STATE OF WISCONSIN PERSONNEL COMMISSION

LISA M. HOUFF[A],
Complainant,

v.

Secretary, DEPARTMENT OF HEALTH AND FAMILY SERVICES,
Respondent.

Case No. 00-0035-PC-ER

FINAL DECISION AND ORDER

NATURE OF THE CASE

This case involves a complaint of discrimination under the Wisconsin Fair Employment Act (WFEA) (Subch. II, Chapter 230). In a prehearing conference report dated June 7, 2000, the parties agreed to the following statement of issue:

> Whether complainant was discriminated against on the basis of sex or disability in regard to her probationary termination on February 2, 2000, or in regard to respondent's failure to award her §230.36 leave for absences resulting from the work injury she sustained on October 4, 1999.

FINDINGS OF FACT

1. Appellant commenced employment at the Northern Wisconsin Center for the Developmentally Disabled (Northern) in Chippewa Falls as a Resident Care Technician 1 (RCT) on March 22, 1999, with a one year probationary period.

2. Complainant continued this employment until her probationary employment was terminated, effective February 2, 2000, for poor attendance.

3. Complainant's work performance was satisfactory when she was at work.

4. During her period of employment, complainant became pregnant with an estimated delivery date of March 31, 2000.

[A] During the time relevant to this case, complainant was known as Lisa M. Grunewald.

5. Northern provides around the clock care of its patients, many of whom require intensive care. In part because of this, management has a strong concern about its employes' attendance, and has a legitimate basis for its concern.

6. Complainant's probationary employment was terminated because of attendance related concerns.

7 Respondent's decision to terminate complainant's probationary employment was based on the absences noted in Respondent's Exhibit 20, which reflects the following:

a. April 17-20, 1999: 23 hours and 5 minutes in connection with a kidney infection;

b. July 13-14, 1999: 16 hours in connection with a medical condition treated at an emergency room;

c. December 18, 19, 22, 23, 30, 31, 1999: 44 hours and 30 minutes in connection with an upper respiratory infection;

d. January 8, 2000: 8 hours in connection with non-work[B]-related injuries sustained in a fall.

8. Complainant provided medical documentation to respondent for each of the periods of absence described in the preceding finding. Respondent has not questioned the legitimacy of these uses of sick leave, only the amount taken during the period of complainant's employment.

9. Respondent's attendance policy calls for management review of a permanent (non-probationary) employe's use of sick leave if it exceeds certain thresholds: 72 hours used in a 12 month period or 10 occurrences (respondent considers each separate day or less as an occurrence) in a 12 month period. Respondent's attendance policy is stricter for probationary employes than for permanent employes. A probationary employe's attendance is subject to management review if there are more than 5 occurrences in a 12 month period. A management review involves a meeting between the employe and management to discuss the employe's absenteeism and to try

[B] This term has been amended for purposes of clarification.

to determine if there have been legitimate reasons for the absenteeism.

10. Management had attendance meetings with complainant on June 2, 1999, and on August 20, 1999. At these meetings the medical necessity of the April and July absences was confirmed, and management explained the importance of good attendance.

11. On September 24, 1999, complainant was injured while trying to help a patient, and was unable to work and was on leave September 24-26, 1999. Respondent approved complainant's hazardous employment injury status pursuant to §230.36, Stats.[C], (which entailed a form of leave with pay) for this absence, and did not consider this leave period to be part of complainant's absenteeism in connection with the decision to terminate complainant's probationary employment.

