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03-03-2021
Clerk of Circuit Court
Brown County, WI
2020CV000492

BY THE COURT:

DATE SIGNED: March 3, 2021

Electronically signed by Thomas J. Walsh
Circuit Court Judge

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH II

BROWN COUNTY

DUSTIN S. SOULEK,

Petitioner,

v.

DEPARTMENT OF WORKFORCE DEVELOPMENT,
EQUAL RIGHTS DIVISION,

Case No.: 20CV492

COSTCO WHOLESALE, INC.,

Respondents.

DECISION AND ORDER

Before the Court is Petitioner Dustin S. Soulek’s (“Soulek”) petition for judicial review of the Wisconsin Department of Workforce Development, Equal Rights Division’s (the “ERD”) decision and order dismissing his complaint against Costco Wholesale, Inc. (“Costco”) for alleged violations of the Wisconsin Family Medical Leave Act (“WFMLA”). For the following reasons, the ERD’s decision will be **AFFIRMED**.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY¹

On or around September 8, 2013, Soulek began his employment with Costco working primarily out of its location in Bellevue, Wisconsin. (R. at 41.)² For purposes of the WFMLA,

¹ The Court considers the following facts essential to this analysis and that are supported by the evidence.

² The administrative proceeding record totals 1463 pages and it is contained within case documents 22 through 50. Citations to the record will be to the record’s page numbers as opposed to case documents and their page numbers.

Soulek qualified as an “employee,” Costco as an “employer,” and Soulek was eligible for leave thereunder due to the birth of a child. (*Id.* at 48); WIS. STAT. §§ 103.10(1)(b), (c), 2(c), 3(b)1. (2019–20).³ On March 1, 2019, Costco implemented a new “Bonding Leave Policy” which provided eligible employees with up to three weeks of paid leave for the birth of a child. (*Id.* at 326.) Around that time, Soulek spoke with the Bellevue Costco’s general manager Jeremy Deshazer (“Deshazer”) regarding the new company policy because Soulek and his spouse were expecting. (*Id.* at 285, 326.) During their conversation Deshazer did not inform Soulek about his rights under the WFMLA. (*Id.* at 326.) On March 6, 2019, Soulek filed Costco’s “Paid Bonding Leave Certification” and “Request for Leave of Absence” forms seeking three weeks of leave from March 9 through March 30, 2019. (*Id.* at 581–82.) Soulek’s daughter was born March 7 and he was on bonding leave starting on or around March 9 and returning to work on or around March 31, 2019. (*Id.* at 285, 387–88.)

After his bonding leave was over, Soulek returned to work at Costco. (*Id.* at 286.) On April 9, 2019, Soulek discussed taking additional leave, this time under the WFMLA, with his spouse. (*Id.* at 1084.) On April 10, Soulek filed a second request for a leave of absence seeking time off from May 15 through July 10, 2019.⁴ (*Id.* at 583.) Payroll clerk Michelle Hatch (“Hatch”) was the first to address Soulek’s request sometime between April 10 and April 15. (*Id.* at 305–06.) At that time, Hatch told Soulek that she would need to figure out how to process his request because she was not sure if or how his previous company bonding leave affected the WFMLA request. (*Id.* at 306.) She also told Soulek that he would need to inform his manager, Carrie Brand (“Brand”), of his WFMLA request because Brand set Soulek’s work schedules. (*Id.* at 310.)

³ All subsequent references to the Wisconsin Statutes will be to the 2019–20 version unless otherwise indicated.

⁴ This request was completed on Costco’s “Request for Leave of Absence” form.

Hatch testified that Soulek's was the first request—where someone took leave, came back, and then requested more leave—that Bellevue Costco had processed. (*Id.* at 307, 309–10.) Hatch later discussed Soulek's WFMLA request with two assistant store general managers. (*Id.* at 309.) On April 17, Hatch also sought external guidance from Costco's integrated leave department which was responsible for determining employee benefits pursuant to the various states' laws.⁵ (*Id.* at 307, 697.) Hatch herself did not have the authority to approve or deny an employee's leave request and she never told Soulek his request would be denied or whether he was ineligible for WFMLA leave. (*Id.* at 310.) Hatch left her role as payroll clerk on April 18, 2019. (*Id.* at 309.)

