STATE OF WISCONSIN PERSONNEL COMMISSION

ALBERTA RIPP,

Complainant,

v.

President, UNIVERSITY OF WISCONSIN SYSTEM (Extension),

Respondent.

Case No. 93-0113-PC-ER

RULING ON MOTION TO DISMISS

This matter is before the Commission on respondent's motion to dismiss for failure to state a claim upon which relief can be granted. The motion arose in the context of a dispute as to the appropriate issue for hearing.

On July 14, 1993, complainant filed a complaint of handicap discrimination relating to the decision terminating her employment as a Data Entry Operator 1 with the Bureau of Audio Visual Instruction. She filed an amended complaint on July 22, 1994, in which she alleged a violation of the Family/Medical Leave Act (FMLA). The amendment included the following description:

> I have already filed this with "Handicap." It is also in violation of Family Leave Act. I have been drawing income continuation and I don't believe that I can be denied my job. My doctor said that I could not return to exact job I had but I don't believe that I can be denied another job then by the same department without serving another probation.

In its answer to the complaint, filed on September 27, 1993, respondent contended that the FMLA claim was untimely, and responded to the merits of the claim by contending that the complainant had been granted her request for medical leave and that by obtaining such a leave instead of participating in a Concentrated Performance Evaluation Program, complainant "certainly knew that there was a potential that the employer would take other actions based upon her inability to adequately perform the requirements of her job." (Answer, page 3) Complainant, through her attorney, responded to the answer, but did not offer any substantive information relative to the FMLA claim.

A Commission investigator issued an initial determination of "no probable cause" on the FMLA claim and "probable cause" on the handicap claim. The initial determination includes the following analysis of the FMLA claim:

> Complainant appeared to allege that respondent terminated her in violation of the Family or Medical Leave Act (FMLA) and failed to accommodate her handicap.
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> It appeared that complainant contended that she was on medical leave (within the meaning of the FMLA) and was terminated, in violation of the FMLA. The FMLA permits employes, among other things, to take necessary family or medical leave without retaliation. With respect to medical leave, an employe may take up to two weeks of leave during a twelve month period for a serious health condition. §103.10(4), Wis. Stats. At the time of her notification of termination, complainant had ben on medical leave for approximately 15 weeks, and appeared to be unable to return to work in the foreseeable future. Fifteen weeks are well outside the two week parameter of the statute, and there is no reason to believe complainant was terminated for exercising her FMLA rights.
>
> There is not a reasonable ground for belief supported by facts and circumstances strong enough in themselves to warrant a prudent person to believe that respondent violated the Family and Medical Leave Act.

Complainant appealed the "no probable cause" portion of the initial determination and a prehearing conference was held on March 9, 1994. During that conference, the following issue for hearing was proposed:

> Did the respondent discriminate against the complainant on the basis of handicap and/or retaliate against the complainant for exercising her rights under the Family/Medical Leave Act with respect to the decision to terminate the complainant's employment in June 1993?

Respondent objects to the proposal, and suggests, as an alternative, an issue which does not reference the FMLA claim.

The FMLA identifies "prohibited acts" in §103.10(11), Stats:

> (a) No person may interfere with, restrain or deny the exercise of any right provided under this section.
> (b) No person may discharge or in any other manner discriminate against any individual for opposing a practice prohibited under this section.
> (c) Section 111.322(2m) applies to discharge or other discriminatory acts arising in connection with any proceeding under this section.

The materials filed to date suggest that there are two possible allegations that complainant may have advanced. The first, which appears to be consistent with the information found on the face of the amended complaint, is that respondent violated §103.10(8), Stats., which requires that an employe returning from medical leave be placed in their former position, if vacant, or an equivalent position, if not vacant. The second, which is consistent with both the initial determination and the proposed issue, is that the decision to terminate complainant's employment was made in retaliation for her prior conduct of exercising her right to take medical leave under the FMLA.

Respondent contends that complainant has failed to allege facts sufficient to constitute a cause of action under the provisions of §103.10(11), Stats., set out above. The Commission's analysis of the respondent's motion is based upon the general rules set forth in Morgan v. Pennsylvania General Ins. Co., 87 Wis. 2d 723, 275 N.W.2d 660 (1979).

