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MARY JANSSEN,

Complainant,

v.

Secretary, DEPARTMENT OF  
CORRECTIONS,

Respondent.

Case No. 93-0072-PC-ER

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RULING  
ON  
MOTION  
TO DISMISS

This is a complaint alleging a violation of the Family and Medical Leave Act (FMLA). On August 31, 1993, respondent filed a Motion to Dismiss for lack of subject matter jurisdiction. The parties were required to file briefs and the final brief was filed on September 30, 1993.

The following findings of fact are based on information provided by the parties and appear to be undisputed:

1. The complainant, at all times relevant to this matter, has been employed by respondent as a Nurse Clinician 2 at the Health Services Unit of the Waupun Correctional Institution.
2. Complainant had been scheduled to work Easter weekend, i.e., April 9, 10, and 11, 1993, and had expressed her displeasure about it to her supervisor and co-workers.
3. On April 7, 1993, complainant called in sick, citing "chest pain and an abnormal EKG," and was absent from work on April 9, 10, and 11. Complainant had not been scheduled to work on April 8.
4. When the complainant returned to work after this absence, she was asked by respondent to provide a "physician's verification of the illness" which resulted in her absence. In response, complainant provided a note from her physician which stated, "Mary was not at work due to chest pain. I saw her on 4/7/93."

5. Complainant was asked by respondent to provide more detailed medical verification. A letter from her physician dated April 20, 1993, stated that complainant was off work from April 8-12, 1993 due to "significant chest pain and associated sinus infection" Respondent subsequently asked for additional medical information including "when you were seen by the doctor, why you were unable to work, why you were able to return to work, and any other relevant information."

6. Respondent subsequently determined that complainant had failed to provide sufficient verification of her inability to work her scheduled hours. As a result, respondent denied her use of sick leave for April 9, 10, and 11, and suspended her for 3 days without pay. Complainant grieved the denial of sick leave and the suspension under the applicable collective bargaining agreement.

Respondent argues that the complainant cannot invoke the protection of the FMLA since she never made a request for medical leave under the FMLA, only a request for sick leave under the applicable collective bargaining agreement. As the court noted in Jicha v. State, 164 Wis. 2d 94, 100, 473 N.W. 2d 578 (Ct. App 1991), the "FMLA, however, does not require that the employee utter magic words or make a formal application to invoke FMLA's protections." The standard relied upon by the court in Jicha was whether the information provided by the employee to the employer would give a "reasonable employer notice of a serious health condition" The undisputed facts in the instant case indicate that complainant provided certain information relating to the condition of her health to her employer prior to the subject absence and thereafter. The question of whether this information was sufficient under the Jicha test involves a question of fact which is not possible to decide at this stage of the proceedings.

Complainant also argues that complainant's request for sick leave as well as the fact that she grieved the denial of this sick leave request demonstrate that the request she made of the employer was a request for sick leave under the applicable collective bargaining agreement, not a request for medical leave under the FMLA. This argument ignores the fact that the same absence for medical reasons can be both a medical leave under the FMLA and a sick leave under the contract. This was recognized by the drafters of the FMLA in §103.10(5)(b), Stas, i.e., the "substitution" provision of the FMLA. In

addition, it is not unusual for the same employment transaction to lead to the invocation of two different rights litigated in two different forums, e.g., a discharge can be grieved under a collective bargaining agreement as well as a discrimination complaint under the Fair Employment Act. There is nothing in the applicable law to indicate that an employee has to choose whether to file a grievance under the applicable collective bargaining agreement or to file a charge under the FMLA when the employee is denied leave for health reasons.

The Commission concludes that the fact that complainant grieved the denial of sick leave under the applicable collective bargaining agreement does not deprive the Commission of jurisdiction over this case pursuant to the FMLA; and that the question of whether complainant's request for leave was sufficient to invoke the protections of the FMLA involves a question of fact which is not possible to decide at this stage of the proceedings.

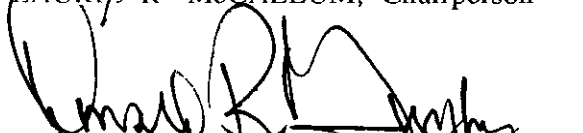
Order

Respondent's Motion to Dismiss is denied

Dated: October 20, 1993 STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

LRM:irm

  
DONALD R. MURPHY, Commission

  
JUDY M. ROGERS, Commissioner