

TERESSA LAWLESS,

Complainant,

v.

Chancellor, UNIVERSITY OF  
WISCONSIN - MADISON

Respondent.

Case No. 90-0023-PC-ER

DECISION  
AND  
ORDER

This matter is before the Commission as a complaint of discrimination under the family leave and medical leave law, §103.10, Wis. Stats. Complainant alleges that the respondent denied her leave to which she was entitled under the law by denying her request to substitute accrued paid leave for family leave and medical leave in a particular sequence.

Complainant filed her complaint with the Commission on February 20, 1990. The complaint states, in part:

Theresa [sic] Lawless is an RN employed by the University of Wisconsin Hospital. She requested a medical leave of absence due to pregnancy and requested to use her paid leave time in a sequence to maximize her paid time off. She requested to use her compensatory and vacation/holiday time first since she is required to use any carryover. She then requested her sick leave. Management is requiring her to use her sick time first which violated the spirit and intent of the family medical leave act.

The Commission convened a conference between the parties on February 22nd. During the conference, the parties agreed to waive the investigation of the complaint, to bypass the probable cause stage and to proceed directly to a decision on the merits based upon briefs and supporting affidavits.

The facts set out below appear to be undisputed.

#### FINDINGS OF FACT

1. Complainant has been employed as a Registered Nurse with the respondent for six years.

2. During 1989, complainant worked 48 hours each two-week pay period, or approximately 96 hours per month.

3. On January 4, 1990, complainant requested a six month leave of absence for the anticipated birth of her third child early in March.

4. Complainant requested that her leave commence March 6, 1990, and requested that she be allowed to use paid leave according to the following schedule:

Pay Period	Leave Requested
3/11 to 3/24	48.0 hrs. compensatory time
3/25 to 4/7	48.0 hrs. compensatory time
4/8 to 4/21	48.0 hrs. compensatory time
4/22 to 5/5	44.9 hrs. compensatory time 3.1 hrs. legal holiday
5/6 to 5/19	47.3 hrs. legal holiday 0.7 hrs. vacation
5/20 to 6/2	48.0 hrs. vacation
6/3 to 6/16	26.1 hrs. vacation 14.4 hrs. personal holiday 7.5 hrs. sick leave
7/1 to 7/14	48.0 hrs. sick leave
7/15 to 7/28	16.8 hrs. legal holiday 11.2 hrs. sick leave 20.0 hrs. vacation
7/29 to 8/11	40.0 hrs. vacation

5. Article VI, Section 6 of the collective bargaining agreement which applies to the complainant's position reads, in part:

(2) Pregnant employes shall be granted a maternity leave of absence without pay as follows:

(a) The employe shall submit written notification to her immediate supervisor at least four (4) weeks prior to her anticipated departure stating the probable duration of the leave. Such leaves shall be granted for a period of time up to, but not exceeding six (6) months. Upon request of the employe and at the discretion of the appointing authority, maternity leaves of absence without pay may be extended or renewed for another period of time, not to exceed six (6) months. In no case shall the total period of leave for maternity, including use of vacation, sick leave, compensatory time, holidays or leave of absence without pay, exceed twelve (12) months.

\* \* \*

(c) Except as provided under Article VI, Section 4 of this Agreement (sick leave), all periods of leave related to maternity shall be leaves of absence without pay.

6. Article VI, Section 4 of the agreement provides, in part:

(1) Employees may use accrued sick leave for personal illnesses, bodily injuries, maternity, or exposure to contagious disease: (a) which require the employe's confinement; or (b) which tender the employe unable to perform assigned duties; or (c) where performance of assigned duties would jeopardize the employe's health or recovery.

7. By letter dated January 22, 1990, Judith Broad, respondent's Director of Nursing, informed the complainant:

Your request for a six month maternity leave to commence March 6, 1990 is granted. However, your request for specific use of benefit time, as discussed in your January 4, 1990 letter, is denied.

The use of sick leave as it pertains to a maternity leave is intended for that period of time immediately following the birth of the baby. Therefore, your request to begin to use sick leave in the pay period of June 3-16 (approximately the 14th week after the birth) is denied.

8. Under the terms of the collective bargaining agreement which applies to the complainant's employment, a number of hours of complainant's compensatory and vacation time will lapse unless they are used in May or June of 1990.

9. Complainant gave birth to a son on March 5, 1990.

#### CONCLUSIONS OF LAW

1. Respondent is an employer as defined in §103.10(1)(c), Stats.
2. Complainant is an employe as defined in §103.10(1)(b), Stats.
3. The Commission has jurisdiction over this matter pursuant to §103.10(12), Stats.
4. The burden of proof is on the complainant to establish that the respondent's decision reflected in Ms. Broad's letter of January 22, 1990, not to permit the complainant to use sick leave commencing in the pay period of

June 3 through 16, 1990, constituted discrimination under the family leave and medical leave law.

5. Complainant has failed to sustain her burden of proof.

6. The respondent's decision not to grant the complainant sick leave commencing in the pay period of June 3 through 16, 1990, does not violate the provisions of §103.10, Stats.

