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JOANNE L. EARNHART,  
 Complainant,

v.

Secretary, DEPARTMENT OF  
 HEALTH AND SOCIAL SERVICES,  
 Respondent.

Case No. 89-0025-PC-ER

\* \* \* \* \*

FINAL  
 DECISION  
 AND  
 ORDER

This matter is before the Commission following the promulgation of a proposed decision and order. The Commission has considered the parties objections and arguments with respect to the proposed decision and consulted with the examiner. At this time the Commission adopts as its final resolution of this matter the proposed decision and order, a copy of which is attached hereto and incorporated by reference as if fully set forth, and adds the following comments with respect to the legal issues involved in this case.

In Phillips v. Wisconsin Personnel Commission, 167 Wis. 2d 205, 219, 482 N.W. 2d 121 (Ct. App. 1992), the Court observed: "while there is, admittedly, disparate treatment in this case, not all disparate treatment is discriminatory. It is only where similarly situated persons are treated differently that discrimination is an issue." (citation omitted) In that case, the employe had been denied family health insurance coverage with respect to her "spouse equivalent." She alleged discrimination on the basis of marital status. The Court pointed out that, unlike a married person, the employe had no legal obligation to support her partner, and therefore she was not similarly situated to a married person. In the instant case there was no disparate treatment of a similarly-situated employe. Complainant was not allowed to use doctor's excuses signed by her husband because their marital relationship created a facial conflict of interest<sup>1</sup> An example of a situation involving the disparate treatment of a similarly situated employe would be if respondent accepted

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<sup>1</sup> Complainant's assertions concerning Dr. Earnhart's integrity and objectivity are wide of the mark. A conflict of interest can exist independently of the subjective state of mind or good faith of the person involved.

doctor's excuses signed by an employe's parent, where there also would be a facial conflict of interest. However, there is nothing in the record that suggests such unequal treatment occurred or would occur.

The foregoing conclusion also is supported by Braatz v. LIRC, 168 Wis. 2d 124, 133, 483 N.W. 2d 246 (Ct. App. 1992), a case which also involves health insurance coverage. Married employes with spouses who were employed and covered by comparable insurance through their employment were required to elect between coverage under the employer's policy or their spouse's policy. The Court rejected the argument that "the district's policy does not discriminate on the basis of marital status but, rather, on the condition that the spouse has insurance coverage through employment" on the following basis:


It is only married employes with duplicate coverage who must make a choice between the district's policy or the policy provided by the spouse's employer. Under the district's policy, not all employees who have duplicate insurance are treated the same. Because the policy only applies to married persons, it discriminates on the basis of marital status.

In other words, if the employer's policy had applied "across-the-board" to all employes who had duplicate coverage, its application to an employe whose duplicate coverage stemmed from a spousal relationship apparently would not have been considered discrimination on the basis of marital status. In the instant case, while respondent did not have a general policy on the subject of who could sign doctor's excuses, its objection to complainant's husband signing her excuses was not premised on their marital relationship per se, but on the inherent conflict of interest involved. As noted above, there is no evidence in the record that any other employe who had a non-marital relationship with a doctor that also raised a facial conflict of interest (e.g., parent/child) was not similarly treated, nor was there evidence that would suggest that such dissimilar treatment would occur if the situation should arise.


ORDER

The attached proposed decision and order, as augmented above, is incorporated by reference as if fully set forth and adopted as the Commission's final disposition of this matter, and this complaint is dismissed.

Dated: November 19, 1992 STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

AJT:rcr

  
DONALD R. MURPHY, Commissioner

  
GERALD F. HODDINOTT, Commissioner

Parties:

Joanne Earnhart  
Route 1, Box 387  
Colfax, WI 54730

Gerald Whitburn  
Secretary, DHSS  
P.O. Box 7850  
Madison, WI 53707

NOTICE  
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW  
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

**Petition for Rehearing.** Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

**Petition for Judicial Review.** Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except

that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

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JOANNE L. EARNHART,  
 Complainant,

v.

