STATE OF WISCONSIN PERSONNEL COMMISSION

STEVE PRELLER,
Complainant,

v.

Chairperson, UNIVERSITY OF WISCONSIN HOSPITALS AND CLINICS AUTHORITY,
Respondent.

Case No. 96-0151-PC-ER

RULING ON RESPONDENT'S MOTION TO DISMISS

The Commission received complainant's discrimination complaint on November 21, 1996, in which he alleged that respondent violated his rights under the Family Medical Leave Act (FMLA) (§103.10, Stats.). Complainant's request for waiver of the investigation of his complaint was granted by the Commission on December 4, 1996. The parties agreed to the statement of issue for hearing at a prehearing conference on December 17, 1996, as noted below. (*See* conference report dated December 17, 1996).

> Issue 1: Whether respondent violated the FMLA in connection with the five day suspension of complainant which was imposed from November 18, 1996 - November 22, 1996.
>
> Issue 2: Whether respondent's attendance policy which figured in the foregoing suspension is in violation of the FMLA.

The hearing was scheduled for January 17, 1997. A conference was held on January 9, 1997, to attempt to resolve various disputes raised by the parties. A letter ruling was issued by the hearing examiner on January 9, 1997, which memorialized the disputes resolved at the conference and which established a briefing schedule for resolution of two remaining disputes. The parties agreed at the conference that the scheduled hearing should be postponed pending resolution of the remaining disputes.

The letter ruling dated January 9, 1997, contained the following description of one of the remaining disputes:

> A fifth topic discussed was **respondent's request to file a motion for summary judgment.** Attorney Dowling [respondent's counsel] expressed continued confusion at today's conference over the nature of

> complainant's case. Attorney Dicks [complainant's counsel] indicated her theory of the case was that complainant's request for sick leave should be deemed the same as a request for leave under the FMLA and that if this legal proposition is accepted, then complainant would argue that the 5-day suspension was taken in retaliation for his "constructive" request for leave under the FMLA. The parties agreed to the following briefing schedule on the motion for summary judgment:
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> > Respondent's initial brief is due on February 10, 1997
> > Complainant's response is due on March 10, 1997
> > Respondent's rebuttal is due on March 21, 1997

This ruling grants respondent's motion in part and denies it in part. The facts recited below are undisputed by the parties, unless specifically noted to the contrary.

FINDINGS OF FACT

1. Complainant has worked as a Hospital Supply Clerk at the University of Wisconsin Hospital and Clinics Authority (UWHCA) since June 1978. His position is covered by a union contract with the Wisconsin State Employees Union (WSEU). He has served as an official of the union, as well as a member of the union's collective bargaining team. He is familiar with the terms of the collective bargaining agreement, as well as respondent's personnel policies and procedures.

2. Respondent imposed a 5-day suspension by letter dated November 11, 1996 (Exh. 7 attached to respondent's motion), which contained the following pertinent information.

> Pursuant to the results of a pre-disciplinary investigation (PDI) meeting held on 10/25/96, this letter is to notify you that you are in violation of . . . UW Hospital & Clinics Policy and Procedure 9.13 (Attendance and Punctuality). . .. During the period July 16, 1996 through October 4, 1996 (12 weeks) you incurred four unscheduled absences as follows:
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> | | | |
> |---|---|---|
> | 07/16/96 | sick | |
> | 08/20/96 | sick | conjunction with days off |
> | 10/03/96 | sick | conjunction with days off |
> | 10/04/96 | sick | conjunction with days off |
>
> You declined union representation during this meeting and you stated you would represent yourself.
>
> While you refused to answer questions during this meeting, you stated you would submit written answers to my questions at a later date. I agreed to give you until 10/28/96 to respond to the investigation questions and provide mitigating information for consideration in making a disciplinary decision. As I stated at the meeting, your 07/16/96

