STATE OF WISCONSIN CIRCUIT COURT FOR PORTAGE COUNTY

RALPH LUBITZ,

Petitioner,

vs.

WISCONSIN PERSONNEL COMMISSION,

Respondent.

DECISION AND ORDER

Portage County Case #98CV31

Ralph Lubitz, a professor of psychology at the University of Wisconsin-Stevens Point (UWSP), contends that UWSP violated the Family and Medical Leave Act (FMLA), §103.10(11)(a), Stats., on 5/1/95 when its psychology department chair issued an adverse evaluation of his performance and on 5/16/95 when its provost/vice-chancellor, relying on the department chair's recommendation, reduced his annual merit award, because of his absences due to migraine equivalent, a serious health condition. The Wisconsin Personnel Commission (WPC or commission) decided that UWSP did not violate the FMLA. I find to the contrary, and therefore set aside the WPC's decision, and order that the references in the adverse evaluation to Lubitz's absences be stricken and that he be restored to the 8 merit points recommended by his departmental colleagues, together with any resulting backpay with interest, and costs to include reasonable attorney's fees.

Section 103.10(4) says:

> (4) MEDICAL LEAVE. (a) Subject to pars. (b) and (c) [not pertinent to this decision], 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.

"Serious health condition" is defined in sec. 103.10(1)(g):

> (g) "Serious health condition" means a disabling physical or mental illness, injury, impairment or condition involving any of the following:
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> * * *
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> 2. Outpatient care that requires continuing treatment or supervision by a health care provider.

1. Does Lubitz have a disabling condition? The answer of the WPC is *yes*.

a. Decision and Order of the WPC (WPC Decision)Finding 22, the 3/7/95 letter of Dr. Ahlskog, which is uncontroverted.

b. WPC Decision Finding 24, which is that the migraine equivalent attacks "are temporarily disabling and render [Lubitz] incapable of functioning during the attack."

c. WPC Decision (Opinion, p. 20): (Regarding handicap discrimination, but nevertheless applicable to FMLA considerations):

> . . . the record here shows that complainant's migraine-equivalent attacks totally incapacitate him during the period of attack. . . .

d. WPC Decision (Opinion, p. 24-5): (Regarding handicap discrimination, but nevertheless applicable to FMLA considerations):

> The record here establishes that, during his migraine-equivalent attacks, complainant was totally incapacitated and absent from the work place.
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> * * *
>
> In view of the medical testimony establishing complainant's total incapacity and inability to attend work during his attacks. . . .

2. Did Lubitz's condition involve outpatient care requiring "continuing treatment or

supervision by a health care provider," §103.10(1)(g), Stats., i.e., "direct, continuous and firsthand contact by a health provider subsequent to the initial patient contact?" MPI Machinery Div. v. DILHR, 159 Wis.2d 358, 464 N.W.2d 79 (1990). The answer of the WPC is *no* because:

> Complainant's contacts with Dr. Ahlskog in the spring of 1995 were by phone and letter and did not involve any direct contact for the purpose of treatment or supervision of complainant's migraine-equivalent condition. WPC Decision (Opinion, p. 26)

a. The WPC's findings of fact regarding Lubitz's contact by a health provider are contained at numbers 22, 23, and 24.

> 22. On March 15, 1995, complainant provided Dean Paul a letter from his physician, J. Eric Ahlskog, M.D. Dr. Ahlskog had seen complainant in person only once, on August 25, 1994, and had been the last neurologist to see complainant at the Mayo Clinic. Previously, complainant had been treated by Dr. Ahlskog's colleagues. Dr. Ahlskog state in this letter, which he had dated March 7, 1995, as follows:
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> "Dr. Ralph Lubitz has been followed at the Mayo Clinic for episodes of migraine equivalent attacks that have been recurrent over many years. Once the diagnosis was established and the appropriate anti-migraine treatment was initiated several years ago, there was substantial improvement in the severity and duration of the attacks. During the several days of each episode, Dr. Lubitz is incapacitated with severe vertigo which precludes carrying on with the usual days' activities. He recently experienced somewhat of a prolonged attack, despite continuation of the previously initiated anti-migraine medication. For that reason, he has added a second medication at my recommendation. I am expecting further substantial improvement with the initiation of this second drug. It should also be noted that migraines and related symptomatology typically improve around middle age. Hence, I am somewhat optimistic that Dr. Lubitz is going to experience some spontaneous improvement in his condition due to age-related factors."
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> In preparing this letter, Dr. Ahlskog had no knowledge of complainant's absences from his employment at UWSP or the reasons