Secretary, DEPARTMENT OF  
 HEALTH AND SOCIAL SERVICES,  
 Respondent.

Case No. 89-0025-PC-ER

\* \* \* \* \*

PROPOSED  
 DECISION  
 AND  
 ORDER

Nature of the Case

This case involves a charge that respondent discriminated against complainant on the basis of marital status in violation of the Wisconsin Fair Employment Act, Subch. II, Ch 111, Stats. The complainant also initially filed on the basis of retaliation for engaging in Fair Employment Act activities, but subsequently dropped that as a basis for her complaint. A hearing was held before Commissioner Gerald F. Hoddinott and the parties filed briefs subsequent to the completion of the evidentiary hearing.

Findings of Fact

1. At all times relevant to this matter and beginning in February of 1976, complainant was employed as a Licensed Practical Nurse (LPN) at respondent's Northern Wisconsin Center for the Developmentally Disabled. Complainant worked only three (3) or four (4) day shifts during her employment with respondent as an LPN. During all or part of her employment as an LPN, complainant's duties were split between nursing duties and aide duties and she had a different supervisor for each Harland Earnhart, M. D., had been complainant's primary physician since 1970. Complainant and Dr Earnhart married in 1985.

2. Effective November 24, 1985, Northern Wisconsin Center had the following written attendance policy which was set forth as Section 19.35o of Northern Wisconsin Center's Policy and Procedure Manual:

POLICY

It is Northern Wisconsin Center's policy to offer employees assistance when they are dealing with matters that contribute to absenteeism or with other factors that have negative impact on work performance by suggesting employees consult with the Personnel Office and/or the Northern Wisconsin Center Employee Assistance Program. Such referral should not be made as a matter of course but rather on a situation-specific basis when circumstances seem appropriate.

PROCEDURE

1. Unanticipated absences need to be evaluated if the reasons for the absences are not readily apparent. A review of unanticipated absences will occur any time one of the following criteria is reached:

Full Time - 8 hour shift:

# of hours used in 6 months - 48  
# of hours used in 12 months - 72  
# of occurrences in 12 months - 10

Half Time - 8 hours shift.

# of hours used in 6 months - 24  
# of hours used in 12 months - 48  
# of occurrences in 12 months - 5

Half Time - 4 hours shift:

# of hours used in 6 months - 24  
# of hours used in 12 months - 48  
# of occurrences in 12 months - 10

Anyone greater than half time will be reviewed on a basis proportional to the amount for a full time employe.

2. When a more thorough review is necessary, such review will be accomplished by a meeting with the employe. Union representation should be offered when applicable. The employe should be given at least 3 days written notice of the meeting along with a summary of the issues to be discussed. Send copies of all correspondence to the appropriate union when applicable.
3. If the meeting shows to the supervisor's satisfaction that the absences that were reviewed were justified and that there is

no reason to suspect abuse, no further action needs to be taken.

4. If the meeting does not alleviate suspicion of abuse, the employe should receive written notice that all future unanticipated absences will require a medical certificate or other appropriate verification. All such requirements will be reviewed within 90-120 days, at which time the decision to rescind the requirement or to continue it will be made in writing with a copy to the Union when applicable.
5. If subsequent verification is satisfactory, no further action needs to be taken.
6. If subsequent verification is not satisfactory or is not received within 5 calendar days, the absence is to be unpaid and unapproved, and disciplinary action commensurate with the offense may be imposed.

Discipline may be imposed on a progressive basis with the intent of correcting the situation that led to the discipline in the first place. The schedule of discipline will be:

- For the first occurrence of unanticipated absence used in excess of Paragraph 1 of this policy after written notice is presented to the employe as outlined in I9.35o, Paragraph 4, one day suspension.
- For the second occurrence, three day suspension.
- For the third occurrence, five day suspension.
- For the fourth occurrence, discharge.