Ronda Harris ("Harris") then became a full-time payroll clerk and she took over Soulek's request. (*Id.* at 312.) Harris however, had no knowledge of the WFMLA. (*Id.* at 313.) Harris immediately requested that Soulek complete Costco's "Certification of Health Care Provider for Family Member's Serious Health Care Condition (Family and Medical Leave Act/State Law)" form. (*Id.* at 313, 677–80.) On the completed form—the form being completed by Soulek's physician signing it on April 26—Soulek had scratched out the original leave dates of May 15 through July 17, 2019, and replaced them with May 25 through July 17, 2019. (*See id.*) Harris did not ask Soulek why he had changed those dates.⁶ (*Id.* at 313–14.) On or around April 28 or 29, Harris testified she spoke with Soulek and informed him that his WFMLA request was approved, but she did not provide him with a written confirmation because she thought Deshazer was the only one who could sign off on the approval.⁷ (*Id.* at 315.) Harris testified that the late-April 2019 conversation was the last she had with Soulek for approximately one month. (*Id.*)

⁵ Hatch never received a response to her email from the leave department. (R. at 308–09.)

⁶ Soulek testified he changed the dates because of delays in getting his doctor to sign this form. (R. at 288, 677–80.) Soulek signed the form on April 17. It is inferred that Soulek changed the dates when he received the form back from his doctor sometime after April 26. Soulek filed the form with Costco on or around April 26 at the earliest.

⁷ The approval form is Costco's "Designation Notice." (*See* R. at 315, 681–82.)

Soulek however, testified that at the late-April 2019 conversation Harris informed him that his request was going to be denied. (*Id.* at 289.) Soulek testified that on April 28 or 29 he also spoke with assistant store general manager Bobby McMahon (“McMahon”) who said that Soulek was not eligible for WFMLA leave pursuant to the Costco employee manual which required the company’s bonding leave to run concurrently with any Wisconsin or federal FMLA. (*Id.* at 289–90.) Curiously, McMahon sent an email to Deshazer on April 29 that said Soulek *qualified* for WFMLA leave and he had provided all the necessary paperwork—but, the email does not say that his leave was *approved*. (*Id.* at 614.) Then Soulek testified that on April 30, Harris told him that his leave was going to be approved, not that it had been approved. (*Id.* at 290, 596.) Soulek testified he was still not provided with written approval of his leave. (*Id.* at 290.)

Then three weeks passed. On May 21, Harris emailed the leave department for guidance as to whether Soulek’s leave should be granted, calling his request “[fishy].” (*Id.* at 694.) Harris testified that she emailed the leave department of her own initiative and was not asked to do so by any of the store managers. (*Id.* at 318.) Harris testified she sent the email because she was uncertain about Soulek changing the dates on his request and that his reason for taking the leave was “vague.” (*Id.* at 317.) In explaining her email, Harris testified she thought Soulek was requesting WFMLA bonding leave, but management had “approved” him for leave to take care of his newborn who had a health condition. (*Id.* at 317–18, 694.) Also, Harris testified she sent the May 21 email despite McMahon informing her that Soulek’s leave was approved. (*Id.* at 317.) At 11:21pm on May 30, Harris received a response indicating that Soulek’s leave should be approved. (*Id.*) Regarding the May 30 response email, Harris testified that that email was *not* the first time the leave department had informed her Soulek’s leave was approved—Harris herself had received a phone call from the leave department informing her it was approved. (*Id.* at 318.)

Nevertheless, Soulek continued to be scheduled for work shifts by his manager, Brand. (*Id.* at 280, 292.) Specifically, Soulek worked May 25, 28, and 29, and June 1 and 2, also being paid for those days. (*See id.*) Soulek working these dates resulted in conversations between Soulek and others, including Harris and Brand who asked him on May 25, what he was doing at work. (*Id.* at 280, 315.) On May 31, the day after Harris received confirmation (for the second time) from the leave department that Soulek's leave request should be approved, Harris put Soulek's name on Costco's Designation Notice form that approved his leave, but a manager never signed it and she never filled in the effective dates. (*Id.* at 291, 316–19, 597–98.) Because the notice had not been signed by a manager, Harris did not think she had given it to Soulek. (*Id.* at 318.) Harris was also unaware if another manager had given Soulek a Designation Notice. (*Id.* at 318–19.) According to Soulek however, Harris gave him the incomplete Designation Notice on June 2. (*Id.* at 290.) On June 2, Harris had Soulek complete another Request for Leave of Absence form that requested leave from June 3 through July 27, 2019. (*Id.* at 291–92, 316, 599.) Soulek then began his WFMLA leave on June 3. (*Id.* at 388.)