> absence is excused due to satisfactory medical documentation provided by Employee Health Service. Your written answers did not provide any mitigating information (e.g. medical documentation, etc.) concerning your other unscheduled absences.
>
> The remaining three unscheduled absences are unexcused. The absence of 08/20/96 occurred following a day off and preceded another day off. This gave you three days off in a row. The absences of 10/03/96 and 10/04/96 were in conjunction with days off and approved leave time. These two dates preceded nine days off and therefore created eleven consecutive days off from work. . . .
>
> You are suspended from work without pay for five days. The dates of your suspension are 11/18/96, 11/19/96, 11/20/96, 11/21/96, and 11/22/96 (Monday - Friday).
>
> Future violations . . . may result in additional progressive discipline. Please be aware that per UWHC Policy & Procedure 9.13 the next progressive disciplinary level is discharge from employment. Please note that the opportunity to provide written responses is highly irregular and should be considered an exception. As was stated in the meeting notice, "you are required to fully and completely answer the questions put to you" during investigatory meetings. . . .

3. The written reprimand noted in the prior paragraph contains reference to respondent's policy and procedure 9.13, which is marked in respondent's motion as Exhibit 1. Pertinent portions of the policy (starting on p. 2) are shown below with the same emphasis as appears in the original document. The policy shows an effective date of January 1, 1995.

> It will be the responsibility of each designated departmental representative or the appropriate supervisor to monitor the attendance record of each employee and to determine through a review process whether excessive absenteeism, excessive tardiness or sick leave abuse exists. A review of an employee's attendance or punctuality may be initiated if any of the following circumstances exist:
>
> A. three (3) unscheduled absences of any length in any 12 week period, including for reasons of illness or personal business,
>
> B. any "0" sick leave balance,
>
> C. the use of unscheduled leave under false pretenses,
>
> D. a pattern of unscheduled absence in conjunction with:
> *scheduled days off,
> *legal holidays,
> *weekends,
> *same days of the week,

E. unscheduled absences:
*immediately following discipline,
*after working a double shift,
*after working overtime,
*after having a leave request denied,
*under any other suspicious circumstances as determined by a department manager,

F. tardiness on three occasions within a 12 week period. . . .

If a review of an employee's attendance is initiated, the manager must take into consideration any mitigating circumstances before determining that possible excessive absenteeism, excessive tardiness or sick leave abuse exists. Discipline is NOT to be automatically applied until the following procedure is followed.

The manager should arrange for a pre-disciplinary investigatory (PDI) meeting with the employee whose record is being reviewed. For represented employees a union representative may be present. The attendance or tardiness record is to be discussed with the employee in an attempt to determine if there is a mitigating reason for the poor record or possible abuse. The manager must be willing to work with the employee to resolve whatever circumstances are adversely affecting the attendance record.

Progressive Discipline:

A. If, after the PDI, the manager determines that a violation of policy exists and that discipline is appropriate, progressive discipline is to be applied according to the following schedule:

*1st violation	verbal reprimand,
*2nd violation	written reprimand,
*3rd violation	2 day suspension
*4th violation	5 day suspension,
*5th violation	termination

B. These progressive steps will be taken in the order listed in all cases except where the manager determines that a violation is serious enough to warrant a higher level of discipline. Examples of serious violations include: no call, no show, or leaving work without authorization.

C. Absences covered under the Federal or State Family Medical Leave laws may not be used as a basis for discipline.

4. Complainant had prior discipline imposed based on attendance problems as noted below, with reference to the supporting exhibit in respondent's motion.

11/10/95	Written reprimand	For four unscheduled absences on 8/21/95 (8 hours sick in conjunction

		with a week end), 8/31/95 (8 hours sick), 10/24/95 (8 hours sick) and 11/1/95 (9 hours sick in conjunction with vacation). (Exh. 2)
12/26/95	Verbal reprimand	For excessive tardiness. (Exh. 3)
3/15/96	Written reprimand	For 11 tardy instances within a 9-week period from 12/26/95 through 2/28/96. (Exh. 3)
6/11/96	2-day suspension	For 5 tardy instances within a 10-week period from 03/18/96 through 5/25/96. (Exh. 4)

None of the discipline was imposed for a claimed medical problem for which complainant provided supporting medical documentation. Complainant did not request that any of the above-noted attendance deficiencies be covered under the FMLA. Complainant had claimed in regard to the written reprimand of November 10, 1995, that those absences were the result of a medical condition in conjunction with respondent's refusal to provide him with an adequate chair in his work area but he elected not to provide medical verification to support his stated excuse.