This directive presupposes employes have paid leave time available to cover their absences. In cases where there is no paid leave available, this may constitute a further violation of work rules subject to further inquiry and discipline.

\*The number of hours and/or 10 occurrences is a guideline only and is not meant to pre-

clude a review of other attendance matters that may be questionable, such as a patter of absenteeism.

Approved: 1 June 1987

The purpose of the policy was to reduce the number of unanticipated absences by employees of the Norther Wisconsin Center. Such unanticipated absences diminished the quality and consistency of client care, disrupted staffing and programming, and increased overtime costs.

3 In June of 1987, the supervisor of complainant's aide duties was Vivian Volker, a shift supervisor for Cottage 6. In a memo to John Heimerl, the Personnel Manager at Northern Wisconsin Center, dated June 22, 1987, Ms. Volker detailed complainant's usage of sick leave from July 31, 1986, through June 21, 1987, and noted that "Employee's seniority date is February 16, 1976. From July 31, 1986 through June 21, 1987 employee has (for six month balance) 9 occurrences and 72 hours; for 1 year balance 12 occurrences and 96 hours. Balance of sick leave as of June 21, 1987 is 23.42 hours." On or around July 7, 1987, respondent conducted a review of this use of sick leave by complainant. As the result of such review, respondent did not discipline complainant or deny her use of sick leave for any of the subject occurrences.

4. In a memo to Ms. Volker dated July 14, 1987, Mark McDermid, Director of Management Services for Northern Wisconsin Center, stated as follows:

As a follow-up to our review of July 7, 1987, you will need to relay some additional information to Ms. Earnhart. Several of the excused absences were excused on the basis of physician statements prepared by her husband. Please extend to Ms. Earnhart our thanks for voluntarily supplying physician documentation. Please advise her that in the future physician statements from her husband do not constitute objective medical evidence supporting the absence. Two of the excused absences from the most recent review were supported by statements from other physicians. Statements from other physicians may constitute objective medical evidence. In the review completed, the statements provided by the two physicians, other than her husband, were acceptable.

This discussion needs to be handled informally. Please let her know that our intent is not to discourage her from providing documentation voluntarily. Our interest is in advising her ahead of time that documentation from her husband will not, in the future, be acceptable. Should JoAnne or her husband have any further questions, they may contact me directly.



At the bottom of this memo, there was a handwritten note which stated "Informal discussion on 7-17-87 - Vivian." Ms. Volker later told Mr. McDermid that she had conducted this discussion with complainant.

5. In a memo to the Attendance Committee dated March 14, 1988, Lu Ann Raymond, a shift supervisor for Cottage 6 and one of complainant's supervisors, stated as follows:

Please review the following information and advise on implementation of Attendance Policy 19.35o.

JoAnne Earnhart, LPN at Cottage 6, has the following unanticipated absences since March 14, 1987: Excused by Committee per memo dated July 8, 1987: May 9, 10

June 5, 6  
June 20, 21

The issue raised in the memo from Mark McDermid July 14, 1987 was discussed with JoAnne by Vivian Volker, IA 4, on July 18, 1987.

This leaves:

1. Sept. 14, 1987	Mon. 8 hrs.	No explanation
2. Nov, 6, 1987	Fri. before weekend X-days; 7 hrs. 50 min.	Sick call 6:10 a.m. Dr. slip to OHN
3. Dec 5, 1987		
4. Dec. 6, 1987	Between X-days Dec. 4 and 9th and 10th	Dr. slip for 4 days to OHN
5. Dec. 7, 1987	32 hrs. total	
6. Dec. 8, 1987		
7. March 11, 1987	Fri. weekend before X-days. 8 hrs.	No Dr. slip provided at this time.
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	Total: 7 occurrences Sept. 14, 1987	55 hrs. 50 min. since

Employee's seniority date is Feb. 16, 1976 Balance of sick leave as of this date is 43 hrs. 52 min.

