STATE OF WISCONSIN PERSONNEL COMMISSION

H. BRUCE ENKE,
Complainant,

v.

Secretary, DEPARTMENT OF TRANSPORTATION,
Respondent.

Case No. 97-0202-PC-ER

DECISION AND ORDER

NATURE OF THE CASE

This is a complaint of discrimination on the basis of sex. The parties waived their right to hearing and agreed to submit the matter to the Commission for decision on stipulated facts. The parties were permitted to file written arguments, and the final brief was filed on December 3, 1998.

FINDINGS OF FACT[1]

1. The Complainant, Mr. H. Bruce Enke is employed by the Department of Transportation as a supervisor in the Project Development Section of Transportation District #3 which has its headquarters in Green Bay, Wisconsin. Mr. Enke's position is not covered by a collective bargaining agreement.

2. On March 17, 1997, Mr. Enke's wife gave birth to a child.

3. Mr. Enke requested leave to care for his child beginning on April 17, 1997. He wanted to take leave for the maximum period for which he could substitute sick leave for unpaid leave. At the time his leave began, Mr. Enke had accumulated 629 hours of sick leave.

4. Mr. Enke was advised by Peggy Geurts, the payroll coordinator for Transportation District #3, that the leave he requested would be deemed family leave under the Wisconsin Family and Medical Leave Act; that the act allowed him to take six weeks of family leave; and that the leave could be unpaid leave or that Mr. Enke could substitute any form of paid leave to which he was entitled, including sick leave,

[1] The statement of facts is derived entirely from the stipulation of facts filed by the parties with the Commission on October 2, 1998.

for unpaid leave under the act. Ms. Guerts gave Mr. Enke this advice after consulting with personnel in Central office payroll and Mr. Regan. (See 7).

5. Mr. Enke was also advised by the payroll coordinator for Transportation District #3 that the leave he requested would be deemed to be family leave under the federal Family and Medical Leave Act; that the federal act allowed an additional six weeks of leave; and that the leave could be unpaid leave or that Mr. Enke could substitute any form of paid leave to which he was entitled, including sick leave, for unpaid leave under the federal act. Ms. Guerts gave Mr. Enke this advice after consulting with personnel in Central office payroll and Mr. Regan. (See 7).

6. Based on this advice Mr. Enke decided he would like to take twelve weeks of leave and that he would like to substitute sick leave for the entire twelve weeks. Mr. Enke began his leave on April 17, 1997, and used 240 hours of sick leave through May 28, 1997.

7. On or about June 3, 1997, the Section Chief of the Administrative Services Section for Transportation District # 3, Mr. Terrance Regan, audited the processing of Mr. Enke's leave request. Mr. Regan is responsible for payroll functions for the district and supervises the district payroll coordinator.

8. After his review, Mr. Regan told the Chief of the Payroll Section in the Division of Business Management, Ms. Lynn Pauls, that an error may have been made by the district payroll coordinator concerning the substitution of sick leave for the second six weeks of Mr. Enke's planned leave. Ms. Pauls is responsible for payroll functions for the Department of Transportation as a whole.

9. Ms. Pauls, after consulting with other staff of the Bureau of Human Resource Services of the Division of Business Management, took the position that sick leave could not be used by Mr. Enke during the second six weeks of his planned leave.

10. Mr. Regan informed Mr. Enke of this decision on June 3, 1997. Mr. Regan advised Mr. Enke that he had the option of taking leave without pay or substituting vacation or other types of paid leave, except sick leave, for the second six weeks of his planned leave. Mr. Enke chose to end his leave and returned to work on Wednesday, June 4, 1997.

11. Ms. Mary Florenza is a supervisor employed in the Division of Transportation Investment Management of the Department. Ms. Florenza adopted a child in the fall of 1996 and took eight weeks of leave beginning on Monday, October 8, 1996 and ending on Friday, December 27, 1996. Ms. Florenza had accumulated 516 hours of sick leave at the time her leave began. She used 176 hours of sick leave, 104 hours of vacation and 24 hours of legal holiday to cover her leave of absence. Ms. Florenza's position is not covered by a collective bargaining agreement.

12. Cindy O'Connor gave birth to a child on Friday, April 21, 1995. She began a leave of absence on that date and returned to work gradually starting the week of June 5, 1995. Ms. O'Connor used 243 hours and 15 minutes of sick leave, 142 hours of vacation, 30 minutes of compensatory time, 17 hours and 30 minutes of legal holiday and 24 hours of personal holiday to cover her leave. Ms. O'Connor's position is covered by the labor agreement between the State Engineering Association and the State of Wisconsin.

13. Colleen Harris gave birth to a child on Saturday, January 27, 1996 and took ten weeks of leave beginning on Monday, January 29, 1996 and ending on Friday, April 5, 1996. She used 301 hours of sick leave, 44 hours and 30 minutes of vacation, 24 hours of personal holiday, 4 hours of legal holiday and 26 hours and 30 minutes of compensatory time to cover her leave. Ms. Harris's position is covered by the labor agreement between the State Engineering Association and the State of Wisconsin.

