STATE OF WISCONSIN PERSONNEL COMMISSION

JANICE SIEGER,

Complainant,

v.

Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondent.

Case No. 90-0085-PC-ER

INTERIM ORDER

In Sieger v. Wisconsin Personnel Commission, No. 93-01713 (Ct. App. Jan. 11, 1994), the Court of Appeals reversed and remanded this matter, stating as follows, in pertinent part:

> The record contains no evidence concerning the medical necessity of Sieger's requested leave . . . While ample evidence existed to demonstrate that lay persons recognized that Sieger's symptoms were interfering with her ability to perform her work duties, no evidence exists to demonstrate that lay persons were capable of concluding from those symptoms that a leave was medically necessary. Indeed, we can find no evidence in the record that directly relates to the issue of whether Sieger's leave was medically necessary. Without this evidence, the broader issue of whether DHSS violated the FMLA by denying Sieger's requested leave and disciplining her for taking that leave cannot be resolved. Sieger at 15 and 16.

After the remand was effected, the Commission scheduled the matter for hearing. Complainant has indicated that she:

> . . . is planning on calling the treating physician, Dr. Mary Berg to testify that Ms. Sieger was under continuing treatment and that she was unable to work. Dr. Berg will be testifying from her memory and from the facts set forth in the transcript from the previous hearing. While Dr. Berg has provided Ms. Sieger with medical records, we have asked Dr. Berg not to review those records pending the decision in this matter. Ms. Sieger believes that from the facts in the transcript and from her memory, Dr.

> Berg can give a medical opinion to a reasonable degree of certainty that Ms. Sieger suffered a serious health condition. . . . Petitioner is also planning to call a psychotherapist who was also treating Ms. Sieger at the time to corroborate Dr. Berg's testimony.
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> . . . Dr. Berg, the only treating physician that examined Ms. Sieger, is the person who can competently testify that the serious health condition existed and Ms. Sieger was accordingly entitled to leave under the act. However, that is the furthest extent that Dr. Berg's testimony is needed.

In a letter to complainant's counsel dated December 1, 1994, counsel for respondent stated as follows:

> I respectfully request that you arrange with Dr. Berg for limited authorization for release of complainant's medical records to the respondent's Office of Legal Counsel. Such records would include any and all medical records, notes or other documents relevant to Janice Sieger and the testimony she provided relating to her medical condition as found in the transcript of the Personnel Commission hearing . . .
>
> I have enclosed a form that you can use for purposes of the release. Please note that this form prohibits discussion with Dr. Berg or any other treating physician and requires us to provide you with copies of documents obtained.

On or around December 28, 1994, counsel for complainant notified counsel for respondent during the course of a telephone conversation that complainant objected to the release of such medical information and would not be providing it to respondent. During the course of a status conference on December 29, 1994, counsel for respondent offered a motion to compel discovery of such information. The parties were permitted to file written arguments relating to such motion and the final argument was filed with the Commission on January 17, 1995.

All parties to a case before the Commission may obtain discovery and preserve testimony as provided by Ch. 804, Stats. §PC 4.03, Wis. Adm. Code. Section 804.01(2)(a), Stats., states as follows:

> *In general.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having

> knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Section 905.04(4)(c), in limiting the scope of the physician-patient, the psychologist-patient, the social worker-patient, and the professional therapist/counselor patient, states as follows, in pertinent part:

> There is no privilege under this section as to communications relevant to or within the scope of discovery examination of an issue of the physical, mental or emotional condition of a patient in any proceedings in which the patient relies upon the condition as an element of the patient's claim or defense . . .