The reference to March 11, 1987, should have been to March 11, 1988. The term "X-days" refers to scheduled days off



7/29/88	5	8	After 2 X-days. No explanation.
8/14-8/16/88	6, 7, and 8	24	Before 2 X-days. M.D. slip to OHN.
9/6/88	9	8	No explanation.

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Total: 9 occurrences, 72 hours in the past year, 64 hours in the past 6 months.

Employee's seniority date is 2/16/76. Balance of sick leave as of this date is 26.22 hours

9. In a memo dated September 3, 1988, to Terry Willkom, the Director of the Northern Wisconsin Center, complainant wrote that "I am requesting a demotion to an aide position, or BMH, or anything else on the grounds that may require a demotion on my part. I understand it takes permission from you to do so." Mr. Arndt replied in writing to this memo on September 8, 1988, that "We will keep your request on file for consideration when vacancies occur. They have to go through posting and clear transfer requests from other institutions before we can consider you." Complainant was not offered a demotion prior to her termination. The hearing record does not indicate that, at any relevant time, there was a vacant position into which complainant was eligible to demote. Mr. Arndt did not meet with complainant to discuss her request for demotion. Other employees at Northern Wisconsin Center have requested demotions and it is not Mr. Arndt's practice to meet with them.

10. In a memo to Ms. Raymond dated September 15, 1988, Mr. Arndt stated as follows:

Subject: Attendance - JoAnne Earnhart

Reviewed September 13, 1988

The employe has 9 occurrences, 72 hours in 12 months. Please schedule a meeting. I will meet with you but contact me before scheduling the date and time.

At the bottom of this memo there appears the following handwritten notations:

9/16 JoAnne brought MD slip for 9/6 - Sent to Darrell Arndt

Meeting scheduled 9/21 2:00

11. In a letter to complainant dated September 16, 1988, Ms. Raymond stated as follows:

This letter is in reference to your attendance record and Northern Center Attendance Policy 19.35o.

The policy states that when you reach 48 hours of unanticipated absence in six months, or 72 hours in twelve months, or 10 occurrences within a twelve-month period, the circumstances of those absences will be reviewed with your supervisor.

According to the record, you have incurred unanticipated absences on the following occasions:

September 14, 1987  
March 11, 1988  
April 26, 1988  
April 27, 1988  
July 29, 1988  
August 14, 1988  
August 15, 1988  
August 16, 1988  
September 6, 1988

I have scheduled a meeting for us to discuss your absences at 2.00 p.m. on Wednesday, September 21, 1988. Please report to the Aid 4 Office in Cottage 6 at that time or please let me know as soon as possible if we cannot meet on this day for some reason.

The purpose of the meetings is to determine if the absences do, in fact, represent violations of the attendance policy and, if so, we want to see if we can arrive at some means of avoiding further violations. Both the terms of the WSEU contract and the Attendance Policy provide that you may have a union representative present at this meeting.

12. The meeting of September 21, 1988, was held. At such meetings, the usual practice is to give the employee an opportunity to explain and an opportunity to provide a medical excuse for each of the subject absences. The information from the meeting is then forwarded to the Attendance Committee. This was the practice followed at this meeting. Complainant was not asked about the nature or cause of her illness(es). Complainant did not volunteer this information nor ask for assistance in dealing with her illness(es).

13. The Attendance Committee met on October 11, 1988, to discuss complainant's attendance, among other matters. The members of the Attendance Committee at that time were Mr. Arndt; Mr. Willkom; Mr. McDermid; and Irene Jahns, who was Mr. Arndt's assistant and a non-voting member of the Committee. The Attendance Committee was established to implement the institution's attendance policy. The Attendance Committee reviewed the attendance records of approximately 15-25 employees each week who meet the criteria for review set forth in the attendance policy.