#### DISCUSSION

The family leave and medical leave law, enacted as 1987 Wisconsin Act 287 on April 15, 1988, provides that employees of the State of Wisconsin are entitled to unpaid leave upon the birth or adoption of a child or when the employee or a member of the employee's family is suffering from a serious health condition.

Pursuant to §103.10(3), Stats., an employee is entitled to 6 weeks of family leave for the birth of the employee's natural child. Pursuant to §103.10(4), Stats., an employee who "has a serious health condition which makes the employee unable to perform his or her employment duties" is entitled to 2 weeks of medical leave. The term "serious health condition" is defined in §103.10(1)(g), Stats., as:

[A] disabling physical or mental illness, injury, impairment or condition involving any of the following:

1. Inpatient care in a hospital ... nursing home ... or hospice.
2. Outpatient care that requires continuing treatment or supervision by a health care provider.

Even though the law only requires the employer to provide unpaid family leave and medical leave, an employee may, pursuant to §103.10(4)(b), Stats., substitute other leave for the statutory leave:

An employee may substitute, for portions of family leave or medical leave, paid or unpaid leave of any other type provided by the employer.

Administrative rules which have been issued by the Department of Industry, Labor and Human Relations (DILHR) provide that substitution is "[a]t the op-

tion of the employe" and that the employe may substitute "any other paid or unpaid leave which has accrued." §Ind 86.03(1), Wis. Adm. Code.<sup>1</sup> The issue raised by the instant complaint is whether the substitution provision extends beyond the first six or eight weeks of leave where the employe has chosen to take a maternity leave of 6 months as permitted by the applicable bargaining agreement.

Family leave for the birth of the employe's natural child must begin "within 16 weeks of the child's birth." §103.10(3)(b)1., Stats. Based on this provision (and the interpretive rules found in §Ind 86.02(6)(a), Wis. Adm. Code), the complainant could have chosen to have commenced her family leave 14 weeks after the date of birth and, pursuant to the substitution clause, could have substituted 6 weeks of accrued sick leave for the 6 weeks of unpaid leave provided by statute. However, the complainant understandably chose to commence her leave on March 6th, which turned out to be one day after the birth of her son. When complainant commenced her leave, she commenced not only her 6 month contractual leave but also her 6 week family leave. This conclusion is dictated by the language of §Ind 86.01(6), Wis. Adm. Code:

(6) To the extent that an employer grants leave to an employe for the birth of the employe's natural child in a manner which is no more restrictive than the leave available to that employe under s. 103.10(3)(b)1., Stats., the leave granted by the employer shall be deemed to be leave available to that employe under s. 103.10(3)(b)1., Stats.

Similar language exists for medical leave provided to an employe because of the employe's own health. §Ind 86.01(9), Wis. Adm. Code.

Therefore, the complainant's 6 weeks of family leave arising from the birth of her son commences on March 6 and ends well before June 3rd which is when the complainant requested that sick leave first be substituted for unpaid leave.<sup>2</sup> By June 3rd, the complainant's leave will no longer be granted to

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<sup>1</sup>Pursuant to §103.10(12), Stats., the responsibility for conducting administrative proceedings under the law is split between the Personnel Commission and DILHR. The Commission processes complaints filed by all employes of state government while DILHR processes complaints relating to all other employers. DILHR has authority under §101.02(2), Stats., to "adopt ... rules ... relative to the exercise of its powers and authorities ...."

<sup>2</sup>In her reply brief, complainant contends that she has a

her under the family leave law. By then, her leave will arise solely from the terms of her collective bargaining agreement.<sup>3</sup> Any dispute as to whether that contractual leave must be paid or unpaid has to be resolved in the manner prescribed by the agreement itself. The Commission lacks the authority to rule on such a dispute.

Based on the above analysis, the decision by the respondent not to permit the complainant to take sick leave commencing June 3, 1990, does not violate the family leave and medical leave law and the Commission issues the following

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right to eight weeks of leave. Two weeks of [medical] leave depend on her medical condition after the birth and therefore must begin with the birth. Six more weeks--full-or part-time-- [of family leave] must begin within sixteen weeks of the birth of the child.

Even if the complainant were found to qualify for 2 full weeks of medical leave commencing with the date of the birth of her son, the total of 8 weeks of statutory leave would be completed before the June 3rd date for substituting sick leave.

<sup>3</sup>An exception to this statement would exist if, on June 3rd or some other date, the complainant or her son suffered from a "serious health condition" which would entitle the complainant to up to 2 weeks of medical leave or up to 2 weeks of additional family leave, respectively. Nothing in the record suggests that a "serious health condition" will exist at that time.

ORDER

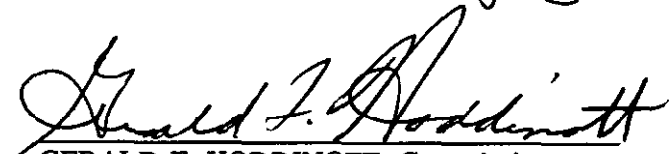
This matter is dismissed.

Dated: April 12, 1990 STATE PERSONNEL COMMISSION

  
LAURIE R. MCCALLUM, Chairperson

KMS:kms

  
DONALD R. MURPHY, Commissioner

  
GERALD F. HODDINOTT, Commissioner

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