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AMI COLLEEN FOLLETT,  
 Complainant,

v.

Secretary, DEPARTMENT OF  
 HEALTH AND SOCIAL SERVICES,  
 Respondent.

Case No. 96-0017-PC-ER

\* \* \* \* \*

DECISION  
AND  
ORDER

This matter is before the Commission on a charge by complainant, Ami Follett, that respondent, Department of Health and Social Services, discriminated against her when it refused to give requested family/medical leave, in violation of the Family/Medical Leave Act, §103.10, Wis. Stats., which resulted in her termination.

FINDINGS OF FACT<sup>1</sup>

1. Complainant, at all times relevant to this charge of discrimination, was a Resident Care Technician 2 at respondent's Central Wisconsin Center (CWC) until December 18, 1995.

2. On December 3, 1995, complainant's unit nurse called complainant at home and, according to respondent, complainant indicated that she would be in for her shift. According to complainant, she did not say that she would be in, but rather the unit nurse told her the time that complainant was scheduled, and that she would "hold someone over" until complainant arrived and then hung up the telephone. At about 10:45 p.m., complainant called in sick for her work shift.

3. On December 5, 1995, complainant participated in a pre-disciplinary meeting with respect to her absence on December 3rd. Complainant's union representative explained that complainant has a 13-year-old son who is having emotional problems along with depression. According to Resident Care Supervisor Linda Boxrucker's notes from this meeting, when complainant was asked if she knew earlier in the day (December 3rd) if she was going to have

<sup>1</sup> Findings of Fact 1 through 11 and 22 are from the Investigative Summary of the Initial Determination and were stipulated by the parties. The other findings are based on the evidence presented at hearing.

problems in the evening, she replied "yes." According to respondent, complainant admitted that she could have called in earlier but because she was already in the disciplinary process for attendance, she thought she would get into trouble. According to complainant, her situation with her son escalated and de-escalated throughout the day.

4. In a memorandum to Tom Alt (of the Division of Care and Treatment Facilities) dated Monday, December 11, 1995, Gerald E. Dymond (CWC's Director) requested to terminate complainant because of her attendance record.

5. On Friday, December 15, 1995, complainant filed "Leave Without Pay Request/Authorization" forms for December 3, 1995. She indicated the reason for the leave as "crisis involving son--unable to report to work Sunday 12/3/95." Complainant produced a letter from Thomas J. Moran, Ph.D. (Licensed Psychologist) which stated, "Please excuse Ami Follett for missing work on Sunday, December 3rd. Due to a family crisis, she was unable to perform her regular work duties."

6. In a letter to complainant dated Monday, December 18, 1995, Richard Lorang (respondent's Deputy Secretary) terminated complainant's employment for the incident on December 3rd plus her record of tardiness for which she had received progressive discipline on October 18, 1994 (verbal reprimand), November 15, 1994 (written reprimand), April 17, 1995 (1 day suspension), June 7, 1995 (3 day suspension), September 12, 1995 (5 day suspension), and December 4, 1995 (10 day suspension).

7. On December 20, 1995, Robin Gruchow (CWC) spoke to complainant to ask her why she requested leave without pay (when she still had various paid leaves available). Gruchow told complainant that she could use whatever type of leave she wanted for 7 hours and 45 minutes, but that the first 15 minutes of her missed shift on December 3rd would remain an unapproved absence. Complainant requested that Gruchow note on the form that the leave was requested under the Family/Medical Leave Act (FMLA).

8. On January 8, 1996, complainant's request for family leave was denied. The letter stated, in part: "the reason for your absence as stated on the letter from your son's psychologist does not qualify under the provisions of the state nor federal family and medical leave acts."

9. According to respondent, the attendance policy for CWC employees is very important because CWC provides 24 hour services to clients with severe

or profound developmental disabilities and there are state and federal laws and regulation requiring adequate care for the clients.

10. CWC's attendance policy requires employes to notify CWC at least 30 minutes prior to the start of the employe's shift if he or she is not going to be to work on time. According to respondent, complainant was not terminated because of the reason for her absence but rather for failure to provide timely notice.