14. In reviewing complainant's attendance record on October 11, 1988, the members of the Attendance Committee were concerned about the total number of sick leave hours used by complainant over the relevant time period; the timing of such sick leave usage, i.e., a majority of sick leave was used in conjunction with X-days which are days immediately before or after a scheduled day off, and the fact that her medical excuses were signed by her husband. In view of these concerns, the Attendance Committee decided that complainant should be issued a "mandatory medical slip letter." Other employees at the Northern Wisconsin Center had been issued "mandatory medical slip letters" based on sick leave usage comparable to complainant's.

15. In a memo to Ms. Raymond dated October 17, 1988, Mr. Arndt stated that "The Committee has reviewed the notes of the September 21, 1988 meeting (see Findings 11 and 12) and are recommending she be put on the letter. Please add to the letter, 'slips signed by husband not acceptable.' "

16. Ms. Raymond issued a "mandatory medical slip letter" to complainant on October 19, 1988, which stated as follows:

Your attendance record indicates you have had a number of unanticipated absences. As an employee of Northern Wisconsin Center, you are expected to report to work as scheduled. An initial review of your absences occurred on October 11, 1988. During this review we discussed a wide variety of issues including reasons for your absences. The slips signed by your husband are not acceptable. The frequency of these absences exceed the limits of the Attendance Policy and demonstrate an abusive sick leave pattern.

Subsequent instances of absences will necessitate your obtaining a medical certificate with an explanation of the reason for absence. This includes personal or family illness. A physician other than your husband must complete the attached form in the case of an illness. Your are required to see a physician on the

day of your absence. You can have the physician bill Northern Center at the address shown on top of the attached form. The physician may call the Director of Management Services (723-5542) if there are any questions about billing.

The medical certificate must be given to your supervisor within five (5) calendar days after you return to work. Future instances of absence will be recorded as an absence without leave if:

1. You do not see the physician on the day of your absence;
2. You do not obtain the medical certificate or other appropriate verification;
3. The medical certificate is incomplete;  
To be complete, the medical certificate (required form attached) must include: physician signature or signature of other appropriate health care professional, date and time seen, that the illness did preclude work.
4. The medical certificate is not returned in a timely manner within five (5) days of your return to work;

Your attendance will be carefully monitored and your progress will be reviewed. This requirement will remain in effect until rescinded in writing.

This letter was the standard "mandatory medical slip letter" with the exception of that language relating to the requirement that the medical excuses provided by complainant be signed by a physician other than her husband.

17. In a memo to complainant dated November 2, 1988, Mr. Arndt stated as follows:

Due to conflict of interest in having your husband as your primary physician, it is our position that all of your medical slips, which are now required for any sick leave taken, are to be filled out and signed by a physician other than you husband. Of course the requirement still stands that you be seen by the physician.

Understand that since Management is requiring and paying for these medical slips, we can also designate the physician if necessary. However, at this time we will give you the opportunity to select the physician you prefer to use. Please advise me by November 9, 1988 of your choice of physician.

If you wish to discuss this further, please give me a call and we can set a time when we can meet

18. In a memo to complainant dated November 9, 1992, Mr. Arndt stated as follows:

Pursuant to a request made by Dan Bowe on your behalf, this is to explain the reasons for not accepting medical slips that you presented.

The slip of September 14, 1987 was one signed by your husband. As was discussed with you in the past, slips signed by your husband would not be accepted for the reasons as indicated in the memo which I sent you on November 1, 1988. The slips of August 18, 1988 and September 6, 1988 lead to only more confusion in terms of your medical providers. We do accept slips from physicians' assistants, however, the August 18 slip was on a form with your husband's name on it out of Colfax. The other slip was on a form with Pine Grove Medical Center, Dr. Hanson. Neither slip indicated that you were seen in the offices and only indicated that you were ill and unable to work.

There is not enough information on these slips for the committee to make a reasonable decision based on the confusion as outlined above.

Mr. Bowe was complainant's union representative. The reference to November 1, 1988 was in error and should have referenced November 2, 1988.

Complainant did not explain to respondent that the physician's assistant Mr. Bergeson, worked out of both Dr Earnhart's and Dr. Hanson's offices.

