STATE OF WISCONSIN PERSONNEL COMMISSION

ROBERT BERGHOFF,
Complainant,

v.

Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES [DHFS],[1]
Respondent.

Case No. 96-0033-PC-ER

DECISION AND ORDER

The Commission, having reviewed the Proposed Decision and Order and the objections thereto, and having consulted with the hearing examiner, adopts the following Decision and Order. Changes were made to the Proposed Decision and Order to further explain the basis for the decision, to more accurately reflect the record, and to address the parties' objections and arguments.

NATURE OF THE CASE

This is a complaint based on an alleged violation of the Family and Medical Leave Act (FMLA). A hearing on the issue of probable cause was held on January 9, 1997, before Laurie R. McCallum, Chairperson. The parties were permitted to file post-hearing briefs and the briefing schedule was completed on March 20, 1997.

FINDINGS OF FACT

1. Complainant was employed for approximately seven years at respondent's Central Wisconsin Center (CWC), a treatment institution for the developmentally disabled. Some time in 1994, complainant was terminated from CWC for violations of

[1] Pursuant to the provisions of 1995 Wisconsin Act 27 which created the Department of Health and Family Services, effective July 1, 1996, the authority previously held by the Secretary of

the institution's attendance policy. Complainant grieved his termination from CWC through the process established by the applicable collective bargaining agreement. Effective April 17, 1995, complainant and respondent entered into an agreement to settle this grievance and certain companion grievances. This settlement agreement was of a type known as a "last chance agreement" and stated as follows, in pertinent part:

> . . . the parties hereby agree that the above-referenced matters have been settled in all respects on the following basis:
>
> 1. The Employer agrees to reinstate the Grievant, Robert Berghoff, without back pay or benefits. The Grievant's sick leave balance as of July 25, 1994 shall be restored. . . .
>
> 3. For a period of one year from the date of this settlement, the parties agree that in the event the Grievant is disciplined for violations of Department of Health & Social Services Work Rules 1 and/or 14, the Grievant will be subject to immediate termination. With regard to any subsequent appeal to arbitration, the only issue to be decided by the arbitrator will be that of proof. . . .
>
> The Grievant has read the provisions of this Settlement Agreement and by signing, represents that he/she understands all its terms and has had full opportunity to consult with his/her representatives for advice.

This agreement was signed by complainant on April 17, 1995, and by Allen Highman, Representative, Wisconsin State Employees Union, on April 13, 1995. The purpose of a last chance agreement is to put an employee on notice that any violation of the relevant department policy(ies) will subject the employee to immediate termination. Complainant understood this agreement to mean that he would be terminated from the position to which he was reinstated if he violated respondent's attendance policy within a year of the date the agreement was signed

2. Pursuant to this agreement, respondent appointed complainant to a Food Service Worker position at its Mendota Mental Health Institute (MMHI).

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the Department of Health and Social Services with respect to the position that is the subject of this proceeding is now held by the Secretary of the Department of Health and Family Services.

3. On January 22, 1996, complainant injured his back while unloading boxes of groceries from the trunk of a car. Complainant was examined by a physician in relation to this back injury on January 23, 1996. The physician wrote as follows on a patient instruction form:

> Please excuse Mr. Robert Berghoff from work 1/23/96 to 1/29/96 due to injuring his back on 1/22/96.

The physician's examination notes indicate that complainant advised him that he had never had back pain before January 22, and that the physician had prescribed medication to relieve the pain caused by muscle spasms in the lower back and had recommended that complainant return to the physician if his symptoms continued after 1/29/96 or if they worsened before that date.[2]

4. After this appointment, complainant called his work unit and spoke to supervisor Deb Schmitt. Complainant asked Ms. Schmitt if he needed to bring his physician's instruction form to the work site. Ms. Schmitt advised complainant that, in view of his back pain and the cold weather, he could bring the instruction form in when he returned to work.

5. It was complainant's understanding from the physician's instruction form that he was released to return to work on January 29, 1996.