12. On October 4, 1999, complainant was injured when struck in the abdomen by a patient. Her doctor diagnosed her injury as a muscular-skeletal strain as a result of having been struck. Respondent's Exhibit R 114, Physician's 230.36 Certification, signed by the doctor on October 27, 1999. The report stated that the symptoms had resolved by that date, "but [complainant is] still at risk for recurrent injury with client outbursts and pregnancy." The doctor further stated on the form that complainant could return to work on October 27, 1999, with the restriction that until her delivery she was to avoid working on units with a possibility of behavioral outbursts by patients, "i. e., this may mean sedentary/light duty until [complainant's] delivery." The physician entered on the form that the end of healing or healing plateau was October 27, 1999, and that the injury had not resulted in any permanent disability

13. Management granted complainant §230.36 status as a result of this injury. She also was given light duty when she returned to work. Her last day of light duty was November 4, 1999, when management explained to her that she had exceeded 14 days of light duty, which was the maximum amount allowable under respondent's policy regarding light duty for non-§230.36 conditions. At that point, management

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[C] Section 230.36,, Stats., provides that employes engaged in certain hazardous employment activities who are injured and unable to work as a result, are entitled to continue on full pay while they are unable to work.

determined that her work restriction was no longer attributable to the §230.36 injury (the blow to her abdomen), because the form (Respondent's Exhibit R114) reflects that she had recovered from that injury as of October 27, 1999, and that the need for light duty after that was related solely to her pregnancy and did not relate the restriction to her October 4th injury

14. Respondent had a reasonable basis for the conclusion it reached as set forth in the prior finding.

15. Complainant was on various forms of leave including leave without pay from November 5, 1999, until November 23, 1999, when she returned to work without restrictions after her doctor advised on November 18, 1999, that she could return to work subject to lifting up to 75-100 pounds. Respondent's Exhibit R115. Management's policy considered lifting up to 75 pounds to be the full performance level for complainant's job.

16. Management did not consider any of complainant's absences in October or November 1999 as absenteeism that contributed to the decision to terminate complainant's probationary employment.

17 In connection with her absences on December 22, 23, 30 and 31, 1999 (noted above in finding 7 c.), complainant had no sick leave or other earned leave time available to cover this time. Therefore, respondent considered these absences to have been "zero time" under respondent's leave policy. Under respondent's policy, employes were required to keep track of their leave balances, and when they found it necessary to use "zero time," they were required to request approval of this status either prior to or during the shift or shifts involved. Complainant failed to request this status with regard to the days in question, and she received a verbal reprimand from management.

18. Following complainant's absence on January 8, 2000 (see Finding 7.d. above), respondent decided to terminate complainant's probationary employment because of the absences noted above in Finding 7, and this occurred with an effective date of February 2, 2000.

19. Complainant's pregnancy did not involve any out of the ordinary condition.

20. Respondent's handling of complainant's medically-related conditions and associated absenteeism was no different from its handling of any other similarly-situated employe's.

CONCLUSIONS OF LAW

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

2. Complainant has the burden of proof as to all issues.

DISABILITY DISCRIMINATION

3. Complainant failed to establish that respondent discriminated against her on the basis of disability with regard to either the termination of her probationary employment or any failure to award her §230.36, Stats., leave for absences resulting from the work injury she sustained on October 4, 1999.

SEX DISCRIMINATION

4. Complainant established she was covered by §111.36(1)(c), Stats., because of her pregnancy.

5. Complainant failed to establish that respondent discriminated against her in connection with her pregnancy in regard either to the termination of her probationary employment or any failure to award her §230.36, Stats., leave for absences resulting from the work injury she sustained on October 4, 1999.

OPINION

DISABILITY DISCRIMINATION—PROBATIONARY TERMINATION

The proposed decision in this case concluded that complainant did not establish she was an "individual with a disability" pursuant to §111.32(8), Wis. Stats., and therefore she did not establish her complaint of disability discrimination. The record in this case shows that even if complainant were considered an "individual with a disability," respondent did not discriminate against her on the basis of disability. The

Commission will withdraw the discussion in the proposed decision about whether complainant was "an individual with a disability" and for its decision relies on the conclusion that respondent did not discriminate against complainant (assuming for the sake of discussion the existence of a disability) on the basis of disability.