Complainant submitted the physician assistant's bill to Mr Arndt but it was never paid. The responsibility for payment rests with the business office, not the personnel office.

19. In a letter to complainant dated November 29, 1988, Ms. Raymond stated as follows:

You are instructed to attend the meeting which has been scheduled for 1400, Friday, December 2, 1988 to review you recent absences and failure to follow the written instructions given you by letter dated October 19, 1988.

The meeting will be held in the office of the Unit Director in Cottage 6. Arrangements have been made for Union Representative Daniel Bowe to be present. Also, attending will be the Personnel Director and the Shift Supervisor.

Since the letter of October 19, 1988, the record shows you were absent on November 5, 6, 7, 8, and 14, 1988. To date, physician slips have not been received by your supervisor from you. The record further indicates absence on November 29, 1988.

20. The meeting scheduled for December 2, 1988, was rescheduled for December 7, 1988. The December 2, 1988, meeting was cancelled because complainant was unavailable due to a work-related emergency. The December 7, 1988 meeting was not held because complainant had tendered her resignation.

21. On December 3, 1988, complainant submitted her resignation from her LPN position to Mr. Willkom. Mr. Willkom acknowledged her resignation, which was effective December 11, 1988, in a letter to complainant dated December 8, 1988. Complainant resigned due to the application of the attendance policy to her and to pressure she felt from meetings relating to the policy being cancelled and rescheduled.

22. In a letter to complainant dated December 19, 1988, Mr. Arndt stated as follows:

In reviewing your final earnings and the use of sick leave, this is to advise you that the sick leave slips provided for November 14, November 29 and December 4, 1988, which were signed by your husband, were not accepted. You were provided notice previously that any medical documentation should be from an independent physician and that your husband's medical slips would not be accepted.

Due to this, the above three dates do not meet the requirements of the mandatory sick leave slip letter which you received October 19, 1988.

Since acceptable documentation was not provided, the sick leave you used on November 14, 19 and December 4 is not approved. In that you have already been paid up to date and your prior usage of vacation time exhausted your final earnings paycheck, it is necessary for you to refund wages paid to you on the above dates. Attached is the salary overpayment notice in which you are expected to refund Northern Wisconsin Center \$224. 51.

Mr. Arndt referred this matter to the business office of Northern Wisconsin Center for collection. It was the practice at Northern Wisconsin Center to retroactively deny sick leave usage for any occurrences which the Attendance Committee did not consider to have been adequately verified.

23. Complainant did not have an exit interview. Such interviews are conducted by Mr. Arndt or a member of his staff but are not mandatory. Complainant did not request an exit interview

24. There was no other employee at Northern Wisconsin Center who had exceeded the sick leave usage limits stated in the attendance policy and whose



spouse had issued the medical excuses for such sick leave absences as the treating physician.

#### Conclusions of Law

1. The Commission has jurisdiction over this matter pursuant to §230 45(1)(b), Stats.
2. Respondent is an employer within the meaning of §111.32(6), Stats.
3. Complainant has the burden to show that probable cause exists to believe that respondent discriminated against her on the basis of her marital status as alleged in her complaint of discrimination.
4. Complainant has not sustained this burden.

#### Opinion

The parties agreed to the following issue

Whether there is probable cause to believe that respondent discriminated against the complainant based on her marital status as alleged in her complaint of discrimination.

Complainant alleges in her complaint of discrimination that the manner in which respondent applied its attendance policy to her constituted discrimination on the basis of marital status.

The issue under consideration is one of probable cause. Probable cause is defined in §PC 1.02(16), Wis Adm. Code, as a reasonable ground for belief, supported by facts and circumstances, strong enough in themselves to warrant a prudent person to believe that discrimination has been or is being committed. Although the Commission recognizes that the burden on a complainant to show probable cause is not as rigorous as the burden to prove discrimination, it is useful in the context of a probable cause proceeding such as the instant one to utilize the analytical frameworks and guidance provided by decisions on the merits in discrimination cases to assist the Commission in reaching a decision on probable cause. The Commission will follow this course in reaching a decision here on probable cause.