5. Complainant requested a chair on September 12, 1995, as an accommodation for his disability which he described as "chronic lower back pain, swelling of legs and pain in legs and feet." Jane Noack, an "OTR", investigated this request and made her recommendation for a new chair by report dated November 14, 1995. Respondent thereafter provided the requested chair. (Documentation is included as Exh. 2 attached to complainant's objections to respondent's motion for summary judgment.) Ms. Noack's report indicated complainant had a history of back pain, but provided no further details. Nowhere in the request or in the report is it indicated that complainant's back condition requires continued inpatient or outpatient care. Nowhere in those documents is the back condition described as "a serious health condition."

6. Complainant submitted answers to respondent's first set of interrogatories on or about January 6, 1996. The interrogatories included questions asking whether complainant had a serious health condition. The pertinent questions and answers are shown below.

> Interrogatory #5: Did you suffer from a serious health condition which may (sic) you unable to perform your employment duties on August 20, 1996? Answer: On August 20, 1996, I had back pain which was too severe to allow me to work. By August 22, 1996, the back pain had decreased so that I was able to return to work. I suffer from morbid obesity which causes muscular skeletal problems with limitations of motion.

> Interrogatory #7: Did you suffer from a serious health condition which may (sic) you unable to perform your employment duties on October 3, 1996? Answer: Yes.
>
> Interrogatory #8: If the answer to Interrogatory No. 7 is "yes," identify the serious health condition and describe its symptoms. Answer: On October 3, 1996, I began to experience back pain as I was working around the house. The pain got worse as the day went on. I was unable to work that day or October 4, 1996. I suffer from morbid obesity which causes a condition of muscular skeletal problems with limitation of motion.
>
> Interrogatory #9: Did you suffer from a serious health condition which made you unable to perform your employment duties on October 4, 1996? Answer: Yes.
>
> Interrogatory #10: If the answer to Interrogatory No. 9 is "yes," identify the serious health condition and describe its symptoms. Answer: See Answer to Interrogatory #8.

7. Prior to the November 11, 1996, letter of suspension, Mr. Preller had not requested or applied for medical leave under the FMLA. The accommodation request noted in paragraph 5 above is the only inkling that his work-unit supervisors and the administrative staff in respondents' Employee Health and Human Resources Departments had to believe that he had a health problem. (*See* affidavits contained in Exhs. 5-6 and 9-11, attached to respondent's motion to dismiss.)

8. It is true that complainant received sick leave under the union contract for his absences which led to the 5-day suspension. The use of contractual sick leave is covered in §13/5/2/A of the union contract pertinent to complainant's position, the text of which is shown below.

> Employes may use accrued sick leave for personal illnesses, bodily injuries, maternity, or exposure to contagious disease:
>
> A. which require the employee's confinement;
> B. which render the employe unable to perform assigned duties; or
> C. where performance of assigned duties would jeopardize the employe's health or recovery.
>
> In the event the Employer has reason to believe that an employe is abusing the sick leave privilege or may not be physically fit to return to work, the Employer may require a medical certificate or other appropriate verification for absences covered by this Article. When an employe has been identified as a sick leave abuser by the Employer and required to obtain a medical doctor's statement for sick leave use, the notice of such requirement will be given to the employe and the local

> Union in writing. If the medical certificate verifies that the employe was not abusing sick leave or is physically fit to report to work, the Employer shall pay the cost of the medical certificate. . . .

