STATE OF WISCONSIN CIRCUIT COURT BRANCH 8 DANE COUNTY

STEVEN G. BUTZLAFF,

Petitioner,

vs.

WISCONSIN PERSONNEL COMMISSION,

Respondent.

Case No. **90-CV-4043**

Filed: 4-23-91

DECISION AND ORDER

PROCEDURAL POSTURE

This is before me on petition for review of a decision by the Wisconsin Personnel Commission (WPC) dismissing, for lack of jurisdiction, Petitioner Steven G. Butzlaff's complaint alleging that the Department of Health and Social Services (DHSS) discriminated against him in violation of the Family and Medical Leave Act (FMLA), sec. 103.10, Stats. For reasons which follow, I conclude Mr. Butzlaff is entitled to a hearing.

STANDARD OF REVIEW

This is a matter of statutory construction and interpretation. Accordingly, as both parties agree, I look at the matter de novo. The interpretation and application of a statute to undisputed facts is a question of law which is reviewable by this court ab initio. Sec. 227.57(5) Stats., West

Bend Co. v. LIRC, 149 Wis 2d 110, 117, 438 N.W. 2d 823 (1989). Courts are not required to accept agency interpretations of statutes even though they may frequently refrain from exercising their power to substitute their own interpretation for that of an agency, and even though there are situations in which courts are encouraged to defer to agencies. West Bend Education Ass'n v. WERC, 121 Wis. 2d 1, 11-14, 357 N.W. 2d 534 (1984).

The de novo standard was recently reaffirmed by the Wisconsin Court of Appeals specifically for cases such as this. M.P.I. Wisconsin Machining Division v. Schimmel, No. 90-0844 (Ct. App. ordered published Dec. 20, 1990). In Schimmel, the Court of Appeals also addressed statutory construction of the FMLA. It held that review under FMLA is different from general agency review because FMLA "contains an unusual provision allowing direct appeal of an examiner's decision and order to the trial court with no intervening review by a commission." Schimmel at 5. The court further stated that it:

> "...would decline to extend greater deference to the conclusions of law of a single, unreviewed hearing examiner than [it] would to those of a trial court."

Thus, the court concluded that

> "the de novo standard is appropriately applied to conclusions of law by a single hearing examiner interpreting sec. 103.10, Stats."

Schimmel at 6.

FACTS

Officer Butzlaff was employed by the State of Wisconsin at the University of Wisconsin-Madison Police and Security Department from November 1984 to July 1989. From July 1989 to January 1990 he was not employed by the State. On January 29, 1990 he was hired again by the State of Wisconsin, this time as a security officer at Mendota Mental Health Institute. The position he filled at Mendota was that of Security Officer III. This was the same position he had held at the University. Benefits he had accrued while working at the University were continued to Mendota. Several documents related to his hiring at Mendota describe it as a "reinstatement" to work for the State.

On March 8, 1990 Officer Butzlaff left work for approximately 2-1/2 hours to take his son to the hospital after the boy suffered a seizure. On or about April 9, 1990, he took time off from work to care for his wife who was having some medical problems. Butzlaff claims that Julius Grulke, a security supervisor at Mendota, rebuked him for these absences and on May 2, 1990, fired him. Butzlaff then filed a complaint with WPC alleging discriminatory firing.

Officer Butzlaff's complaint was dismissed by WPC for lack of jurisdiction. WPC claimed that the FMLA did not apply to Officer Butzlaff because he had not been employed for the requisite amount of time. This claimed lack of jurisdiction was based on a hearing examiner's interpretation of sec.

103.10(2)(c), Stats., of the FMLA.

DECISION

The pivotal question is whether the disputed statutory language is ambiguous. A statute is ambiguous if it is capable of being construed differently by reasonably well informed people. Schimmel at 7 citing La Crosse Footwear v. LIRC, 147 Wis. 2d 419, 423, 434 N.W. 2d 392 (Ct. App. 1988); State v. Williquette, 129 Wis. 2d 239, 248, 385 N.W. 2d 145 (1986).

The ambiguity to be clarified here is whether Officer Butzlaff was employed for the length of time required to be covered by the FMLA. The dispute is over the "52 consecutive week requirement" of sec. 103.10(2)(c), Stats. The statute reads:

> "This section only applies to an employe who has been employed by the same employer for more than 52 consecutive weeks and who worked for the employer for at least 1,000 hours during the preceding 52-week period." (emphasis added)

The conflict is in determining whether the 52 consecutive weeks referred to in the statute has to be the 52 consecutive weeks immediately preceding a claim under the FMLA.