On June 19, 2019, Soulek filed a family and medical leave complaint against Costco. (*Id.* at 1458–63.) On July 30, 2019, an ERD investigator determined there was probable cause to believe that Costco violated the WFMLA and the matter was scheduled for a formal hearing. (*Id.* at 1424–26.) The hearing was held on January 16, 2020, in front of an ALJ. (*Id.* at 1396.) The ALJ concluded that Soulek failed to prove by a preponderance of the evidence that Costco had violated the WFMLA by interfering, restraining, or denying him benefits thereunder.⁸ (*See* Doc. 4.) Soulek's complaint was dismissed with prejudice. (*Id.*) On May 14, 2020, Soulek initiated this action seeking reversal of the ALJ's decision.

⁸ Soulek argued that the interference occurred when Costco failed to inform him of his rights under the WFMLA; verbally denied his request for leave several times; and delayed approval of his leave.

STANDARD

In a judicial review of an agency decision, the review shall be confined to the record. WIS. STAT. § 227.57(1). Further, “the court shall accord no deference to the agency’s interpretation of law.” § 227.57(11). “If the agency’s action depends on any fact found by the agency in a contested case proceeding, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact.” § 227.57(6). “The court shall, however, set aside agency action or remand the case to the agency if it finds that the agency’s action depends on any finding of fact that is not supported by substantial evidence in the record.” *Id.*

“No person may interfere with, restrain or deny the exercise of any right provided under [the WFMLA.]” WIS. STAT. § 103.10(11)(a). “To prevail on [a federal] FMLA interference claim, an employee need only show that his employer deprived him of an FMLA entitlement; no finding of ill intent is required.”⁹ *Burnett v. LFW, Inc.*, 472 F.3d 471, 477 (7th Cir. 2006). The employee must prove: (1) they were eligible for the FMLA’s protections; (2) their employer was covered by the FMLA; (3) they were entitled to leave under the FMLA; (4) they provided sufficient notice of their intent to take leave; and (5) the employer denied them the FMLA benefits to which they were entitled.¹⁰ *Ridings v. Riverside Med. Ctr.*, 537 F.3d 755, 761 (7th Cir. 2008) (citing *Burnett*, 472 F.3d at 477). However, a “[v]iolation of the FMLA is not enough to establish injury; instead, [the employee] must show he was prejudiced by [the employer’s] violation.” *Lutes v. United Trailers, Inc.*, 950 F.3d 359, 368 (7th Cir. 2020) (citing *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 89 (2002)).

⁹ State courts may look to federal cases for guidance when interpreting state statutes that have similar federal counterparts. *Crystal Lake Cheese Factory v. LIRC*, 2003 WI 106, ¶¶ 45–46, 264 Wis. 2d 200, 664 N.W.2d 651.

¹⁰ The fifth element is the only one that is in dispute here.

ANALYSIS

In his petition for review, Soulek argues first that Costco interfered with his WFMLA entitlements by denying him the right to leave from May 25 through June 2. (Doc. 73 at 7–8.) Second, Soulek argues that he was prejudiced by Costco’s interference when he was forced to restructure his leave differently than he would have if Costco had lawfully processed his request. (*Id.* at 10.) Costco does not appear to dispute that it violated the WFMLA, it only argues that Soulek was not prejudiced by the violation. The Court concludes that Costco interfered with Soulek’s WFMLA entitlements by mishandling his WFMLA leave request, however, Soulek has failed to prove how he was prejudiced by having to take his leave approximately one week later than he wanted to. Therefore, the ALJ’s decision dismissing Soulek’s complaint will be affirmed.

I. Costco interfered with Soulek’s WFMLA rights by mishandling his request for leave.

In early April 2019, Soulek, who was fresh off Costco’s paid bonding leave, filed a request for additional leave pursuant to the WFMLA. Initially, Costco’s payroll department and an assistant store general manager were uncertain whether Soulek was eligible for the additional leave. The uncertainty stemmed from Soulek’s recent return from company bonding leave, the fact that the company bonding leave policy was new, and their unfamiliarity with the WFMLA. Payroll sought guidance from the corporate leave department in mid-April, but did not receive a response to its first inquiry. Payroll also required Soulek to fill out the additional certification of health care condition form in an effort to obtain his leave.

By the end of April, Costco management had at minimum determined Soulek was eligible for WFMLA leave. The evidence suggests management had also likely informed Soulek verbally that his leave was approved. But, management did not approve Soulek’s leave in writing, even though that was the store’s policy. Also, the designation form approving leave had to be signed by

a manager, not by payroll. At best, Soulek had verbal approval from someone, but he never received final approval on the Company Designation form executed by store management. Ostensibly, Soulek was unofficially approved for leave starting on May 25, 2019.