15.[2] Brenda Veeser gave birth to a child on Sunday, May 12, 1996. Ms. Veeser began a leave of absence on May 13, 1996. She used 368 hours and 51 minutes of sick leave, 48 hours of vacation, 54 hours and 24 minutes of compensatory time and 1 hour of personal holiday to cover her leave. Ms. Veeser's position at that time was covered by the labor agreement between the Wisconsin State Employees Union and the State of Wisconsin for the period [sic]

16. Jill Michaelson gave birth to a child on Wednesday, March 20, 1996. Starting on that date she took a leave of absence and returned to work gradually starting the week of May 6, 1996. Ms. Michaelson used 412 hours of sick leave, 40 hours of compensatory time, 93 hours of vacation and 20 hours of legal holiday to cover her

[2] The stipulation of facts submitted by the parties did not contain a fact #14.

leave. Ms. Michaelson's position is covered by the labor agreement between the State Engineering Association and the State of Wisconsin.

17. Exhibit A is a copy of the labor agreement between the State Engineering Association and the State of Wisconsin for the period November 13, 1993 to April 12, 1996. Exhibit B is a copy of the labor agreement between the State Engineering Association and the State of Wisconsin for the period April 13, 1996 to October 10, 1997. Exhibit C is a copy of the labor agreement between the Wisconsin State Employees Union and the State of Wisconsin for the period November 26, 1995 to October 10, 1997.

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §230.45(1)(b), Stats.

2. Complainant has the burden to prove that he was discriminated against on the basis of sex as alleged.

3. Complainant has failed to sustain this burden.

OPINION

The hearing issue to which the parties stipulated is as follows:

> Whether complainant was discriminated against on the basis of sex when he was denied the use of sick leave during 1997.

In order to determine if complainant was improperly denied leave, it is necessary to examine the nature and extent of the leave to which complainant, and those females to whom he has compared himself, are entitled. Such leave consists of the following three types:

1. It has been stipulated that complainant's position is not covered by a collective bargaining agreement. Section 230.25, Stats., provides that leaves of absence without pay are available to incumbents of unrepresented positions subject to regulations promulgated by the Secretary of the Department of Employment Relations (DER). Section ER 18.14(2)(e), Wis. Adm. Code, of these regulations states that, upon request of an employee with permanent status in the classified service, an

employer shall grant a leave of absence without pay for a period not to exceed six months (which may be extended up to an additional six months at the discretion of the appointing authority) for paternity, adoption, and pre-adoptive foster care. This section goes on to state that:

> . . . Part or all of the original paternity, adoptive or pre-adoptive foster care leave, extension or renewal may be covered by leave of absence without pay, earned annual leave, sabbatical leave, holiday leave, compensatory time off at the employee's discretion, or anticipated annual leave subject to s. ER 18.02(6).

2. Section 103.10(3), Stats., of the Wisconsin Family and Medical Leave Act (FMLA) provides that an employee may take up to six weeks of family leave following the birth of a child, adoption of a child or placement of a child for adoption, or as a precondition to adoption. Section 103.10(5)(b), Stats., provides:

> An employee may substitute, for portions of the family leave or medical leave, paid or unpaid leave of any other type provided by the employer. . . .

This provision has been construed by the Wisconsin Supreme court as allowing the substitution of sick leave for family leave qualifying under §103.10(3)(b)1. *Richland School District v. DILHR*, 173 Wis. 2d 878, 498 N.W.2d 826 (1993).

3. 29 U.S.C. §2612(a) of the federal Family and Medical Leave Act provides that an employee may take a total of twelve work weeks of family leave in order to care for a son or daughter following the birth of a natural child or because of the placement of a son or daughter for adoption or foster care. 29 U.S.C. §2612(d)(2)(A), provides in relevant part that:

> An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or family leave of the employee for leave provided under subparagraph (A), (B), or (c) of subsection (a)(1) for any part of the 12-week period of such leave under this subsection.

The failure of this statutory section to list sick leave, and the fact that sick leave is specifically mentioned in 29 U.S.C.§2612(d)(2)(B) as a type of leave that may be substituted for leave for a serious health condition, lead to the conclusion that sick leave is not available for substitution for federal family leave.

Complainant requested that he be allowed to use sick leave for twelve weeks of leave after the birth of his child. His only entitlement to the use of sick leave for this purpose derives from the Wisconsin FMLA which provides a maximum of six weeks of family leave. It is undisputed that complainant was granted the use of sick leave for six weeks for family leave. Complainant has not shown entitlement to the use of sick leave for a longer period of time under the circumstances present here.