6. At hearing, complainant provided the following through his testimony:

> It was complainant's practice to take the city bus to his job at MMHI. When his shift began at 10:00 a.m., it was complainant's practice to leave his apartment at 9:20 a.m. to catch the bus which arrived at his stop at 9:30 a.m. Under normal conditions, it took

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[2] In his objections, complainant, in regard to the patient instruction form prepared by Dr. Musa which is referenced in this finding, states that: "It is unclear, however, how this document became part of the record. According to my records, neither party submitted it as an exhibit." Objections dated May 12, 1997, page 1, footnote 1. The record shows, however, that the patient notes and patient instruction form prepared by Dr. Musa from which the information in this finding was drawn comprised part of Complainant's Exhibit 2 which counsel for complainant asked complainant to identify during his testimony (Transcript page 6), and which was offered by counsel for complainant and received by the hearing examiner into the hearing record. (Transcript, page 20)

> complainant about 8 or 9 minutes to walk the block to block and a half from his apartment to the bus stop.
>
> On January 29, 1996, complainant left his apartment at his usual time of 9:20 a.m. to catch the 9:30 bus to take him to MMHI for his 10:00 a.m. shift. When he left his apartment, complainant's back "felt OK." Because his usual route to the bus stop was snow-covered and icy, complainant had to take a less direct route. This less direct route required complainant to walk two and a half or three and a half blocks from his apartment to the bus stop. Because of the snow and ice, complainant also walked more slowly than usual. About one block into his walk to the bus stop, complainant began to experience back pain. When complainant arrived at the bus stop, the bus had already gone by. Complainant walked back to his apartment and placed a call to MMHI at about 9:40 a.m.

This information, particularly as it relates to distance and time, is internally inconsistent and, as a result, not credible.

7. Complainant did call the food service unit at MMHI at 9:40 or 9:45 a.m. on January 29, 1996. The person in the food service unit who answered complainant's phone call was Edward Lalor, a Food Service Supervisor 1. Complainant explained to Mr. Lalor that he would not be in to work because he had a sore back. Mr. Lalor indicated to complainant that this was a late call-in, and that there may be some discipline because of it. Complainant did not explain to Mr. Lalor why he had called in late, and they did not discuss whether this situation would qualify as a "tardy" or a "late call-in."

8. Complainant had received chiropractic treatment on January 26, 1996. During that treatment visit, complainant indicated that the condition for which he was seeking treatment was back pain; that the pain had begun on January 22, 1996; and that he had not experienced the same or similar symptoms prior to January 22, 1996. During that treatment visit, a follow-up visit was scheduled for the afternoon of January 29, 1996. Complainant kept this appointment and his chiropractor composed and signed a memo dated January 29, 1996, which stated as follows:

> This is to certify that Robert Berghoff has recovered sufficiently to be able to return to:

_____light ___X___regular
_____part time _____full time
___X___work _____school _____P.E. duties
on_____1-30-96_____

Restrictions: None

Remarks: Robert missed work today due to back pain.

Although there were appointments scheduled for complainant to see the chiropractor after January 29, 1996, complainant did not keep any of these appointments.

9. Complainant was examined again on February 2, 1996, at the clinic where he had visited the physician on January 23, 1996. The examination notes by Jeffrey J. Patterson, D.O., for this visit indicate as follows, in relevant part:

> Pt. [Patient] is here for his back pain. He was seen for this approx. a week ago. He made a couple trips to the chiropractor and his pain got better. He returned to work. Then last night he was loading groceries and his pain recurred, . . .
>
> Garden variety muscle spasm and back pain. Pt. [Patient] will treat w/ [with] exercise and rest.

Mr. Patterson provided complainant with a note that stated as follows:

> Bob Berghoff should not work 2/2-2/4/96 for medical reasons.

10. The MMHI Attendance Policy, which is the same attendance policy applicable to CWC and other institutions within respondent's Division of Care and Treatment Facilities, states as follows, in pertinent part:

> . . . Employes are expected to report for duty as scheduled and to notify the employer in a timely manner when, for any reason, they are unable to do so. . .
>
> PROCEDURES:
> A. Call-In Procedures
>
> Employees or family member/significant other have the responsibility to notify the employer (according to the rules of your employing unit) prior to the shift when unable to report for duty for any reason. In the case of a medical emergency or if the employee is

hospitalized, notification by another responsible adult is acceptable by following these procedures:

1. Call each day prior to the scheduled reporting time if unable to report to work at the scheduled time. Calls should be made as early as possible, but not later than 30 minutes (60 minutes for WRC) prior to the beginning of the scheduled shift. This requirement may be waived by the supervisor for long-term illness.