In filing an action under the Wisconsin Family and Medical Leave Act (FMLA) and in asserting and endeavoring to prove that she was suffering from a serious medical condition which made her requested leave medically necessary within the meaning of the FMLA, complainant has placed in issue her "physical, mental or emotional condition." As a result, the Commission concludes, consistent with §905.04, Stats., that the requested medical records are not privileged. Moreover, the physical, mental, or emotional condition of complainant at the time of the requested leave, as one of the central areas of inquiry and proof here, would clearly be "relevant to the subject matter involved in the pending action," within the meaning of §804.01(2)(a), Stats., and, as a result, the records created in relation to the treatment of such condition would be discoverable. This result is consistent with Wisconsin case law authority. For example, the Court of Appeals stated as follows in Ambrose v. General Cas. Co., 156 Wis. 2d 306, 456 N.W. 2d 642 (Ct. App. 1990), in pertinent part:

> . . . Wisconsin discovery law reflects a principle of liberal and open pretrial discovery. . . . Further, in a contest between the medical records discovery rule and the claimant's physician-patient privilege, the discovery rule wins. . . The medical records inspection rule is remedial and is to be construed liberally, while the physcian-patient privilege is to be strictly construed.
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> A proper construction of sec. 804.10(2), Stats., gives effect both to the values served by liberal discovery and the values served by the physician-patient privilege. . . . We conclude that under sec. 804.10(2) a circuit court may order the claimant to consent to inspection and copying of health care records and reports of treatment of injuries and medical conditions incurred prior to the claimed injury, if two conditions are met. First, the

> requester makes a showing that the health care records and reports sought are reasonably calculated to lead to the discovery of admissible evidence. [See footnote below] *See* sec. 804.10(2)(a). Second, the claimant is given an opportunity to assert his or her physician-patient prvilege, subject to sec. 905.04(4)(c), Stats.
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> [footnote] Such a showing is not, of course, required where the requested health care records and reports concern the injuries claimed and the treatment thereof. The claimant may successfully resist disclosing such a record or report only by showing that the record or report is not relevant to or within the scope of discovery examination of an issue of the physical, mental or emotional condition of the claimant-patient.

Here, the medical information sought to be discovered is clearly relevant to one of the central areas of inquiry and proof and, accordingly, clearly discoverable.

Complainant argues against the discovery of such records by asserting that Dr. Berg will be testifying based on her "memory" of complainant's condition at the time of the leave request, not on her present review of such records. It is disingenuous, however, to assert that the opinion to be expressed by Dr. Berg in her testimony as to the nature and severity of complainant's health condition and the medical necessity of the requested leave will not be based primarily on the information obtained by Dr. Berg through her examination and treatment of complainant during the relevant time period. The records being sought here are the means by which Dr. Berg memorialized this information. The "memory" from which it is asserted that she will be testifying is her present recall of this information. The conclusion expressed above that the information under consideration here is discoverable is actually strengthened by complainant's stated intent to call Dr. Berg and a psychotherapist who was treating complainant during the relevant time period as witnesses and ask them to express an opinion as to whether complainant had a serious health condition and whether the requested leave was medically necessary. It would be incongruous from a litigation standpoint to give complainant an opportunity to offer this testimony without giving respondent an opportunity to review the information upon which this testimony is based for cross-examination purposes and an opportunity to have its medical or other expert review it for rebuttal purposes.

Complainant also argues that, since complainant's employer would not be entitled to request or obtain such information in reviewing a request for

medical leave under the FMLA, respondent should not now be permitted to obtain such information within the context of the litigation of an FMLA complaint. However, these two processes are governed by different requirements. The statutory framework for requesting and obtaining information under the FMLA is not co-extensive with the statutory framework for requesting and obtaining information as a part of litigation. Complainant would have to show that the records sought here are not discoverable within the litigation framework and this she has failed to do.

Complainant also seeks to draw a distinction between the type of information provided by a patient to a health care professional when the patient has broken his or her arm, and the type of information provided to a health care professional during treatment of a mental or emotional condition, i.e., the records sought here contain "intimate thoughts" which are not "medical facts which support a diagnosis" but "private thoughts." The distinction sought to be drawn here is an artificial one. When a litigant places in issue a health problem based upon a mental or emotional condition as complainant has done here, the related medical records have not been shown to have a different discovery status than medical records related to a different type of health problem. Complainant offers no authority for her position in this regard.

Order

Respondent's Motion to Compel is granted. Complainant is ordered to take whatever action is necessary to make the subject records available to respondent within 30 days of the date of this order.

Dated: February 6, 1995 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

LRM:lrm