Complainant alleges that female employees of respondent were permitted to use sick leave for a longer period of time than he. The analysis of such a differential treatment allegation is usually carried out using the model set forth in *McDonnell-Douglas v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 5 FEP Cases 965 (1973); and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 25 FEP Cases 113 (1981). Pursuant to this model, the initial burden of proof is on the complainant to show a prima facie case of discrimination. If complainant meets this burden, the employer then has the burden of articulating a non-discriminatory reason for the actions taken which the complainant may, in turn, attempt to show was a pretext for discrimination. In the context of discrimination regarding terms and conditions of employment, a prima facie case is demonstrated if the evidence shows that 1) the complainant is a member of a protected group; 2) the complainant suffered an adverse term or condition of employment; and 3) the adverse term or condition exists under circumstances which give rise to an inference of discrimination.

Complainant, as a male, is a member of a protected group and, for purposes of this analysis, it will be assumed that he suffered an adverse term or condition of employment. However, the circumstances here do not give rise to an inference of discrimination. Complainant has failed to show that he was similarly situated to the comparison females who were granted more than six weeks of sick leave. Specifically, unlike complainant, each of these females underwent pregnancy and childbirth which could have qualified them for medical leave as well as family leave. As a result, complainant has failed to demonstrate a prima facie case of sex discrimination.

If such a prima facie case had been demonstrated, the burden would then shift to respondent to articulate a legitimate, non-discriminatory reason for the subject action. Respondent has stated that complainant was denied the use of more than six weeks of

sick leave following the birth of his child because he was not eligible for it. This reason is legitimate and non-discriminatory on its face.

The burden would then shift to complainant to demonstrate pretext. It is not clear what argument complainant is offering in this regard. It appears that he may be arguing that he should be eligible for the same amount of sick leave after the birth of a child as those women who actually gave birth. However, the Wisconsin Court of Appeals has determined that ongoing pregnancy both before, during, and after birth is a serious health condition for purposes of the Wisconsin FMLA. *Haas v. DILHR, Equal Rights Division*, 166 Wis. 2d 288, 479 N.W.2d 229 (1991). In addition, this health condition may also qualify for non-FMLA sick leave provided by the employer, or for the 12-week medical leave provisions of the federal FMLA for which sick leave may be substituted. Complainant has failed to show that he suffered from a qualifying health condition as the result of the birth of his child which would make him eligible for medical leave as well as family leave, and it must be presumed from the circumstances that he did not. The one comparison female who could be considered similarly situated to complainant is Ms. Florenza who adopted a child and, as a result, was presumably eligible only for family leave, not family leave and medical leave. Ms. Florenza was not granted more than six weeks of sick leave, so complainant has failed to show that he was treated differently than the similarly situated female offered for comparison purposes. *See, Phillips v. Wisconsin Personnel Commission*, 167 Wis. 2d 205, 482 N.S. 2d 121 (Ct. App. 1991). The record here shows that the different treatment cited by complainant as the basis for his claim resulted from the medical consequences of pregnancy and childbirth, not from gender. As a result, he has failed to show that he was the subject of sex discrimination within the meaning of the Fair Employment Act.

The other argument which complainant appears to be advancing is that respondent simply presumed that the female employees who gave birth had a qualifying medical condition during the entire duration of their medical leave without actually requiring them to verify that they did, and that this presumption constitutes sex discrimination against complainant. First of all, and most importantly, there is nothing in the factual underpinnings of this matter which supports complainant's assertion in this regard. There is no information in the parties' stipulation, which constitutes the

entire factual record here, which relates to the process by which respondent assessed the medical condition of the comparison females who had given birth. Although complainant argues that statements made by respondent in the answer it provided as part of the investigative process establish this presumption, the Commission concludes otherwise. First of all, a response required by the Commission pursuant to §PC 2.04, Wis. Adm. Code, as part of its investigation of an equal rights complaint, would not generally be regarded as the type of pleading presumptively considered part of the factual record for decision purposes. As a result, since this answer was not included in the parties' stipulation of fact, it is not part of the factual record here. Second, the language in respondent's answer referenced by complainant does not establish the existence of the presumption, i.e., this language does not state, either explicitly or by reasonable implication, that respondent did not have a factual basis for concluding that the comparison females had a qualifying medical condition during the period of their medical leave. As a result, the presumption to which complainant refers has not been established. In addition, complainant appears to lack standing to raise this issue. What he is essentially claiming is that the provisions of the medical leave benefit were applied improperly to certain female employees. However, such application, even if proved, did not result in an injury to complainant since he presumably did not qualify to have the medical leave benefits applied to him at all within the context of this matter.

In order to prevail here, complainant would have had to show that a similarly situated female, e.g., one who had adopted a child, was granted more than six weeks of sick leave as family leave in order to care for this child after the adoption. This complainant has failed to do and his claim, therefore, must necessarily fail.

ORDER

This complaint is dismissed.

Dated: December 16, 1998

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

JUDY M. ROGERS, Commissioner

LRM
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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