In analyzing a claim such as the one under consideration here, the Commission generally uses the method of analysis set forth in McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668, 5 FEP Cases 965 (1973), and its progeny, to determine the merits of the complainant's

charge. Under this method, the initial burden is on the complainant to establish the existence of a prima facie case of discrimination. The employer may rebut this prima facie case by articulating legitimate, non-discriminatory reasons for the actions taken which the complainant may, in turn, attempt to show were in fact pretexts for discrimination.

Under the facts of this case, complainant was a member of a class protected by the Fair Employment Act as the result of her marital status and conditions were placed on her usage of sick leave as the result of her marriage to her treating physician. Since the complainant is not claiming discrimination on the basis of her marital status per se, but rather on the basis of the identity of her spouse, the Commission concludes that the circumstances under consideration here could raise an inference of discrimination.

The burden then shifts to the respondent to articulate legitimate, non-discriminatory reasons for its actions. Respondent's position in this regard is that conditions were placed on complainant's usage of sick leave due to the fact that her usage had met or exceeded the sick leave limits specified in the attendance policy; and that medical excuses from Dr. Earnhart were not accepted since it was felt their marital relationship could affect his objectivity. Both of these reasons are legitimate and non-discriminatory on their face.

The burden then shifts to complainant to show that the reasons offered by respondent were pretexts for discrimination. Complainant argues in this regard that respondent's failure to follow its own policies and practices in dealing with complainant's attendance demonstrates pretext. Specifically, complainant has alleged that the following actions on respondent's part relating to complainant's attendance demonstrate respondent's failure to follow its own policies and practices

a respondent's attempt to gain access to complainant's medical records. However, the record does not indicate that respondent ever made such an attempt. The record does show that Mr. Arndt gave complainant the opportunity to provide such information but not that he requested or required that she do so and that this was the practice generally followed by Northern Wisconsin Center.

b. respondent's decision not to permit complainant to submit medical excuses signed by a physician's assistant when such excuses were accepted from other Northern Wisconsin Center employees. However, the record shows

that, although Mr. Arndt may have told complainant at one point in time that he did not know whether it was the practice to accept such excuses, he later told her that he had checked and such excuses would be accepted. Although he also indicated that the Attendance Committee had some questions about excuses signed by a physicians assistant which indicated that he was acting on behalf of Dr. Earnhart, the basis for the questions was the identity of the supervising physician, not the fact that they were signed by a physicians assistant.

c. respondent's requirement that complainant disclose the nature of her illness to respondent. However, the record does not indicate that respondent ever required or even requested such a disclosure. Moreover, complainant has implied in her testimony and argument that respondent's insensitive attitude toward her was further demonstrated by respondent's failure to ascertain the nature of her illness and the manner in which her work environment was contributing to it. This is curious given complainant's allegation that respondent had required that she disclose the nature of her illness and her argument that this constituted evidence of discrimination.

d. respondent's requirement that complainant be seen by a physician on the date that she requested sick leave and that this physician complete a form provided by respondent. The requirements that an employe actually see a physician on the date for which sick leave is , however, were set forth in the "mandatory medical slip letter" issued to complainant as well as in the standard "mandatory medical slip letter" issued to other Northern Wisconsin Center employees. Complainant has failed to show that she was treated differently than other employees in this regard.

e. respondent's retroactive disapproval of three days of sick leave claimed by complainant. The record shows, however, that this was the practice employed by Northern Wisconsin Center when it was concluded that an employee on a "mandatory medical slip letter" had not presented acceptable medical verification of an absence for which sick leave was requested. Complainant has failed to show that she was treated differently than other employees in this regard

f. respondent's designation of who complainant's treating physician should be. Actually, the record show that respondent did not specify who complainant's treating physician should be, but who the physician issuing her medical excuses should not be. There was no requirement by respondent

that complainant actually be treated by the physician issuing her medical excuse, only that her incapacity to work on the days for which she was claiming sick leave be verified by this physician. This requirement did not actually interfere with complainant's right to choose her own treating physician, as alleged by complainant.