Officer Butzlaff relies in part on the maxim of statutory interpretation, expressio unius est exclusio alterius. He argues that since there is no explicit requirement in the first part of the statute's sentence that the 52 consecutive weeks be the immediately preceding ones, and since later in the same sentence

of the statute (relating to the "1,000 hour requirement") there is a requirement that a 52 week period be the immediately preceding one, that the first 52 week period is thus not required to immediately precede a claim. Butzlaff had worked for the state for more than 52 consecutive weeks when he was at his University job and therefore believes that he is covered by the FMLA.

WPC argues that Butzlaff employs a "what might have been" theory and refers to the Wisconsin Supreme Court's statement that "[p]rimarily . . . the meaning must be read from the language chosen by the legislature, . . ." State ex rel. Neelen v. Lucas, 24 Wis. 2d 262, 268, 128 N.W. 2d 425 (1964). WPC also argues that the proper grammatical interpretation of the words "has been employed" and "worked" in the statute should control. The Commission relies heavily on a case from Indiana which deals with the exact tenses in conflict here. Payne v. State, 396 N.E. 2d 439 (Ind. App., 1979).

It is true that it would be helpful if everyone wrote with perfect grammar. However, even perfectly grammatical writing is subject to interpretation, especially when it is ambiguous.

> "[T]he meaning of some words in a statute may be enlarged or restricted in order to harmonize them with the legislative intent of the entire statute."

Town of Menominee v. Skubitz, 53 Wis. 2d 430, 437, 192 N.W. 2d 887 (1972). It is the intention of the statute which governs.

WPC further argues that liberal construction is "not germane to this case." It cites the Wisconsin Supreme Court for the

proposition that:

> "The general liberal construction rule is subject to one limitation, . . . [that] court interpretation of a statute is not to be used as a device for repealing it or changing its obvious meaning. . . ."

Larson v. ILHR Department, 76 Wis. 2d 595, 615, 252 N.W. 2d 33 (1977). In this case, however, there is not an obvious meaning to this portion of the statute. Therefore, a liberal construction of the statute is proper.

WPC refers to part of Butzlaff's argument as "reinstatement by waiver." This refers to his assertion that even if the 52 consecutive week requirement applied to the time immediately preceding a claim, the state waived this requirement when it reinstated him at his previous position, with his previous benefits. As a preliminary matter, this argument is not, as WPC suggests, a "Johnny Come Lately." Butzlaff presented it in his brief to the commission (pages 4, 5, and 11) and it is therefore properly argued on appeal.

Since I conclude that the 52 consecutive weeks need not be the immediately preceding ones, there is no "requirement" to be waived before FMLA rights are reinstated. If there were such a requirement, it would not matter in this case. The statute clearly states, as Butzlaff points out that:

> "[n]othing . . . prohibits an employer from providing employes with rights to family leave or medical leave which are more generous to the employe than the rights under this section."

Section 103.10(2)(a), Stats. By "rehiring" or "reinstating" Butzlaff, and by providing him with accrued sick leave and other

collateral benefits, the state indicated a continuation of state employment and a continuation of benefits and rights.

If this treatment is more generous than the statute provides as a minimum, there is no reason it should not be allowed. WPC cites two cases to the contrary but both are inapplicable. Neither concerns anything analogous to the liberal provision of family and medical leave anti-discrimination rights by the state to one of its own employees. Rather, both deal with attempts by private parties to get the state to pay monetary benefits to unworthy recipients. The first case concerns an attempt to shoehorn an alleged employee into eligibility for workers compensation benefits. Porter v. Industrial Comm., 173 Wis. 267, 271, 181 N.W. 317 (1921). The second concerns two private parties trying to characterize an independent contractor as an employee in order to get him unemployment benefits. Graebel Moving & Storage v. LIRC, 131 Wis. 2d 353, 355, 389 N.W. 2d 37 (Ct. App. 1987).

Based upon the above, I conclude that a liberal provision of certain rights offends neither the statute itself nor public policy. I also am persuaded by Officer Butzlaff's argument that it is neither absurd nor unreasonable to provide rights to an employee in a manner more liberal than that laid out as a minimum by the statute. Rather, it would be absurd and unreasonable to provide an employee with various benefits accrued from over four years of employment with the state, and then deny that employee anti-discrimination rights available to employees with only one

year of tenure.

Based upon the above, I conclude that Officer Butzlaff's interpretation of the statute is correct. He was employed for the requisite length of time and is covered by FMLA. Thus, he is entitled to a hearing on his discrimination complaint.

The Personnel Commission decision and order dismissing Officer Butzlaff's complaint is reversed and this matter remanded for further proceedings.

IT IS SO ORDERED.

Dated this 23rd day of April, 1991.

BY THE COURT:

Susan Steingass, Judge
Circuit Court Branch 8