2. Give name, classification, work location, reason for absence and anticipated time or date of return to work. If return to work is possible at an earlier time than originally reported, notify supervisor by telephone prior to reporting to work.

B. Unauthorized Absence

When staff are unable to report for or continue work, they will be considered absent without authorization under the following circumstances: failing to provide proper notice of absence, failing to report for duty during the scheduled shift, taking extended or unauthorized break/lunch periods. . . .

2. The first three instances of tardiness within each calendar year shall be disregarded in terms of the disciplinary schedule. . . . Therefore, the disciplinary process does not begin until the fourth instance of tardiness within the calendar year. . . .

C.Unanticipated/Anticipated Absence

Unanticipated absence includes illness, family emergency, death in family, requests to leave work early for any reason (excluding vacation, personal/Saturday/legal holiday or comp time), or other occurrences outside of the control of the employee which result in the employee being unable to report for scheduled duty (this does not include inclement weather), and notice is less than 72 hours. Anticipated absence is when an employee provides notice 72 hours or more to the employer. . . .

11. Respondent's work rules state as follows, in pertinent part:

. . . All employes of the Department are prohibited from committing any of the following acts:

1. Disobedience, insubordination, inattentiveness, negligence, or refusal to carry out written or verbal assignments, directions, or instructions. . . .

> 14. Failure to give proper notice when unable to report for or continue duty as scheduled, tardiness, excessive absenteeism, or abuse of sick leave privileges. . . .

12. On December 11, 1995, complainant acknowledged by his signature on one of respondent's forms that he had received a copy of respondent's work rules and MMHI's Attendance Policy.

13. During his employment at MMHI, complainant was aware of the requirement that an employee call in at least 30 minutes prior to the start of a scheduled shift if they are going to be absent.

14. Within a few days of complainant's January 29 late call-in, Ms. Schmitt contacted James Billings, MMHI Director of Personnel and Employment Relations, and advised him that she believed complainant may have violated the MMHI attendance policy, and she wanted to discuss this with Mr. Billings. Mr. Billings informed Ms. Schmitt of the existence of the last chance agreement; that it appeared complainant had violated the attendance policy; that the late call-in could result in complainant's termination as the result of the last chance agreement; and that Mr. Billings would follow up. Based upon available information relating to the late call-in incident and upon advice he received from respondent's central personnel unit, Mr. Billings decided to schedule a termination meeting.

15. In a letter to complainant dated March 12, 1996, Mr. Billings stated as follows, in pertinent part:

> This letter is to inform you that we have scheduled a termination meeting on Thursday, March 14, 1996 for 0800 (8:00 a.m.) in my office (Personnel) in the administration building. You are being directed to be at this meeting . . . A union steward shall be present at this meeting.. . . On January 29, 1996 you were absent from work and failed to give proper notice. This is a violation of the DCTF Attendance Policy and DHSS Work rules #1 and #14. The purpose of this meeting is to inform you of our purpose to terminate your employment under the conditions set forth in the Settlement Agreement which you entered into on April 17, 1995, and to provide you the opportunity to provide any information which should be considered prior to rendering a final decision.

A copy of this letter was sent to Marie Carlin, Chief Steward of the local union representing certain MMHI employees, including complainant, and Robert Lauterbach, a representative of the local union.

16. Prior to the March 14, 1996, meeting, Al Highman, the Wisconsin State Employees Union Council 24 business representative, telephoned Mr. Billings and asked him whether respondent would be willing to forego a challenge to complainant's unemployment compensation if complainant would submit a letter of resignation. Mr. Billings told Mr. Highman that respondent would probably be willing to do that. Ms. Carlin also contacted Mr. Billings and advised that the local union was in agreement with Mr. Highman's proposal, and that the local felt that the violations of the attendance policy and last chance agreement by complainant seemed very clear and it would be in complainant's best interest to resign voluntarily if respondent would not challenge complainant's unemployment compensation.

