. & P. RR. Co. v. DILHR*, 62 Wis.2d 392, 396, 215 N.W.2d 443, 445 (1974).

Substantial evidence supports the commission's determination that none of these actions was taken for retaliatory motives. The record contains ample evidence of a non-retaliatory reason for all of the DHSS decisions regarding Sieger's employment and education. The decision to include Sieger's position on a priorities list for reduction or elimination was made two months before she asked for a FMLA leave. The decision to cut her position was made for budgetary reasons. Even then, she could have transferred to another full-time position, but elected not to. Nothing in FMLA prohibits an employer from making legitimate alterations to an employee's position for business reasons. *See Kelley Co. v. Marquardt*, 172 Wis.2d 234, 251, 493 N.W.2d 68, 76 (1992).

Sieger alleges that her supervisor occasionally made corrections to her time sheets. The record shows that the time sheets were altered to conform with DHSS rules. Sieger is not entitled to additional hours beyond that of her co-workers merely because she filed a FMLA request, especially when the additional hours exceed the budget for that position. Sieger did not establish any retaliatory motive for the alterations.

Sieger argues that her supervisor disallowed the use of sick leave when her former brother-in-law was murdered. That decision was later overturned by DHSS. It constitutes no basis for relief and no evidence regarding her supervisor's motivation. Her supervisor was merely following mistaken advice provided by the personnel department.

DHSS's demand that Sieger file an expense report consistent with department rules does not constitute retaliation. The department does not reimburse employees for actual expenses. Rather, state employees traveling on state time are required to live within the allowances provided by the state. If they exceed the allowances, they must pay for the excess themselves.

Although Sieger mentions that DHSS requested documentation for tuition reimbursement and proof of payment for a course, she does not directly address the issue on appeal. The commission found that there was no retaliation regarding her tuition reimbursement. Sieger failed to provide sufficient information including the days and times the course met. Her supervisor also determined that the courses had little to do with her job. Sieger's claim of retaliation when she was required to produce proof of payment for courses fails because the person who requested the documentation was not even aware that Sieger had requested medical leave.

Finally, Sieger's claim that her work was rescheduled in a manner that interfered with her ability to take classes at the University is not properly before this court. This incident was not one of the original incidents certified for hearing on Sieger's complaint of retaliation. Therefore, the commission made no findings in this regard and this court will not review the matter.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