OPINION

Summary judgment should be granted only in clear cases. *See, Grams v. Boss*, 97 Wis. 2d 332, 338-39, 294 N.W.2d 473 (1980) (citations omitted):

> On summary judgment the moving party has the burden to establish the absence of a genuine, that is, disputed, issue as to any material fact. On summary judgment the court does not decide the issue of fact. A summary judgment should not be granted unless the moving party demonstrates a right to a judgment with such clarity as to leave no room for controversy; some courts have said that summary judgment must be denied unless the moving party demonstrates his entitlement to it beyond a reasonable doubt. Doubts as to the existence of a genuine issue of material fact should be resolved against the party moving for summary judgment.
>
> The papers filed by the moving party are carefully scrutinized. The inferences to be drawn from the underlying facts contained in the moving party's material should be viewed in the light most favorable to the party opposing the motion. If the movant's papers before the court fail to establish clearly that there is no genuine issue as to any material fact, the motion will be denied. If the material presented on the motion is subject to conflicting interpretations or reasonable people might differ as to its significance, it would be improper to grant summary judgment.

Respondent's motion for summary judgment is based on the fact that complainant never requested leave under the FMLA for his absences on August 20, October 3, and October 4, 1996, and the contention that facts were insufficient for respondent to be held to knowledge that complainant suffered from a "serious health condition," within the meaning of §103.10(1)(g), Stats.

Complainant's opposition to the respondent's motion is based on the following arguments: 1) contractual use of sick leave is protected under the FMLA "automatically" and, accordingly, it is invalid under the FMLA for the employer to impose discipline for use of contractual sick leave; and 2) even if contractual sick leave were not automatically protected under the FMLA, the fact that complainant did not specifically request leave under the FMLA should not defeat his claim because it is apparent to any observer that he suffers from "morbid obesity" and it is this condition which causes him to suffer from muscular skeletal problems with limitation of motion, medical problems of which respondent should have been aware due to the chair provided as a result of complainant's accommodation request.

Granting a Request to Take Sick Leave under a Union Contract Does Not Automatically Protect Such Leave under the FMLA

Complainant is correct that respondent would be deemed in violation of the FMLA if discipline were imposed for leave taken under the FMLA. *See*, §103.10(11)(c), Stats. Respondent's sick leave policy (paragraph 3 of the Findings of Fact) specifically provides that discipline may not be imposed for "absences covered under" the FMLA. Further, it is undisputed that complainant never requested FMLA leave for his absences on August 20, October 3 and October 4, 1996. Complainant contends, however, that these absences "automatically" came under the protection of the FMLA by virtue of respondent's decision to allow him to take contractual sick leave. The Commission disagrees.

Complainant's entitlement to contractual sick leave is governed by §13/5/2/A of the union contract as recited in ¶8 of the Findings of Fact. Complainant's entitlement to FMLA leave is governed by §103.10, Stats., the pertinent portions of which are shown below (with emphasis added).

> 103.10(4)(a) . . . an employe who has a serious health condition which makes the employe unable to perform his or her employment duties may take medical leave for the period during which he or she is unable to perform those duties.
>
> 103.10(1)(g) "Serious health condition" means a disabling physical or mental illness, injury, impairment or condition involving any of the following:
>
> 1. Inpatient care in a hospital, as defined in s. 50.33(2), nursing home, as defined in s. 50.01(3), or hospice.
> 2. Outpatient care that requires continuing treatment or supervision by a health care provider.

It is clear from the plain language shown in the contract and in the statute that use of sick leave under the contract is more generous (or broader) than use of medical leave under the FMLA. For example, an employe suffering from a headache which renders the employe unable to perform assigned tasks would be eligible for contractual sick leave but not for leave under the FMLA unless such headache involved inpatient care or outpatient care as those terms are defined in the statute. Similarly, an employe who does spring cleaning at home on the weekend only to suffer from a backache the following Monday morning which renders the employe unable to perform assigned tasks would be eligible for contractual sick leave but not for leave under the FMLA

unless such backache involved inpatient care or outpatient care as those terms are defined in the statute.

Complainant argues that language contained in a DER bulletin leads to a different result. Even if this contention were true, resort to such extrinsic evidence is unwarranted when the statutory language is clear. Further, complainant's contention is incorrect.