Despite this purported approval, Harris emailed the corporate leave department a second time on May 21—the first email was sent by her predecessor—to verify whether Soulek was eligible for WFMLA leave. Harris sent this second email even though she testified she had already received a phone call from the leave department saying Soulek’s leave was to be approved. Additionally, Soulek’s direct manager was not informed either by payroll or the assistant GM, that his leave was approved (albeit never in writing). As a result, Soulek’s manager continued to schedule him for shifts on and after May 25 and Soulek worked those shifts. Soulek apparently had had disciplinary action taken against him previously. Soulek’s reasoning for working was that because he did not have written approval of his leave and he was on the schedule, his leave must have been denied and he was obligated to work the scheduled shifts. On May 25, Soulek was questioned why he was at work and he gave that answer. Still, management did not provide written approval of Soulek’s leave. It was not until June 2, the last day Soulek worked, that he was given an incomplete and unsigned Designation Notice “approving” his leave. The incomplete notice was given to him by payroll which did not have the authority to approve leave.

While the ALJ’s findings of fact are supported by the evidence, the ALJ erred when it concluded that Costco’s actions and inactions did not interfere with Soulek’s rights under the WFMLA. The ALJ also erred by concluding that Soulek had any additional burden to obtain his leave beyond providing the notice required and the proper paperwork. The parties have cited various cases that are all as fact-laden as this one is. Therefore, it is difficult to articulate exactly what interference or delay is, but the Court knows it when it sees it.

Here, it is not excusable that a corporation with so many financial and personnel resources at its disposal, including a corporate department dedicated to addressing state and federal FMLA claims such as this one, could not figure out Soulek's request and process it through to completion in a timely fashion. Moreover, Costco did not even follow its own store policy by approving Soulek's leave in writing. These shortcomings are concerning when dealing with the valuable statutory rights employees are entitled to. The interference and delay stemmed from management's and payroll's poor communication and their lack of initiative in resolving Soulek's request once and for all—i.e. in writing—back in April 2019 when they had all of the proper paperwork in front of them. Compounding the confusion is Harris' unilateral investigation of Soulek's claim despite admitting the leave department had already told her that the leave should be approved. If Costco did not understand Soulek's request, then the burden was theirs to resolve it in a timely manner.

The ALJ concluded that the testimony of Costco's employees was more credible than that of Soulek, and the Court appreciates the ALJ's vantage point. However, the paperwork Costco generated tells a story, too. Even if their testimony was credible, the paperwork and the timeline here show that Costco simply did not get the request done as expeditiously as it should have. In conclusion, the Court finds that Costco interfered with Soulek's entitlements under the WFMLA by failing to process his leave request in a timely manner.

II. Soulek was not prejudiced by Costco's interference with his WFMLA rights.

Soulek's argument here is that he was prejudiced because he was forced to restructure his leave differently than he would have if Costco had processed his request properly. Soulek primarily relies on the *Lutes* cases, however there, the plaintiff-employee was actually fired when, in apparent ignorance of his FMLA rights, he failed to go to work due to a rib injury. In *Vannoy v. Federal Reserve Bank of Richmond*, 827 F.3d 296 (4th Cir. 2016), as well, the plaintiff-employee

was terminated. In this case, Soulek simply did not get to take his leave when he wanted to. Once he took his leave, there is no evidence to suggest he did not receive the leave to which he was entitled to under the WFMLA. Additionally, Soulek himself is responsible for delaying his leave by at least one week because he went to Florida on or around May 17 through May 22, 2019.

Soulek was obviously not fired or disciplined. The Court is certainly relieved that nothing bad happened, but there is no evidence that working from May 25 through June 2 caused irreparable harm to Soulek's relationship with his newborn or that he was forced to miss critical appointments or once-in-a-lifetime moments with his daughter. The Court does not know what else to say about the matter. The one-week delay may have been inconvenient, but there has been no provable prejudice that the Court can surmise. Therefore, the ALJ's decision concluding that Soulek failed to prove prejudice and dismissal of his complaint is affirmed.

CONCLUSION AND ORDER

Based upon the foregoing, it is hereby **ORDERED** that the Wisconsin Department of Workforce Development, Equal Rights Division's (the "ERD") decision and order dismissing Petitioner Dustin S. Soulek's complaint against Costco Wholesale, Inc. is **AFFIRMED**.