17. The termination meeting was held as scheduled on March 14, 1996. At the meeting, the only information provided by complainant in support of his contention that he should not be terminated was that he was under the impression that not providing at least 30 minutes' notice would simply count as tardiness and would be automatically excused under the attendance policy. Complainant was represented at the meeting by union representative Robert Lauterbach. Complainant was not asked specifically at this meeting why he had called in late but was given an opportunity to provide any information he wished in support of his contention that he should not be terminated. At the meeting, Mr. Billings raised the issue of voluntary resignation but complainant indicated that he did not intend to resign.

18. After the meeting, Mr. Billings contacted Ms. Carlin to advise her of the outcome of the meeting, including complainant's decision not to resign voluntarily. Ms. Carlin telephoned Mr. Billings later that day and advised that she had discussed the matter with complainant and that it was her understanding that he had changed his

mind about resigning. After this conversation, complainant brought a letter of resignation to Mr. Billings which respondent accepted.

19. Complainant requested 8 hours of sick leave for January 29 and respondent granted this leave request.

20. Both before and after March of 1996, MMHI employees have been disciplined for late call-ins of absences due to illness.

21. At no time prior to his resignation did complainant or anyone acting on his behalf advise respondent that the reason for complainant's late call-in on January 29, 1996, was a re-injury of his back on January 29, 1996, on his way to the bus stop.

22. Complainant was on vacation or otherwise absent from work during much of the month of February of 1996.

23 Complainant's termination/resignation was handled in a manner consistent with MMHI practice.

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to 103.10(12), Stats.

2. The complainant has the burden to show that probable cause exists to believe that respondent violated the FMLA when its employment relationship with complainant ended on March 14, 1996.

3. The complainant has failed to sustain this burden.

OPINION

The issue here was agreed to by the parties and is as follows:

> Whether probable cause exists to believe that respondent violated the FMLA when its employment relationship with Complainant ended on March 14, 1996.

The standard here is one of probable cause, which is a lesser standard than that applied when a case is reviewed on the merits. Although the following analysis

resembles in form the type of analysis applied in reviewing a case on the merits, the probable cause standard was applied.

Motion to Dismiss for Failure to State a Claim

At hearing, at the close of the complainant's case in chief, counsel for respondent filed a motion to dismiss for failure to state a claim and asked that the motion be decided as a part of this decision.

The general rule for consideration of a motion to dismiss for failure to state a claim upon which relief can be granted is set forth in *Morgan v. Pennsylvania General Insurance Co.,* 87 Wis. 2d 723, 731-732, 275 N.W. 2d 600 (1979):

> Because the pleadings are to be liberally construed, a claim should be dismissed only if "it is quite clear that under no circumstances can the plaintiff recover." The facts pleaded and all reasonable inferences from the pleadings must be taken as true, but legal conclusions and unreasonable inferences need not be accepted.
>
> . . . A claim should not be dismissed . . . unless it appears to a certainty that no relief can be granted under any set of facts that plaintiff can prove in support of his allegations. (citations omitted)

Here, we have gone beyond the pleadings. As a result, what will be reviewed for purposes of deciding this motion will be the evidence complainant introduced at hearing. Viewing this evidence in the light most favorable to complainant, the Commission declines to conclude that it appears to a certainty that no relief could be granted to complainant.

Probable Cause Analysis

Complainant contends that the back condition resulting from his January 22nd injury and January 29th re-injury constitutes a "serious health condition" within the meaning of the Family and Medical Leave Act (FMLA); that he was suffering from this "serious health condition" on January 29th; that the timing of the January 29th re-injury prevented him from meeting respondent's 30-minute advance call-in

requirement; that, under such circumstances, to require notice other than "reasonable" or "practicable" notice is a violation of the FMLA; that his termination was based solely on his failure to satisfy the 30-minute advance call-in requirements; and that, as a result, his termination was based on a violation of the FMLA and should be overturned.

The first question then is whether complainant's back condition constitutes a "serious health condition" within the meaning of the FMLA. It is not necessary, however, in view of the conclusions reached by the Commission below, to resolve this question.