for such absences, except as reported to him by complainant in the following contacts: on February 22, 1995, complainant telephoned Dr. Ahlskog but did not reach him so left a message; Dr. Ahlskog returned the call, but there was no answer; on February 25, complainant wrote Dr. Ahlskog requesting a letter to Dean Paul regarding his health condition; by telephone on March 2, 1995, complainant told Dr. Ahlskog he'd had a prolonged absence from work and needed a letter to clarify his health condition.

23. The letter to Dean Paul from Dr. Ahlskog was the only information relating to his health condition provided by complainant in response to Dean Paul's request.[1]

24. Uncontroverted expert medical testimony at hearing indicated that complainant suffers from probable migraine variants, including episodes of vertigo which might last from one hour to three days and occur three to four times a year; and that these episodic attacks are temporarily disabling and render complainant incapable of functioning during the period of the attack.

b. These findings of fact make no reference at all to the several contacts Lubitz has

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[1]Lubitz was not required to provide more. Sec. 103.10(7), Stats. says:

(a) If an employe requests . . . medical leave, the employer may require the employe to provide certification, as described in par. (b), issued by the health care provider. . .

(b) No employer may require certification stating more than the following:

1. That the . . . employe has a serious health condition.

2. The date the serious health condition commenced and its probable duration.

3. Within the knowledge of the health care provider . . . , the medical facts regarding the serious health condition.

4. If the employe requests medical leave, an explanation of the extent to which the employe is unable to perform his or her employment duties.

had with Marshfield Clinic regarding his condition of migraine equivalent, or to the letter of 9/27/94 from Ahlskog to Lubitz which referred him to his local physician for management of Ahlskog's prescription for his migraine equivalent condition; and these findings of fact, except as Ahlskog's letter refers to them in finding number 22, pay no attention to the history of examination, diagnosis, treatment or supervision of Lubitz's condition by Mayo Clinic prior to Ahlskog's involvement.

c. Exhibit 6 of the Return of Record on Review (return): the records from Mayo Clinic indicating approximately 10 occasions between 8/30/84 and 9/25/94 when Lubitz presented with migraine equivalent symptoms;

d. Exhibit 6 of the return: the records of Marshfield Clinic indicating Lubitz's phone calls from 5/16/94 through 3/8/96 for prescriptions recommended by his Mayo Clinic treating doctor, and examinations by Dr. Bjarnason of Marshfield Clinic on 1/19/95 and 5/1/95 and Dr. Quinn of Marshfield Clinic on 2/8/95.

e. The WPC, despite its findings of fact and in accordance with its failure to adequately recognize the Marshfield Clinic records or those of Mayo Clinic, concluded that Lubitz did not engage in direct contact, because his contacts with Ahlskog were by phone and letter and not directly.

Ahlskog was not the only physician at Mayo Clinic to treat or supervise Lubitz's condition; Ahlskog treated Lubitz's condition as a part of a continuing course of diagnosis, treatment, and supervision. As of 3/7/95 (his letter) and 5/1/95 (the department chair's evaluation), Ahlskog was still involved in Lubitz's treatment. It was Ahlskog who referred Lubitz to his local physician, Bjarnason, for local supervision of Lubitz's condition while he

was taking the medications prescribed by Ahlskog. The Marshfield Clinic records show contact by Lubitz, directly with his supervising physician Bjarnason, with Dr. Washington, Dr. Quinn and Dr. Grierson, by phone and in person. The uncontroverted medical evidence (WPC says so at Finding 24) indicates that Lubitz's contacts with Ahlskog regarding his condition were not only by phone or letter; that Lubitz presented at Mayo Clinic in person for examination, diagnosis, treatment and supervision; and that Lubitz had contact with Marshfield Clinic in person and by phone. It's not the case (the evidence is uncontroverted) that Lubitz's only contact with Ahlskog was by phone or letter, or by implication from WPC's Finding 22 and ruling that Ahlskog was the only physician treating or supervising Lubitz's condition.

