

**GEORGE S. TOELLER,**  
*Complainant,*

v.

**Secretary, DEPARTMENT OF  
CORRECTIONS,**  
*Respondent.*

**RULING  
ON  
REQUEST TO  
WITHDRAW**

Case No. 00-0155-PC-ER

The Commission convened a hearing in this matter in August of 2002 on the following issue:

Whether respondent's decision to terminate complainant's employment on October 26, 2000, was in violation of the [Wisconsin] Family or Medical Leave Act (FMLA), §103.10, Stats.

After the hearing, the parties submitted written arguments relating to the narrow issue of whether complainant's leave for surgery in April and May of 2000 had an effect on his eligibility for medical leave under §103.10, Stats., later in the year. The parties agreed that if that issue was not dispositive, they would proceed to file briefs on the more general topic encompassed by the issue for hearing.

The hearing examiner issued a "Proposed Ruling" on June 4, 2003. The proposed ruling, if adopted by the Commission, would dismiss the complaint based upon conclusions that 1) complainant had exhausted his Wisconsin FMLA leave in May of 2000; 2) complainant was not eligible for and did not receive additional Wisconsin FMLA leave prior to the decision to terminate his employment on October 26, 2000. In a cover letter dated June 4, 2003, the parties were given until July 7, 2003, in which to request oral argument or file written objections to the proposed ruling.

By letter dated June 11, 2003, complainant asked that the Commission dismiss this case without prejudice, prior to the entry of the proposed ruling, so complainant could pursue a claim, in federal court, that the State of Wisconsin had denied his Federal

FMLA rights. Respondent objected to dismissal and cited prior Commission decisions to support its position.

The Commission has previously denied a request to withdraw a complaint where the request was filed after a proposed decision had been issued in the matter. In *Stygar v. DHSS*, 89-0033-PC-ER, etc., 2/21/95, the complainant had already filed an action in federal district court covering much of the same ground as Ms. Stygar's cases before the Commission. The Commission wrote:

The Commission has discretion, pursuant to §1.11, Wis. Adm. Code, to grant or deny a request for withdrawal such as the instant one. A similar fact situation was considered in *Klein v. UW & DER*, 91-0208-PC, 2/8/93, in which the Commission ruled as follows, in pertinent part:

This matter is before the Commission following the promulgation of a hearing examiner's proposed decision. . . . [T]he Commission will not permit the withdrawal of the appeal short of a decision on the merits under these circumstances. To do so would encourage the use of the appeal and hearing process as a kind of "test run," with the option of withdrawing the appeal prior to a decision on the merits if the appeal appears to be heading towards a negative conclusion.

The Commission is of the opinion that the instant situation is even more compelling than that in *Klein* since it is apparent here that the complainant is forum-shopping. As the Commission stated in its ruling [denying Ms. Stygar's Motion for Stay filed a few weeks earlier]:

From the standpoint of good public policy and judicial economy, the interests of the public would not be served by permitting a party who has received an adverse proposed decision from a hearing examiner after five days of hearing encompassing 37 hours of testimony, more than 200 exhibits, and 30 witnesses, to re-litigate substantially identical claims in another forum.

The hearing in the present case was shorter than in *Stygar*, and there were fewer witnesses and exhibits. The Commission also recognizes that the United States Supreme Court just issued a decision on May 27, 2003, in *Nevada Department of Human Resources v. Hibbs*, 123 S. Ct. 1972, 155 L. Ed. 2d 953, holding that State employees may recover money damages in federal court in the event of the State's

failure to comply with the Federal FMLA's family-care provision. The complainant cited the *Hibbs* decision as a basis of his request for dismissal without prejudice.

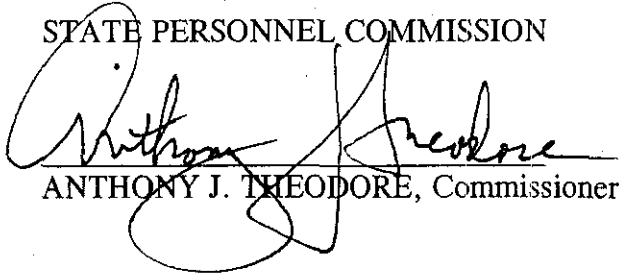
Nevertheless, the Commission concludes that balancing the various considerations in terms of granting the dismissal request or considering the substance of the proposed ruling still supports denial of the complainant's request. The hearing in this matter took two days, there were 9 witnesses and the case file includes hundreds of pages of exhibits. The parties and the examiner have already expended substantial time and expense in creating a record, filing written arguments and drafting an analysis of an issue that has the potential for wider application than the present dispute. These circumstances cause the Commission to conclude that it should exercise its discretion by denying the complainant's request for dismissal.

ORDER

Complainant's request that this matter be dismissed without prejudice is denied. The time period for filing a request for oral argument or to submit objections to the proposed ruling is extended to 14 days from the date of this ruling.

Dated: July 10, 2003

STATE PERSONNEL COMMISSION

  
ANTHONY J. THEODORE, Commissioner

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Commissioner Theodore is the sole sitting commissioner; the other two commissioner positions are vacant. Therefore, Commissioner Theodore is exercising the authority of the Commission. See 68 Op. Atty. Gen. 323 (1979).