The second question deals with the events of January 29th as they are relevant to complainant's contention that the timing of his January 29th re-injury prevented him from complying with respondent's 30-minute advance call-in requirement. Complainant's version of these events, as reflected in his hearing testimony, is not credible. If, as complainant represented, he left home at 9:20 a.m.; it took 8-9 minutes under usual conditions for him to walk to the bus stop; but he had to walk twice the usual distance and more slowly than usual because of the ice and snow; then it would have taken him more than 32-36 minutes for the round trip from his home to the bus stop. However, complainant testified that he called the MMHI food service unit from his home at about 9:40 a.m., only 20 minutes after he testified that he had left home to walk to the bus stop. Using the information to which complainant testified that is most favorable to complainant, the earliest that complainant would have arrived back home would have been 9:52 a.m. and this fails to take into account complainant's testimony that he walked more slowly than usual, not only that he had to walk twice the usual distance. In addition, the fact that complainant did not share this version of events with any representative of respondent prior to his termination/resignation, including Mr. Lalor who took his call immediately after these events allegedly occurred or Mr. Billings who conducted the termination meeting, or apparently even to any of the union representatives who were involved in this matter since none of them brought it to respondent's attention, further undermines complainant's credibility here.

Even if complainant had succeeded in showing that his back condition constituted a serious health condition on January 29th within the meaning of the FMLA, and that the events of January 29th occurred as he represented, he has still failed to show that the respondent's application of the 30-minute advance notice requirement was unreasonable under the circumstances or violated the FMLA. In making its decision to terminate complainant, as far as respondent knew, complainant was calling in sick on January 29th for the same reason he had been out sick for the previous days, i.e., back pain resulting from his back injury on January 22nd. Respondent had no indication that complainant had left for work on January 29th; that he had re-injured his back on the way to the bus stop; and that the timing of this re-injury prevented him from satisfying the 30-minute advance call-in requirement. Complainant did not provide this information to Mr. Lalor when he called in his absence on January 29th, or even at the termination meeting despite the fact that the letter advising him of the termination meeting specifically stated that one of the purposes of the meeting was to "...provide you the opportunity to provide any information which should be considered prior to rendering a final decision." It is not possible for an employer to interfere with, restrain, or deny the exercise of an employee's right under the FMLA (here, as contended by complainant, the right to provide only "reasonable" or "practicable" advance notice as opposed to 30-minute advance notice due to the timing of his re-injury) if the employee never asserts the right or even provides any information relating to the underlying circumstances from which the employer could infer that such a right was being asserted.

In his objections to the proposed decision, complainant appears to contend that since he had been on sick leave through January 28th, his absence on January 29th should have been construed as unplanned and unintended, and hence not subject to the advance notice requirement:

> DHSS had notice of Mr. Berghoff's back injury and that it prevented him from working. They also knew that he had *planned* to return to work on January 29, 1996, because he informed them he would.

> *Therefore, his absence on the 29th must not have been planned.* These facts should be enough to put a reasonable employer on notice of potential FMLA protection. Complainant's objections to proposed decision, pp.9-10 (emphasis original, footnote omitted).

In the Commission's view, this is a *non sequitur.* On January 29, complainant was in the same position as each of the employees scheduled to work a shift at MMHI that day: if he was aware 30 minutes or more prior to the start of his shift that he was going to be absent, the attendance policy required him to call in at least 30 minutes prior to the start of his shift; if an emergency or unanticipated event arose which prevented him from complying with the 30-minute notice requirement, then the emergency provisions of the attendance policy could be invoked; and, if he arrived at work after his shift began, he would be considered tardy. The fact that he had been on FMLA leave the day before did not imbue him with any different protections or status than any other employee who was expected to be at work that day.

Complainant also asserts that, because his absence on January 29 was "unplanned and unintended," the provisions of the FMLA and the interpretation of these provisions in *MPI Wi. Machining Div. v. DILHR,* 159 Wis. 2d 358, 464 N.W. 2d 79 (Ct. App. 1990), dictate that application of respondent's 30-minute advance notice requirement violates the notice provisions of the FMLA. However, as concluded above, complainant has failed to show that his absence on January 29 was "unplanned and unintended."[3] Furthermore, the *MPI* court did not rule that all advance notice requirements for reporting an absence based on a health condition were vitiated by the FMLA. In the *MPI* case, the two fact situations which most closely parallel that present here (the first and third absences addressed in the opinion) involve an employee calling in an absence on the day of the absence "within the time specified" in the employer's attendance policy, but being penalized by the employer nonetheless for failing to obtain "prior approval" for the absence prior to the day of the absence. In