f. I'm not bound by the WPC's application of law to the facts. I cannot conclude from the facts as found and those disregarded by WPC that Lubitz's contacts with Ahlskog by letter and phone were not "direct contact for the purpose of treatment or supervision of complainant's migraine equivalent condition." Ahlskog and Lubitz communicated directly, without intermediary, whether in person, by phone, or by letter.

g. Under its findings and its failure to consider evidence before it, for the WPC to conclude that there was no "direct contact for the purpose of treatment or supervision of complainant's migraine equivalent condition," is, as a matter of law, erroneous. This court is not bound by the conclusions of law drawn by the WPC if they are not reasonable.

WPC urges that its legal conclusions are entitled to great weight because of its experience, technical competence, and specialized knowledge. It equates its experience, competence and knowledge with that of DILHR. See, Richland School Dist. v. DILHR, 174

Wis.2d 878, 498 N.W.2d 826 (1993); Jicha v. DILHR, 169 Wis. 284, 485 N.W.2d 256 (1992). But DILHR (now DWD) is not the same agency as WPC; and WPC cannot translate DILHR expertise into WPC expertise.[2]

In Sieger v. WPC, 181 Wis.2d 845, 512 N.W.2d 220 (C.A. 1994), it was determined that WPC had failed to establish expertise, and it was determined that WPC's legal conclusion was subject to de novo review. Sieger, supra, 181 Wis.2d, at 855-6.[3]

In Haas v. DILHR, 166 Wis.2d 288, 479 N.W.2d 229 (C.A. 1991), the court of appeals affirmed the trial court's reversal of the hearing examiner who determined that morning sickness associated with pregnancy was not a "serious health condition."

> Since there appears to be no real dispute that Haas was in fact ill with morning sickness on August 8 and September 12, 1988, we believe the hearing

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[2]WPC makes a disingenuous attempt to translate DILHR expertise into WPC expertise, when at pp. 7 and 8 of its brief, it says:

> In the instant case, the Department's decision should be accorded "great weight" because of its expertise in reviewing, analyzing, and applying Wis. Stats., §103.10, to facts similar to those presented in this administrative review. (Emphasis added.)

In every other reference to the Wisconsin Personnel Commission, WPC brief used the word *commission*. See p. 11 of the Brief of Respondent Wisconsin Personnel Commission. Only when trying to convince this court that WPC's expertise is the same as DILHR's does WPC refer to itself as *department*.

[3]Besides the Sieger rationale, there are other reasons to disregard claims of WPC expertise; among them its complete disregard of the uncontroverted Marshfield Clinic records, it reliance on the uncontroverted Mayo Clinic records only to the extent of Ahlskog's letter and phone call, and its failure to understand that Ahlskog's letter certifying Lubitz's condition was the statutorily required and adequate response.

> officer's determination was a legal conclusion: that, as a matter of law, morning sickness does not meet the statutory definition of a "serious health condition." We review that conclusion *de novo* and we reject it.

Haas, supra, 166 Wis.2d, at 295-6.

Like the court of appeals and the circuit court in Haas, which reviewed the hearing officer's legal conclusion *de novo* and rejected it, I should reject the legal conclusion of the WPC that Lubitz's migraine equivalent condition was not a serious health condition because it "did not involve any direct contact for the purpose of treatment or supervision of complainant's migraine equivalent condition."[4]

3. Did UWSP retaliate against Lubitz for his exercise of FMLA rights? The WPC says *no* because Lubitz failed to prove that the migraine equivalent was a serious medical condition.

Because WPC determined that Lubitz's migraine equivalent was not a serious medical condition, it never reached the next question: whether UWSP retaliated against Lubitz because of his exercise of FMLA rights.

> (11) PROHIBITED ACTS. (a) No person may interfere with, restrain or deny the exercise of any right provided under this section.
> Sec. 103.10(11), Stats.