11. According to complainant:

I am responsible for having been late in the past. I have been accountable for those instances. I am responsible to my son and accountable for my actions with regard to him. I am not responsible for the explosion of verbal and physical force that I withstood immediately prior to the start of my shift. I used my best judgement and took care of the situation as it happened; to make safe my elder and younger sons and myself.

12. Complainant has two sons, one 13 years old and the other 8. The older son, Sean, has been treated by Dr. Moran since October 1994.

13. On the morning of December 3, 1995, Sean continued in a sporadic pattern of uncontrollable behavior. He had been acting this way for two days. The behavior included verbal aggression, physical aggression, threats against his younger brother and noncompliance with parental requests.

14. This behavior continued throughout the day.

15. At 9:00 or 9:30 p.m., Timothy Pomeray telephoned complainant from work. While talking with complainant, Pomeray could hear Sean's loud talk, abusing complainant and being defiant.

16. In addition to concerns about the well-being of Sean, complainant was also concerned about Sean's threats against his brother. She considered taking her younger son to work with her, where he would remain until 11:00 p.m. when he could return home with Pomeray, who then would be ending his work shift.

17. Nurse Clinician Rita Schoen, R.N., supervised the second shift on complainant's unit and was responsible for staffing the night shift, which started at 10:30 p.m.

18. At 10:30 p.m., Schoen discovered that complainant was not at work. She waited about five minutes and then called complainant's home.

19. After ascertaining that complainant knew she was scheduled for the night shift and was late, Schoen told complainant she would "pull" someone from the p.m. shift to cover her position until she arrived. Schoen believed complainant was coming to work within approximately ten minutes.

20. About ten minutes later, complainant called back and told Schoen she was not coming in that evening. She gave no reason for her absence. Schoen instructed complainant to report her absence to the switchboard as required.

21. As directed, complainant called the switchboard at about 10:45 p.m. She told the person who answered that she was using eight hours of sick leave. The written record of that phone call shows complainant's absence as personal and not family, work-related, or other; the other options provided on the Late Call In form.

22. Prior to December 15, 1995, complainant telephoned Colleen Hilgendorf, her unit supervisor, to request forms for family medical leave. Hilgendorf referred complainant to the Resident Care Supervisor, Linda Boxrucker, because she could not assist her.<sup>2</sup>

23. Complainant telephoned Linda Boxrucker. Because she was not familiar with the procedure, Boxrucker referred complainant to the Resident Living Office, where they retained such forms and could provide information about medical leave.

#### CONCLUSIONS OF LAW

1. This matter is before the Commission pursuant to §103.10, Wis. Stats.
2. Complainant has the initial burden of proof to establish that she timely filed her complaint under §103.10(12)(b), Wis. Stats.
3. In addition, complainant has the burden of proof to establish that respondent discriminated against her in violation of the Family Medical Leave Act when she was denied leave and her employment was terminated by respondent.
4. Complainant failed to satisfy her burden of proof with respect to timely filing her termination of employment claim and, as a result, the remaining family leave issue was moot.

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<sup>2</sup> This finding of fact was stipulated by the parties.

OPINION

The stipulated issue in this case is whether respondent violated the Family Medical Leave Act when it denied complainant family leave for her absence on December 3, 1995, and as a result, terminated her employment. But during the prehearing conference, respondent raised a timeliness objection regarding the termination decision, contending it was made more than 30 days prior to the filing of the complaint. The Commission directed the parties to address this preliminary issue in their post-hearing briefs. Accordingly, the Commission will discuss this issue first.

Respondent argues that complainant failed to file a timely complaint regarding her termination or her request for family leave as required by §103.10(12)(b), Wis. Stats. Subsection 103.10(12)(b) provides in pertinent part as follows:

An employe who believes his or her employer has violated sub (11)(a) or (b) may, within 30 days after the violation occurs or the employe should reasonably have known that the violation occurred, whichever is later, file a complaint. . . .