As to the first of the two possible allegations being advanced by the complainant (that respondent violated §103.10(8), Stats.), respondent argues:

> Complainant's position was vacant [upon conclusion of her medical leave]. However, as confirmed by complainant in her complaint, her own physician wrote respondent and stated that she was unable to perform the duties of that position.
>
> The FMLA does not require an employer to accommodate an individual by providing a different position where the person on leave is unable to return to the position held prior to the leave.

Under §103.10(8), an employe returning from leave has a right to return to their former position, if that position is vacant. If an employer offers that option to an employe, and the employe declines, the employer does not, under the FMLA, have some obligation to provide alternative employment for the employe. Here, the complainant effectively declined to return to her former position, which was vacant. By doing so, she relinquished her rights under §103.10(8). Any rights she may have retained to return to some other position would be derived from some source other than the FMLA. In light of this legal conclusion, the respondent is entitled to dismissal of the first possible FMLA claim.

The second possible FMLA theory being raised by complainant is that the decision to terminate her employment was made in retaliation for her

prior conduct of exercising the right to take medical leave. The respondent's arguments which have some relationship to this second theory are as follows:

> Complainant has also failed to allege that she was discharged or discriminated against for opposing a practice prohibited under the FMLA. Section 103.10(11)(b), Stats. Nor has she alleged anything that would constitute retaliatory conduct under sec. 111.322(2m), Stats., as incorporated into the FMLA by sec. 103.10(11)(c), Stats.
>
> Complainant has only alleged that she was entitled to another job with the respondent. There is no indication that she opposed a practice prohibited under the FMLA. She does not allege that she was discharged or discriminated against under sec. 111.322(2m)(a), Stats., because she filed a complaint or attempted to enforce a right under the FMLA....

The FMLA is a remedial statute and, as such, must be liberally construed so as to effectuate the legislative intent. Butzlaff v. Wis. Personnel Comm., 166 Wis.2d 1028, 480 N.W.2d 559 (Ct. App., 1992) In Butzlaff, the court found that the purpose of the FMLA is "to require employers to permit employees to take family and medical leave, and to prohibit employers from interfering with their employees' leave rights." 166 Wis.2d 1028, 1035. Here, the complainant appears to contend that her employment was terminated because of her prior action of taking medical leave. It would be contrary to the stated purpose of the FMLA not to protect those employes who are retaliated against because of exercising their right to medical leave under the act. The Commission acknowledges that the language used in §103.10(11) could have more explicitly included the type of allegation apparently being made here. However, there is sufficient breadth in the reference to "interfere" in §103.10(11)(a), to include this claim. Paragraph (c) also references §111.322(2m), which in turn references "enforcing a right" under the FMLA.[1] This language also appears to be broad enough to include the second claim. Even if the Commission were to conclude

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[1]Section 111.322(2m), Stats., provides that it is "an act of employment discrimination to" do the following:

> (2m) To discharge or otherwise discriminate against any individual because of any of the following;
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> (a) The individual files a complaint or attempts to enforce any right under s. ... 103.10....
>
> (b) The individual testifies or assists in any action or proceeding held under or to enforce any right under s.... 103.10....

that the language of §103.10(11) did not provide protection from retaliation for someone who had taken medical leave, an employe who attempts to enforce a right under §103.10 and then is discriminated against because of that activity has a separate option of directly invoking the Fair Employment Act's protection pursuant to §111.322(2m)(a), Stats.

The Commission will provide the complainant an opportunity to clarify whether she is alleging that the decision to terminate her employment was in retaliation for having taken medical leave.

ORDER

The complainant is provided 10 days from the date this ruling is issued in which to indicate whether she is alleging that the decision to terminate her employment was in retaliation for having taken medical leave. If she indicates that she is pursuing that allegation, the issue for hearing shall read:

> Did the respondent discriminate against the complainant on the basis of handicap and/or retaliate against the complainant for exercising her rights under the Family/Medical Leave Act with respect to the decision to terminate the complainant's employment in June 1993?

If the complainant indicates that she is not alleging that the decision to terminate her employment was in retaliation for having taken medical leave, the respondent's motion to dismiss the FMLA claim shall be considered granted without further action of the Commission and this matter will proceed to hearing on the following issue:

> Did the respondent discriminate against the complainant on the basis of handicap with respect to the decision to terminate the complainant's employment in June 1993?

Dated: June 21, 1994 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

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