Ordinarily it would be appropriate to remand this matter to WPC for further consideration of this issue. In this case, however, remand would only be a waste of the time

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[4]In Haas, as in this case, there appears to have been no direct contact with the treating or supervising physician on the day of the attack of the disabling condition. See, f.n. 6, Haas, supra, 166 Wis.2d, at 296.

of all concerned. That's because WPC has already considered whether UWSP retaliated in the related Fair Employment Act (FEA) matter, and concluded that there was no causal relation between the adverse evaluation of 5/1/95 or the reduced merit award of 5/16/95 and Lubitz's request for leave or accommodation. Accommodation is a concern of FEA; leave as a form of accommodation is a concern of FEA. Leave, as in absence because of a serious health condition, is a concern of FMLA. But the causal relationship between leave, absence for serious health condition, is the same in either FEA or FMLA. WPC's decision whether a causal relationship existed between Lubitz's absences and the 5/1/95 adverse evaluation or the 5/16/95 reduction of merit points award is a conclusion of law. I consider it de novo, because I am not bound by the commission's unreasonable conclusion.

a. Finding 28. The 5/1/95 adverse evaluation by Lubitz's department chair: (referring to the 5/16/94 developmental plan) "Your frequent absences from classes are the most severe performance problem" [, and this] continues to be an issue.'

b. Also in finding 28 at page 3 in the department chair's conclusions, an emphatic one-sentence paragraph: "Your most serious problem remains simple attendance at work."

c. There is no finding that the absences of Lubitz were other than FMLA absences. Nowhere is it even contended by UWSP that such was the case. In fact, the department chair conceded that Lubitz's absences were related to a serious medical condition, that there was no doubt in her mind that Lubitz was suffering from migraine equivalent condition in the spring of '95. Tr., 5/16/96, p. 63.

d. On the basis of 5/1/95 evaluation, Lubitz's department chair wrote to the dean of the college that Lubitz's performance was "inconsistent with meritorious behavior," and she

recommended that Lubitz receive no merit points for the year. Respondent's Exhibit 11 of Exhibit 17 of the return. The dean referred the chair's recommendation to the provost/vice-chancellor, who on 5/16/95 relied on it in the reducing of merit award. Exhibit 17 of Exhibit 17 of the return.

e. Finding 32: "The concerns UWSP management had relating to complainant's absences did not relate to his absences *per se*, but to his failure to obtain colleague coverage for canceled classes, to re-schedule such canceled classes , or to increase his availability to students through such mechanisms as increased office hours, to make up classes canceled as a result of his absences." This finding concedes that the absences were the reasons for the conditions, e.g., colleague coverage, etc. The WPC brief, at p. 13, makes this concession, too, when it says:

> Although the University did cite the frequent absences from teaching and the missed appointments with students. . . those absences were only one factor in the negative evaluations.

FMLA absences may not be a factor at all in such an evaluation. Sec. 103.10(11), Stats. It is inappropriate to impose any condition, e.g., reschedule class, upon the exercise of FMLA absence.

For WPC to admit that Lubitz's absences were only "one factor" in the negative evaluations is to admit too much; it is the acknowledge of a violation of §103.10(11), Stats.

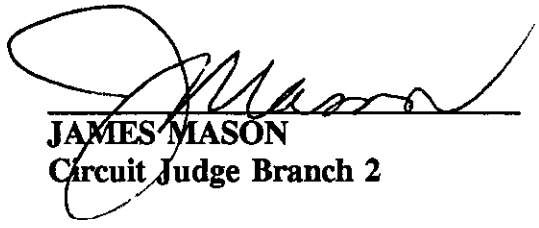
The contents of the 5/1/95 adverse evaluation quoted in Finding 28, its obvious emphasis placed on Lubitz's absence, the acknowledgement by the department chair that Lubitz's absence was due to migraine equivalent, a serious health condition, the

recommendation to the dean based on the 5/1/95 evaluation, and the resulting sanction compel a conclusion that UWSP interfered with Lubitz's exercise of rights under FMLA.

IT IS ORDERED that the Decision and Order of the Wisconsin Personnel Commission is set aside, that references in the 5/1/95 evaluation of Lubitz to his absences be stricken, that he be restored to the 8 merit points recommended by his departmental colleagues, that he be awarded backpay with interest, and that he be awarded costs to include reasonable attorney's fees.

Dated this 14th day of December, 1998.

BY THE COURT:



JAMES MASON
Circuit Judge Branch 2