The record shows that respondent terminated complainant's employment on December 18, 1995. Complainant filed her complaint with the Commission on February 8, 1996. Respondent argues that since more than 30 days elapsed between her termination and the filing of her complaint, it is untimely.

Regarding complainant's request for family leave, respondent argues that complainant submitted the request on Friday, December 15, 1995, and her employment was terminated on Monday, December 18, 1995; that she should have known when she received her termination letter dated December 18, 1995, that her leave request was effectively denied, and that her complaint filed with the Commission on February 8, 1996, was untimely.

In rebuttal, complainant asserts that 30 days from the date of denial of FML is within the appropriate time frame. Complainant states that she called "DILHR" and was referred to the "PC," where she spoke to an official who informed her that a complaint filed 30 days from the date she received the denial was acceptable. Complainant states she received the denial by mail on January 10 or 11, 1996, and actually had two or three days after February 8th to file her complaint in a timely manner.

While the evidence presented supports the claim of complainant that she timely filed a complaint regarding family leave denial, it is equally apparent she failed to do so with respect to her employment termination. Therefore, that element of the issue is extinguished, for the Commission has consistently held such filing time limits to be mandatory.

Having determined that complainant failed to timely file her employment termination complaint, the next question is whether the remaining issue, the denial of family leave, is now moot.

In Wisconsin Employment Relations Board v. Allis-Chalmers Workers Union, 252 Wis. 436, 440, 31 N.W. 2d 772, 32 N.W. 2d 190 (1948), the court held:

A moot case has been defined as one which seeks to determine an abstract question which does not rest upon existing facts or rights, or which seeks a judgment in a pretended controversy when in reality there is none, or one which seeks a decision in advance about a right before it has actually been asserted or contested, or a judgment upon some matter which when rendered for any cause cannot have any practical legal effect upon the existing controversy.

The Commission, in Maday v. DOC & DER, Case No. 92-0838-PC, 6/23/93, granted respondent's motion to dismiss, where the issue was the effective date of appellant's reclassification and respondent agreed to credit appellant with 59.45 hours of duty and correct the effective date of his classification.

Here, the record shows that respondent initially granted complainant paid leave for seven and three-quarters hours for her absence on December 3, 1995. The record also shows that subsequently, when complainant requested family leave without pay, respondent agreed to grant the request for 7.75 hours of the 8-hour absence, but not the .25 hours she was late in reporting to work. This time would remain as an unexcused absence. Complainant refused this offer and respondent adjusted its records to show complainant's absence on December 3, 1995, as 8 hours of unpaid leave, at complainant's request.

When complainant received formal denial of her leave request in early January 1996, and subsequently filed her complaint with the Commission, she was no longer employed by respondent. Considering the Commission's ruling on the timeliness issue, it can do nothing which would have "any practical legal effect upon the existing controversy." Whether or not complainant is granted family leave for her eight hours of absence, instead of 7.75 hours, the results would be the same. Except for perhaps some notation in her leave

record, it would indicate her absence on December 3, 1995, as it does currently as leave without pay. There would be no potential for a retroactive salary adjustment for the disputed 15 minutes, because complainant requested family leave without pay for that period. Her personnel file would still reflect that she was terminated for her prior attendance record and failure to provide proper notice on December 3, 1995. Therefore, the Commission concludes a ruling on this issue will have no practical legal effect.

ORDER

Complainant's complaint is dismissed.

Dated: July 5, 1996

STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

DRM  
R:D:FOLLETT PD&O

  
DONALD R. MURPHY, Commissioner

  
JUDY M. ROGERS, Commissioner

Parties:

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Madison, WI 53713

Joe Leann  
Secretary, DHSS  
1 W. Wilson Street  
P.O. Box 7850  
Madison, WI 53707

NOTICE  
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW  
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

**Petition for Rehearing.** Any person aggrieved by a final order (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for

rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

**Petition for Judicial Review.** Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.

2/3/95