[3] As discussed above, the Commission does not find credible complainant's account of what occurred the morning of January 29th.

essence, the *MPI* court agreed with the hearing examiner that the "notice requirements of sec. 103.10(6)(b), Stats., do not apply where leave is taken on an emergency basis." *MPI* at 364-5. This makes sense. If the employee shows, as the employee did in the *MPI* case, that it was not possible due to the timing of the FMLA-covered injury or illness for the employee to meet the advance notice requirements of the employer's attendance policy, it would be a violation of the FMLA for the employer, with knowledge of this situation, to take action against the employee for failure to meet these notice requirements. This, however, is not the situation present here. In the instant case, complainant has failed to show that it was not possible for him to meet the 30-minute advance notice requirement. Furthermore, even if he had succeeded in making such a showing, he failed to provide this information to his employer.

The Commission rejects complainant's argument that notifying respondent for the first time five days after the termination decision was finalized that the timing of his re-injury made it impossible for him to satisfy the 30-minute advance notice requirement on January 29, constituted adequate notice to respondent of the circumstances surrounding his re-injury in the context of the termination decision under consideration here. Complainant argues that *Jicha v. State*, 164 Wis. 2d 94, 473 N.W. 2d 578 (Ct. App. 1991), supports his contention that respondent had enough information here to be held accountable for violating the FMLA by terminating complainant's employment for his failure to provide 30 minutes' notice. *Jicha*, however, stands for the proposition that the information provide by an employee regarding his health condition need not contain particular words or be in a particular format to put the employer on notice that the leave requested by the employee for an absence resulting from the health condition was FMLA leave. In *Jicha*, it was disclosed to the employer by the absent employee's attorney that the employee's wife was expected to file a petition that day for the employee's involuntary commitment based on an alleged mental illness. The court held this was sufficient information to give a reasonable employer notice that the employee's absence was due to a serious health condition within the meaning of the FMLA. The court went on to state that the

FMLA " . . . does not require that the employee utter magic words or make a formal application to invoke FMLA's protections." *Jicha* at 100. In the instant case, however, the employee uttered no words relating to the circumstances surrounding his alleged re-injury and its effect on his ability to call in at least 30 minutes prior to the start of his shift.

Complainant contends that FMLA liability for improperly requiring advance notice of an absence (i. e., where the absence is unplanned and unintended) does not require that the employer have the intent to violate the law. This is correct, but this does not mean that the employe does not have an obligation to provide the information to the employer that lets the employer know the circumstances surrounding his or her failure to call in in a timely manner that take the case into the exception to the FMLA's advance notice requirement. Obviously, an employer is not clairvoyant, and can not be expected to be aware of the specifics of the employe's failure to call in the required period before the start of the shift unless the employe provides this information. Furthermore, there is nothing about the circumstances of this particular case which supports an argument for a different approach here. Complainant's failure to have called in at least 30 minutes before the start of his shift was the subject of a disciplinary process. He was given notice of a pre-termination disciplinary meeting,[4] which included not only specific notice of the work rule violation, but also further notice that the meeting would "provide you the opportunity to provide any information which should be considered prior to rendering a final decision." (Finding #15). Complainant attended the meeting with a union representative, but failed to provide any information about his asserted reason for having called in late on the day in question, notwithstanding that this information would have provided potential mitigation of his work rule violation, and he had been notified he was facing termination as a result of his "last chance" agreement with management. (Finding #1).[5]

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[4] Complainant was facing termination for this work rule violation because of he was on a "last chance" agreement in connection with his poor attendance record. (Finding # 1).

[5] Complainant's failure to have come forward at this time and under these circumstances with his story about the events of January 29th further undermined his credibility.