Pursuant to *Target Stores v. LIRC,* 217 Wis. 2d 1, 9, 576 N. W. 2d 545 (Ct. App. 1998), the second element that must be established (after establishing the complainant is "an individual with a disability") is that the employer discriminated against the complainant on the basis of disability. In this case, there are two alleged adverse employment actions—the employer's termination of complainant's probationary employment, and the employer's failure to award her §230.36 leave for absences resulting from the work injury she sustained on October 4, 1999. With regard to complainant's termination, respondent's position is essentially that it did not terminate her because of her pregnancy, and, in a related vein, that it did not terminate her because of absences caused by her pregnancy. The Findings of Fact reflect that respondent's termination decision was based on the absences noted in Finding 7, none of which were connected to complainant's pregnancy, but rather were caused by such things as a kidney infection and an upper respiratory tract infection. To the extent complainant were to argue that respondent's stated reliance on the absences enumerated in Finding 7 was not the real reason for her termination, but rather a pretext[D] for an intent to discriminate against her because of her pregnancy, there is no evidence of pretext. Respondent established that due to the program at Northern, it had a legitimate reason to have placed a high priority on employees having good attendance, and there is nothing to suggest that it did not in fact base its termination decision on the absences set forth in Finding 7.

It may be that complainant believes that since she had documentation of the medical conditions associated with the absences in question, and all of these absences

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[D] *See, e. g., McDonnell Douglas v. Green,* 411 U. S. 792, 5 FEP Cases 965 (1973).

involved "legitimate" use of leave (including leave without pay) in the sense that the absences were caused by actual illness, that respondent was not entitled to have considered these absences in deciding whether to retain complainant. However, this is not the case under the WFEA. Due to the kind of program involved at NWC, respondent had a legitimate basis to have placed a strong emphasis on employees' absenteeism and to consider their leave usage when deciding whether to retain probationary employees, even when there was no question about the absenteeism having been related to actual illness.

DISABILITY DISCRIMINATION--§230.36 LEAVE

The second part of the disability issue is the question of whether respondent discriminated against complainant on the basis of disability with regard to its failure to award her §230.36 leave for absences resulting from the work injury she sustained on October 4, 1999.

The record shows that respondent granted complainant §230.36 leave for the period of time for which her physician had certified she was unable to work due to the injury she sustained on October 4, 1999—i. e., to October 27, 1999.[E] Following that point, respondent had no basis for concluding complainant was still unable to work due to a §230.36 injury. There was no basis for respondent to have awarded her further §230.36 benefits after October 27th, since her inability to work without restrictions after that point was not connected with her hazardous employment injury. Again, there was no evidence that respondent's rationale for its limitation of §230.36 benefits in keeping with what the doctor entered on the form and in keeping with its established policy was a pretext for discrimination against complainant because of her pregnancy.

SEX DISCRIMINATION--TERMINATION

Section 111.36(1)(c), Stats., provides: "Employment discrimination because of sex includes [d]iscriminating against any woman on the basis of pregnancy, childbirth, maternity leave or related medical conditions by engaging in any of the

[E] The doctor indicated on the form that the symptoms related to her October 4, 1999, injury had resolved by then and that the healing plateau was on October 27, 1999. Respondent's Exhibit R114.

actions prohibited under s. 111.322, including, but not limited to, actions concerning fringe benefit programs covering illnesses and disability." Since complainant was pregnant during the time frame involved in this case, she is covered by this section of the WFEA. The Commission is unclear as to how complainant contends that sex/pregnancy discrimination occurred. In any event, the record shows that respondent terminated complainant's probationary employment because of her record of absenteeism, that respondent had a legitimate reason to put a strong emphasis on attendance, and that this was not a pretext for discrimination against complainant because of her pregnancy. Furthermore, there is no indication that respondent treated complainant different from similarly-situated non-pregnant employes.

SEX DISCRIMINATION—FAILURE TO AWARD §230.36 LEAVE

As discussed above, respondent made an apparently justified decision to deny complainant §230.36 leave status after October 27, 1999, because according to her medical documentation, after that date her light duty restriction was not based on her October 4th injury, but solely on her pregnancy. Again, there is no indication that respondent treated complainant differently from similarly-situated non-pregnant employes with regard to §230.36 benefits.

ORDER

The Commission having concluded that respondent did not discriminate against complainant as she alleged, this case is dismissed.

Dated: March 22, 2001

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

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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.

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