Complainant has failed to demonstrate pretext in regard to any of the listed allegations.

Complainant's basic argument in this case, however, is that she was not permitted to submit medical excuses signed by her treating physician or someone acting as his agent because she was married to her treating physician. Complainant is not arguing, therefore, that she was discriminated against based on her marital status per se, but on the basis of the identity of the person to whom she was married. The Commission has upheld the Fair Employment Act's application to such situations in Ray v. DHSS, Case No. 83-0129-PC (10/10/84), *aff'd* by Dane Co. Circ. Ct., Ray v. Pers. Comm. 84-CV-6165 (5/15/85).

The Fair Employment Act states in pertinent part:

"Marital Status" means the status of being married, single, divorced, separated, or widowed. Section 111.32(12), Stats.

Notwithstanding §111.32, it is not employment discrimination because of marital status to prohibit an individual from directly supervising or being directly supervised by his or her spouse. Section 111.345, Stats.

In the interpretation of this subchapter, and otherwise, it is declared to be the public policy of the state to encourage and foster to the fullest extent practicable the employment of all properly qualified . . . individuals regardless of age, race, creed, color, handicap, marital status, sex, national origin, . . . ancestry, sexual orientation, arrest record or conviction record. This subchapter shall be liberally construed for the accomplishment of this purpose.

In the Ray decision cited above, the Commission held that the exception stated in §111.345, Stats., was not meant to be an exhaustive statement of all exceptions to the FEA's prohibition against marital status discrimination. The stated exception has many of the same characteristics as the situation under consideration here. By including such an exception, the Legislature acknowledged that a married employee may be treated differently than other employees if the employer is presented with a situation in which this married em-

ployee is required to objectively evaluate or be objectively evaluated by his or her spouse. That is the situation we have here and the Commission concludes that respondent's requirement that complainant's medical excuses be signed by a physician other than her husband did not constitute discrimination on the basis of marital status.

Complainant presents a public policy argument in support of her position in this case; i.e., that public policy favors an individual's right to choose his or her own treating physician. As discussed above, the Commission has concluded that respondent did not require that complainant be treated by a physician other than her husband, only that her medical excuses be issued by a physician other than her husband. In addition, state law and ethics requirements are replete with examples of requirements imposed based on the presumption that the marital relationship interferes with the presence of or the perception of objectivity. Generally, judges are not permitted to participate in decisions in which their spouse may have an interest; attorneys are not permitted to draft wills under which their spouse may receive some benefit; public officials are not permitted to participate in decisions which could result in some benefit to their spouse; notaries are not permitted to notarize their spouse's signature on a document.

Complainant cites Federal Rural Electric Insurance Co. v. Kessler, 388 N.W. 2d 553 (Wis. 1986) in support of her position in this case. However, this decision relates to a claim of discrimination on the basis of marital status per se, which the instant case does not; and was brought pursuant to a city ordinance, not the state Fair Employment Act. As a consequence, its application to the instant case is unclear.

The complainant has failed to show that there is probable cause to believe that she was discriminated against on the basis of her marital status.

In its post-hearing brief, respondent asked the Commission to disregard complainant's brief due to the "unexplained delay" in filing it. The Commission denies respondent's request and will consider the brief. The Commission believes that parties should have a full opportunity to present their case. In addition, complainant responded quickly and timely to the revised briefing schedule set by the Commission. Considering the delay that has already occurred, it seems more judicious to allow complainant's brief to be considered.

Order

This complaint is dismissed.

Dated: \_\_\_\_\_, 1992      STATE PERSONNEL COMMISSION

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LAURIE R McCALLUM, Chairperson

LRM/lrm/gdt

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