The record shows that the first time complainant provided his version of the events of January 29 to anyone was in his FMLA complaint filed with the Commission five days after the decision to terminate him was finalized. The Commission rejects complainant's argument that this constituted sufficient notice under the FMLA to respondent of the circumstances surrounding his re-injury in the context of the termination decision under consideration here.[6]

Complainant has cited no authority for the proposition that under circumstances like those present here, the employer can be liable for failing to take action on the basis of information first communicated in a complaint filed by the employe with a third party several days after the personnel transaction in question. However, *cf. Miller v. National Casualty Co.,* 61 F. 3d 627, 4 AD Cases 1089, 1090-91 (8th Cir. 1995), a case arising under the Americans with Disabilities Act (ADA), 42 USC 12101-12213 (Supp. V 1993):

> Before an employer must make accommodation for the physical or mental limitation of an employe, the employer must have knowledge that such a limitation exists. The Interpretative Guidance on Title I of the ADA states that "an employer [is not] expected to accommodate disabilities of which it is unaware." The logic of this proposition is overwhelming and has been affirmed repeatedly by other courts construing both the ADA and the Rehabilitation Act of 1973. In general, "it is the responsibility of the individual with a disability to inform the employer that an accommodation is needed."
>
> Having reviewed the record in the present case, we conclude that the evidence all points one way: Miller did not apprise National Casualty of the fact that she suffered from a mental impairment . . . . the first indication she gave to National Casualty that she was manic depressive was in a letter she sent to the company . . . more than a week after her employment had been terminated. . . .

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[6] Since the Commission has concluded that complainant's version of what transpired on January 29th lacks credibility, the foundation for avoiding the requirement of advance notice—i. e., that the leave was "unplanned and unintended," *MPI Wi. Machining Div.,* 159 Wis. 2d at 376, is not present, complainant could not prevail even if his contention that the post-termination notice of those events was legally sufficient were adopted.

> To the extent Miller's symptoms were known to National Casualty prior to its termination of her employment, they were not so "obviously manifestations of an underlying disability that it would be reasonable to infer that [her] employer actually knew of the disablity. . . . The ADA does not require clairvoyance." (citations omitted, brackets in original).

Similarly, in the instant case, respondent could not have granted complainant an exception to the 30 minute call-in requirement if it never knew until after both the pre-disciplinary hearing and the date of his discharge that he was claiming that his absence was unplanned and unintended.

Complainant has offered several other arguments in the nature of pretext arguments. The first of these is that complainant's termination violated the terms of the last chance agreement. First of all, the issue in this case is not one of just cause or contract interpretation, but whether respondent's actions violated the FMLA. As a result, it is understood that complainant is arguing here that respondent's alleged failure to follow the terms of the agreement is evidence of an intent on respondent's part to "interfere with, restrain, or deny" the exercise of complainant's FMLA rights or to retaliate against complainant for his exercise of rights protected by the FMLA. It is clear from the record, however, that, although the agreement was not artfully drafted, respondent's interpretation and application of the terms of the agreement was consistent with the understanding of the parties to the agreement, including complainant, that any violation of respondent's attendance policy would subject complainant to immediate termination. It is concluded on this basis that the record does not support complainant's contention here.

In a related vein, complainant asserts that the fact that complainant's termination was not "immediate," i.e., it occurred several weeks after January 29th, demonstrates pretext. However, the record shows that the phrase "subject to immediate termination" has been used by respondent to mean that termination could result without the necessity of going through the progressive discipline process, i.e., "immediate termination" refers to going immediately to the end of the disciplinary process, rather than to being terminated without the lapse of time between the employee's action and the

termination. Respondent's action here was consistent with this interpretation. It should also be noted that one of the primary reasons that the termination was not effected within a shorter period of time was that complainant was absent from the work place most of the month of February. Again, the record does not support complainant's contention.

Complainant further argues that the language of respondent's attendance policy relevant here violates the notice requirements of the FMLA. However, this argument appears to be keyed to complainant's contention that the attendance policy, as applied to his situation, failed to take into account the timing of his re-injury and the effect this had on his ability to satisfy the 30-minute advance call-in requirement. However, as discussed above, the circumstances of complainant's alleged re-injury were never brought to respondent's attention prior to complainant's termination/resignation. In addition, the attendance policy under consideration here has provisions for unanticipated illnesses or injuries, but they were not applied here because complainant never advised respondent that an emergency or unanticipated injury had taken place which interfered with his ability to make a timely call-in. Complainant has failed to show that the relevant provisions of respondent's attendance policy violate the FMLA.

ORDER

There is no probable cause to believe that respondent violated the FMLA as alleged. This complaint is dismissed.

Dated: June 19, 1997

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

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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