The bulletin language cited by complainant is contained in DER Bulletin number OS-63/CC-POL-7/CB-76, dated July 25, 1994, covering implementation guidelines for the federal family and medical leave act. Under the federal act, employes suffering from a serious health condition are permitted to substitute unused accumulated paid leave (including sick leave) for all or any part of leave under the federal act (which is unpaid leave). (See Bulletin marked as Exh. 3 to Complainant's brief in opposition to respondent's motion for summary judgment, p. 7, items under "c." 1 and 2.) A similar right exists under state law (§103.10(5)(b), Stats.) where an employe may substitute paid leave of "any other type provided by the employer" for the unpaid leave under the Wisconsin FMLA. The specific language referenced by complainant pertains to application of §103.10(5)(b), Stats., and indicates that contractual sick leave is a paid leave which may be substituted for unpaid FMLA leave because the contractual sick leave is "more generous" than medical leave under the FMLA. The cited language does not interpret or expand the statutory definition of a "serious health condition" found in §103.10(1)(g), Stats.

Factual Disputes Exist Regarding the Need for Complainant to Specifically Request Leave under the FMLA to Obtain Protection Under that Act

Complainant correctly notes that circumstances might arise where it is unnecessary for an employe to specifically request medical leave under the FMLA as a prerequisite to gaining protections under the FMLA. This principle was noted by the Wisconsin Court of Appeals in *Jicha v. State*, 164 Wis. 2d 94, 473 N.W.2d 578 (1991). The employe in *Jicha* failed to file a complaint within 30 days after he received his termination letter and, to avoid dismissal of his claim for such failure, argued that the 30-day filing period did not commence until after the employer had detailed information about his medical condition. The employe in *Jicha* did not specifically request leave under the FMLA, but the employe's lawyer had informed the employer prior to termination that a hearing was pending on an involuntary commitment of the employe to a mental health facility. The *Jicha* court found that the

employer had been adequately notified prior to termination that the employe's absence was due to a serious medical condition, stating as follows (*Jicha v. State*, 164 Wis. 2d at 100-101):

> Jicha contends that Fort Howard did not know the details of his situation until after it sent the termination letter. Jicha thus argues that it was not until Fort Howard refused to reinstate him that it violated the Act. This case presents an unusual fact situation in that the employee, rather than the employer, argues that the employee must give the employer detailed information concerning his medical condition. FMLA, however, does not require that the employee utter magic words or make a formal application to invoke FMLA's protections. In this case, the telephone conversations between Jicha's attorney and Fort Howard gave sufficient notice to bring Jicha under FMLA's fold. Because Fort Howard was informed of Jicha's situation in a manner giving a reasonable employer notice of a serious health condition, the alleged violation occurred when Jicha received his termination letter on October 27, 1988. Therefore, the thirty-day statute of limitations began to run on that date.

The question in terms of Mr. Preller's case is whether respondent received actual or effective notice that complainant's absence was due to a serious health condition. Complainant contends a reasonable employer should have drawn such a conclusion based on his morbid obesity in conjunction with his accommodation request for an ergonomic chair. A disputed question of fact exists regarding this claim. *Janssen v. DOC*, 93-0072-PC-ER, 10/20/93. While respondent provided several affidavits in support of its motion to dismiss, none of the affiants attested to knowledge of the accommodation request or the reason why respondent complied with the request.

Also present as a disputed fact is whether complainant's own actions were sufficient to mislead respondent into believing that complainant was not requesting leave under the FMLA. Complainant knew he would not be disciplined for the absences on July 16, August 20, October 3 and October 4, 1996, if he presented medical verification for the absences. He also knew discipline would not be imposed if the absences were due to a serious health condition covered under the FMLA. Respondent provided an opportunity for him to present mitigating circumstances for all the absences. In response, he provided medical documentation for the absence on July 16, 1996, but not for the other absences. This disputed fact also would be a consideration in resolving the *Jicha* test of whether a "reasonable employer" would have interpreted the situation as providing actual or effective notice that complainant was requesting leave under the FMLA

ORDER

That respondent's motion for summary judgment is granted in part and denied in part as detailed in this ruling. A status conference will be scheduled for the parties to select a hearing date.

Dated: April 11, 1997. STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

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